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Title 3—

The President

Proclamation 9555 of December 15, 2016

To Implement the Nepal Preference Program and for Other Purposes

By the President of the United States of America

A Proclamation

1. Section 915(b) of the Trade Facilitation and Trade Enforcement Act of 2015 (the ''TFTEA'') (19 U.S.C. 4454) confers authority upon the President to provide preferential treatment for eligible articles imported directly from Nepal into the customs territory of the United States if the President determines that Nepal meets the eligibility requirements specified in section 915(b)(1)(A) of the TFTEA, taking into account the factors specified in section 915(b)(1)(B) of the TFTEA.

2. Pursuant to section 915(b) of the TFTEA, I have determined that Nepal meets the eligibility requirements of section 915(b)(1)(A), taking into account the factors specified in section 915(b)(1)(B).

3. Section 915(c) of the TFTEA describes the requirements for articles from Nepal to be considered eligible for duty-free treatment. Pursuant to section 915(c)(2)(A)(iv) of the TFTEA, the President may designate certain articles as eligible for duty-free treatment when imported from Nepal if, after receiving the advice of the United States International Trade Commission (Commission) in accordance with section 503(e) of the Trade Act of 1974 (the ''Trade Act'') (19 U.S.C. 2463(e)), the President determines that such articles are not import-sensitive in the context of imports from Nepal.

4. Pursuant to sections 915(c)(2)(A)(iv) of the TFTEA, and after receiving advice from the Commission in accordance with section 503(e) of the Trade Act, I have determined to designate the articles included in Annex I of this proclamation as eligible for duty-free treatment when imported from Nepal.

5. Section 604 of the Trade Act (19 U.S.C. 2483), as amended, authorizes the President to embody in the Harmonized Tariff Schedules of the United States (the ''HTS'') (19 U.S.C. 1202) the substance of the relevant provisions of the Trade Act and of other Acts affecting import treatment, and actions thereunder, including removal, modification, continuance, or imposition of any rate of duty or other import restriction.

6. In order to implement the duty-free treatment provided in accordance with the provisions of the TFTEA, it is necessary to modify the HTS, thus incorporating the substance of relevant provisions of the TFTEA, and of actions taken thereunder, into the HTS, pursuant to section 604 of the Trade Act.

7. In Proclamation 7748 of December 30, 2003, President Bush determined that the Central African Republic was not making continual progress in meeting the requirements described in section 506A(a)(1) of the Trade Act (19 U.S.C. 2466a(a)), as added by section 111(a) of the African Growth and Opportunity Act (the ''AGOA''). Thus, pursuant to section 506A(a)(3) of the Trade Act (19 U.S.C. 2466a(a)(3)), President Bush terminated the designation of the Central African Republic as a beneficiary sub-Saharan African country for purposes of section 506A of the Trade Act.

8. Section 506A(a)(1) of the Trade Act authorizes the President to designate a country listed in section 107 of the AGOA (19 U.S.C. 3706) as a ''beneficiary

sub-Saharan African country'' if the President determines that the country meets the eligibility requirements set forth in section 104 of the AGOA (19 U.S.C. 3703), as well as the eligibility criteria set forth in section 502 of the Trade Act (19 U.S.C. 2462).

9. Pursuant to section 506A(a)(1) of the Trade Act, based on actions that the Central African Republic has taken, I have determined that the Central African Republic meets the eligibility requirements set forth in section 104 of the AGOA and the eligibility criteria set forth in section 502 of the Trade Act, and I have decided to designate the Central African Republic as a beneficiary sub-Saharan African country.

10. On April 22, 1985, the United States and Israel entered into the Agreement on the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel (the ''USIFTA''), which the Congress approved in section 3 of the United States-Israel Free Trade Area Implementation Act of 1985 (the ''USIFTA Act'') (19 U.S.C. 2112 note).

11. Section 4(b) of the USIFTA Act provides that, whenever the President determines that it is necessary to maintain the general level of reciprocal and mutually advantageous concessions with respect to Israel provided for by the USIFTA, the President may proclaim such withdrawal, suspension, modification, or continuance of any duty, or such continuance of existing duty-free or excise treatment, or such additional duties, as the President determines to be required or appropriate to carry out the USIFTA.

12. In order to maintain the general level of reciprocal and mutually advantageous concessions with respect to agricultural trade with Israel, on July 27, 2004, the United States entered into an agreement with Israel concerning certain aspects of trade in agricultural products during the period January 1, 2004, through December 31, 2008 (the ''2004 US-Israel Agreement'').

13. In Proclamation 7826 of October 4, 2004, consistent with the 2004 US-Israel Agreement, President Bush determined, pursuant to section 4(b) of the USIFTA Act, that, in order to maintain the general level of reciprocal and mutually advantageous concessions with respect to Israel provided for by the USIFTA, it was necessary to provide duty-free access into the United States through December 31, 2008, for specified quantities of certain agricultural products of Israel.

14. Each year from 2008 through 2015, the United States and Israel entered into agreements to extend the period that the 2004 US-Israel Agreement was in force for 1-year periods to allow additional time for the two governments to conclude an agreement to replace the 2004 US-Israel Agreement.

15. To carry out the extension agreements, the President in Proclamation 8334 of December 31, 2008; Proclamation 8467 of December 23, 2009; Proclamation 8618 of December 21, 2010; Proclamation 8770 of December 29, 2011; Proclamation 8921 of December 20, 2012; Proclamation 9072 of December 23, 2013; Proclamation 9223 of December 23, 2014; and Proclamation 9383 of December 21, 2015, modified the HTS to provide duty-free access into the United States for specified quantities of certain agricultural products of Israel, each time for an additional 1-year period.

16. On December 5, 2016, the United States entered into an agreement with Israel to extend the period that the 2004 US-Israel Agreement is in force through December 31, 2017, and to allow for further negotiations on an agreement to replace the 2004 US-Israel Agreement.

17. Pursuant to section 4(b) of the USIFTA Act, I have determined that it is necessary, in order to maintain the general level of reciprocal and mutually advantageous concessions with respect to Israel provided for by the USIFTA, to provide duty-free access into the United States through the close of December 31, 2017, for specified quantities of certain agricultural products of Israel.

18. Section 1206(a) of the Omnibus Trade and Competitiveness Act of 1988 (the ''1988 Act'') (19 U.S.C. 3006(a)) authorizes the President to proclaim modifications to the HTS based on the recommendations of the Commission under section 1205 of the 1988 Act (19 U.S.C. 3005) if he determines that the modifications are in conformity with United States obligations under the International Convention on the Harmonized Commodity Description and Coding System (Convention) and do not run counter to the national economic interest of the United States. In 2006 and 2011, the Commission recommended modifications to the HTS pursuant to section 1205 of the 1988 Act to conform the HTS to amendments made to the Convention. In Proclamation 8097 of December 29, 2006, and Proclamation 8771 of December 29, 2011, President Bush and I, respectively, modified the HTS pursuant to section 1206 of the 1988 Act to conform the HTS to the amendments to the Convention.

19. Proclamation 8332 of December 29, 2008, implemented the United States-Oman Free Trade Agreement (the ''USOFTA'') with respect to the United States and, pursuant to section 201 of the United States-Oman Free Trade Agreement Implementation Act (the ''USOFTA Act'') (19 U.S.C. 3805 note), the staged reductions in rates of duty that President Bush determined to be necessary or appropriate to carry out or apply articles 2.3, 2.5, 2.6, 3.2.8, and 3.2.9, and the schedule of duty reductions with respect to Oman set forth in Annex 2–B of the USOFTA.

20. In order to ensure the continuation of the staged reductions in rates of duty for originating goods from Oman in categories that were modified to conform to the Convention, President Bush and I proclaimed in Proclamation 8097 and Proclamation 8771, respectively, modifications to the HTS that we determined were necessary or appropriate to carry out the duty reductions proclaimed in Proclamation 8332.

21. The United States and Oman are parties to the Convention. Because the substance of changes to the Convention are reflected in slightly differing form in the national tariff schedules of the United States and Oman, the rules of origin set out in Annex 3–A and Annex 4–A of the USOFTA must be changed to ensure that the tariff and certain other treatment accorded under the USOFTA to originating goods will continue to be provided under the tariff categories that were modified in Proclamation 8097 and Proclamation 8771. The United States and Oman have agreed to make these changes.

22. Section 202 of the USOFTA Act (19 U.S.C. 3805 note) provides certain rules for determining whether a good is an originating good for the purposes of implementing preferential tariff treatment under the USOFTA. Section 202(j) of the USOFTA Act authorizes the President to proclaim the rules of origin set out in the USOFTA and any subordinate tariff categories necessary to carry out the USOFTA, subject to the exceptions stated in section 202(j)(2)(A) of the USOFTA Act.

23. I have determined that the modifications to the HTS proclaimed pursuant to section 202 of the USOFTA Act and section 1206(a) of the 1988 Act are necessary or appropriate to ensure the continuation of tariff and certain other treatment accorded originating goods under tariff categories modified in Proclamation 8097 and Proclamation 8771 and to carry out the duty reductions proclaimed in Proclamation 8332.

24. Section 604 of the Trade Act authorizes the President to embody in the HTS the substance of the relevant provisions of that Act, and of other Acts affecting import treatment, and actions thereunder, including removal, modification, continuance, or imposition of any rate of duty or other import restriction. Section 1206(c) of the 1988 Act (19 U.S.C. 3006(c)), as amended, provides that modifications proclaimed by the President may not take effect before the thirtieth day after the date on which the text of the proclamation is published in the *Federal Register*.

25. Proclamation 8894 of October 29, 2012, implemented the United States-Panama Trade Promotion Agreement (the ''USPTPA'') with respect to the

United States and, pursuant to section 201 of the United States-Panama Trade Promotion Agreement Implementation Act (the ''USPTPA Act'') (19 U.S.C. 3805 note), the staged reductions in duty that the President determined to be necessary or appropriate to carry out or apply articles 3.3, 3.5, 3.6, 3.26, 3.27, 3.28, and 3.29, and the schedule of duty reductions with respect to Panama set forth in Annex 3.3 of the USPTPA.

26. The United States and Panama are parties to the Convention. Because changes to the Convention are reflected in slight differences of form between the national tariff schedules of the United States and Panama, the rules of origin set out in Annex 4.1 of the USPTPA must be changed to ensure that the tariff and certain other treatment accorded under the USPTPA Act to originating goods will continue to be provided under the tariff categories that were proclaimed in Proclamation 8894. The United States and Panama have agreed to make these changes.

27. Section 202 of the USPTPA Act (19 U.S.C. 3805 note) provides certain rules for determining whether a good is an originating good for the purposes of implementing tariff treatment under the USPTPA. Section 202(o) of the USPTPA Act authorizes the President to proclaim the rules of origin set out in the USPTPA and any subordinate tariff categories necessary to carry out the USPTPA, subject to the exceptions stated in section 202(o) of the USPTPA Act.

28. I have determined that the modifications to the HTS proclaimed pursuant to section 202 of the USPTPA Act and section 1206(a) of the 1988 Act are necessary or appropriate to ensure the continuation of tariff and certain other treatment accorded originating goods under tariff categories modified in Proclamation 8097 and Proclamation 8771 and to carry out the duty reductions proclaimed in Proclamation 8894.

29. Section 604 of the Trade Act authorizes the President to embody in the HTS the substance of relevant provisions of that Act, or other Acts affecting import treatment, and of actions taken thereunder, including removal, modification, continuance, or imposition of any rate of duty or other import restriction. Section 1206(c) of the 1988 Act provides that modifications proclaimed by the President may not take effect before the thirtieth day after the date on which the text of the proclamation is published in the *Federal Register.*

30. Proclamation 7987 of February 28, 2006, implemented the Dominican Republic-Central America-United States Free Trade Agreement (the ''CAFTA-DR'') with respect to the United States and, pursuant to section 201 of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (the ''CAFTA-DR Act'') (19 U.S.C. 4031), the staged reductions in duty that the President determined to be necessary or appropriate to carry out or apply articles 3.3, 3.5, 3.6, 3.21, 3.26, 3.27, and 3.28, and Annexes 3.3 (including the schedule of United States duty reductions with respect to originating goods), 3.27, and 3.28 of the CAFTA-DR.

31. The United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua (the ''CAFTA-DR countries'') are parties to the Convention. Because changes to the Convention are reflected in slight differences of form between the national tariff schedules of the United States and the other CAFTA-DR countries, Annexes 4.1, 3.25, and 3.29 of the CAFTA-DR must be changed to ensure that the tariff and certain other treatment accorded under the CAFTA-DR to originating goods will continue to be provided under the tariff categories that were proclaimed in Proclamation 7987. The United States and the other CAFTA-DR countries have agreed to make these changes.

32. Section 201 of the CAFTA-DR Act authorizes the President to proclaim such modifications or continuation of any duty, such continuation of duty-free or excise treatment, or such additional duties, as the President determines to be necessary or appropriate to carry out or apply articles 3.3, 3.5, 3.6,

3.21, 3.26, 3.27, and 3.28, and Annexes 3.3 (including the schedule of United States duty reductions with respect to originating goods), 3.27, and 3.28 of the CAFTA-DR.

33. I have determined that the modifications to the HTS proclaimed pursuant to section 201 of the CAFTA-DR Act and section 1206(a) of the 1988 Act are necessary or appropriate to ensure the continuation of tariff and certain other treatment accorded originating goods under tariff categories modified in Proclamation 8097 and Proclamation 8771 and to carry out the duty reductions proclaimed in Proclamation 7987.

34. Section 604 of the Trade Act authorizes the President to embody in the HTS the substance of relevant provisions of that Act, or other Acts affecting import treatment, and of actions taken thereunder, including removal, modification, continuance, or imposition of any rate of duty or other import restriction. Section 1206(c) of the 1988 Act provides that modifications proclaimed by the President may not take effect before the thirtieth day after the date on which the text of the proclamation is published in the *Federal Register.*

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States of America, including but not limited to section 915 of the TFTEA (19 U.S.C. 4454), section 506A(a)(1) of the Trade Act (19 U.S.C. 2466a(a)); section 4(b) of the USIFTA Act (19 U.S.C. 2112 note); section 301 of title 3, United States Code; section 1206(a) of the 1988 Act (19 U.S.C. 3006(a)); section 202 of the USOFTA Act (19 U.S.C. 3805 note); section 202 of the USPTPA Act (19 U.S.C. 3805 note); section 201 of the CAFTA-DR Act (19 U.S.C. 4031); and section 604 of the Trade Act (19 U.S.C. 2483), do proclaim that:

(1) In order to provide for the preferential treatment provided for in section 915 of the TFTEA, the HTS is modified as provided in Annex I to this proclamation. The modifications to the HTS set forth in Annex I shall continue in effect through December 31, 2025.

(2) The Central African Republic is designated as a beneficiary sub-Saharan African country.

(3) In order to reflect this designation in the HTS, general note 16(a) and U.S. note 1 to subchapter XIX of chapter 98 to the HTS are each modified by inserting in alphabetical sequence in the list of beneficiary sub-Saharan African countries ''Central African Republic.'' Further, note 2(d) to subchapter XIX of chapter 98 is modified by inserting in alphabetical sequence in the list of lesser developed beneficiary sub-Saharan African countries ''Central African Republic.''

(4) In order to implement U.S. tariff commitments under the 2004 US-Israel Agreement through December 31, 2017, the HTS is modified as provided in Annex II to this proclamation.

(5) The modifications to the HTS set forth in Annex II to this proclamation shall be effective with respect to eligible agricultural products of Israel that are entered, or withdrawn from warehouse for consumption, on or after January 1, 2017.

(6) The provisions of subchapter VII of chapter 99 of the HTS, as modified by Annex II to this proclamation, shall continue in effect through December 31, 2017.

(7) In order to reflect in the HTS the modifications to the rules of origin under the USOFTA, general note 31 to the HTS is modified as provided in Annex III to this proclamation.

(8) The modifications and technical rectifications to the HTS set forth in Annex III to this proclamation shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after the later of (i) February 1, 2017, or (ii) the thirtieth day after the date of publication of this proclamation in the *Federal Register.*

(9) In order to provide generally for the modifications in the rules for determining whether goods imported into the customs territory of the United States are eligible for preferential tariff treatment under Annex 4.1 of the USPTPA, to provide preferential tariff treatment for certain other goods under the USPTPA, and to make technical and conforming changes in the general notes to the HTS, the HTS is modified as set forth in Annex IV to this proclamation.

(10) The modifications to the HTS made by paragraph (9) of this proclamation shall enter into effect on the date, as announced by the United States Trade Representative in the *Federal Register,* that the conditions set forth in the Agreement have been fulfilled, and shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after that date.

(11) In order to provide generally for the modifications in the rules for determining whether goods imported into the customs territory of the United States are eligible for preferential tariff treatment under the CAFTA-DR, to provide preferential tariff treatment for certain other goods under the CAFTA-DR, and to make technical and conforming changes in the general notes to the HTS, the HTS is modified as set forth in Annex V to this proclamation.

(12) The modifications to the HTS made by paragraph (11) of this proclamation shall enter into effect on the date, as announced by the United States Trade Representative in the *Federal Register,* that the applicable conditions set forth in the CAFTA-DR have been fulfilled, and shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after that date.

(13) Any provisions of previous proclamations and Executive Orders that are inconsistent with the actions taken in this proclamation are superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of December, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.

Billing code 3295–F7–P

ANNEX I

MODIFICATIONS TO THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, AS REQUIRED BY THE TRADE FACILITATION AND TRADE ENFORCEMENT ACT

Effective with respect to goods the product of Nepal that are entered, or withdrawn from warehouse for consumption, on or after December 30, 2016 and through December 31, 2025, the Harmonized Tariff Schedule of the United States (HTS) is hereby modified as follows:

1. General note 4 is modified by inserting at the end thereof the following new subdivision (e):

"(e) Notwithstanding the provisions of subdivision (c) of this note, articles provided for in a provision for which a rate of duty of "Free" appears in the "Special" subcolumn followed by the symbol "NP" in parentheses are those designated by the President to be eligible articles for purposes of section 915 of the Trade Facilitation and Trade Enforcement Act of 2015. An article described in this subdivision is eligible for this treatment if–

(i)(1) the article is the growth, product or manufacture of Nepal; and

(2) in the case of a textile or apparel article, Nepal is the country of origin of the article, as determined under section 102.21 of title 19, Code of Federal Regulations (as in effect on February 24, 2016),

(ii) the article is imported directly from Nepal into the customs territory of the United States; and

(iii) the sum of the cost or value of the materials produced in, and the direct costs of processing operations performed in, Nepal or the customs territory of the United States is not less than 35 percent of the appraised value of the article at the time it is entered.

An article shall not be treated as the growth, product or manufacture of Nepal for the purposes of this subdivision by virtue of having merely undergone (A) simple combining or packaging operations, or (B) mere dilution with water or mere dilution with another substance that does not materially alter the characteristics of the article. For purposes of subdivision (iii) above, the cost or value of materials produced in, and the direct costs of processing operations performed in, the customs territory of the United States and attributed to the 35 percent requirement under such subdivision may not exceed 15 percent of the appraised value of the article at the time it is entered."

2. The Rates of Duty 1-Special subcolumn for each of the subheadings enumerated in the table below is modified by inserting the symbol "NP," in the parenthetical expression following the "Free" rate of duty in such subcolumn for each such subheading:

4202.11.00	4202.32.80	5701.10.90	6216.00.80
4202.12.21	4202.32.91	5702.31.20	6217.10.85
4202.12.29	4202.32.93	5702.49.20	6301.90.00
4202.12.40	4202.32.99	5702.50.40	6308.00.00
4202.12.60	4202.91.10	5702.50.59	6504.00.90
4202.12.81	4202.91.90	5702.91.30	6505.00.08
4202.12.89	4202.92.08	5702.91.40	6505.00.15
4202.21.60	4202.92.15	5702.92.90	6505.00.20
4202.21.90	4202.92.20	5702.99.15	6505.00.25
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4202.22.40	4202.92.33	5703.10.80	6505.00.40
4202.22.45	4202.92.39	5703.90.00	6506.00.50
4202.22.60	4202.92.45	5705.00.20	6506.00.60
4202.22.70	4202.92.60	6117.10.60	6505.00.80
4202.22.81	4202.92.91	6117.80.85	6505.00.90
4202.22.89	4202.92.93	6214.10.10	6506.99.30
4202.29.50	4202.92.94	6214.10.20	6506.99.60
4202.29.90	4202.92.97	6214.20.00	
4202.31.60	4202.99.90	6214.40.00	
4202.32.40	4203.29.50	6214.90.00	

ANNEX II

TEMPORARY EXTENSION OF CERTAIN PROVISIONS OF THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

Effective with respect to eligible agricultural products of Israel which are entered, or withdrawn from warehouse for consumption, on or after January 1, 2017, and before the close of December 31, 2017, subchapter VIII of chapter 99 of the Harmonized Tariff Schedule of the United States is hereby modified as follows:

1. U.S. note 1 to such subchapter is modified by striking "December 31, 2016," and by inserting in lieu thereof "December 31, 2017".

2. U.S. note 3 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2017" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "466,000".

3. U.S. note 4 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2017" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "1,304,000".

4. U.S. note 5 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2017" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "1,534,000".

5. U.S. note 6 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2017" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "131,000".

6. U.S. note 7 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2017" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "707,000".

ANNEX III

MODIFICATIONS TO THE RULES OF ORIGIN FOR THE U.S.-OMAN FREE TRADE AGREEMENT, AS REFLECTED IN THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

Effective with respect to goods of Oman, under the terms of general note 31 of the Harmonized Tariff Schedule of the United States (HTS), that are entered, or withdrawn from warehouse for consumption, on or after February 1, 2017, or the thirtieth day after the date of publication of this proclamation in the Federal Register, general note 31 to the HTS is modified as follows:

1. Tariff Classification Rule (TCR) 2 to chapter 54 is modified by deleting "5402.43.10" and replacing in lieu thereof ""5402.47.10".

2. TCR 1 to chapter 61 is modified by deleting "6101.10" and replacing in lieu thereof "6101.20".

3. TCR 2 to chapter 61 is deleted and the following new TCR is inserted in lieu thereof:

"2. (A) A change to goods of wool or fine animal hair of subheading 6101.90 from any other chapter, except from heading 5106 through 5113, 5204 through 5212, 5307 through 5308 or 5310 through 5311, chapter 54 or headings 5508 through 5516 or 6001 through 6006, provided that:

(i) the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of Oman or the United States, or both; and

(ii) any visible lining material used in the apparel article satisfies the requirements of chapter rule 1 to chapter 61.

(B) A change to any other good of subheading 6101.90 from any other chapter, except from heading 5106 through 5113, 5204 through 5212, 5307 through 5308 or 5310 through 5311, chapter 54 or heading 5508 through 5516 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of Oman or the United States, or both."

4. TCRs 5 through 7, inclusive, to chapter 61 are deleted and the following new TCRs are inserted in lieu thereof:

"5. A change to tariff items 6103.10.70 or 6103.10.90 from any other chapter, except from headings 5106 through 5113, 5204 through 5212, 5307 through 5308 or 5310 through 5311, chapter 54 or headings 5508 through

5516 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn and otherwise assembled in the territory of Oman or the United States, or both.

6. A change to subheading 6103.10 from any other chapter, except from headings 5106 through 5113, 5204 through 5212, 5307 through 5308 or 5310 through 5311, chapter 54 or headings 5508 through 5516 or 6001 through 6006, provided that:

(A) the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of Oman or the United States, or both; and

(B) any visible lining material used in the apparel article satisfies the requirements of chapter rule 1 to chapter 61."

5. TCR 8 to chapter 61 is modified by deleting "6103.21" and replacing in lieu thereof "6103.22".

6. TCR 13 to chapter 61 is modified by deleting "subheadings 6104.11 through 6104.13" and replacing in lieu thereof "subheading 6104.13".

7. TCR 16 to chapter 61 is modified by deleting "6104.21" and replacing in lieu thereof "6104.22".

8. TCR 12 to chapter 62 is modified by deleting "6203.21" and replacing in lieu thereof "6203.22".

9. TCR 29 to chapter 62 is deleted.

10. TCR 35 to chapter 62 is modified by deleting "6211.31" and replacing in lieu thereof "6211.32".

11. TCR 2 to chapter 63 is modified by deleting "5402.43.10" and replacing in lieu thereof "5402.47.10".

12. The following new heading rule and TCRs to chapter 96 are inserted in numerical sequence:

"**Heading Rule 1**: For purposes of determining the origin of tariff item 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64, 9619.00.68, 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79, or 9619.00.90, the rule applicable to that good shall only apply to the component that determines the tariff classification of the good and such component must satisfy the tariff change requirements set out in the rule for that good.

1. A change to tariff item 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64, or 9619.00.68, from any other chapter, except from headings 5106 through 5113, 5204 through 5212, 5307 through 5308 or 5310 through 5311, chapter 54, or headings 5508 through 5516 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of Oman or of the United States, or both.

2. A change to tariff items 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79, or 9619.00.90, from any other chapter, except from headings 5106 through 5113, 5204 through 5212, 5307 through 5308, or 5310 through 5311, chapter 54, or headings 5508 through 5516, 5801 through 5802, or 6001 through 6006, provided that the good is both cut and sewn or otherwise assembled in the territory of Oman or of the United States, or both.

3. A change to tariff items 9619.00.21 or 9619.00.25 from any other chapter, except from heading 5106 through 5113, 5204 through 5212, 5307 through 5308, or 5310 through 5311, or chapter 54 through 55."

ANNEX IV

MODIFICATIONS TO THE RULES OF ORIGIN FOR THE U.S.-PANAMA TRADE PROMOTION AGREEMENT, AS REFLECTED IN THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

Effective with respect to goods of Panama, under the terms of general note 35 of the Harmonized Tariff Schedule of the United States (HTS), that are entered, or withdrawn from warehouse for consumption, on or after the date announced by the United States Trade Representative and published in the Federal Register, general note 35 to the HTS is modified as follows:

1. Tariff classification rule (TCR) 1 to chapter 3 is modified by deleting "0307" and inserting in lieu thereof "0308".

2. TCR 2 to chapter 15 is deleted and the following new TCR is inserted in lieu thereof:

"2. A change to heading 1511 from any other chapter, except from palm nuts or kernels of subheading 1207.10."

3. TCR 9 to chapter 20 is modified by deleting "2009.80" at each instance and inserting in lieu thereof "2009.89".

4. TCR 12 to chapter 28 is deleted.

5. TCR 16 to chapter 28 is modified by deleting "2851" and inserting in lieu thereof "2853".

6. TCR 5 to chapter 29 is modified by deleting "2918.90" and inserting in lieu thereof "2918.99".

7. TCR 13 to chapter 29 is deleted and the following new TCRs are inserted in lieu thereof:

"13. A change to subheadings 2936.21 through 2936.29 from any other subheading.

13A. (A) A change to unmixed provitamins of subheading 2936.90 from any other good of subheading 2936.90 or from any other subheading; or

(B) A change to any other good of subheading 2936.90 from unmixed provitamins of subheading 2936.90 or from any other subheading.

13B. A change to subheadings 2937.11 through 2939.99 from any other subheading."

8. TCR 1 to chapter 30 is modified by deleting "3001.10" and inserting in lieu thereof "3001.20".

9. TCR 3 to chapter 30 is modified by deleting "3006.80" and inserting in lieu thereof "3006.92".

10. TCR 1 to chapter 33 is modified by deleting "3301.11" and inserting in lieu thereof "3301.12".

11. TCR 5 to chapter 34 is modified by deleting "3404.10" and inserting in lieu thereof "3404.20".

12. TCR 2 to chapter 38 is deleted and the following new TCR is inserted in lieu thereof:

"2. A change to subheadings 3808.50 through 3808.99 from any other subheading provided that not less than 50 percent by weight of the total active ingredient or ingredients is originating."

13. New TCR 5 to chapter 38 is inserted in numerical sequence:

"5. A change to heading 3826 from any other heading."

14. TCR 4 to chapter 39 is deleted and the following new TCR is inserted in lieu thereof:

"4. (A) A change to subheading 3920.10 through 3920.99 from any other subheading; or

(B) A change to vulcanized fiber of subheading 3920.79 from any other good of subheading 3920.79 or from any other subheading; or

(C) No change in tariff classification is required, provided that there is a regional value content of not less than:

(1) 25 percent under the build-up method, or

(2) 30 percent under the build-down method."

15. TCR 17 to chapter 42 is modified by deleting "4204" and inserting in lieu thereof "4205".

16. TCR 7 to chapter 48 is modified by deleting "4818.40" and inserting in lieu thereof "4818.50".

17. TCR 2 to chapter 54 is modified by deleting "5402.43.10" and inserting in lieu thereof "5402.47.10".

18. TCR 1 to chapter 61 is modified by deleting "6101.10" and inserting in lieu thereof "6101.20".

19. TCR 2 to chapter 61 is deleted and the following new TCR is inserted in lieu thereof:

"2. A change to goods of wool or fine animal hair of subheading 6101.90 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516 or 6001 through 6006, provided that:

(A) the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of Panama or the United States, or both, and

(B) any visible lining material contained in the apparel article satisfies the requirements of chapter rule 1 for chapter 61; or

2A. A change to any other good of subheading 6101.90 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of Panama or the United States, or both."

20. TCR 6 to chapter 61 is modified by deleting "6103.19.60 or 6103.19.90" and inserting in lieu thereof "6103.10.70 or 6103.10.90".

21. TCR 7 to chapter 61 is modified by deleting "6103.19" and inserting in lieu thereof "6103.10".

22. TCR 8 to chapter 61 is modified by deleting "6103.21" and inserting in lieu thereof "6103.22".

23. TCR 13 to chapter 61 is modified by deleting "subheadings 6104.11 through 6104.13" and inserting in lieu thereof "subheading 6104.13".

24. TCR 16 to chapter 61 is modified by deleting "6104.21" and inserting in lieu thereof "6104.22".

25. TCR 12 to chapter 62 is modified by deleting "6203.21" and inserting in lieu thereof "6203.22".

26. TCR 33 to chapter 62 is deleted and the following new TCR is inserted in lieu thereof:

"33. A change to pajamas and nightwear of subheadings 6207.21 or 6207.22, tariff items 6207.91.3010 or 6207.99.8510, subheadings 6208.21 or 6208.22 or tariff items 6208.91.30, 6208.92.00 or 6208.99.20 from any other chapter, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of Panama or of the United States, or both."

27. TCR 38 to chapter 62 is modified by deleting "6211.31" and inserting in lieu thereof "6211.32".

28. TCR 1 to chapter 64 is deleted and the following new TCR is inserted in lieu thereof:

"1. A change to subheading 6401.10 or tariff items 6401.92.90, 6401.99.10, 6401.99.30, 6401.99.60, 6401.99.90, 6402.30.70, 6402.91.10, 6402.91.20, 6402.91.26, 6402.91.50, 6402.91.80, 6402.91.90, 6402.99.08, 6402.99.16, 6402.99.19, 6402.99.33, 6402.99.80, 6402.99.90, 6404.11.90 or 6404.19.20 from any other heading outside headings 6401 through 6405, except from subheading 6406.10, provided that there is a regional value content of not less than 55 percent under the build-up method."

29. TCR 2 to chapter 65 is deleted and the following new TCR is inserted in lieu thereof:

"2. A change to headings 6504 through 6506 from any other heading, except from headings 6504 through 6507."

30. TCRs 2 through 4, inclusive, to chapter 68 are deleted and the following new TCRs are inserted in lieu thereof:

"2. A change to subheadings 6812.80 through 6812.91from any other subheading.

3. A change to subheadings 6812.92 through 6812.93 from any other subheading outside that group.

4. A change to subheading 6812.99 from any other heading."

31. TCR 11 to chapter 70 is deleted and the following new TCR is inserted in lieu thereof:

"11. A change to headings 7011 through 7018 from any other heading outside that group, except from glass inners for vacuum flasks or other vacuum vessels of heading 7020, or headings 7007 through 7008."

32. TCR 13 to chapter 73 is modified by deleting "7321.83" at each instance and inserting in lieu thereof "7321.89".

33. TCR 2 to chapter 78 is deleted and the following new TCRs are inserted in lieu thereof:

"2. A change to heading 7804 from any other heading.

3. (A) A change to lead bars, rods, profiles or wire of heading 7806 from any other good of heading 7806 or any other heading; or

(B) A change to lead tubes, pipes or tube or pipe fittings of heading 7806 from any other good of heading 7806 or any other heading; or

(C) A change to any other good of heading 7806 from lead bars, rods, profiles, or wire of heading 7806, or from lead tubes, pipes or tube or pipe fittings of heading 7806 or any other heading."

34. TCR 4 to chapter 79 is modified by deleting "7907" and inserting in lieu thereof "7905".

35. The following new TCR for chapter 79 is inserted immediately below TCR 4:

"5. (A) A change to zinc tubes, pipes or tube or pipe fittings of heading 7907 from any other good of heading 7907 or any other heading; or

(B) A change to any other good of heading 7907 from zinc tubes, pipes or tube or pipe fittings of heading 7907 or any other heading."

36. TCRs 2 through 4, inclusive, to chapter 80 are deleted and the following new TCRS are inserted in lieu thereof:

"2. A change to heading 8003 from any other heading.

3. (A) A change to tin plates, sheets or strip, of a thickness exceeding 0.2 mm, of heading 8007 from any other good of heading 8007 or any other heading; or

(B) A change to tin foil, of a thickness not exceeding 0.2 mm, tin powders or flakes of heading 8007 from any other good of heading 8007, except from tin plates, sheets or strip, of a thickness exceeding 0.2 mm of heading 8007, or any other heading; or

(C) A change to tin tubes, pipes and tube or pipe fittings of heading

8007 from any other good of heading 8007 or any other heading; or

(D) A change to any other good of heading 8007 from tin plates, sheets or strip, of thickness exceeding 0.2 mm, tin foil of thickness not exceeding 0.2 mm, tin powders or flakes, tin tubes, pipes or tube or pipe fittings of heading 8007 or any other heading."

37. TCR 2 to chapter 81 is deleted.

38. TCR 3 to chapter 81 is deleted and the following new TCR is inserted in lieu thereof:

"3. A change to subheading 8101.96 from any other subheading, except from bars and rods (other than those obtained simply by sintering), profiles, plates, sheets, strip and foil of subheading 8101.99."

39. TCR 5 to chapter 81 is deleted and the following new TCR is inserted in lieu thereof:

"5. (A) A change to bars, rods (other than those obtained simply by sintering), profiles, plates, sheets, strip or foil of subheading 8101.99 from any other good of subheading 8101.99 or any other subheading; or

(B) A change to any other good of subheading 8101.99 from bars, rods (other than those obtained simply by sintering), profiles, plates, sheets, strip or foil of subheading 8101.99 or any other subheading."

40. TCRs 29 and 30 to chapter 81 are deleted and the following new TCRs are inserted in lieu thereof:

"29. (A) A change to unwrought germanium or vanadium, germanium or vanadium waste, scrap or powders of subheading 8112.92 from any other chapter; or

(B) No change in tariff classification is required for articles of unwrought germanium or vanadium, germanium or vanadium waste, scrap or powders of subheading 8112.92, provided that there is a regional value content of not less than:

(1) 35 percent under the build-up method, or

(2) 45 percent under the build-down method; or

(C) A change to other goods of subheading 8112.92 from any other chapter.

30. (A) A change to articles of vanadium or germanium of subheading 8112.99 from any other chapter; or

(B) No change in tariff classification is required for articles of germanium or vanadium, provided that there is a regional value content of not less than

(1) 35 percent under the build-up method, or

(2) 45 percent under the build-down method; or

(C) A change to other goods of subheading 8112.99 from articles of germanium or vanadium of subheading 8112.99 or from any other subheading."

41. TCR 61 to chapter 84 is deleted and the following new TCR is inserted in lieu thereof:

"61. A change to subheading 8442.30 from any other subheading."

42. TCRs 63 through 65, inclusive, to chapter 84 are deleted and the following new TCRs are inserted in lieu thereof:

"63. (A) A change to subheadings 8443.11 through 8443.39 from any other subheading outside that group, except from subheadings 8443.91 through 8443.99; or

(B) A change to subheadings 8443.11 through 8443.39 from subheading 8443.91 through 8443.99, provided that there is a regional value content of not less than:

(1) 35 percent under the build-up method, or

(2) 45 percent under the build-down method.

64. (A) A change to machines for uses ancillary to printing of subheading 8443.91 from any other good of subheading 8443.91 or from any other subheading except from subheadings 8443.11 through 8443.39; or

(B) A change to any other good of subheading 8443.91 from any other heading.

65. (A) A change to subheading 8443.99 from any other heading; or

(B) No change in tariff classification required, provided that there is a regional value content of not less than:

(1) 35 percent under the build-up method, or

(2) 45 percent under the build-down method."

43. TCR 76 to chapter 84 is deleted and the following new TCR is inserted in lieu thereof:

"76. A change to subheading 8452.30 from any other subheading."

44. TCRs 91 and 92 to chapter 84 are deleted and the following new TCR is inserted in lieu thereof:

"91. A change to heading 8469 from any other heading."

45. TCR 118 to chapter 84 is deleted and the following new TCR is inserted in lieu thereof:

"118. (A) A change to subheadings 8486.10 through 8486.40 from any other subheading outside that group; or

(B) No change in tariff classification required provided there is a regional value content of not less than:

(1) 35 percent under the build-up method, or

(2) 45 percent under the build-down method."

46. The following new TCRs to chapter 84 are inserted in numerical sequence:

"119. (A) A change to subheading 8486.90 from any other heading; or

(B) No change of tariff classification required provided there is a regional value content of not less than:

(1) 35 percent under the build-up method, or

(2) 45 percent under the build-down method.

120. A change to heading 8487 from any other heading."

47. TCR 8 to chapter 85 is modified by deleting "8505.30" and inserting in lieu thereof "8505.20".

48. TCR 9 to chapter 85 is deleted and the following new TCR is inserted in lieu thereof:

"9. (A) A change to electromagnetic lifting heads of subheading 8505.90 from any other subheading, or from any other good of subheading 8505.90; or

(B) A change to any other good of subheading 8505.90 from any other heading."

49. TCR 16 to chapter 85 is deleted and the following new TCR is inserted in lieu thereof:

"16. (A) A change to subheadings 8508.11 through 8508.60 from any other heading; or

(B) A change to subheadings 8508.11 through 8508.60 from any other subheading, whether or not there is also a change from any other heading, provided there is a regional value content of not less than:

(1) 35 percent under the build-up method, or

(2) 45 percent under the build-down method.

16A. A change to subheading 8508.70 from any other heading.

16B. (A) A change to subheadings 8509.40 through 8509.80 from any other heading; or

(B) A change to subheadings 8509.40 through 8509.80 from any other subheading; whether or not there is also a change from any other heading, provided there is a regional value content of not less than:

(1) 35 percent under the build-up method, or

(2) 45 percent under the build-down method."

50. TCR 38 to chapter 85 is modified by deleting "8517.80" and inserting in lieu thereof "8517.69".

51. TCR 39 to chapter 85 is modified by deleting "8517.90" and inserting in lieu thereof "8517.70".

52. TCR 44 to chapter 85 is modified by deleting "8519.10 through 8519.40" and inserting in lieu thereof "8519.20 through 8519.89".

53. TCRs 45 through 56, inclusive, to chapter 85 are deleted, and the following new TCRs are inserted in lieu thereof:

"45. (A) A change to subheadings 8521.10 through 8523.80 from any other subheading; or

(B) A change to recorded media of subheadings 8523.21 through 8523.80 from unrecorded media of subheadings 8523.21 through 8523.80."

46. A change to subheading 8525.50 from any other subheading, except from subheading 8525.60.

47. A change to subheading 8525.60 from any other subheading, except from subheading 8525.50.

48. A change to subheading 8525.80 from any other subheading.

49. A change to subheadings 8526.10 through 8527.99 from any other subheading.

50. A change to subheading 8528.41 from any other subheading.

51. (A) A change to color monitors of subheading 8528.49 from any other good of subheading 8528.49 or from any other subheading, except from subheadings 7011.20, 8540.11 or 8540.91; or

(B) A change to any other good of subheading 8528.49 from any other subheading.

52. A change to subheadings 8528.51 through 8528.71 from any other subheading.

53. A change to subheading 8528.72 from any other subheading, except from subheadings 7011.20, 8528.73, 8540.11 or 8540.91.

54. A change to subheading 8528.73 from any other subheading."

54. TCR 79 to chapter 85 is deleted, and the following new TCR is inserted in lieu thereof:

"79. A change to subheading 8543.10 from any other subheading except from ion implanters for doping semiconductor materials of subheading 8486.20."

55. TCR 81 to chapter 85 is deleted, and the following new TCR is inserted in lieu thereof:

"81. A change to subheading 8543.70 from any other subheading."

56. TCR 87 to chapter 85 is modified by deleting "8544.41" and inserting in lieu thereof "8544.42".

57. TCR 88 to chapter 85 is deleted.

58. TCR 1 to chapter 88 is deleted, and the following new TCRs are inserted in lieu thereof:

"1. (A) A change to gliders or hang gliders of heading 8801 from any other good of heading 8801 or any other heading; or

(B) A change to any other good of heading 88.01 from gliders or hang gliders of heading 8801 or any other heading.

1A. A change to subheading 8802.11 through 8803.90 from any other subheading."

59. TCR 13 to chapter 90 is modified by deleting "9007.11" and inserting in lieu thereof "9007.10".

60. TCR 15 to chapter 90 is modified by deleting "subheadings 9008.10 through 9008.40" and inserting in lieu thereof "subheading 9008.50".

61. TCRs 17 through 21, inclusive, to chapter 90 are deleted.

62. TCR 2 to chapter 91 is deleted.

63. TCRs 1 through 3, inclusive, to chapter 95 are deleted and the following new TCRs are inserted in lieu thereof:

1. A change to heading 9503 from any other heading.

2. (A) A change to headings 9504 through 9508 from any other chapter; or

(B) A change to subheading 9506.31 from subheading 9506.39, whether or not there is also a change from any other chapter, provided that there is a regional value content of not less than:

(1) 35 percent under the build-up method, or

(2) 45 percent under the build-down method."

64. TCR 8 to chapter 96 is modified by deleting "9608.31" and inserting in lieu thereof "9608.30".

65. TCRs 18 and 19 to chapter 96 are deleted, and the following new TCR is inserted in lieu thereof:

"18. A change to heading 9614 from any other heading."

66. The following new heading rules are inserted to chapter 96 immediately below TCR 24 to such chapter:

"**Heading rule 1:** For the purposes of determining the origin of a good of tariff items 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64, 9619.00.68, 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79 or 9619.00.90, the rule applicable to that good shall only apply to the component that determines the tariff classification of the good and such component must satisfy the change of tariff classification requirements set out in the rule for that good.

Heading rule 2: Notwithstanding heading rule 1 to this chapter, a good of tariff items 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64, 9619.00.68, 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79 or 9619.00.90 containing fabrics of subheading 5806.20 or heading 6002 shall be considered originating only if such fabrics are both formed from yarn and finished in the territory of Panama or of the United States, or both.

Heading rule 3: Notwithstanding heading rule 1 to this chapter, a good of tariff items 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64, 9619.00.68, 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79 or 9619.00.90 containing sewing thread of headings 5204, 5401 or 5508 shall be considered originating only if such sewing thread is both formed and finished in the territory of Panama or of the United States, or both."

67. The following new TCR to chapter 96 is inserted in numerical sequence:

"25. (A) A change to sanitary towels (pads) and tampons and similar articles of textile wadding of heading 9619 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311 or chapter 54 through 55; or

(B) A change to a tariff item 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64, or 9619.00.68 from any other chapter, except from heading 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516

or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of Panama or of the United States, or both; or

(C) A change to a tariff item 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79, or 9619.00.90 from any other chapter, except from heading 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516, 5801 through 5802 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of Panama or of the United States, or both; or

(D) A change to any other good of heading 9619 from any other heading."

ANNEX V

MODIFICATIONS TO THE RULES OF ORIGIN FOR THE UNITED STATES – CENTRAL AMERICAN-DOMINICAN REPUBLIC FREE TRADE AGREEMENT, AS REFLECTED IN THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

Effective with respect to goods of a party to the Agreement specified in general note 29(a) to the tariff schedule that are entered, or withdrawn from warehouse for consumption, on or after the date announced by the United States Trade Representative and published in the Federal Register, general note 29(n) to the Harmonized Tariff Schedule of the United States is modified as provided herein:

1. TCR 1 to chapter 3 is deleted and the following new TCRs are inserted in lieu thereof:

"1. A change to headings 0301 through 0305 from any other chapter.

2. (A) A change to smoked goods of headings 0306 through 0308 from goods that are not smoked of headings 0306 through 0308; or

(B) A change to any other good of headings 0306 through 0308 from any other chapter."

2. TCR 4 to chapter 9 is deleted and the following new TCR is inserted in lieu thereof:

"4. (A) A change to crushed, ground, or powdered spices put up for retail sale of subheadings 0904.11 through 0910.99 from spices that are not crushed, ground, or powdered of subheadings 0904.11 through 0910.99, or from any other subheading, except from subheadings 0910.11 through 0910.12; or

(B) A change to mixtures of spices or any good of subheading 0904.11 through 0910.99 other than crushed, ground, or powdered spices put up for retail sale from any other subheading, except from subheadings 0910.11 through 0910.12."

3. TCR 8 to chapter 20 is modified by deleting "2005.90" and inserting in lieu thereof "2005.99".

4. TCR 21 to chapter 20 is deleted and the following new TCR is inserted in lieu thereof:

"21. A change to subheadings 2008.93 through 2008.97 from any other chapter, except that cranberries or a mixture that has been prepared by packing (including canning) in water, brine, or natural juices (including processing incidental to packing) shall be treated as originating only if the

fresh good was wholly obtained or produced entirely in the territory of one or more of the parties to the Agreement."

5. TCR 25 to chapter 20 is modified by deleting "2009.80" at each instance and inserting in lieu thereof "2009.89".

6. TCR 16 to chapter 28 is modified by deleting "2811.23" and inserting in lieu thereof "2811.29".

7. TCR 36 to chapter 28 is modified by deleting "2826.11" and inserting in lieu thereof "2826.12".

8. TCR 46 to chapter 28 is deleted.

9. TCR 51 to chapter 28 is deleted.

10. TCR 54 to chapter 28 is deleted and the following new TCR is inserted in lieu thereof:

"54. (A) A change to commercial ammonium carbonate or other ammonium carbonates of subheading 2836.99 from any other subheading; or

(B) A change to bismuth carbonate of subheading 2836.99 from any other subheading, except from subheading 2617.90; or

(C) A change to lead carbonates of subheading 2836.99 from any other subheading, except from heading 2607; or

(D) A change to other goods of subheading 2836.99 from any other subheading, provided that the good classified in subheading 2836.99 results from a chemical reaction."

11. TCR 56 to chapter 28 is deleted.

12. TCR 58 to chapter 28 is deleted and the following new TCR is inserted in lieu thereof:

"58. A change to subheading 2839.90 from any other subheading."

13. TCRs 61 and 62 to chapter 28 are deleted and the following new TCRs are inserted in lieu thereof:

"61. A change to subheading 2841.30 from any other subheading.

62. (A) A change to chromates of zinc or lead of subheading 2841.50 from any other subheading; or

(B) A change to potassium dichromate of subheading 2841.50 from any other good of subheading 2841.50 or any other subheading; or

(C) A change to other chromates, dichromates or peroxochromates of subheading 2841.50 from potassium dichromate of subheading 2841.50 or any other subheading, except from heading 2610."

14. TCR 66 to chapter 28 is deleted and the following new TCR is inserted in lieu thereof:

"66. (A) A change to aluminates of subheading 2841.90 from any other subheading; or

(B) A change to any other good of subheading 2841.90 from aluminates of subheading 2841.90 or from any other subheading, provided that the good classified in subheading 2841.90 results from a chemical reaction."

15. TCR 68 to chapter 28 is deleted and the following new TCR is inserted in lieu thereof:

"68. (A) A change to fulminates, cyanates or thiocyanates of subheading 2842.90 from any other subheading; or

(B) A change to any other good of subheading 2842.90 from any other subheading, provided that the good classified in subheading 2842.90 results from a chemical reaction."

16. TCR 80 to chapter 28 is deleted and the following new TCR is inserted in lieu thereof:

"80. A change to heading 2850 from any other heading."

17. New TCRs 81 and 82 to chapter 28 are inserted in numerical sequence:

"81. A change to heading 2852 from any other heading.

82. A change to heading 2853 from any other heading."

18. TCR 10 to chapter 29 is modified by deleting "2903.30" and inserting in lieu thereof "2903.39".

19. TCR 11 to chapter 29 is modified by deleting "2903.41 through 2903.49" and inserting in lieu thereof "2903.71 through 2903.79".

20. TCR 12 to chapter 29 is modified by deleting "2903.51" and inserting in lieu thereof "2903.81".

21. TCR 20 to chapter 29 is deleted.

22. TCR 21 to chapter 29 is deleted and the following new TCR is inserted in lieu thereof:

"21. (A) A change to terpineols of subheading 2906.19 from any other good, except from heading 3805; or

(B) A change to any other good of subheading 2906.19 from pine oils of subheading 3805.90 or any other subheading, except from subheading 3301.90 or any other goods of subheading 3805.90."

23. TCR 34 to chapter 29 is modified by deleting "2912.13" and inserting in lieu thereof "2912.12".

24. TCR 39 to chapter 29 is deleted and the following new TCR is inserted in lieu thereof:

"31. A change to subheading 2914.22 from any other subheading."

25. TCR 41 to chapter 29 is deleted and the following new TCR is inserted in lieu thereof:

"41. (A) A change to camphor of subheading 2914.29 from any other subheading; or

(B) A change to any other good of subheading 2914.29 from any other subheading, except from subheading 3301.90 or 3805.90."

26. TCR 44 to chapter 29 is modified by deleting "2915.35" and inserting in lieu thereof "2915.33".

27. TCR 45 to chapter 29 is deleted and the following new TCRs are inserted in lieu thereof:

"45. A change to subheading 2915.36 from any other subheading, except from subheading 3301.90.

45A. (A) A change to isobutyl acetate or 2-ethoxyethyl acetate of subheading 2915.39 from any other subheading; or

(B) A change to any other good of subheading 2915.39 from any other subheading except from subheading 3301.10."

28. TCR 53 to chapter 29 is modified by deleting "subheading 2918.90" and inserting in lieu thereof "subheadings 2918.91 through 2918.99".

29. TCR 55 to chapter 29 is modified by deleting "2920.10" and inserting in lieu thereof "2920.11".

30. TCR 62 to chapter 29 is modified by deleting "2936.10" and inserting in lieu thereof "2936.21".

31. TCR 63 to chapter 29 is deleted and the following new TCR is inserted in lieu thereof:

"63. (A) A change to unmixed provitamins of subheading 2936.90 from any other good of subheading 2936.90 or from any other subheading; or

(B) A change to any other good of subheading 2936.90 from any other subheading, except from subheadings 2936.21 through 2936.29."

32. TCR 1 to chapter 30 is modified by deleting "3001.10" and inserting in lieu thereof "3001.20".

33. TCR 4 to chapter 30 is modified by deleting "subheading 3006.80" and inserting in lieu thereof "subheadings 3006.91 through 3006.92".

34. TCR 2 to subheading 31 is deleted and the following new TCRs are inserted in lieu thereof:

"2. A change to subheadings 3102.10 through 3102.80 from any other subheading.

3. (A) A change to calcium cyanamide of subheading 3102.90 from any other good of subheading 3102.90 or any other subheading; or

(B) A change to any other good of subheading 3102.90 from calcium cyanamide of subheading 3102.90 or any other subheading.

4. A change to subheading 3103.10 from any other subheading.

5. (A) A change to basic slag of subheading 3103.90 from any other good of subheading 3103.90 or any other subheading; or

(B) A change to any other good of subheading 3103.90 from basic slag of subheading 3103.90 or any other subheading.

6. A change to subheadings 3104.20 through 3104.30 from any other subheading.

7. (A) A change to carnallite, sylvite or other crude natural potassium salts of subheading 3104.90 from any other good of subheading 3104.90 or any other subheading; or

(B) A change to any other good of subheading 3104.90 from carnallite, sylvite or other crude natural potassium salts of subheading 3104.90 or any other subheading.

8. A change to subheadings 3105.10 through 3105.90 from any other subheading."

35. TCR 7 to chapter 32 is modified by deleting "3206.43" and inserting in lieu thereof "3206.42".

36. TCR 8 to chapter 32 is deleted and the following new TCR is inserted in lieu thereof:

"8. (A) A change to concentrated dispersions of pigments in plastics materials of subheading 3206.49 from any other chapter; or

(B) A change to pigments or preparations based on cadmium compounds of subheading 3206.49 from any other good, except from pigments or preparations based on hexacyanoferrates of subheading 3206.49 or subheadings 3206.11 through 3206.42; or

(C) A change to pigments or preparations based on hexacyanoferrates of subheading 3206.49 from any other good, except from pigments and preparations based on cadmium compounds of subheading 3206.49 or subheadings 3206.11 through 3206.42; or

(D) A change to any other good of subheading 3206.49 from any other subheading."

37. TCR 1 to chapter 33 is deleted and the following new TCRs are inserted in lieu thereof:

"1. A change to subheadings 3301.12 through 3301.13 from any other subheading.

1A. (A) A change to essential oils of bergamot or lime of subheading 3301.19 from any other good of subheading 3301.19; or

(B) A change to any other good of subheading 3301.19 from essential oils of bergamot or lime of subheading 3301.19 or from any other subheading.

1B. A change to subheadings 3301.24 through 3301.25 from any other subheading.

1C. (A) A change to essential oils of geranium, jasmine, lavender, lavandin or vetiver of subheading 3301.29 from any other good of subheading 3301.29; or

(B) A change to any other good of subheading 3301.29 from essential oils of geranium, of jasmine, of lavender, of lavandin, or of vetiver of subheading 3301.29 or from any other subheading.

1D. A change to subheadings 3301.30 through 3301.90 from any other subheading."

38. TCR 8 to chapter 34 is deleted and the following new TCRs are inserted in lieu thereof:

"8. A change to subheading 3404.20 from any other subheading.

8A. (A) A change to artificial waxes or prepared waxes of chemically modified lignite of subheading 3404.90 from any other good of subheading 3404.90 or from any other subheading; or

(B) A change to any other good of subheading 3404.90 from any other subheading.

8B. A change to subheadings 3405.10 through 3505.90 from any other subheading."

39. TCR 9 to chapter 38 is modified by deleting "3808.10 through 3808.90" and inserting in lieu thereof "3808.50 through 3808.99".

40. TCR 22 to chapter 38 is modified by deleting "subheadings 3824.10 through 3824.20" and inserting in lieu thereof "subheading 3824.10".

41. New TCR 27 to chapter 38 is inserted in numerical sequence:

"27. A change to heading 3826 from any other heading."

42. TCR 13 to chapter 42 is deleted and the following new TCRs are inserted in lieu thereof:

"13. (A) A change to articles of leather or of composition leather, of a kind used in machinery or mechanical appliances or for other technical uses of heading 4205 from any other good of heading 4205 or from any other heading; or

(B) A change to any other good of heading 4205 from articles of leather or of composition leather, of a kind used in machinery or mechanical appliances or for other technical uses of heading 4205 or from any other heading.

14. A change to heading 4206 from any other heading."

43. TCR 7 to chapter 48 is modified by deleting "4818.40" and inserting in lieu thereof "4818.50".

44. TCR 9 to chapter 48 is deleted and the following new TCRs are inserted in lieu thereof:

"9. (A) A change to floor coverings on a base of paper or of paperboard, whether or not cut to size, of subheading 4823.90 from any other good of heading 4823 or any other heading, except from headings 4812 through 4817; or

(B) A change to any other good of heading 4823 from floor coverings on a base of paper or of paperboard, whether or not cut to size, of subheading 4823.90; or

(C) A change to any other good of heading 4823 from any other heading."

45. TCR 2 to chapter 54 is modified by deleting "5402.43.10" and inserting in lieu thereof "5402.47.10".

45. Chapter rule 3 to chapter 61 is deleted and the following new chapter rule 3 is inserted in lieu thereof:

"Chapter rule 3: Notwithstanding chapter rule 2 to this chapter, a good of this chapter, other than a good of subheading 6102.20, tariff item 6102.90.90 (for goods subject to cotton restraints), 6104.13.20, 6104.19.15, 6104.19.60 (for jackets imported as parts of suits), 6104.19.80 (for jackets imported as parts of suits and subject to cotton restraints), 6104.19.80 (for goods subject to man-made fiber restraints), 6104.22.00 (for garments described in heading 6102 or jackets and blazers described in heading 6104), 6104.29.20 (for garments described in heading 6102 or jackets and blazers described in heading 6104, the foregoing subject to cotton restraints), subheading 6104.32, tariff item 6104.39.20 (for goods subject to cotton restraints), 6112.11.00 (for women's or girls' garments

described in headings 6101 or 6102), 6113.00.90 (for coats and jackets of cotton, for women or girls) or 6117.90.90 (for coats and jackets of cotton), containing fabrics of subheading 5806.20 or heading 6002 shall be considered originating only if such fabrics are both formed from yarn and finished in the territory of one or more of the parties to the Agreement."

46. Chapter rule 4 to chapter 61 is deleted and the following new chapter rule 4 is inserted in lieu thereof:

> **"Chapter rule 4**: Notwithstanding chapter rule 2 to this chapter, a good of this chapter, other than a good of subheading 6102.20, tariff item 6102.90.90 (for goods subject to cotton restraints), 6104.13.20, 6104.19.15, 6104.19.60 (for jackets imported as parts of suits), 6104.19.80 (for jackets imported as parts of suits and subject to cotton restraints or for goods subject to man-made fiber restraints), 6104.22.00 (for garments described in heading 6102 or jackets and blazers described in heading 6104), 6104.29.20 (for garments described in heading 6102 or jackets and blazers described in heading 6104, the foregoing subject to cotton restraints), subheading 6104.32, tariff item 6104.39.20 (for goods subject to cotton restraints), 6112.11.00 (for women's or girls' garments described in headings 6101 or 6102), 6113.00.90 (for coats and jackets of cotton, for women or girls) or 6117.90.90 (for coats and jackets of cotton), containing sewing thread of heading 5204, 5401 or 5508 or yarn of heading 5402 used as sewing thread, shall be considered originating only if such sewing thread or yarn is both formed and finished in the territory of one or more of the parties to the Agreement."

47. Chapter rule 5 to chapter 61 is modified by deleting "6104.12.00 (for jackets imported as parts of suits), 6104.13.20, 6104.19.15, 6104.19.80 (for jackets imported as parts of suits and subject to cotton restraints or for goods subject to man-made fiber restraints)" and inserting in lieu thereof "6104.13.20, 6104.19.15, 6104.19.60 (for jackets imported as parts of suits), 6104.19.80 (for jackets imported as parts of suits and subject to cotton restraints or for goods subject to man-made fiber restraints)".

48. TCR 1 to chapter 61 is modified by deleting "6101.10" and inserting in lieu thereof "6101.20".

49. TCR 2 to chapter 61 is deleted and the following new TCR is inserted in lieu thereof:

> "2. (A) A change to goods of wool or fine animal hair of subheading 6101.90 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516 or 6001 through 6006, provided that:
>
> (i) the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the parties to the Agreement, and

(ii) any visible lining material contained in the apparel article must satisfy the requirements of chapter rule 1 for chapter 61; or

(B) A change to any other good of subheading 6101.90 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the parties to the Agreement.

50. TCR 5 to chapter 61 is deleted and the following new TCR is inserted in lieu thereof:

"5. (A) A change to tariff items 6103.10.70 or 6103.10.90 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the parties to the Agreement.

(B) A change to any other tariff item of subheading 6103.10 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, heading 5508 through 5516 or 6001 through 6006, provided that:

(1) the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the parties to the Agreement, and

(2) any visible lining material contained in the apparel article must satisfy the requirements of chapter rule 1 for chapter 61."

51. TCRs 6 and 7 to chapter 61 are deleted.

52. TCR 8 to chapter 61 is modified by deleting "6103.21" and inserting in lieu thereof "6103.22".

53. TCRs 13, 13A, and 13B to chapter 61 are deleted.

54. TCR 14A to chapter 61 is modified by deleting "6104.19.15 or 6104.19.80" and inserting in lieu thereof "6104.19.15, 6104.19.60 or 6104.19.80".

55. TCR 16 to chapter 61 is deleted.

56. Chapter rule 1 to chapter 62 is modified by deleting "6211.41" and inserting in lieu thereof "6211.49".

57. Chapter rule 3 to chapter 62 is modified (a) in subdivision (a) of such chapter rule, by deleting "6202.91.20" and inserting in lieu thereof "6202.91.15 or 6202.91.60"; deleting "6202.92.15" and inserting in numerical sequence"6202.92.05," and "6202.92.30,"; deleting "6202.92.20" and inserting in lieu thereof "6202.92.12or 6202.92.90"; deleting 6202.99.90 and inserting in numerical sequence "6202.99.15," and "6202.99.80,"; deleting "6210.50.90" and inserting in numerical sequence "6210.50.22," and "6210.50.80,"; deleting "6211.41.00" and inserting in numerical sequence "6211.49.15," and 6211.49.60," "; deleting "6211.42.00" and inserting in lieu thereof "6211.42.05 or 6211.42.10"; and (b) in subdivision (b) of such chapter rule, by deleting "6211.41" and inserting in lieu thereof "6211.49".

58. Chapter rule 4 to chapter 62 is modified (a) in subdivision (a) of such chapter rule, by deleting "6202.91.20" and inserting in lieu thereof "6202.91.15 or 6202.91.60"; deleting "6202.92.15" and inserting in numerical sequence "6202.92.05," and "6202.92.30,"; deleting "6202.92.20" and inserting in lieu thereof "6202.92.12 or 6202.92.90"; deleting "6202.99.90" and inserting in numerical sequence "6202.99.15," and "6202.99.80,"; deleting "6210.50.90" and inserting in numerical sequence "6210.50.22," and "6210.50.80,"; deleting "6211.41.00" and inserting in lieu thereof "6211.49.15 or 6211.49.60" ; deleting "6211.42.00" and inserting in lieu thereof "6211.42.05 or 6211.42.10"; " and (b) in subdivision (b) of such chapter rule, by deleting "6211.41" and inserting in lieu thereof "6211.49".

59. Chapter rule 5 to chapter 62 is modified (a) in subdivision (a) of such chapter rule, by deleting "6202.91.20" and inserting in lieu thereof "6202.91.15 or 6202.91.60"; deleting "6202.92.15" and inserting in numerical sequence "6202.92.05," and "6202.92.30,"; deleting "6202.92.20" and inserting in lieu thereof "6202.92.12 or 6202.92.90"; deleting 6202.99.90 and inserting in numerical sequence "6202.99.15," and "6202.99.80,"; deleting "6210.50.90" and inserting in numerical sequence "6210.50.22," and "6210.50.80,"; deleting "6211.41.00" and inserting in lieu thereof " 6211.49.15 or 6211.49.60"; deleting "6211.42.00" and inserting in lieu thereof "6211.42.05 or 6211.42.10"; and (b) in subdivision (b) of such chapter rule, by deleting "6211.41" and inserting in lieu thereof "6211.49".

60. TCR 7 to chapter 62 is modified by deleting "6202.91.20" and inserting in lieu thereof "6202.91.15 or 6202.91.60".

61. TCR 7B to chapter 62 is modified by deleting "6202.92.15 or 6202.92.20" and inserting in lieu thereof "6202.92.05, 6202.92.12, 6202.92.30 or 6202.92.90".

62. TCR 8 to chapter 62 is modified by deleting "6202.99.90" and inserting in lieu thereof "6202.99.15 or 6202.99.80".

63. TCR 11 to chapter 62 is modified by deleting "6203.21" and inserting in lieu thereof "6203.22".

64. TCR 30 to chapter 62 is deleted.

65. TCR 33 to chapter 62 is modified by deleting "6207.92.40" and inserting in lieu thereof "6207.99.85".

66. TCR 38 to chapter 62 is modified by deleting "6211.31" and inserting in lieu thereof "6211.32".

67. TCRs 38A and 38B to chapter 62 are deleted.

68. TCR 38E to chapter 62 is deleted and the following new TCRs are inserted in lieu thereof:

"38E. A change to tariff item 6211.49.41 (for jackets and jacket-type garments excluded from heading 6202) from any other chapter, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the Parties.

38F. A change to any other tariff item of subheadings 6211.43 through 6211.49 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the parties to the Agreement."

69. TCR 2 to chapter 63 is modified by deleting "5402.43.10" and inserting in lieu thereof "5402.47.10".

70. Chapter rule 1 to chapter 64 is modified by deleting the text following "6402.12.00 through" and inserting in lieu thereof the following:

"6402.91.05, inclusive, 6402.91.16, 6402.91.30, 6402.91.40, 6402.91.60, 6402.91.70, 6402.99.04, 6402.99.12, 6402.99.21, 6402.99.23 through 6402.99.31, inclusive, and 6402.99.41 through 6402.99.79, inclusive; heading 6403; tariff items 6404.11.20 through 6404.19.15, inclusive, and 6404.19.25 through 6404.20.60, inclusive; and headings 6405 and 6406."

71. TCR 1 to chapter 64 is deleted and the following new TCR is inserted in lieu thereof:

"1. A change to subheading 6401.10, or tariff items 6401.92.90, 6401.99.10, 6401.99.30, 6401.99.60, 6401.99.90, 6402.91.10, 6402.91.20, 6402.91.26, 6402.91.50, 6402.91.70, 6402.91.80, 6402.91.90, 6402.99.08, 6402.99.16, 6402.99.19, 6402.99.33, 6402.99.80, 6402.99.90, 6404.11.90 or

6404.19.20 from any other heading outside headings 6401 through 6405, except from subheading 6406.10, provided that there is a regional value content of not less than 55 percent under the build-up method."

72. TCR 2 to chapter 65 is modified by deleting "6503" at each instance and inserting in lieu thereof "6504".

73. TCRs 2 through 4, inclusive, to chapter 68 are deleted and the following new TCRs are inserted in lieu thereof:

"2. A change to subheading 6812.80 from any other subheading.

3. A change to subheading 6812.91 from any other subheading.

4. A change to subheading 6812.92 through 6812.93 from any other subheading outside that group.

4A. A change to subheading 6812.99 from any other heading.

74. TCR 8 to chapter 70 is deleted and the following new TCR is inserted in lieu thereof:

"8. A change to headings 7009 through 7018 from any other heading outside that group, except from headings 7007 through 7008 or glass inners for vacuum flasks or other vacuum vessels of heading 7020."

75. TCR 13 to chapter 73 is modified by deleting "7321.83" at each instance and inserting in lieu thereof "7321.89".

76. TCR 2 to chapter 78 is deleted and the following new TCRs are inserted in lieu thereof:

"2. A change to heading 7804 from any other heading.

3. (A) A change to lead bars, rods, profiles and wire of heading 7806 from any other good of heading 7806 or any other heading; or

(B) A change to lead tubes or pipes of heading 7806 and fittings for tubes or pipes (for example, couplings, elbows, sleeves) of heading 7806 from any other good of heading 7806 or from any other heading; or

(C) A change to any other good of heading 7806 from lead bars, rods, profiles, wire and pipes of heading 7806; or from fittings for tubes or pipes (for example, couplings, elbows, sleeves) of heading 7806 or any other heading."

77. TCR 4 to chapter 79 is deleted and the following new TCRs are inserted in lieu thereof:

"4. A change to headings 7904 through 7905 from any other heading.

5. (A) A change to zinc tubes of heading 7907, or pipes and fittings for tubes or pipes (for example, couplings, elbows, sleeves) of heading 7907, from any other good of heading 7907 or from any other heading; or

(B) A change to any other good of heading 7907 from zinc tubes or pipes of heading 7907; or fittings for tubes or pipes (for example, couplings, elbows, sleeves) of heading 7907 or any other heading."

78. TCRs 2 through 4, inclusive, to chapter 80 are deleted and the following new TCRs are inserted in lieu thereof:

"2. A change to heading 8003 from any other heading.

3. (A) A change to heading 8007 from any other heading; or

(B) A change to plates, sheets and strip, of a thickness exceeding 0.2 mm, of heading 8007 from any other good of heading 8007; or

(C) A change to tin foil and strip, thin (printed or even fixed on paper, cardboard, plastic or similar supports), of thickness not exceeding 0.2 mm (without including the support); or to tin powders and flakes of heading 8007 from any other good of heading 8007, except from plates, sheets and strip, of a thickness exceeding 0.2 mm, of heading 8007; or

(D) A change to tin tubes or pipes and fittings for tubes and pipes (for example, couplings, elbows, sleeves) of heading 8007 from any other good of heading 8007."

79. TCRs 2 and 3 to chapter 81 are deleted and the following new TCR is inserted in lieu thereof:

"2. A change to subheading 8101.96 from any other subheading, except from bars, rods, profiles, plates, sheets and strip of subheading 8101.99."

80. TCR 5 to chapter 81 is deleted and the following new TCR is inserted in lieu thereof:

"5. (A) A change to bars or rods (other than those obtained simply by sintering), profiles, plates, sheets, strip or foil of subheading

8101.99 from any other good of subheading 8101.99 or any other subheading; or

(B) A change to any other good of subheading 8109.99 from bars or rods (other than those obtained simply by sintering), profiles, plates, sheets, strip or foil of subheading 8101.99 or any other subheading."

81. TCRs 35 and 36 to chapter 81 are deleted and the following new TCRs are inserted in lieu thereof:

"35. (A) A change to unwrought germanium or vanadium, germanium or vanadium waste, scrap or powders of subheading 8112.92 from any other chapter; or

(B) No change in tariff classification is required for articles of unwrought germanium or vanadium, germanium or vanadium waste, scrap or powders of subheading 8112.92, provided that there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used; or

(C) A change to other goods of subheading 8112.92 from any other chapter.

36. (A) A change to articles of vanadium or germanium of subheading 8112.99 from any other chapter; or

(B) No change in tariff classification is required for articles of germanium or vanadium, provided that there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used; or

(C) A change to other goods of subheading 8112.99 from articles of germanium or vanadium of subheading 8112.99 or from any other subheading."

82. TCR 69 to chapter 84 is deleted and the following new TCR is inserted in lieu thereof:

"69. A change to subheading 8442.30 from any other subheading."

83. TCRs 71 through 73, inclusive, to chapter 84 are deleted and the following new TCRs are inserted in lieu thereof:

"71. (A) A change to subheading 8443.11 through 8443.19 from any other subheading outside that group, except from machines for uses ancillary to printing of subheading 8443.91; or

(B) A change to subheading 8443.11 through 8443.19 from machines for uses ancillary to printing of subheading 8443.91, provided that there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used.

72. A change to subheading 8443.31 from any other subheading.

73. (A) A change to subheading 8443.32 from any other subheading, except from machines for uses ancillary to printing of subheading 8443.91; or

(B) A change to subheading 8443.32 from machines for uses ancillary to printing of subheading 8443.91, provided there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used.

73A. A change to subheading 8443.39 from any other subheading.

73B. (A) A change to machines for uses ancillary to printing of subheading 8443.91 from any other good of subheading 8443.91 or from any other subheading, except from subheadings 8443.11 through 8443.39; or

(B) A change to any other good of subheading 8443.91 from any other heading.

73C. (A) A change to subheading 8443.99 from any other subheading; or

(B) No change in tariff classification required, provided that there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used."

84. TCRs 84 and 85 to chapter 84 are deleted and the following new TCRs are inserted in lieu thereof:

"84. A change to subheading 8452.30 from any other subheading.

85. (A) A change to furniture, bases and covers for sewing machines and parts thereof of subheading 8452.90 from any other good of subheading 8452.90 or from any other subheading; or

(B) A change to any other good of subheading 8452.90 from any other heading."

85. TCRs 99 and 100 to chapter 84 are deleted and the following new TCR is inserted in lieu thereof:

"99. A change to heading 8469 from any other heading."

86. TCR 128 to chapter 84 is deleted and the following new TCRs are inserted in lieu thereof:

"128. (A) A change to subheading 8486.10 from any other subheading; or

(B) No change in tariff classification required provided there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used.

129. (A) A change to subheading 8486.20 from any other subheading, except from particle accelerators of subheading 8543.10; or

(B) No change in tariff classification required, provided there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used.

130. (A) A change to subheading 8486.30 through 8486.40 from any other subheading; or

(B) No change in tariff classification required, provided there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used.

131. (A) A change to subheading 8486.90 from any other heading; or

(B) No change of tariff classification required, provided there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used.

132. A change to heading 8487 from any other heading."

87. TCR 8 to chapter 85 is modified by deleting "8505.30" and inserting in lieu thereof "8505.20".

88. TCR 9 to chapter 85 is deleted and the following new TCR is inserted in lieu thereof:

"9. (A) A change to electromagnetic lifting heads of subheading 8505.90 from any other subheading, or from any other good of subheading 8505.90; or

(B) A change to any other good of subheading 8505.90 from any other heading."

89. The following new TCRs to chapter 85 are inserted in numerical sequence:

"15A. (A) A change to subheadings 8508.11 through 8508.60 from any other heading; or

(B) A change to subheadings 8508.11 through 8508.60 from any other subheading, provided there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used.

15B. A change to subheading 8508.70 from any other heading."

90. TCR 16 to chapter 85 is modified by deleting "8509.10" at each instance and inserting in lieu thereof "8509.40".

91. TCR 38 to chapter 85 is modified by deleting "8517.80" and inserting in lieu thereof "8517.69".

92. TCR 39 to chapter 85 is deleted and the following new TCR is inserted in lieu thereof:

"39. (A) A change to parts of electrical apparatus for telephony or telegraphy or parts of videophones of subheading 8517.70 from any other subheading; or

(B) No change in tariff classification is required to parts of electrical apparatus for telephony or telegraphy or parts of videophones of subheading 8517.70 provided there is a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used; or

(C) A change to any other good of subheading 8517.70 from any other subheading."

93. TCR 44 to chapter 85 is modified by deleting "8519.10 through 8519.40" and inserting in lieu thereof "8519.20 through 8519.89".

94. TCRs 45 and 46 to chapter 85 are deleted.

95. TCR 51 to chapter 85 is deleted and the following new TCRs are inserted in lieu thereof:

"51. A change to subheadings 8522.10 through 8522.90 from any other subheading.

51A. (A) A change to subheadings 8523.21 through 8523.80 from any other subheading; or

(B) A change to recorded media of subheadings 8523.21 through 8523.80 from unrecorded media of subheadings 8523.21 through 8523.80."

96. TCRs 52 and 53 to chapter 85 are deleted and the following new TCRs are inserted in lieu thereof:

"52. A change to subheading 8525.50 from any other subheading, except from subheading 8525.60.

53. A change to subheading 8525.60 from any other subheading, except from subheading 8525.50.

53A. A change to subheading 8525.80 from any other subheading."

97. TCR 55 to chapter 85 is modified by deleting "8527.90" and inserting in lieu thereof "8527.99".

98. TCRs 56 through 59, inclusive, to chapter 85 are deleted and the following new TCRs are inserted in lieu thereof:

"56. A change to subheading 8528.41 from any other subheading.

57. (A) A change to color video monitors of subheading 8528.49 from any other good of subheading 8528.49 or from any other subheading, except from subheadings 7011.20, 8540.11 or 8540.91; or

(B) A change to any other good of subheading 8528.49 from any other subheading.

58. A change to subheading 8528.51 from any other subheading.

59. A change to subheading 8528.59 from any other subheading.

59A. A change to subheading 8528.61 from any other subheading.

59B. A change to subheading 8528.69 from any other subheading.

59C. A change to subheading 8528.71 from any other subheading.

59D. A change to subheading 8528.72 from any other subheading, except from subheading 7011.20, 8540.11 or 8540.91.

59E. A change to subheading 8528.73 from any other subheading."

99. TCR 81 to chapter 85 is modified by deleting "semiconductor devices, integrated circuits, or microassemblies" and inserting in lieu thereof "semiconductor devices or integrated circuits".

100. TCR 82 to chapter 85 is deleted and the following new TCR is inserted in lieu thereof:

"82. A change to subheading 8543.10 from any other subheading, except from ion implanters for doping semiconductor materials of subheading 8486.20."

101. TCR 84 to chapter 85 is deleted and the following new TCR is inserted in lieu thereof:

"84. A change to subheading 8543.70 from any other subheading."

102. TCR 85 to chapter 85 is deleted and the following new TCR is inserted in lieu thereof:

"85. (A) A change to subheading 8543.90 from any other heading; or

(B) A change to electronic microassemblies of subheading 8543.90 from any other subheading; or

(C) No change in tariff classification to electronic microassemblies of subheading 8543.90 is required, provided there is a regional value content of not less than:

(i) 30 percent when the build-up method is used, or

(ii) 35 percent when the build-down method is used."

103. TCR 90 to chapter 85 is deleted and the following new TCR is inserted in lieu thereof:

"90. (A) A change to electric conductors, for a voltage exceeding 80 V but not exceeding 1000 V fitted with connectors, from any other heading; or

(B) A change to any other good of subheading 8544.42 from electric conductors, for a voltage exceeding 80 V but not exceeding 1000 V fitted with connectors, or from any other subheading, provided there is also a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used."

104. TCR 91 to chapter 85 is deleted and the following new TCR is inserted in lieu thereof:

"91. (A) A change to electric conductors, for a voltage exceeding 80 V but not exceeding 1000 V not fitted with connectors, from any other heading; or

(B) A change to any other good of subheading 8544.49 from electric conductors, for a voltage exceeding 80 V but not exceeding 1000 V not fitted with connectors, or from any other subheading, provided there is also a regional value content of not less than:

(i) 35 percent when the build-up method is used, or

(ii) 45 percent when the build-down method is used."

105. TCR 1 to chapter 88 is deleted and the following new TCR is inserted in lieu thereof:

"1. (A) A change to gliders and hang gliders of heading 8801 from any other good of heading 8801 or any other heading; or

(B) A change to any other good of heading 8801 from gliders and hang gliders of heading 8801 or any other heading.

1A. A change to subheading 8802.11 through 8803.90 from any other subheading."

106. TCR 21 to chapter 90 is modified by deleting "9007.11" at each instance and inserting in lieu thereof "9007.10".

107. TCR 23 to chapter 90 is deleted.

108. TCR 24 to chapter 90 is modified by deleting "subheadings 9008.20 through 9008.40" at each instance and inserting in lieu thereof "subheading 9008.50".

109. TCRs 26 through 30, inclusive, to chapter 90 are deleted.

110. TCR 32 to chapter 90 is modified by deleting "subheadings 9010.41 through 9010.50" at each instance and inserting in lieu thereof "subheading 9010.50".

111. TCRs 1 through 3, inclusive, to chapter 95 are deleted and the following new TCRs are inserted in lieu thereof:

"1. (A) A change to heading 9503 from any other chapter; or

(B) A change to dolls representing only human beings of heading 9503 from any other heading.

2. A change to subheadings 9504.20 through 9506.29 from any other chapter.

3. A change to subheading 9506.31 from subheading 9506.39, whether or not there is a change from another chapter, provided there is a regional value content of not less than:

   (A) 35 percent when the build-up method is used, or

   (B) 45 percent when the build-down method is used.

4. A change to subheadings 9506.32 through 9508.90 from any other chapter."

112. TCRs 18 and 19 to chapter 96 are deleted and the following new TCRs are inserted in lieu thereof:

"18. A change to heading 9614 from any other heading."

113. The following new heading rules are inserted to chapter 96 immediately below TCR 24 to such chapter:

"**Heading rule 1:** For the purposes of determining the origin of a good of tariff items 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64, 9619.00.68, 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79 or 9619.00.90, the rule applicable to that good shall only apply to the component that determines the tariff classification of the good and such component must satisfy the change of tariff classification requirements set out in the rule for that good.

Heading rule 2: Notwithstanding heading rule 1 to this chapter, a good of tariff items 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64, 9619.00.68, 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79 or 9619.00.90, containing fabrics of subheading 5806.20 or heading 6002 shall be considered originating only if such fabrics are both formed from yarn and finished in the territory of one or more of the parties to the Agreement.

Heading rule 3: Notwithstanding heading rule 1 to this chapter, a good of tariff items 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64, 9619.00.68, 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79 or 9619.00.90, containing sewing thread of headings 5204, 5401 or 5508 or yarn of heading 5402 used as sewing thread, shall be considered originating only if such sewing thread is both formed and finished in the territory of one or more of the parties to the Agreement."

114. The following new TCR to chapter 96 is inserted in numerical sequence:

"25. (A) A change to sanitary towels (pads) and tampons and similar articles of textile wadding of heading 9619 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311 or chapter 54 through 55; or

(B) A change to a tariff items 9619.00.31, 9619.00.41, 9619.00.43, 9619.00.46, 9619.00.61, 9619.00.64 or 9619.00.68 from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the parties to the Agreement; or

(C) A change to a tariff items 9619.00.33, 9619.00.48, 9619.00.71, 9619.00.74, 9619.00.78, 9619.00.79 or 9619.00.90, from any other chapter, except from headings 5111 through 5113, 5204 through 5212, 5310 through 5311, chapter 54, headings 5508 through 5516, 5801 through 5802 or 6001 through 6006, provided that the good is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the parties to the Agreement; or

(D) A change to any other good of heading 9619 from any other heading."

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Billing code 7020–02–C

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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2016–0091]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security DHS/U.S. Customs and Border Protection (CBP)–023 Border Patrol Enforcement Records (BPER) System of Records

AGENCY: Department of Homeland Security, Privacy Office.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a newly established system of records titled, ''Department of Homeland Security U.S. Customs and Border Protection (DHS/CBP)–023 Border Patrol Enforcement Records (BPER) System of Records'' from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the ''DHS/CBP–023 BPER System of Records'' from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: This final rule is effective December 20, 2016.

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Debra Danisek (202–344–1191), CBP Privacy Officer, Privacy and Diversity Office, 1300 Pennsylvania Avenue NW., Washington, DC 20229. For privacy issues please contact: Jonathan R. Cantor (202–343–1717), Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Homeland Security (DHS) U.S. Customs and Border Protection (CBP) published a notice of proposed rulemaking in the **Federal Register**, (81 FR 72551, October 20, 2016) proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. DHS issued the ''DHS/CBP–023 Border Patrol Enforcement (BPER) Records System of Records'' in the **Federal Register** at 81 FR 72601 on October 20, 2016, to provide notice to the public that DHS/CBP will collect and maintain enforcement records to secure the U.S. border between Ports of Entry (POE), furthering its enforcement and immigration mission. DHS previously maintained these records under the DHS/ICE–011 Criminal Arrest Records and Immigration Enforcement Records (CARIER) (81 FR 72080, October 19, 2016) and the DHS/USVISIT–004 DHS Automated Biometric Identification System (IDENT) (72 FR 31080, June 5, 2007) System of Records Notices. DHS/CBP issued this new system of records to claim ownership of records created as a result of CBP interactions between POE.

DHS/CBP invited comments on both the Notice of Proposed Rulemaking (NPRM) and System of Records Notice (SORN).

II. Public Comments

DHS/CBP received one positive comment on the NPRM and no comments on the SORN for the DHS/CBP–023 BPER System of Records. After consideration of the public comment, DHS will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS amends Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for Part 5 continues to read as follows:

Authority: Pub. L. 107–296, 116 Stat. 2135; (6 U.S.C. 101 *et seq.*); 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. Add paragraph 76 to appendix C to part 5 to read as follows::

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

76. The DHS/CBP–023 Border Patrol Enforcement Records (BPER) System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/CBP–023 BPER System of Records is a repository of information held by DHS/CBP in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. The DHS/CBP–023 BPER System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies. The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a (c)(3), (c)(4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8); and (g). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a (c)(3); (d); (e)(1), (e)(4)(G), and (e)(4)(H). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or

evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(f) From subsections (e)(4)(G) and (e)(4)(H) (Agency Requirements) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: December 13, 2016.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2016–30457 Filed 12–19–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 251, 271, 272 and 277

[FNS–2016–0028]

RIN: 0584–AE44

Supplemental Nutrition Assistance Program Promotion

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Final rule.

SUMMARY: This final rule implements Section 4018 of the Agricultural Act of 2014. Section 4018 created new limitations on the use of Federal funds authorized in the Food and Nutrition Act of 2008, as amended (FNA), for the Supplemental Nutrition Assistance Program (SNAP) promotion and outreach activities. Specifically, Section 4018 of the 2014 Farm Bill prohibits the use of Federal funds appropriated in the FNA from being used for: recruitment activities designed to persuade an individual to apply for SNAP benefits; television, radio, or billboard advertisements that are designed to promote SNAP benefits and enrollment; or agreements with foreign governments designed to promote SNAP benefits and enrollment. The prohibition on using funds appropriated under the FNA for television, radio, or billboard advertisements does not apply to Disaster SNAP.

Section 4018 also prohibits any entity that receives funds under the FNA from compensating any person engaged in outreach or recruitment activities based on the number of individuals who apply to receive SNAP benefits. Lastly, Section 4018 modifies Section 16(a)(4) of the FNA to prohibit the Federal government from paying administrative costs associated with recruitment activities designed to persuade an individual to apply for program benefits or that promote the program through television, radio, or billboard advertisements.

This final rule also impacts the Food Distribution Program on Indian Reservations (FDPIR) and The Emergency Food Assistance Program (TEFAP), both of which receive funding and/or foods authorized under the FNA.

DATES: This final rule is effective January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Rose Conroy, Chief, Program Development Division, Program Design Branch, Food and Nutrition Services, U.S. Department of Agriculture, 3101 Park Center Drive, Room 810, Alexandria, VA 22302, or by phone at (703) 305–2803, or by email at *Maryrose.conroy@fns.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

This rule implements Section 4018 of the Agricultural Act of 2014 (Pub L. 113–79, 2014 Farm Bill). Section 4018 of the 2014 Farm Bill creates new limitations on the use of Federal funds authorized in the Food and Nutrition Act of 2008 (FNA) for Supplemental Nutrition Assistance Program (SNAP) promotion and recruitment activities. Specifically, Section 4018:

- Amends Section 16(a)(4) of the FNA to prohibit Federal reimbursement for activities that are designed to persuade an individual to apply for program benefits or that promote the program through television, radio, or billboard advertisements.
- Amends the end of Section 18 of the FNA to prohibit the use of Federal funds authorized to be appropriated under the FNA from being used for:

(1) Recruitment activities designed to persuade an individual to apply for SNAP benefits;

(2) Television, radio, or billboard advertisements that are designed to promote SNAP benefits and enrollment. This provision does not apply to Disaster SNAP; or

(3) Any agreements with foreign governments designed to promote SNAP benefits and enrollment.

- Amends the end of Section 18 of the FNA to require the Secretary of Agriculture to issue regulations that prohibit entities that receive funds under the FNA from compensating any person engaged in outreach or recruitment activities based on the number of individuals who apply to receive SNAP benefits.

II. Discussion of Comments and the Final Rule

General Comments

On March 14, 2016, the Department published a proposed rule to implement the changes made by Section 4018. *See* Supplemental Nutrition Assistance Program Promotion, 81 FR 13290 (Mar.

14, 2016). The Department received 94 comments on the proposed rule published on March 14, 2016 and open for public comments for 60 days. Commenters included 17 private individuals, one anonymous commenter, 23 food banks or food bank coalitions, two county governments, one university association, one member of a university, and 49 other not-for-profit organizations. Sixty-six of the comments received were variations of two form letters, and 28 comments were unique comments.

Overall, comments were very supportive of the proposed rule. Commenters, however, did point to specific areas in need of clarification. The Department has reviewed these comments and in many cases has made the suggested recommendations, as discussed below. The Department appreciates the efforts of community partners and concerned members of the public to offer insightful comments that have enhanced the final regulations.

Definition of Recruitment Activities Designed To Persuade

The Agricultural Act of 2014 prohibits the use of funds appropriated under the FNA from being used for recruitment activities that are designed to persuade an individual to apply for SNAP benefits.

In the proposed rule, prohibited recruitment activities were defined as those designed to persuade an individual to apply for SNAP benefits through the use of persuasive practices. Persuasive practices constitute coercing or pressuring an individual to apply, or providing incentives to fill out an application. Communicating factual information pertaining to SNAP is not a recruitment activity designed to persuade an individual to apply for SNAP benefits.

Overall, the definition of recruitment activities that would be prohibited in the proposed rule were supported by commenters, with the specific exceptions discussed below. Commenter support focused on the importance of providing factual information through SNAP outreach (n = 78), and the importance of outreach to clear up myths or misconceptions about SNAP (n = 71). Commenters appreciated that the definition in the proposed rule supported these important outreach activities.

However, commenters felt two components of the definition of recruitment activities designed to persuade were in need of clarification. First, a large number of commenters (n = 73) felt the rule should state that individuals are allowed to make an ''informed choice'' about whether or not to apply for SNAP benefits and that this phrase should be added to the regulatory definition of recruitment activities designed to persuade. These commenters explained that long-standing FNS regulations clearly state that prohibited recruitment activities are those that persuade an individual who has made an *informed choice* not to apply for SNAP to change his or her mind and apply for benefits. Some commenters also pointed to floor statements made by Members of Congress during consideration of the conference report on the 2014 Farm Bill. In these floor statements, Members explained that the statute made no change with respect to the role of the applicant to make an ''informed choice'' on whether or not to apply for benefits. These commenters recommended that the Department's final rule explicitly incorporate the long-standing ''informed choice'' standard in the regulatory definition of activities designed to persuade.

Second, a majority of commenters (n = 68) felt that the rule needed to be clarified to explain that outreach workers should be allowed to ask follow-up questions to potential SNAP applicants to clear-up misinformation. Some commenters pointed to a specific example in the preamble of the proposed rule in which a food pantry visitor comes by a SNAP informational table and expresses disinterest in learning more about SNAP. In this example, the Department explained continuing to discuss SNAP with the visitor would constitute a persuasive practice because the visitor had clearly expressed a lack of interest and should not be pressured to apply. These commenters felt that frequently a follow-up question about why an individual is not interested is necessary in order to determine whether or not he or she has accurate information about the program, and should not be considered a persuasive practice. If the individual responds to the follow-up question in such a way as to show he or she is misinformed about SNAP, the outreach worker then has an opportunity to clarify his or her misunderstanding, so that he or she can then make a well-informed choice about applying.

The Department agrees with the commenters that it is important that potential SNAP applicants have the necessary information to make an informed choice about whether or not to apply for benefits, and that outreach is an important tool to ensure that SNAP applicants can make this informed choice. The Department also understands that it was not the intent of Congress to prohibit informational activities that provide basic program information to potentially eligible individuals, as specifically authorized in Section 11(e)(1) of the FNA. Basic program information allows individuals to make a well-informed decision about whether or not to apply based on accurate information, rather than myths or other types of misinformation.

Pursuant to these comments the Department has clarified the regulations at a new 7 CFR 277.4(b)(5). As in the proposed rule, the Federal reimbursement rate shall not include recruitment activities designed to persuade an individual to apply for SNAP benefits through the use of persuasive practices. Persuasive practices constitute coercing or pressuring an individual to apply, or providing incentives to fill out an application for SNAP benefits. However, in the final rule the Department has added the ''informed choice'' standard to the third sentence: communicating factual information so that an individual can make an informed choice pertaining to SNAP is not a recruitment activity designed to persuade an individual to apply for SNAP benefits. As a result, prohibited recruitment activities would not include providing accurate program information to dispel misinformation, answering questions about SNAP, providing assistance in filling out forms or obtaining verification documents, or providing basic information about SNAP availability, application procedures, eligibility requirements, and the benefits of the program, as specifically permitted by Section 11(e)(1) of the FNA.

To conform to this change from the proposed rule, the Department is clarifying one of the examples from the preamble of the proposed rule to make a distinction between persuasive practices and asking appropriate follow-up questions to ensure an individual has made an informed choice. The revised example is as follows:

> A worker funded by SNAP funds is staffing a SNAP informational table at a food pantry. A food pantry visitor comes to the table, but soon replies that he is not interested in learning more. The worker may ask a follow-up question about why the visitor is not interested in learning more. If the visitor's answer demonstrates a lack of accurate information about SNAP, the worker may correct the misunderstanding, thus helping the visitor make an informed choice about applying. However, if the visitor responds to the follow-up questions with a further expression of disinterest, continuing to question the visitor would be pressuring the individual to apply and therefore constitutes a persuasive practice.

Similarly, the Department is hereby clarifying one of the examples from the preamble of the proposed rule about allowable informational activities:

> An outreach worker is talking to a senior citizen who explains that he does not think he is eligible because he owns his own home. The worker would be allowed to correct this misconception, including asking any necessary follow-up questions to ensure the senior citizen makes an informed choice about whether or not to apply.

Application of Recruitment Activities Designed To Persuade to Written Materials

The preamble to the proposed rule explained that written materials would also be expected to comply with the designation of allowable and unallowable activities that are described in the above definition of recruitment activities designed to persuade an individual to apply for SNAP benefits through coercion, pressure, or incentives. One commenter sought clarification on what information may be included in written outreach materials. This commenter suggested that FNS expand the list of permissible written outreach materials to include additional examples in the preamble.

The Department has reviewed the commenter's request and feels that the original language in the preamble was sufficiently clear that it was not intended to be an exhaustive list, and that written outreach materials are permissible, so long as they are not recruitment activities designed to persuade, as defined in 277.4(b)(5)(i).

Specialized Services

The Manager's Statement to the Conference Report, H.R. Rep. 113–333 stated that the changes in Section 4018 of the Agricultural Act of 2014 do not preclude specialized services for eligible SNAP applicants, including application assistance for vulnerable populations. The Manager's Statement explained that specialized services are particularly important for vulnerable populations, including the elderly, homeless, and individuals with disabilities, to ensure they receive the food assistance they need. Consequently, the proposed rule would not have prohibited specialized services that provide vulnerable populations (including the elderly, homeless, and individuals with disabilities) with application assistance or basic program information, including information about rights, program rules, client responsibilities, and benefits.

A majority of commenters (n = 63) supported the language in the proposed rule, agreeing that Congressional intent was never to prohibit specialized or targeted services to vulnerable populations. However, commenters (n = 65) also argued that neither the Act nor the Manager's Statement in the Conference Report, H.R. Rep. 113–333, limit application assistance and specialized services to these vulnerable populations only. These commenters felt that the Department should clarify that application assistance and specialized services can be provided to all individuals, not just so-called vulnerable populations cited in the preamble. For example, these commenters explained, targeted SNAP outreach can be important for limited English proficient populations, pregnant women receiving WIC only benefits, recently unemployed families in a factory town that has lost its primary business, or a community that has suffered severe weather and power outages that do not rise to the level of a Presidentially declared disaster.

The Department considers specialized services to be a subset of all activities provided under informational activities, as defined in 7 CFR 272.5(c). Specialized services are informational activities targeted to specific populations based on their specific needs. For example, a community outreach partner may develop a SNAP Web site targeted to households who have become recently unemployed, informing those households of available SNAP Employment and Training activities. The Web site is a specialized service provided to a targeted group to provide information about SNAP based on their needs and available local resources. Therefore, the Department agrees with the commenters and concludes that specialized services, as a subset of allowable informational activities in 7 CFR 272.5(c), can be targeted to any particular group to meet the specific needs of that population. However, the Department does not believe any changes are needed to the regulatory text to address that clarification.

Incentives

As discussed above, the proposed rule prohibited recruitment activities that are designed to persuade an individual to apply for SNAP benefits through the use of persuasive practices. Providing an incentive to fill out an application was defined as one type of persuasive practice. The preamble to the proposed rule also included an example where a worker funded by SNAP funds at a community-based organization explained to a group of likely eligible SNAP applicants, that every person who applied that day for SNAP would be allowed to stay for a free parenting class. The preamble to the proposed rule explained that this practice would be prohibited if only those who filled out the SNAP application were allowed to attend the parenting class. However, if everyone was allowed to participate in the parenting class, regardless of whether or not they completed an application, the practice would be allowable.

While no comments were received that directly supported the incentive language in the proposed rule, some commenters (n = 19) felt the incentive language in the definition of recruitment activities designed to persuade needed to be clarified. For example, some of the commenters explained that providing information about the ancillary benefits of participating in SNAP and offering outreach reinforcement items that are *not* dependent on the recipient submitting a SNAP application should be clarified as permissible reimbursable outreach activities. Commenters explained that the Department's longstanding State Outreach Plan Guidance allows for reimbursement of appropriate outreach reinforcement items, but not those ''intended as rewards for pre-screening or completing an application.''

To address these comments, the Department is hereby clarifying that providing individuals with information about the ancillary benefits of applying for SNAP is not an incentive or a recruitment activity designed to persuade. Providing factual information to an individual about the benefits of SNAP, such as that SNAP participation may make a household's children eligible for the National School Lunch Program, is a permissible sharing of factual information, per the regulations on allowable informational activities in 7 CFR 272.5(c). The Department is also hereby clarifying that offering outreach reinforcement items at any point in the process of sharing information about SNAP with an interested individual(s) is permissible and not a recruitment activity designed to persuade, so long as the receipt of such reinforcements is not contingent on applying for SNAP. The Department does not think any changes are needed to the regulatory text to address these clarifications.

Radio, Television and Billboard Advertisements

Section 4018 of the Agricultural Act of 2014 prohibits the use of funds authorized to be appropriated under the FNA for television, radio, or billboard advertisements that are designed to promote SNAP benefits and enrollment. The proposed rule would have prohibited States or other entities from

using these Federal funds for television, radio, or billboard advertisements designed to promote program benefits and enrollment.

Several commenters (n = 14) supported language in the preamble that stated only funds authorized by the FNA would be prohibited from purchasing television, radio and billboard advertisements that promote SNAP benefits and enrollment, but that funding from other sources could be spent on these advertisements. In addition, some commenters had concerns about individual elements of the restriction on radio, television, and billboard advertisements, which are discussed more below.

Billboards and Retailer Informational Activities

The proposed rule defined billboards as large format advertising displays intended for viewing from extended distances of more than 50 feet. There were no comments that directly supported the billboard definition in the proposed rule. Several commenters (n = 18) stated that the billboard definition needed to be changed or clarified to consider the context in which a billboard is used so as to allow for large signs at health fairs, farmers markets, or other similar venues where individuals may be seeking information about SNAP or SNAP services. In addition, one commenter explained that not allowing retailers to advertise would prevent these businesses from educating the community about SNAP benefits and remove opportunities to advertise that they support SNAP beneficiaries.

The Department agrees that the restriction on Federal funding for billboard advertisements is not intended to prohibit Federal funding for large signs used for informational purposes at health fairs, farmers markets, and other venues where most attendees are on foot. Consequently, for the purposes of the final rule, a billboard is now defined as an outdoor, large format advertising display, either permanent or portable, which is used to advertise or inform alongside a roadway. This definition does not include large signs and banners intended for viewing predominantly by individuals not travelling along a roadway.

In addition, the Department believes that retailers advertising where SNAP benefits are accepted does not constitute promoting SNAP benefits and enrollment. FNS has long allowed retailers to advertise that SNAP benefits can be used at their establishment. This practice is essential to help both SNAP beneficiaries identify locations to use their benefits, and retailers to connect with potential customers. As a result, the final regulatory text at 7 CFR 277.4(b)(5)(ii) is amended to state that the restriction on the use of Federal funds for radio, television, and billboard advertising does not restrict retailers, such as farmers markets, from using these methods to provide information about where SNAP benefits are accepted. Similarly, the Department also believes that the restriction on the use of Federal funds for radio, television, and billboard advertising does not restrict retailers from using these methods to provide factual information about their FNS-approved programs for currently enrolled SNAP households, such as fruits and vegetables incentive programs.

Exception for Remote Areas and Native American Tribes, and Other Vulnerable Communities

Six commenters felt that radio, television, and billboard advertisements are helpful ways to communicate information about SNAP and suggested these advertising methods should continue to be allowable activities. Two of these commentators noted that the prohibition on radio, television, and billboard advertising would have a negative impact on Native American communities, especially tribes living in remote areas. In addition, a commenter in Alaska noted that radio advertisements are an effective method to communicate within their state, which has many remote areas. One commenter explained that radio, television, and billboard advertisements are important ways to communicate about SNAP in elderly or highly impoverished communities.

The Department understands that the prohibition on using Federal funds for radio, television, and billboard advertisements may negatively impact information sharing in Alaskan, Native American, and other vulnerable communities, as well as other rural areas where radio, television, and billboard advertisements are effective methods of communication. The Department will continue to conduct allowable outreach and communication activities appropriate to various types of vulnerable communities served by SNAP, including technical assistance and regular Tribal consultation. However, the Department has no discretion to allow appropriations authorized under the FNA to fund television, radio, and billboard advertisements to promote program benefits and enrollment in these targeted communities. Consequently, as proposed, the regulation at new 7 CFR 277.4(b)(5)(ii), continues to prohibit States or other entities from using Federal funds for television, radio, or billboard advertisements that promote program benefits and enrollment, with the exception that Federal funds may be used to provide factual information identifying retailers that accept SNAP benefits.

Disaster SNAP

Pursuant to the Agricultural Act of 2014, the prohibition on the use of funding authorized to be appropriated under the FNA for television, radio, or billboard advertisements does not apply to Disaster SNAP. Accordingly, the proposed rule stated that the advertising restriction would not apply to Disaster SNAP. Eleven commenters supported the proposed rule language exempting Disaster SNAP from the ban on Federal funding for radio, television, and billboard advertisements. There were no comments opposing the exemption for Disaster SNAP. Therefore, in the final rule the Department maintains that the prohibition on the use of Federal funding authorized to be appropriated in the FNA for television, radio, and billboard advertisements that promote SNAP benefits and enrollment does not apply to Disaster SNAP.

Social Media

Section 4018 of the Agricultural Act of 2014 does not address the use of social media in promotion activities. As a result, in the proposed rule, the use of social media like Twitter, Facebook, YouTube, or other internet sites was not prohibited, so long as the content was not recruitment activity designed to persuade an individual to apply for SNAP benefits through coercion, pressure, or incentives. The majority of commenters (n = 71) supported the language in the proposed rule exempting social media from the ban on Federal funding for radio, television, and billboard advertisements that promote SNAP benefits and enrollment. No comments were received seeking a change or clarification in the proposed rule language. Therefore, the use of social media, such as Twitter, Facebook and YouTube is not prohibited in the final rule, so long as the content is not designed to persuade an individual to apply for SNAP benefits through persuasive practices.

Ban on Outreach With Foreign Governments

Section 4018 of the Agricultural Act of 2014 prohibits the use of funds appropriated under the FNA from being used for any agreements with foreign governments designed to promote SNAP benefits and enrollment. Accordingly,

under the proposed rule, agreements with foreign governments that are designed to promote SNAP benefits and enrollment were proposed to be prohibited. The ban on outreach with foreign governments contained in the proposed rule was only addressed by two commenters. They both supported the ban on the use of Federal funding for SNAP outreach with foreign countries. No commenters requested a change or clarification to this provision. As a result, the Department maintains the language from the proposed rule, to state that the Federal funds authorized to be appropriated under the Act shall not be used to support agreements with foreign governments that are designed to promote SNAP benefits and enrollment.

Worker Compensation

Section 4018 of the Agricultural Act of 2014 also states that any entity that receives funds under the FNA is banned from compensating any person for conducting outreach activities relating to participation in, or for recruiting individuals to apply to receive benefits under SNAP, if the amount of the compensation would be based on the number of individuals who apply to receive benefits. Pursuant to this provision, the proposed rule banned tying outreach worker compensation to the number of individuals who apply for SNAP as a result of that worker's efforts in any organization that receives funding under the FNA. In other words, the proposed rule would have prohibited organizations who receive any funding from the FNA from requiring a worker to meet a quota of SNAP applicants in order to receive their full compensation or performance bonus; however, the preamble to the proposed rule stated that organizations would be allowed to compensate outreach workers based on the number of hours an outreach worker dedicates to assisting individuals applying for SNAP benefits. For example, an outreach worker may be compensated at an hourly rate of ''X'' dollars for each hour the worker spends providing SNAP application assistance. Lastly, the preamble in the proposed rule also stated this prohibition would apply even if the organization used funds from a source other than those authorized to be appropriated in the FNA to pay outreach workers on a per application basis, so long as that organization received any funds under the FNA.

Several commenters (n = 16) supported the language in the proposed rule prohibiting compensation of workers based on the number of individuals who apply for benefits by entities that receive funds under the FNA. However, these same commenters recommended clarifying that State agencies and their partners are allowed to set outreach and application goals as part of their State outreach plan contracts. These commenters explained that State agencies should be able to hold outreach partners accountable for effective use of State and Federal resources, and be able to track submitted applications that result from educational or informational activities. Another commenter expressed a similar sentiment in explaining that the final rule should confirm that the prohibition on tying outreach worker compensation to the number of SNAP applications completed by a worker applies only to the compensation of individuals and not to the compensation of organizations.

In addition, an advocacy organization stated that the worker compensation regulation raised serious concerns about unwarranted control of independent organizations by the government, including possible constitutional violations by the government. At the very least, this commenter felt that the policy was overbroad and unfairly intruded into the lawful activity of important organizations over which the government cannot, and should not, exert such control.

The Department understands the importance of setting outreach goals for organizations involved in allowable SNAP outreach activities to ensure accountability for taxpayer dollars. The Department encourages States to establish performance metrics in their agreements with community partners as part of their State outreach plans to ensure State and Federal resources are used efficiently and effectively. Accordingly, the Department does not intend to ban the setting of outreach goals, but seeks to prevent the tying of compensation of individual workers, by any organization that receives funding under the FNA, to the number of individuals who apply for SNAP as a result of that particular worker's efforts as required by the Agricultural Act of 2014. The Department is hereby clarifying that the ban does not apply to the setting of outreach goals at the level of the individual or the organization, so long as those goals are not tied to individual worker compensation. The Department believes the regulatory text is sufficiently clear in this regard and maintains the language from the proposed rule.

Regarding the comment on potential government overreach, the Department has little discretion in how this provision of the Agricultural Act of 2014 is implemented. If an organization does not receive funding under the FNA, then this regulation would not apply to them. However, for organizations that do receive funding under the FNA, the final rule maintains the restriction on the spending of funds received from any source.

Other Impacted FNS Programs

The FNA provides authorization of funds for SNAP, and also for food purchases and administrative costs for the Food Distribution Program on Indian Reservations (FDPIR) (7 U.S.C. 2013b) and for food purchases for The Emergency Food Assistance Program (TEFAP) (7 U.S.C. 2036). Under the proposed rule, FDPIR and TEFAP funds, as authorized under the FNA, would not be permitted for use in banned recruitment activities as described above.

No comments were received regarding the impact of the proposed rule on programs other than SNAP. As a result, the Department will proceed, as discussed in the proposed rule, to amend current 7 CFR 251.10(i), to prohibit entities funded by TEFAP from compensating staff engaged in SNAP outreach activities based on the number who apply to receive SNAP benefits. FDPIR regulations, at Section 253.11 of Title 7, currently require that funds must be expended and accounted for in accordance with the SNAP regulations at Part 277. Because the SNAP regulations at Part 277 have been amended to account for the changes mandated by the Agricultural Act of 2014, FDPIR funds, as authorized under FNA, would not be permitted for use in SNAP recruitment and promotion activities.

III. Procedural Matters

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Regulatory Impact Analysis

This rule has been designated as not significant by the Office of Management and Budget, therefore, no Regulatory Impact Analysis is required.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities.

This final rule would not have an impact on small entities because, while the rule would restrict the types of recruitment and promotion activities eligible for Federal reimbursement and the types of activities for which funds authorized to be appropriated under the FNA may be spent, it does not change the type of entities that may receive administrative reimbursement or the rate at which they may be reimbursed for allowable activities. In addition, the rule would prohibit entities that receive funds under the FNA from compensating any person engaged in outreach or recruitment activities based on the number of individuals who apply to receive SNAP benefits; however, this is not expected to limit the ability of small entities, or any entity, from using other methods of compensating persons engaged in outreach or recruitment activities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under Section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local or Tribal governments, in the aggregate, or the private sector, of $146 million or more (when adjusted for 2016 inflation; GDP deflator source: Table 1.1.9 at *http://www.bea.gov/iTable*) in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of $146 million or more in any one year. Thus, the rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

Executive Order 12372

The State Administrative Matching Grants for the Supplemental Nutrition Assistance Program is listed in the Catalog of Federal Domestic Assistance Programs under 10.561. For the reasons set forth in the final rule in 2 CFR chapter IV, and related Notice (48 FR 29114, June 24, 1983), this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials. FNS has consulted with State and local officials regarding the changes set forth in this rule by issuing to SNAP State agencies on March 21, 2014, an Implementation Memorandum for the 2014 Farm Bill which included guidance on implementing the changes in Section 4018 and on May 5, 2014, issuing a Question and Answer Memorandum responding to implementation questions from the State SNAP agencies and their partners. In addition, FNS hosted a stakeholder meeting on September 4, 2014, to consult with State and local representatives on the provisions of Section 4018.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13121. The Department has determined that this final rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

Executive Order 12988, Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation.

This final rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with USDA Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex, or disability. After a careful review of the rule's intent and provisions, FNS has determined that this rule is not expected to affect the participation of protected individuals in the Supplemental Nutrition Assistance Program.

Executive Order 13175

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

FNS has assessed the impact of this rule on Indian tribes and determined that while this rule may have tribal implications as discussed in the summary of comments in the preamble, FNS has no discretion to change the implementation of the final rule, and for that reason no tribal consultation under Executive Order 13175 is required. If a Tribe requests consultation, FNS will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires Office of Management and Budget (OMB) approval of all covered collections of information by a Federal agency before such collections can be implemented. Respondents are not required to respond to any such collection of information unless it

displays a current valid OMB control number. This rule does not contain information collection requirements subject to approval by the Office of Management and Budget under the Paperwork Reduction Act of 1994.

E-Government Act Compliance

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

List of Subjects

7 CFR Part 251

The Emergency Food Assistance Program, Miscellaneous provisions.

7 CFR Part 271

Supplemental Nutrition Assistance Program, Promotional activities.

7 CFR Part 272

Supplemental Nutrition Assistance Program, Program informational activities.

7 CFR Part 277

Supplemental Nutrition Assistance Program, Funding.

Accordingly, 7 CFR parts 251, 271, 272 and 277 are amended as follows:

PART 251—THE EMERGENCY FOOD ASSISTANCE PROGRAM

■ 1. The authority citation for 7 CFR part 251 is revised to read as follows:

Authority: 7 U.S.C. 2011–2036.

■ 2. Revise § 251.10 (i) to read as follows:

§ 251.10 Miscellaneous provisions.

* * * * *

(i) *Recruitment activities related to the Supplemental Nutrition Assistance Program (SNAP).* Any entity that receives donated foods identified in this section must adhere to regulations set forth under § 277.4(b)(6) of this chapter.

* * * * *

PART 271—GENERAL INFORMATION AND DEFINITIONS

■ 3. The authority citation for 7 CFR part 271 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

■ 4. Add § 271.9 to read as follows:

§ 271.9 Promotional activities.

No funds authorized to be appropriated under the Food and Nutrition Act of 2008, as amended, shall be used for recruitment or promotion activities as described in § 277.4(b)(5). No entity receiving funds under the Food and Nutrition Act of 2008, as amended, shall be permitted to perform activities described in § 277.4(b)(6) of this chapter.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

■ 5. The authority citation for 7 CFR part 272 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

■ 6. Revise § 272.5(c) to read as follows:

§ 272.5 Program informational activities.

* * * * *

(c) *Program informational activities for low-income households.* At their option, State agencies may carry out and claim associated costs for Program informational activities designed to inform low-income households about the availability, eligibility requirements, application procedures, and benefits of SNAP. Allowable informational activities shall not include recruitment activities as described in § 277.4(b)(5) of this chapter. Program informational materials used in such activities shall be subject to § 272.4(b), which pertains to bilingual requirements. Before FNS considers costs for allowable informational activities eligible for reimbursement at the fifty percent rate under part 277 of this chapter, State agencies shall obtain FNS approval for the attachment to their Plans of Operation as specified in § 272.2(d)(1)(ix). In such attachments, State agencies shall describe the subject activities with respect to the socio-economic and demographic characteristics of the target population, types of media used, geographic areas warranting attention, and outside organizations which would be involved. State agencies shall update this attachment to their Plans of Operation when significant changes occur and shall report projected costs for this Program activity in accordance with § 272.2(c), (e), and (f).

PART 277—PAYMENTS OF CERTAIN ADMINISTRATIVE COSTS OF STATE AGENCIES

■ 7. The authority citation for 7 CFR part 277 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

■ 8. In § 277.4:

■ a. Remove the phrase ''Food Stamp Program'' wherever it appears and add in its place ''SNAP''.

■ b. Amend paragraph (b) introductory text by removing the last two sentences; and

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

The additions read as follows:

§ 277.4 Funding.

* * * * *

(b) * * *

(5) The Federal reimbursement rate shall include reimbursement for SNAP informational activities, but shall not include the following:

(i) Recruitment activities designed to persuade an individual to apply for SNAP benefits through the use of persuasive practices. Persuasive practices constitute coercing or pressuring an individual to apply, or providing incentives to fill out an application for SNAP benefits. Communicating factual information pertaining to SNAP so that an individual can make an informed choice is not a recruitment activity designed to persuade an individual to apply for SNAP benefits.

(ii) Television, radio or billboard advertisements that are designed to promote SNAP benefits and enrollment, excepting the use of such advertisements for programmatic activities undertaken with respect to benefits provided under § 280.1 of this chapter. This restriction does not apply to radio, television, or billboard advertisements that are not designed to promote SNAP benefits and enrollment and that provide factual information identifying retail food stores where SNAP benefits are accepted.

(iii) Agreements with foreign governments that are designed to promote SNAP benefits and enrollment.

(6) Any entity that receives funding from the programs identified by this section and § 251.4 of this chapter is prohibited from compensating any person for conducting outreach activities relating to participation in, or for recruiting individuals to apply to receive benefits under, the Supplemental Nutrition Assistance Program, if the amount of the compensation would be based on the number of individuals who apply to receive the benefits.

Dated: December 13, 2016.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2016–30621 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 923

[Doc. No. AMS–SC–16–0077; SC16–923–1 FR]

Cherries Grown in Designated Counties in Washington; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Washington Cherry Marketing Committee (Committee) to increase the assessment rate established for the 2016–2017 and subsequent fiscal periods from $0.15 to $0.25 per ton of Washington cherries handled. The Committee locally administers the marketing order and is comprised of growers and handlers of cherries operating within the production area. Assessments upon cherry handlers are used by the Committee to fund reasonable and necessary expenses of the marketing order. The fiscal period begins April 1 and ends March 31. The assessment rate will remain in effect indefinitely unless modified, suspended or terminated.

DATES: Effective December 21, 2016.

FOR FURTHER INFORMATION CONTACT: Teresa Hutchinson or Gary D. Olson, Northwest Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326–2724, Fax: (503) 326–7440, or Email: *Teresa.Hutchinson@ams.usda.gov* or *GaryD.Olson@ams.usda.gov.*

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 923, as amended (7 CFR part 923), regulating the handling of cherries grown in designated counties in Washington, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the order now in effect, Washington cherry handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate, as issued herein, will be applicable to all assessable Washington cherries beginning April 1, 2016, and continue until amended, suspended, or terminated.

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

This rule increases the assessment rate for the 2016–2017 and subsequent fiscal periods from $0.15 to $0.25 per ton of Washington cherries handled.

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

For the 2013–2014 and subsequent fiscal periods, the Committee recommended, and the USDA approved, an assessment rate of $0.15 per ton of Washington cherries that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on May 18, 2016, and unanimously recommended expenditures of $57,150 for the 2016–2017 fiscal period. In comparison, the previous fiscal period's budgeted expenditures were $59,750. The Committee also unanimously recommended an assessment rate of $0.25 per ton of Washington cherries. The recommended assessment rate of $0.25 is $0.10 higher than the rate currently in effect.

The expenditures recommended by the Committee for the 2016–2017 fiscal period include $25,000 for the management fee; $7,000 for compliance; $5,000 for the data management fee; $5,000 for accounting administration; $5,000 for research; $4,000 for Committee travel; $3,000 for an audit; and $3,150 for other miscellaneous expenses. In comparison, expenditures for the 2015–2016 fiscal period were $25,000 for the management fee; $7,000 for compliance; $5,000 for the data management fee; $7,000 for accounting administration; $5,000 for research; $4,000 for Committee travel; $4,000 for an audit; and $2,750 for other miscellaneous expenses.

Committee members estimated the 2016 fresh cherry production to be approximately 150,000 tons, which would be less than the 2015 production of 165,358 tons by 15,358 tons. However, cherry production tends to fluctuate due to the effects of weather, pollination, and tree health. The Committee's recommended assessment rate was derived by dividing the 2016–2017 anticipated expenses by the expected shipments of Washington cherries, while also taking into account the Committee's monetary reserve. The recommended assessment rate of $0.25 per ton, when multiplied by the 150,000 tons of estimated 2016 Washington cherry shipments, is expected to generate $37,500 in handler assessments. The projected revenue from handler assessments, together with funds from the Committee's monetary reserve, should be adequate to cover the 2016–2017 budgeted expenses of $57,150. The Committee expects its monetary reserve to decrease from $49,661 at the beginning of the 2016–2017 fiscal period to approximately $30,011 at the end of the 2016–2017 fiscal period. That amount will be within the provisions of the order and will provide the Committee with greater ability to absorb fluctuations in assessment income and expenses into the future.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA

upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee and USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2016–2017 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

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

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

There are 53 handlers of Washington sweet cherries subject to regulation under the order and approximately 1,500 growers in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $7,500,000, and small agricultural growers are defined as those having annual receipts of less than $750,000.

National Agricultural Statistics Service has prepared a preliminary report for the 2015 shipping season showing that prices for the 171,600 tons of sweet cherries that entered the fresh market averaged $2,380 per ton. Based on the number of growers in the production area (1,500), the average grower revenue from the sale of sweet cherries in 2015 can therefore be estimated at approximately $272,272 per year. In addition, the Committee reports that most of the industry's 53 handlers reported gross receipts of less than $7,500,000 from the sale of fresh sweet cherries last fiscal period. Thus, the majority of growers and handlers of Washington sweet cherries may be classified as small entities.

This action increases the assessment rate established for the Committee and collected from handlers for the 2016–2017 and subsequent fiscal periods from $0.15 to $0.25 per ton of Washington cherries handled. The Committee unanimously recommended 2016–2017 expenditures of $57,150 and an assessment rate of $0.25 per ton. The assessment rate of $0.25 is $0.10 higher than the rate established for the 2013–2014 fiscal period.

The 2016–2017 Washington cherry crop is estimated at 150,000 tons. At the $0.25 per ton assessment rate, the Committee anticipates that assessment income of approximately $37,500, along with reserve funds, should be adequate to cover budgeted expenses for the 2016–2017 fiscal period. With the increased assessment rate and budgeted expense level, the Committee anticipates that $19,650 will need to be deducted from the monetary reserve. As such, reserve funds are estimated to be at $30,011 on March 31, 2017. That reserve level is within the maximum permitted by the order of approximately one fiscal period's operational expenses (§ 923.42(a)(2)).

The expenditures recommended by the Committee for the 2016–2017 fiscal period include $25,000 for the management fee; $7,000 for compliance; $5,000 for the data management fee; $5,000 for accounting administration; $5,000 for research; $4,000 for Committee travel; $3,000 for the audit; and $3,150 for other miscellaneous expenses.

In comparison, expenditures for the 2015–2016 fiscal period were $25,000 for the management fee; $7,000 for compliance; $5,000 for the data management fee; $7,000 for accounting administration; $5,000 for research; $4,000 for Committee travel; $4,000 for the audit; and $2,750 for other miscellaneous expenses.

The Committee discussed alternatives to this action, including recommending alternative expenditure levels and assessment rates. Although lower assessment rates were considered, none were selected because they would not have generated sufficient income to administer the order.

A review of historical data and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for the 2016–2017 fiscal period could average $2,380 per ton of sweet cherries. Therefore, the estimated assessment revenue for the 2016–2017 fiscal period, as a percentage of total grower revenue, is approximately 0.01 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to growers. However, these costs are offset by the benefits derived by the operation of the order.

In addition, the Committee's meeting was widely publicized throughout the Washington cherry industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the May 18, 2016, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

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

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

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

A proposed rule concerning this action was published in the **Federal Register** on September 21, 2016 (81 FR 64785). Copies of the proposed rule were also emailed to all commodity handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 15-day comment period ending October 6, 2016, was provided

for interested persons to respond to the proposal.

One comment was received during the comment period in response to the proposal. The commenter was concerned about the impact that the increased assessment rate would have on growers. The commenter also questioned why the assessment is only applied to certain counties in Washington, and not others. In addition, the commenter stated that the opinions of sweet cherry growers and handlers should be taken into consideration when establishing assessment rates, and that there should be flexibility during the transitional period when a new assessment rate is implemented. Lastly, the commenter offered recommendations with regards to the assessment rate establishment process and took exception to the indefinite period that assessment rates are in effect.

Under the order, it is handlers that are assessed, not growers. As such, growers will not be directly impacted by this action. However, as mentioned previously in this rule, some of the additional costs to handlers as a result of this action may be passed on to growers. Nevertheless, USDA believes that such additional costs will be offset by the benefits derived by the operation of the order.

Furthermore, the commenter's request for clarity with regards to why only certain counties are covered by this regulatory change is addressed in the order's provisions. Section 923.4 defines the order's production area as the counties of Okanogan, Chelan, Kittitas, Yakima, Klickitat in the State of Washington and all of the counties in Washington lying east thereof. Only handlers who handle cherries grown within the specific production area are subject to assessment.

Lastly, the commenter's thoughts regarding the assessment rate establishment process and effective period have been previously addressed in this rule. The Committee meets prior to, or during, each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings.

Meetings are widely publicized throughout the Washington cherry industry and all interested persons are invited to attend the meetings and participate in Committee deliberations on all issues. In addition, interested persons are invited to submit comments on any proposed assessment rules. All comments are considered prior to finalization of a proposed rule. Once established, assessment rates remain in effect until modified by USDA upon the recommendation of the Committee.

Accordingly, no changes will be made to the rule as proposed, based on the comment received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2016–2017 fiscal period began on April 1, 2016, and the order requires that the assessment rate for each fiscal period apply to all assessable Washington cherries handled during such fiscal period; (2) the Committee needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis; (3) handlers have already shipped Washington cherries from the 2016 crop; and (4) handlers are aware of this action, which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years.

List of Subjects in 7 CFR Part 923

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 923 is amended as follows:

PART 923—CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

■ 1. The authority citation for 7 CFR part 923 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 923.236 is revised to read as follows:

§ 923.236 Assessment rate.

On and after April 1, 2016, an assessment rate of $0.25 per ton is established for the Washington Cherry Marketing Committee.

Dated: December 12, 2016.

Bruce Summers,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2016–30302 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[Doc. No. AMS–SC–16–0045; SC16–981–2 FR]

Almonds Grown in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Almond Board of California (Board) for an increase of the assessment rate established for the 2016–17 through the 2018–19 crop years from $0.03 to $0.04 per pound of almonds handled under the marketing order (order). Of the $0.04 per pound assessment, 60 percent (or $0.024 per pound) is available as credit-back for handlers who conduct their own promotional activities. The assessment rate will return to $0.03 for the 2019–20 and subsequent crop years, and the amount available for handler credit-back will return to $0.018 per pound (60 percent). The Board locally administers the order and is comprised of growers and handlers of almonds grown in California. Assessments upon almond handlers are used by the Board to fund reasonable and necessary expenses of the program. The crop year began on August 1 and ends on July 31. The $0.04 assessment rate will remain in effect until July 31, 2019. Beginning August 1, 2019, the assessment rate will return to $0.03 and will remain in effect indefinitely unless modified, suspended, or terminated. Two comments period were provided to interested individuals. Comments will be addressed later in this document.

DATES: Effective December 21, 2016.

FOR FURTHER INFORMATION CONTACT: Marketing Specialist Andrea Ricci, or Regional Director Jeffrey Smutny, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program,

AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906, or Email: with *Andrea.Ricci@ams.usda.gov* or *Jeffrey.Smutny@ams.usda.gov.*

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California almond handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable almonds beginning on August 1, 2016, through July 31, 2019. Beginning August 1, 2019, the assessment rate will return to $0.03 and will remain in effect indefinitely unless modified, suspended, or terminated.

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

This rule increases the assessment rate established for the Board for the 2016–17 through 2018–19 crop years from $0.03 to $0.04 per pound of almonds received. Of the $0.04 per pound assessment, 60 percent (or $0.024 per pound) is available as credit-back for handlers who conduct their own promotional activities. The assessment rate will return to $0.03 for the 2019–20 and subsequent crop years, and the amount available for handler credit-back will return to $0.018 per pound (60 percent).

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

For the 2005–06 and subsequent crop years, the Board recommended, and USDA approved, an assessment rate of $0.03 per pound that would continue in effect from crop year to crop year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other information available to USDA. Of the $0.03 per pound assessment, 60 percent ($0.018) per pound was made available as credit-back for handlers who conducted their own promotional activities.

The Board met on April 12, 2016, and unanimously recommended 2016–17 expenditures of $69,897,626 and an assessment rate of $0.04 per pound of almonds received. In comparison, last year's budgeted expenditures were $58,998,976. The assessment rate of $0.04 is $0.01 higher than the rate currently in effect, and the credit-back portion of the assessment rate ($0.024 per pound) is $0.006 more than the credit-back portion currently in effect.

The Board estimates a production increase of thirty percent, or 600 million pounds, by the 2019–20 crop year. This increase is nearly as much as is consumed by the industry's largest market. Due to the size of the increase in forecasted production, the Board believes that increased market development projects and new marketing programs are required to successfully market the additional supply. Accordingly, the Board has recommended a new ''Nut of Choice'' marketing program.

The Board also anticipates needing additional funding for the industry's new ''Crop of Choice'' research program, as well as additional research to address concerns such as changing water supply and quality systems; air quality and how it relates to harvesting, pesticide, and energy use; and bee health.

The three-year higher assessment rate is needed to fund the increase in marketing and research activities. The Board anticipates that by the 2019–20 crop year, the increase in production assessed at the reinstated $0.03 per pound rate should generate sufficient revenue to cover the anticipated expenditures at that time. Therefore, beginning August 1, 2019, the assessment rate will return to $0.03 per pound.

The following table compares major budget expenditures recommended by the Board for the 2015–16 and 2016–17 crop years:

Budget expense categories	2015–16	2016–17
Operations Expenses	$ 7,904,000	$ 8,404,000
Board Accelerated Innovation Management (AIM) Initiatives	1,500,000	1,000,000
Crop of Choice Initiatives	0	5,625,000
Reputation Management	1,826,350	2,000,000
Production Research	1,843,331	1,843,331
Environmental Research	1,039,790	1,039,790
Scientific Affairs/Nutrition	1,640,000	1,640,000
Global Market Development	38,583,756	38,583,756
Nut of Choice Initiatives	0	5,100,000
Technical & Regulatory Affairs	1,045,500	1,045,500
Industry Services	2,436,220	2,436,220
Almond Quality & Food Safety	790,800	790,800
Corporate Technology	389,229	389,229

The assessment rate recommended by the Board was derived by considering the anticipated 30-percent production increase in the next three years, anticipated expenditures plus additional program expenses, current production level, and maintaining adequate operating reserve funds. In its recommendation, the Board utilized an estimate of 1,835,290,000 pounds of assessable almonds for the 2016–17 crop year. If realized, this should provide estimated assessment revenue of $62,262,213, which reflects credit-back reimbursements and organic exemptions. In addition, it is anticipated that $20,907,722 will be provided by other sources, including interest income, Market Access Program (MAP) funds, and operating reserve funds. When combined, revenue from these sources should be adequate to cover budgeted expenses.

Section 981.81 of the order authorizes the Board to maintain operating reserve funds consisting of an administrative-research portion and a marketing promotion portion, and states that the amount allocated to each portion shall not exceed six months' budgeted expenses for that activity area. Funds in the reserve at the end of the 2016–17 crop year are estimated to be approximately $16,581,222, well within the amount permitted by the order.

A proposed rule concerning this action was published in the **Federal Register** on July 18, 2016 (81 FR 46616). A 15-day comment period ending August 2, 2016, was provided for interested persons to respond to the proposal. One commenter raised concern that notification of the proposal was not promptly circulated within industry and asked for an extension of the comment period. After reviewing the request, USDA published a notice reopening the comment period for an additional 30 days in the **Federal Register** on September 12, 2016 (81 FR 62668). All comments will be addressed further in this document.

The assessment rate established in this rule will continue in effect until July 31, 2019. Beginning August 1, 2019, the assessment rate will return to $0.03 and will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other available information.

Although this assessment rate will be in effect for a specified period, the Board will continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Board meetings are available from the Board or USDA. Board meetings are open to the public, and interested persons may express their views at these meetings. USDA would evaluate Board recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Board's 2016–17 budget and those for subsequent crop years would be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

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

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

There are approximately 6,800 almond growers in the production area and approximately 100 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,500,000 (13 CFR 121.201).

The National Agricultural Statistics Service (NASS) reported in its 2012 Agricultural Census that there were 6,841 almond farms in the production area (California), of which 6,204 had bearing acres. The following computation provides an estimate of the proportion of producers (farms) and agricultural service firms (handlers) that would be considered small under the SBA definitions.

The NASS Census data indicates that out of the 6,204 California farms with bearing acres of almonds, 4,471 (72 percent) have fewer than 100-bearing acres.

In its most recently reported crop year (2015), NASS reported an average yield of 2,130 pounds per acre and a season average grower price of $2.84 per pound. A 100-acre farm with an average yield of 2,130 pounds per acre would produce about 213,000 pounds of almonds. At $2.84 per pound, that farm's production would be valued at $604,920.

Because the Census of Agriculture indicates that the majority of California's almond farms are smaller than 100 acres, it could be concluded that the majority of growers had annual receipts from the sale of almonds in 2015 of less than $604,920, well below the SBA threshold of $750,000. Thus, over 70 percent of California's almond growers would be considered small growers according to SBA's definition.

According to information supplied by the Board, approximately 30 percent of California's almond handlers shipped almonds valued under $7,500,000 during the 2014–15 crop year and would therefore be considered small handlers according to the SBA definition.

This rule increases the assessment rate collected from handlers for the 2016–17 through the 2018–19 crop years from $0.03 to $0.04 per pound of almonds received. Of the $0.04 per pound assessment, 60 percent (or $0.024 per pound) is available as credit-back for handlers who conduct their own promotional activities, consistent with § 981.441 of the order's regulations and subject to Board approval. The Board unanimously recommended 2016–17 expenditures of $69,897,626 and an assessment rate of $0.04 per pound of almonds received. The assessment rate of $0.04 is $0.01 higher than the 2015–16 rate, and the credit-back portion of $0.024 per pound is $0.006 higher than the current credit-back portion of $0.018. The quantity of assessable almonds for the 2016–17 crop year is estimated at 1,835,290,000 pounds. This should provide estimated assessment revenue of $62,262,213, which reflects credit-back reimbursements and organic exemptions. In addition, it is anticipated that $20,907,722 will be provided by other sources, including interest income, MAP funds, and operating reserve funds. When combined, revenue from these sources should be adequate to cover budgeted expenses.

The major expenditures recommended by the Board for the 2016–17 crop year include $8,404,000 for Operations Expenses, $1,000,000 for Board AIM Initiatives, $5,625,000 for Crop of Choice Initiatives, $2,000,000 for Reputation Management, $1,843,331 for Production Research, $1,039,790 for Environmental Research, $1,640,000 for Scientific Affairs/Nutrition, $38,583,756 for Global Market Development, $5,100,000 for Nut of Choice Initiatives, $1,045,500 for Technical & Regulatory Affairs, $2,436,220 for Industry

Services, $790,800 for Almond Quality & Food Safety, and $389,229 for Corporate Technology.

Budgeted expenses for these items in 2015–16 were $7,904,000 for Operations Expenses, $1,500,000 for Board AIM Initiatives, $0 for Crop of Choice Initiatives, $1,826,350 for Reputation Management, $1,843,331 for Production Research, $1,039,790 for Environmental Research, $1,640,000 for Scientific Affairs/Nutrition, $38,583,756 for Global Market Development, $0 for Nut of Choice Initiatives, $1,045,500 for Technical & Regulatory Affairs, $2,436,220 for Industry Services, $790,800 for Almond Quality & Food Safety, and $389,229 for Corporate Technology.

The Board estimates a production increase of 30 percent, or 600 million pounds, by the 2019–20 crop year. This increase is nearly as large as the current consumption of the industry's largest market. Increased market development investment as well as new marketing programs will be required to successfully market the additional supply. Additional investment in research is also needed to address concerns such as changing water supply and quality systems; air quality and how it relates to harvesting, pesticide, and energy use; and bee health. Accordingly, the three-year higher assessment rate is needed to fund the Board's new Nut of Choice marketing program and Crop of Choice research activities. The Board anticipates that by the 2019–20 crop year, the increased production assessed at the reinstated $0.03 per pound rate should generate sufficient revenue to cover the anticipated expenditures at that time.

Prior to arriving at this budget and assessment rate, the Board held a strategic planning session in February 2016. The Board also considered recommendations made from its various committees, including the Global Market Development Committee, Production Research Committee, and Environmental Committee. Alternative expenditure levels were discussed, based upon the relative value of various activities to the almond industry. Ultimately, the Board unanimously determined that 2016–17 expenditures of $69,897,626 were appropriate and that the recommended assessment rate, plus income from other sources and operation reverse funds, would generate sufficient revenue to meet its expenses.

A review of historical information and preliminary information pertaining to the upcoming crop year indicates that the grower price for the 2016–17 season could range between $4.00 and $2.84 per pound of almonds. Therefore, the estimated assessment revenue for the 2016–17 crop year (disregarding any amounts credited pursuant to § 981.41 and § 981.441) as a percentage of total grower revenue could range between 1.00 and 1.41 percent, respectively.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to growers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Board's meeting was widely publicized throughout the California almond industry, and all interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the April 12, 2016, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue.

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

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

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

As previously noted, a proposed rule concerning this action was published providing a 15-day comment period for interested persons to respond to the proposal. In addition, on September 12, 2016, the comment period was reopened for an additional 30 days. Copies of the proposed rule were provided to all almond handlers. Finally, the proposal was made available through the internet by USDA and the Office of the Federal Register. A total of forty-six comments were received. Twenty-eight supported and eighteen opposed the proposal. Of the eighteen in opposition, three were grower/handlers, eleven were growers, two individuals were from outside of the production area, and two individuals did not identify themselves.

Of those who supported the proposal, twenty-three were growers.

The majority of the commenters in support of the proposal stated that increasing the assessment rate now was necessary to fund market development programs and new marketing and promotion activities to create demand prior to the onset of the increased production. Commenters noted that the industry is aware of the increasing almond acreage and the need to invest prior to the larger crop materializing. The commenters also noted that the three-year ''sunset'' feature will ensure that once the additional 30 percent increase in production is realized, the assessment rate will return to the current $0.03 rate. One commenter noted the need to develop demand for the increased supplies to ensure the carry-over inventory is kept near zero each year, which will help stabilize prices at the grower level and negate the effect of the increased assessment. Another commenter noted that the recent volatility in almond prices illustrates how critically important it is to make investments now. Several commenters stated the Board has had proven success in the areas of marketing and promotion; nutrition, environmental, and production research; and grower outreach; and they are pleased overall with the work of the Board. Commenters also expressed the need for continued investment in research, specifically in areas that will provide resources for growers to continue to remain profitable in the face of continued challenges. One commenter stated that programs such as the almond order are a good example of a public/private partnership which has worked for the consumer, farmer, and food safety while expanding markets around the world.

The majority of commenters in opposition of the proposal stated the increase of production over the next several years should generate adequate income to fund Board programs. In the development of the budget, the Board contemplated the production forecast of a 30 percent increase in the next three years. The Board anticipates the 2016–17 crop year production at 1.835 billion pounds, 2017–18 crop year production at 2.184 billion pounds, 2018–19 crop year production at 2.277 billion pounds, and 2019–20 crop year production at 2.354 billion pounds. The Board discussed the need to build demand before this increased production is realized. The Board strongly believes

not doing so in advance will negatively impact prices. The Board is concerned that without market expansion and new market development programs, the anticipated 600 million pounds' increase in production will lead to oversupply. This year, after Committee input and Board strategic planning, the Board decided an increase in the assessment rate was necessary. The increase in revenue will be used to fund new marketing programs and increase the budgets of existing market research and development projects. At the $0.03 assessment rate, the Board determined funding generated would not be adequate to cover anticipated expenses necessary to establish outlets for the increased production. In its recommendation to have the assessment rate revert back to $0.03 after three years, the Board considered current program needs at the current production level against the anticipated production in the next three years, while recognizing that the increased production will generate adequate income once realized.

In its discussion, the Board also considered the time and resources needed to develop new marketing and promotion programs. The Global Market Demand Committee developed a comprehensive marketing plan, which includes the Nut of Choice program. The plan encompasses expanding the Germany and Japan markets by increasing funding in order to increase impressions; accelerating momentum by increasing budgets and impressions for the U.S./Canada, France, United Kingdom, India, and South Korea markets; maintaining budget levels in the China market and Global Initiative; and allocating spending for one to two additional exploratory markets (*i.e.,* Mexico, Indonesia, and Saudi Arabia regions). Prior to the Committee recommending the marketing plan, it reviewed key factors for each market, including market attractiveness, total market demand forecast, market outlook, opportunities and challenges, historical spending data, and low-end and high-end demand potential. The Board also determined that with the current environment of the agriculture industry, investing in new and innovative techniques would be key to the viability of the almond industry moving forward. Key areas of focus are water management, food safety, production, pest management, pollination, biomass, and soil health.

Additionally, several commenters stated that for growers, with the decline in prices and the rising production costs, it is difficult to remain profitable. The Board has had considerable strategic discussions about the continued challenges facing growers, including rising production costs, water availability, and regulatory impacts, and ways to address the issues. As a result, a substantial portion of the revenue generated by the increased assessment rate is designated for research. More specifically, the newly established nine capabilities of the Crop of Choice Program will fund research at a level of $5.625 million. Areas of focus include Irrigation and Nutrients; Orchard, Tree, Rootstock; Harvesting; Value-Added Orchard Utilization; Soil Health Management; Pest Management; Food Safety; Pollination; Energy; and the Sustainability Program update and outreach. This investment is intended to develop new and innovative techniques to help the almond industry continue to remain profitable. In addition, the increased investment in market development and new marketing programs is intended to create demand to absorb the anticipated increase in production. In turn, these activities should stabilize prices.

Three commenters raised concern that only 23 percent of the additional funding generated is allocated to direct marketing. The commenters further stated that if at least 80 percent of the additional funding was not allocated to direct marketing and promotion activities, they were opposed to the increase. The Board utilizes a comprehensive strategy that includes a balanced approach for research and marketing and promotion activities to sustain and develop market outlets. The Board-funded research plays an integral part in supporting the almond industry, which continues to face new challenges as the landscape of agriculture changes. The Board triennially holds strategic planning retreats to develop tactics that directly address the needs of the almond industry as well as ever-changing market demands. The Board recommends a budget each year utilizing recommendations made by each Committee. Committees are comprised of industry members and meet regularly to deliberate and prioritize programs. Marketing and promotion has been set as a priority, and recommendations have been made to increase spending. Along with the marketing activities, the Board has a robust research program. Nutrition, production, environmental, and food safety research has been utilized by the marketing programs to better position almonds in the marketplace. Specifically, in the past several years with the drought in California, the almond industry came under media fire for its water use. Through the research programs funded by the Board, the marketing team was able to provide data regarding almonds and water use. This research was pivotal in transitioning the conversation from negative to neutral or positive. Additionally, almonds have a qualified heart-healthy claim, which can be directly linked to the research funded as part of the nutrition research program. The almond industry's ability to utilize the heart-health claim is a vital part of the marketing program. Further, the Board is celebrating the tenth year of its California Almond Sustainability Program. As consumer demand continues to shift towards products that are sustainable, the Sustainability Program has been a great resource to the marketing program to provide data regarding the sustainability of the almond industry. The research and marketing and promotion activities work interdependently, ensuring the viability of the industry.

Two commenters stated an assessment rate increase should be approved by growers prior to implementation. Two of the commenters questioned the outreach to the growing community, stating growers should have a larger role in the discussion. One of the commenters requested a grower referendum prior to implementation of an assessment rate change. All Board and Committee meetings are open to the public, allowing directly affected persons and other interested parties an opportunity to participate and provide input. On April 14, 2016, the Board sent a memo to almond handlers and growers as part of its mailer, providing notice of the Board's unanimous recommendation to increase the assessment rate. The Board also included an article regarding the recommendation in the April California Almonds Outlook e-newsletter. In addition, two comment periods were provided, which gave interested parties the opportunity to comment on the recommended proposal. The Board included notice of the comment periods in its industry e-newsletters, on its Web site (specifically, on the grower site), on its social media platforms, and announced this information at its Committee and Board meetings. Notices of the comment periods were also made available on the USDA Web site. In response to the request to hold a grower referendum, under the California almond marketing order, referenda are conducted every five years to ascertain whether continuation of the order is favored by growers. The last continuance referendum was held in 2014, and results indicated continued

grower support for the order. Furthermore, annual budget and assessment rate recommendations are among the many duties the Board, which is comprised of grower and handler members, is required to perform as authorized under the order.

One commenter raised concern that the additional funding will be used to increase the size and salaries of the organization, which will lead to the continuation of increasing the assessment rate year after year. Also, the commenter expressed concerns about transparency and availability of financial information. The majority of the funds generated by the increased assessment are allotted to research programs and marketing and promotion activities. For the past several years, operating expenses have fluctuated between 12 percent and 15 percent of the total budget. In the recommended budget for the 2016–17 crop year, operating expenses are approximately 12 percent of the total budget. In addition, in its unanimous recommendation, the Board stipulated that the increased assessment rate continue only through the 2018–19 crop year. The assessment rate will revert to the current $0.03 rate beginning August 1, 2019. All Board and Committee meetings are open to the public. On a quarterly basis, the Board reviews and approves financial statements at its public meetings. Those documents are made available to the public, and interested persons are encouraged to participate in all meetings.

One commenter expressed concern about the order's credit-back program and that it is not advantageous to non-branded handlers. While credit-back is associated with the assessment rate, the Board did not discuss the program as part of this proposal. This rule does not modify the percentage rate available for handler credit-back.

One commenter raised concern that the Nut of Choice and Crop of Choice programs appear to be an effort to improve the image of almonds at the expense of other California commodities. USDA has a strict policy against any marketing order boards, committees, or councils disparaging other commodities. USDA reviews all marketing and communication materials prior to publication to ensure that policy is being followed.

Accordingly, no changes will be made to the rule as proposed, based on the comments received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously-mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because the 2016–17 crop year began August 1, 2016, and the marketing order requires that the rate of assessment for each crop year apply to all assessable almonds handled during such crop year. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 15-day comment period was provided for in the proposed rule, followed by an additional 30-day comment period.

List of Subjects in 7 CFR Part 981

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 981 is amended as follows:

PART 981—ALMONDS GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 981 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 981.343 is revised to read as follows:

§ 981.343 Assessment rate.

For the period August 1, 2016, through July 31, 2019, the assessment rate shall be $0.04 per pound for California almonds. Of the $0.04 assessment rate, 60 percent per assessable pound is available for handler credit-back. On and after August 1, 2019, an assessment rate of $0.03 per pound is established for California almonds. Of the $0.03 assessment rate, 60 percent per assessable pound is available for handler credit-back.

Dated: November 12, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–30264 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 987

[Doc. No. AMS–SC–16–0084; SC16–987–1 FIR]

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

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim rule that implemented a recommendation from the California Date Administrative Committee (committee) to decrease the assessment rate established for the committee for the 2016–17 and subsequent crop years from $0.10 to $0.05 per hundredweight of dates handled under the marketing order (order). The committee locally administers the order and is comprised of producers and handlers of dates operating within the area of production. The interim rule was necessary to allow the committee to reduce its financial reserve while still providing adequate funding to meet program expenses.

DATES: Effective December 21, 2016.

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

Small businesses may obtain information on complying with this regulation by viewing a guide at the following Web site: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses;* or by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 987, both as amended (7 CFR part 987), regulating the handling of domestic dates produced or packed in Riverside County, California, hereinafter referred to as the ''order.'' The order is

effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

Under the order, California date handlers are subject to assessments, which provide funds to administer the order. Assessment rates issued under the order are intended to be applicable to all assessable domestic dates produced or packed in Riverside County, California, for the entire crop year and continue indefinitely until amended, suspended, or terminated. The committee's crop year began October 1, 2016, and ends on September 30, 2017.

In an interim rule published in the **Federal Register** on September 21, 2016, and effective on September 22, 2016, (81 FR 64759, Doc. No. AMS–SC–16–0084, SC16–987–1 IR), § 997.339 was amended by decreasing the assessment rate established for California dates for the 2016–17 and subsequent crop years from $0.10 to $0.05 per hundredweight. The decrease in the per hundredweight assessment rate allows the committee to reduce its financial reserve while still providing adequate funding to meet program expenses.

Final Regulatory Flexibility Analysis

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

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

There are approximately 70 date producers in the production area, and 11 date handlers subject to regulation under the order. The Small Business Administration (SBA) defines small agricultural producers as those having annual receipts of less than $750,000 and small agricultural service firms as those whose annual receipts are less than $7,500,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), data for the most recently completed crop year (2015) shows that about 4.36 tons, or 8,720 pounds, of dates were produced per acre. The 2015 producer price published by NASS was $1,560 per ton. Thus, the value of date production per acre in 2014–15 averaged about $6,802 (4.36 tons times $1,560 per ton, rounded to the nearest dollar). At that average price, a producer would have to farm over 110 acres to receive an annual income from dates of $750,000 ($750,000 divided by $6,802 per acre equals 110.26 acres). According to committee staff, the majority of California date producers farm less than 110 acres. Thus, it can be concluded that the majority of date producers could be considered small entities.

In addition, according to data from the committee staff, the majority of California date handlers have receipts of less than $7,500,000 and may also be considered small entities under SBA's definition.

This rule continues in effect the action that decreased the assessment rate established for the committee and collected from handlers for the 2016–17 and subsequent crop years from $0.10 to $0.05 per hundredweight of dates. The committee unanimously recommended 2016–17 expenditures of $52,500 and an assessment rate of $0.05 per hundredweight of dates. The assessment rate of $0.05 is $0.05 lower than the rate previously in effect. Applying the $0.05 per hundredweight assessment rate to the committee's 29,000,000 pounds (290,000 hundredweight) crop estimate should provide $14,500 in assessment income. Thus, income derived from handler assessments, along with interest income and funds from the committee's monetary reserve, will be adequate to cover the budgeted expenses. This action will allow the committee to reduce its financial reserve while still providing adequate funding to meet program expenses.

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

In addition, the committee's meeting was widely publicized throughout the California date industry, and all interested persons were invited to attend the meeting and encouraged to participate in committee deliberations on all issues. Like all committee meetings, the June 22, 2016, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue.

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

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

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

Comments on the interim rule were required to be received on or before November 21, 2016. No comments were received. Therefore, for reasons given in the interim rule, we are adopting the interim rule as a final rule, without change.

To view the interim rule, go to: *https://www.regulations.gov/document?D=AMS-SC-16-0084-0001.*

This action also affirms information contained in the interim rule concerning Executive Orders 12866, 12988, 13175, and 13563; the Paperwork Reduction Act (44 U.S.C. Chapter 35); and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim rule, without change, as published in the **Federal Register** (81 FR 64759, September 21, 2016) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 987

Dates, Marketing agreements, Reporting and recordkeeping requirements.

PART 987—DOMESTIC DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA [AMENDED]

■ Accordingly, the interim rule amending 7 CFR part 987, which was published at 81 FR 64759 on September 21, 2016, is adopted as a final rule, without change.

Dated: December 12, 2016.

Bruce Summers,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2016–30303 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AB25

Scope of Sections 202(a) and (b) of the Packers and Stockyards Act

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA), Packers and Stockyards Program (P&SP) is amending the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act). GIPSA is adding a paragraph addressing the scope of sections 202(a) and (b) of the P&S Act. This interim final rule clarifies that conduct or action may violate sections 202(a) and (b) of the P&S Act without adversely affecting, or having a likelihood of adversely affecting, competition. This interim final rule reiterates USDA's longstanding interpretation that not all violations of the P&S Act require a showing of harm or likely harm to competition. The regulations would specifically provide that the scope of section 202(a) and (b) encompasses conduct or action that, depending on their nature and the circumstances, can be found to violate the P&S Act without a finding of harm or likely harm to competition. This interim final rule finalizes a proposed amendment that GIPSA published on June 22, 2010. GIPSA is now publishing as an interim final rule what was proposed on June 22, 2010, with slight modifications, in order to allow additional comment on these provisions.

DATES: This interim final rule is February 21, 2017. Interested persons are invited to submit written comments on this interim final rule on or before February 21, 2017.

ADDRESSES: We invite you to submit comments on this interim final rule. You may submit comments by any of the following methods:

- *Mail:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Hand Delivery or Courier:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2530–S, Washington, DC 20250–3613.
- *Internet: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

Instructions: All comments should make reference to the date and page number of this issue of the **Federal Register**. All comments received will be included in the public docket without change, including any personal information provided. Regulatory analyses and other documents relating to this rulemaking will be available for public inspection in Room 2542A–S, 1400 Independence Avenue SW., Washington, DC 20250–3613 during regular business hours. All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)). Please call the Management and Budget Services staff of GIPSA at (202) 720–8479 to arrange a public inspection of comments or other documents related to this rulemaking.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Litigation and Economic Analysis Division, P&SP, GIPSA, 1400 Independence Ave, SW., Washington, DC 20250, (202) 720–7051, *s.brett.offutt@usda.gov.*

SUPPLEMENTARY INFORMATION: The first section that follows provides background and a summary of the regulatory text for § 201.3(a) and (b) in this interim final rule as compared to the regulatory wording for § 201.3(c) and (d) in the 2010 proposed rule. The second section provides background information about this rule. The third section provides a summary of the public comments received on the proposed rule and at the relevant USDA/Department of Justice Joint Competition Workshops that occurred during the comment period. The fourth section discusses the proposal of new §§ 201.210, 201.211, and 201.214, in this issue of the **Federal Register**. The last section provides the required impact analyses including the Regulatory Flexibility Act, the Paperwork Reduction Act, Civil Rights Analysis, and the relevant Executive Orders.

I. Summary of Changes From the 2010 Proposed Rule

Section 201.3 as Proposed in June 2010

In the proposed rule published in the **Federal Register** on June 22, 2010 [75 FR 35338], GIPSA proposed a new § 201.3, ''Applicability of regulations in this part,'' providing four (4) subsections to describe, in certain respects, the application of the regulations in 9 CFR part 201. These subsections were designated § 201.3(a) through § 201.3(d). Subsection 201.3(c) described the appropriate application of sections 202(a) and (b) of the P&S Act (7 U.S.C. 192(a) and (b)).

In this current rule, GIPSA is re-designating the existing undesignated paragraph in § 201.3 as § 201.3(b), and is adding back the subject heading, ''Effective dates'' to this paragraph.

GIPSA is amending § 201.3 with the addition of proposed § 201.3(c), with slight modifications. Because this provision is of primary importance, GIPSA is designating it as the first of two paragraphs in § 201.3 and changing its designation from (c) to (a). GIPSA has made slight modifications including a grammatical edit and also modified a few words to make the language internally consistent and also consistent with the language in new proposed §§ 201.210, 201.211, and 201.214, published concurrently in this issue of the **Federal Register** as separate proposed rules.

II. Background

A. Development of the Rule

Prior to issuing the initial proposed regulations in 2010, GIPSA held three public meetings in October 2008, in Arkansas, Iowa, and Georgia to gather comments, information, and recommendations from interested parties. Attendees at these meetings were asked to give input on the elements of the 2008 Farm Bill and other issues of concern under the P&S Act. In 2010, USDA and the Department of Justice held five joint public workshops to explore competition issues affecting agricultural industries in the 21st century and the appropriate role for antitrust and regulatory enforcement in those industries. These workshops were held in Ankeny, Iowa (Issues of Concern to Farmers, March 12, 2010); Normal, Alabama (Poultry Industry, May 21, 2010); Madison, Wisconsin (Dairy Industry, June 25, 2010); Fort Collins, Colorado (Livestock Industry, August 27, 2010); and Washington, District of Columbia (Margins, December 8, 2010). The Secretary informed attendees of the workshop in Fort Collins, Colorado that their comments provided that day would be considered in the development of this rulemaking. The Fort Collins workshop addressed issues in the cattle, hog, and other animal

sectors. Attendees provided comments on concentration in livestock markets, buyer power, and enforcement of the P&S Act. GIPSA incorporated relevant comments from the Madison, Wisconsin and Fort Collins, Colorado workshops into the text of the wording of the final rule published on December 9, 2011.

The regulations in this current interim final rule also reflect comments, information, and recommendations received in all those meetings.

On June 22, 2010, GIPSA published the proposed rule [75 FR 35338] upon which this interim final rule is based. The background information presented in the proposed rule remains pertinent to this interim final rule. Some of this background information is presented again here.

In that proposed rule, GIPSA proposed a multi-faceted rule and sought public input. During a 5-month comment period, GIPSA received over 61,000 comments from a wide variety of stakeholders. Some commenters addressed issues associated with this interim final rule. GIPSA published a final rule in 2011 that included modifications to address concerns expressed by commenters. The final rule addressed most, but not all, of the requirements of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) (2008 Farm Bill); however, for the reasons described in further detail below, GIPSA never implemented a final § 201.3(c) following the 2010 public notice and comment period. The 2010 proposed rule also proposed three other regulations, §§ 201.210, 201.211, and 201.214, that GIPSA has restructured and rewritten and is publishing as two separate proposed rules concurrent with this rule. Proposed § 201.210, ''Unfair, unjustly discriminatory and deceptive practices or devices by packers, swine contractors, or live poultry dealers,'' and § 201.211, ''Undue or unreasonable preferences or advantages'' further clarify and define the provisions of § 201.3(a). Proposed § 201.214, ''Poultry Grower Ranking Systems'' provides criteria which would be used in considering whether a live poultry dealer has used a poultry grower ranking system in an unfair, unjustly discriminatory, or deceptive manner or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.

Beginning with the fiscal year (FY) 2012 appropriations act, USDA was precluded from finalizing some of the regulations as proposed in June 2010. Section 201.3(c), ''Scope of Sections 202(a) and (b) of the Act,'' §§ 201.210, 201.211, and 201.214, published as part of the June 22, 2010, proposed rule, were included in the restrictions in the appropriations acts. Until FY 2016, appropriations acts continued to preclude the finalization of §§ 201.3(c), 201.210, 201.211, and 201.214.

Section 201.3(a), ''Applicability to live poultry dealers,'' and § 201.3(d), ''Effective dates,'' proposed in June 2010, were published on December 9, 2011 [76 FR 76874], as a final rule with some changes. At that time, the designation of proposed paragraph (d) was changed to (b).

Section 731, Division A, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235), required the Secretary to rescind what was then § 201.3(a), ''Applicability to live poultry dealers,'' leaving paragraph (b) as the only paragraph in § 201.3. As a result, GIPSA removed the designation for this paragraph as paragraph (b) and also removed its subject heading, ''Effective dates.'' This was accomplished by a final rule published on February 5, 2015 [80 FR 6430].

Neither the FY 2016 appropriations act nor the FY 2017 continuing appropriations act precludes GIPSA from publishing §§ 201.3(c), 201.210, 201.211, or 201.214 as final rules.

B. Purpose of the Regulatory Action

Section 202 of the P&S Act provides that ''[i]t shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry'' to engage in certain prohibited conduct. Section 202(a) prohibits ''any unfair, unjustly discriminatory, or deceptive practice or device.'' Section 202(b) prohibits ''any undue or unreasonable preference or advantage'' or ''any undue or unreasonable prejudice or disadvantage.'' USDA has consistently taken the position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of competitive injury.[1] At the same time, USDA has always understood that an act or practice's effect on competition can be relevant[2] and, in certain circumstances, even dispositive[3] with respect to whether that act or practice violates sections 202(a) and/or (b).

As we explained in the proposed rule, the longstanding agency position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of likelihood of competitive injury is consistent with the language and structure of the P&S Act, as well as its legislative history and purposes. Neither section 202(a) nor section 202(b) contains any language limiting the application of those sections to acts or practices that have an adverse effect on competition, such as acts ''restraining commerce.'' Instead, these provisions use terms including ''deceptive,'' ''unfair,'' ''unjust,'' ''undue,'' and ''unreasonable''—which are commonly understood to encompass more than anticompetitive conduct.[4] This is in direct contrast to subsections (c), (d), and (e), which expressly prohibit only those acts that have the effect of ''restraining commerce,'' ''creating a monopoly,'' or producing another type of antitrust injury. The fact that Congress expressly included these limitations in subsections (c), (d), and (e), but not in subsections (a) and (b), is a strong indication that Congress did not intend subsections (a) and (b) to be limited to instances in which there was harm to competition. And Congress confirmed the agency's position by amending the P&S Act to specify specific instances of conduct prohibited as unfair that do not involve any inherent likelihood of competitive injury.[5]

USDA's interpretation of sections 202(a) and (b) is also consistent with the interpretation of other sections of the P&S Act using similar language—sections 307 and 312 (7 U.S.C. 208 and 213). Courts have recognized that the proper analysis under these provisions

[1] *In re Ozark County Cattle Co.,* 49 Agric. Dec. 336, 365 (1990); 1 John H. Davidson et al., *Agricultural Law* section 3.47, at 244 (1981).

[2] *See, In re Sterling Colo. Beef Co.,* 39 Agric. Dec. 184, 235 (1980) (considering and rejecting respondent packer's business justification for challenged conduct).

[3] *See, Armour & Co.* v. *United States,* 402 F.2d 712, 717 (7th Cir. 1968) (a coupon promotion plan (here coupons for fifty cents off specified packages of bacon) is not per se unfair and violates section 202(a) if it is implemented with some predatory intent or carries some likelihood of competitive injury); *In re IBP, Inc.,* 57 Agric. Dec. 1353, 1356 (1998) (contractual right of first refusal at issue violated section 202 ''because it has the effect or potential of reducing competition'').

[4] When the P&S Act was enacted, *Webster's New International Dictionary* defined ''deceptive'' as ''[t]ending to deceive; having power to mislead, or impress with false opinions''; ''unfair'' as ''[n]ot fair in act or character; disingenuous; using or involving trick or artifice; dishonest; unjust; inequitable'' (2d. definition); and ''unjust'' as ''[c]haracterized by injustice; contrary to justice and right; wrongful.'' *Webster's New International Dictionary* 578, 2237, 2238, 2245, 2248 (1st ed. 1917). This is the same understanding of the terms today.

[5] *See* sections 409(c) and 410(b).

depends on ''the facts of each case,'' [6] and that these sections may apply in the absence of harm to competition or competitors.[7]

The legislative history and purposes of the P&S Act also support USDA's position. The P&S Act ''is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.'' [8] In amending the P&S Act, Congress made clear that its goals for the statute extended beyond the protection of competition. In 1935, for instance, when Congress first subjected live poultry dealers to sections 202(a) and (b), Congress explained in the statute itself that ''[t]he handling of the great volume of live poultry . . . is attendant with various unfair, deceptive, and fraudulent practices and devices, resulting in the producers sustaining sundry losses and receiving prices far below the reasonable value of their live poultry. . . .'' [9] Similarly, the House Committee Report regarding the 1958 amendments stated that ''[t]he primary purpose of [the P&S Act] is to assure fair competition *and fair trade practices*'' and ''to safeguard farmers . . . against receiving less than the true market value of their livestock.'' [10] The Report further observed that protection extends to ''unfair, deceptive, unjustly discriminatory'' practices by ''small'' companies in addition to ''monopolistic practices.'' [11] In accordance with this legislative history, courts and commentators have recognized that the purposes of the P&S Act are not limited to protecting competition.[12]

Four courts of appeals have disagreed with USDA's interpretation of the P&S Act and have concluded (in cases to which the United States was not a party) that plaintiffs could not prove their claims under sections 202(a) and/or (b) without proving harm to competition or likely harm to competition.[13] After carefully considering the analyses in these opinions, USDA continues to believe that its longstanding interpretation of the P&S Act is correct. These court of appeals opinions (two of which were issued over vigorous dissents) [14] are inconsistent with the plain language of the statute; they incorrectly assume that harm to competition was the only evil Congress sought to prevent by enacting the P&S Act; and they fail to defer to the Secretary of Agriculture's longstanding and consistent interpretation of a statute administered by the Secretary. To the extent that these courts failed to defer to USDA's interpretation of the statute because that interpretation had not previously been enshrined in a regulation,[15] this new regulation may constitute a material change in circumstances that warrants judicial reexamination of the issue.[16]

Although it is not necessary in every case to demonstrate competitive injury in order to show a violation of sections 202(a) and/or (b), any act that harms competition or is likely to harm competition may violate the statute. How a competitive injury or the likelihood of a competitive injury manifests itself depends critically on whether the target of the act or practice is a competitor (*e.g.,* a packer harms other packers), or whether the target of the act or practice operates at a different level of the livestock or poultry production process (*e.g.,* a packer harms a livestock producer). Competitive injury or the likelihood of competitive injury may occur when an act or practice improperly forecloses competition in a large share of the market through exclusive dealing, restrains competition among packers, live poultry dealers or swine contractors or otherwise represents a use of market power to distort competition.[17] Competitive injury or the likelihood of competitive injury also may occur when a packer, swine contractor, or live poultry dealer wrongfully depresses prices paid to a livestock producer, swine production contract grower, or poultry grower below market value or impairs the livestock producer, swine production contract grower, or poultry grower's ability to compete with other producers or growers.

To establish an actual or likely competitive injury, it is not necessary to show that a challenged act or practice had a likely effect on resale price levels. Even the antitrust laws do not require such a showing. The P&S Act is broader than the antitrust laws and, therefore, such a requirement of showing effect on resale price levels is not necessary to establish competitive injury under section 202 of the P&S Act (though such a showing would suffice).

III. Discussion of Comments

The proposed rule published on June 22, 2010, (75 FR 35338) provided a 60-day comment period to end on August 23, 2010. In response to requests for an extension of time to file comments, on July 28, 2010, GIPSA extended the comment period to end on November 22, 2010 (75 FR 44163). Commenters covered the spectrum of those affected by the rule, including livestock producers and poultry growers, packers and live poultry dealers, trade associations representing both production and processing, plant workers, and consumers. GIPSA considered all comments postmarked or electronically submitted by November 22, 2010. GIPSA received over 61,000 comments, which addressed the rule generally as well as specific provisions. GIPSA considered written comments as well as comments received at two public meetings, on June 25, 2010, and August 27, 2010, conducted jointly by USDA and the Department of Justice. Because these ''Workshops on Competition in Agriculture'' were held during the comment period for the proposed rule, the Secretary announced that any comments made in those forums would be considered comments on the proposed rule.

Comments on proposed § 201.3(c) were sharply divided with respect to

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[6] *Capitol Packing Co.* v. *United States,* 350 F.2d 67, 76 (10th Cir. 1965); *see also, Spencer Livestock Comm'n Co.* v. *USDA,* 841 F.2d 1451, 1454 (9th Cir. 1988).

[7] *See, e.g., Spencer,* 841 F.2d at 1455 (Section 312 covers ''a deceptive practice, whether or not it harmed consumers or competitors.'').

[8] H.R. Rep. 67–77, at 2 (1921); *see also, Swift & Co.* v. *United States,* 308 F.2d 849, 853 (7th Cir. 1962) (''The legislative history showed Congress understood the sections of the [P&S Act] under consideration were broader in scope than antecedent legislation such as the Sherman Antitrust Act, sec. 2 of the Clayton Act, 15 U.S.C. 13, sec. 5 of the Federal Trade Commission Act, 15 U.S.C. 45 and sec. 3 of the Interstate Commerce Act, 49 U.S.C. 3.'').

[9] Public Law 74–272, 49 Stat. 648, 648 (1935).

[10] H.R. Rep. No. 85–1048 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213 (emphasis added).

[11] *Id.* at 5213.

[12] *See, e.g., Stafford* v. *Wallace,* 258 U.S. 495, 513–14 (1922); *Spencer,* 841 F.2d at 1455: *United States* v. *Perdue Farms, Inc.,* 680 F.2d 277, 280 (2d Cir. 1982); *Bruhn's Freezer Meats of Chicago, Inc.* v. *USDA,* 438 F.2d 1332, 1336 (8th Cir. 1971); *Bowman* v. *USDA,* 363 F.2d 81, 85 (5th Cir. 1966); *United States* v. *Donahue Bros.,* 59 F.2d 1019, 1023 (8th Cir. 1932).

[13] *Terry* v. *Tyson Farms, Inc.* 604 F.3d 272, 280 (6th Cir. 2010) (''[I]n order to succeed on a claim under §§ 192(a) and (b) of the [P&S Act], a plaintiff must show an adverse effect on competition.''); *Wheeler* v. *Pilgrim's Pride Corp.,* 591 F.3d 355, 363 (5th Cir. 2009) (*en banc*) (''To support a claim that a practice violates subsection (a) or (b) of § 192 [of the P&S Act] there must be proof of injury, or likelihood of injury, to competition.''); *Been* v. *O.K. Indus., Inc.,* 495 F.3d 1217,1238 (10th Cir. 2007) (An ''unfair practice'' under section 202(a) of the P&S Act is one that injures or is likely to injure competition); *London* v. *Fieldale Farms Corp.,* 410 F.3d 1295, 1303 (11th Cir. 2005) (P&S Act prohibits only those unfair, discriminatory, or deceptive practices that adversely affect or are likely to adversely affect competition).

[14] *Wheeler,* 591 F.3d at 371–85 (Garza, J., dissenting); *Been,* 495 F.3d at 1238–43 (Hartz, J., concurring in part and dissenting in part).

[15] *See Been,* 495 F.3d at 1226–27.

[16] *See Nat'l Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 982–84 (2005).

[17] *See, e.g.,* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price,* 96 Yale L.J. 209 (1986); 11 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 1821 (2d ed. 2005).

harm to competition. Those supporting the proposal pointed out it would provide legal relief for farmers and ranchers who suffer because of unfair actions, such as false weighing and retaliatory behavior, without having to show competitive harm to the industry. Opposing comments relied heavily on the fact that several of the United States Courts of Appeals have ruled that harm to competition (or the likelihood of harm to competition) is a required element to find a violation of sections 202(a) and (b) of the P&S Act.

Those supporting proposed § 201.3(c) included numerous livestock producers and poultry growers and organizations representing the interests of farmers and ranchers. Commenters supporting proposed § 201.3(c) pointed out that it would reduce the costs of litigation for poultry growers and livestock producers who suffer because of unfair actions, such as false weighing and retaliation. Proposed § 201.3(c), according to some commenters, corrects the analytical framework of the P&S Act and ensures that the courts grant a higher level of deference to USDA's interpretation of the P&S Act. They believed it was wrong to require a demonstration of harm to competition to the whole industry stemming from an unfair practice targeting an individual grower or producer in order to violate section 202(a) of the P&S Act, and that proposed § 201.3(c) would remove an undue barrier to relief.

Commenters in favor of proposed § 201.3(c) further pointed out the imbalance in power between livestock producers and packers and noted that without this provision, the packers are inoculated against recourse by a livestock producer because the livestock producer is small and overmatched relative to the much larger and more well-resourced packer. A common theme among supporters was that proposed § 201.3(c) allowed farmers and ranchers to seek redress by showing that they were individually harmed in cases such as false weighing or retaliatory behavior, rather than requiring a showing of harm to competition in the industry. Commenters felt that the packers and poultry companies were given a free pass to act unfairly toward livestock producers, swine production contract growers, and poultry growers knowing that proving harm to competition to the industry would be difficult, if not impossible, in many situations.

Many of the supporting comments also addressed the plain language and intent of section 202 of the P&S Act and opined that the recent court decisions were based on incorrect interpretations of the law. Commenters wrote that proposed § 201.3(c) correctly interpreted the plain language of section 202 and the legislative history of the P&S Act.

Commenters opposing proposed § 201.3(c) included many meat packers, live poultry dealers, and organizations representing packers and poultry companies. The opposing comments stated that the P&S Act had always been considered an antitrust statute and therefore, GIPSA should be required to show competitive harm to allege a violation of section 202(a). They also expressed concern that a flood of litigation would ensue if the scope of section 202(a) did not remain closely aligned with case law. Commenters opposed to the rulemaking asserted that allowing allegations of section 202(a) violations without a showing of harm or likely harm to competition would enable swine production contract growers, poultry growers, or livestock producers to sue a swine contractor, live poultry dealer, or packer for aa broad range of adverse circumstances affecting them. The comments went on to say that this would guarantee swine production contract growers, poultry growers, and livestock producers a profit on every transaction, a standard afforded in no other industry. In turn, this would reduce the number of swine production contract growers, poultry growers, and livestock producers with whom companies would do business.

Opposing comments relied heavily on the fact that several United States Courts of Appeals have ruled that harm to competition (or the likelihood of harm to competition) is a required element to find a violation of sections 202(a) and (b) of the P&S Act. These commenters stated that because of the decisions in these circuit courts, GIPSA lacked authority to implement proposed § 201.3(c). Several large packers and poultry companies wrote that the proposed § 201.3(c), if implemented, would be in direct conflict with circuit court decisions in the geographic regions in which they do business. One packer commented that livestock producers would bear the cost of determining the legality of an expanded scope of sections 202(a) and 202(b).

Many opposing commenters felt that proposed § 201.3(c) would lead to a large increase in frivolous litigation and greatly increase operational costs for packers and poultry companies. Commenters felt that an increase in frivolous litigation would lead to a decrease in the use of the value-based pricing. Commenters opposed allowing livestock producers to file lawsuits based on their thoughts of what is unfair. Some commenters believed that proposed § 201.3(c) would eliminate the requirement to show any harm at all. A common concern presented by those in opposition to the proposed change to § 201.3 was that while section 202(a) prohibits unfair, unjustly discriminatory, or deceptive practices, the P&S Act does not define what types of conduct would be classified as such. Of particular concern to these commenters was the prospect that GIPSA may bring actions under section 202(a) without a finding of harm to competition which would encourage livestock producers to sue firms subject to the P&S Act for any conduct having an adverse effect on livestock producer interests. While most of the comments focused on unfair conduct that could violate section 202(a), a few comments mentioned section 202(b) as well. These comments set forth concerns calling for regulatory guidance as to what conduct GIPSA would deem as unfair, unjustly discriminatory, or deceptive, and an undue preference or advantage in violation of the P&S Act, especially when there was no showing of harm to competition.

Agency response: GIPSA did not make the specific changes to proposed § 201.3(c) requested by comments. However, GIPSA is proposing new rule language in proposed rules §§ 201.210, 201.211, and 201.214, that provide the guidance commenters were seeking. GIPSA also modified a few words in § 201.3(c) to make the language internally consistent and to make it consistent with the language in new proposed §§ 201.210, 201.211, and 201.214, published concurrently in this issue of the **Federal Register** as two separate proposed rules. Specifically, proposed §§ 201.210 and 201.211 discuss ''conduct or action'' and GIPSA has modified the references to ''conduct'' in proposed § 201.3(c) to ''conduct or action.'' GIPSA also changed the reference to ''challenged act or practice'' to ''challenged conduct or action,'' again for consistency with proposed §§ 201.210 and 201.211 and to make the language in § 201.3(a) internally consistent. In the proposed rule for § 201.214 in this issue of the **Federal Register**, GIPSA proposes listing the failure to use a poultry grower ranking system in a fair manner after applying the criteria in § 201.214 as a tenth type of ''challenged conduct or action'' under § 201.210(b). GIPSA also made a minor grammatical edit and changed all references to ''section'' to ''sections.'' GIPSA believes the paragraph proposed on June 22, 2010, as § 201.3(c) (''Scope of Sections 202(a) and (b) of the Act.'') is of primary

importance. As a result, the paragraph is designated as paragraph (a) and the current text in § 201.3 is designated as paragraph (b).

It is the longstanding position of the Secretary of Agriculture that a violation of section 202(a) or (b) can be proven without evidence of competitive injury or the likelihood of competitive injury. The Secretary's position is consistent with the language and structure of the P&S Act, as well as its legislative history and purposes. Sections 202(c), 202(d), and 202(e) of the P&S Act include ''restraint'' and ''monopoly'' language, some of which resembles language in the Clayton Act, 15 U.S.C. 12–27. Neither section 202(a) nor section 202(b) contains language limiting the application to conduct or action that has an adverse effect, or the likelihood of an adverse effect, on competition, such as acts ''restraining commerce.'' Sections 202(a) and 202(b) are tort-like provisions that are concerned with unfair practices, discrimination, and preferential treatment, but not with restraint of trade or monopolistic activities.

Analysis of the Federal Trade Commission Act, 15 U.S.C. 41–58, as amended, (FTC Act) is helpful in illustrating the Secretary's position on the scope of sections 202(a) and 202(b) of the P&S Act. Congress considered the FTC Act in drafting the P&S Act as it incorporated portions of the FTC Act by reference into the P&S Act. Section 5 of the FTC Act, now codified at 15 U.S.C. 45, states, ''[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.'' Thus, in the FTC Act, Congress makes a distinction between ''unfair methods of competition'' and ''unfair or deceptive acts or practices.'' In drafting the P&S Act, Congress chose to prohibit any ''unfair, unjustly discriminatory, or deceptive practice or device,'' and the making or giving of ''any undue or unreasonable preference or advantage . . .,'' without limiting the unfair practices or devices, discrimination, or preferential treatment to only those involving competition. The Supreme Court of the United States has examined the scope of Section 5 of the FTC Act, noting that unfair practices are not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws, nor are unfair practices in commerce confined to purely competitive behavior.[18] The FTC Act's phrase, '''unfair or deceptive acts or practices' '' makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.'' [19] The Court also noted, upon consideration of legislative and judicial authorities, that the Federal Trade Commission considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[20]

Recent circuit court decisions have found that a showing of competitive harm, or a likelihood of competitive harm, is required to substantiate a violation of sections 202(a) and 202(b) of the P&S Act. In one of these cases, *Wheeler* v. *Pilgrim's Pride Corp.,*[21] while the majority opinion required a finding of harm to competition, the dissenting opinion agreed with the district court's ruling that sections (a) and (b) of 202 do not contain language limiting their application to actions which have an adverse effect on competition.[22] The court in another case, *Been* v. *O.K. Indus., Inc.,*[23] declined to defer to USDA's interpretation of ''unfair'' practices under section 202(a) of the P&S Act, in part, because ''the Secretary has not promulgated a regulation applicable to the practices the Growers allege violate § 202(a).'' [24] The court, however, stated that ''[r]egulations promulgated by an agency exercising its congressionally granted rule-making authority'' are entitled to deference,[25] implying that such regulation, once enacted by USDA, would be entitled to deference. Therefore, while decisions of the courts of appeals support comments in opposition to amending § 201.3, these same decisions have also pointed to a need for the very rulemaking the addition of paragraph (a) to § 201.3 provides.

An initial increase in litigation costs is a likely result of this rule, as the industry and the courts are setting precedents for the interpretation of § 201.3. However, the litigation costs and the number of lawsuits are expected to decrease after precedent setting decisions are established. In order to place some parameters on conduct or action that constitutes unfair, unjustly discriminatory, and deceptive practices or devices under section 202(a), and on conduct or action that constitutes undue or unreasonable preferences or advantages under section 202(b), and to address concerns raised by commenters about what those terms mean, GIPSA is publishing concurrently with this interim final rule, proposed rules that will include revised §§ 201.210,201.211, and 201.214, which will help clarify the conduct or action GIPSA considers violations of sections 202(a) and 202(b) of the P&S Act.

Contrary to some comments, § 201.3(a) does not stand for the proposition that GIPSA never has to demonstrate that the challenged conduct or action adversely affects competition. Instead, § 201.3(a) solely reiterates GIPSA's longstanding position that a finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. Certain conduct is prohibited because it is unfair, unjustly discriminatory or deceptive even though there may be no harm, or likelihood of harm, to competition. Likewise, certain conduct is prohibited because it creates an unfair preference or advantage even though there may be no harm, or likelihood of harm, to competition. This rule, combined with the specific examples of prohibited conduct in proposed § 201.210 and the criteria the Secretary will consider as set forth in proposed § 201.211, will assist industry participants in understanding which behaviors violate sections 202(a) and 202(b) of the P&S Act.

IV. Interim Final Rule and Request for Comments

As previously discussed, GIPSA published a notice of proposed rulemaking in June, 2010, that, *inter alia,* proposed regulatory text relating to the scope of the P&S Act. GIPSA solicited comments over a 5 month period and received thousands of comments on this aspect of the proposed rule. Accordingly, the agency has fulfilled the notice and comment requirements of the Administrative Procedure Act. However, given the significant level of stakeholder interest in this regulatory provision, the intervening six years, and in the interests of open and transparent government, the agency has decided to promulgate the rule as an interim final rule and provide an additional opportunity for public comment. The agency will consider all comments received by the date indicated in the **DATES** section of this interim final rule with request for comments. After the comment period closes, the agency intends to publish another document in the **Federal Register**. The document will

[18] *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233 (1972).

[19] *Id.,* at 244. (quoting H.R.Rep.No.1613, 75th Cong., 1st Sess., 3 (1937).

[20] *Id.,* at 244.

[21] 591 F. 3d 355 (5th Cir. 2009).

[22] *Id.* at 377 (Garza, J., dissenting).

[23] 495 F. 3d 1217 (10th Cir. 2007).

[24] *Id.* at 1226–27.

[25] *Id.* at 1226.

include a discussion of any comments received and whether any amendments will be made to the rule.

V. Concurrent Publication of Proposed §§ 201.210, 201.211, and 201.214

While some appellate courts have determined that a showing of competitive injury, or likelihood of competitive injury, is required to allege a violation of sections 202(a) or 202(b), some dissenting opinions agreed with USDA's interpretation of sections 202(a) and 202(b) [26] and at least one dissenting opinion stated that if GIPSA developed regulation explaining whether a showing of competitive injury was required in a given circumstance, that regulation would entitle USDA to deference.[27] Amending § 201.3 with the addition of § 201.3(a) provides a structural foundation for the development of more specific regulations containing examples or criteria GIPSA may then use to determine if given conduct or action requires a showing of competitive injury or the potential for competitive injury to allege a violation of section 202(a) or section 202(b). As mentioned in the summary of comments, implementation of these specific regulations may lower costs to some livestock producers, swine production contract growers and poultry growers should they bring legal action for an alleged violation of section 202(a) or section 202(b). GIPSA acknowledges that § 201.3(a) may initially encourage litigation, temporarily driving up overall costs for stakeholders. While this interim rule is a standalone rulemaking, it is worth noting that GIPSA's current thinking is also expressed in separate proposed rules published concurrently in this edition of the **Federal Register**. GIPSA is proposing § 201.210, which clarifies the conduct or action by packers, swine contractors, or live poultry dealers that GIPSA considers unfair, unjustly discriminatory, or deceptive and a violation of section 202(a), and clarifies whether a showing of harm to competition or likelihood of harm to competition is required. GIPSA is also proposing § 201.211, which identifies criteria the Secretary will consider in determining whether conduct or action by packers, swine contractors, or live poultry dealers constitutes an undue or unreasonable preference or advantage and a violation of section 202(b). Section 201.214, as proposed in this edition of the **Federal Register**, lists criteria the Secretary will consider in determining whether a live poultry dealer has used a poultry grower ranking system to compensate poultry growers in an unfair, unjustly discriminatory, or deceptive manner in violation of section 202(a), or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage in violation of section 202(b). GIPSA believes §§ 201.210, 201.211, and 201.214, once published as final rules, will mitigate potential costs associated with § 201.3(a) by clarifying what conduct or action would violate section 202(a) and section 202(b). Listing examples and criteria to explain the boundaries for compliance with section 202 of the P&S Act will promote compliance and reduce the number of disputes associated with section 202. Even while proposed §§ 201.210, 201.211, and 201.214 are being considered through the rulemaking process, amending § 201.3 with the addition of § 201.3(a) provides sufficient clarity to obtain deference from the courts.

VI. Required Impact Analyses

A. Executive Order 12866 and Regulatory Flexibility Act

This rulemaking has been determined to be ''economically significant'' for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. GIPSA is issuing this interim final rule under the P&S Act, in part, to formalize USDA's position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of competitive injury or likelihood of competitive injury. As a required part of the regulatory process, GIPSA prepared an economic analysis of § 201.3(a). The first section of the analysis is an introduction and a discussion of the prevalence of contracting in the cattle, hog, and poultry industries as well as a discussion of potential market failures. Next, GIPSA discusses three regulatory alternatives it considered and presents a summary cost-benefit analysis of each alternative. GIPSA then discusses the impact on small businesses.

Introduction

GIPSA issued a proposed rule on June 22, 2010, which included §§ 201.3, 201.210, 201.211, 201.214. GIPSA is issuing amendments to § 201.3 as an interim final rule and is proposing new versions of §§ 201.210 and 201.211 in a separate proposed rule published concurrently in this issue of the **Federal Register**. Likewise, 201.214 is being proposed in a separate rulemaking. Section 201.3(a) formalizes GIPSA's longstanding position that conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition. GIPSA believes the interim final § 201.3(a) will serve to strengthen the protection afforded the nation's livestock producers and poultry growers.

Section 201.3(a) states that a finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases . . . Some unfair, unjustly discriminatory, or deceptive practices do not result in competitive harm to the industry but still result in significant harm to individual livestock producers, swine production contract growers, and poultry growers. If, for example, a livestock producer, swine production contract grower, or poultry grower filed a complaint related to a matter that does not result in competitive harm, such as retaliatory conduct, use of inaccurate scales, or providing a poultry grower sick birds, the livestock producer, swine production contract grower, or poultry grower will be able to prevail without proof of harm to competition or the likelihood of harm to competition. GIPSA believes the standard articulated in § 201.3(a) is consistent with its mission, which is to ''protect fair trade practices, financial integrity and competitive markets for livestock, meats and poultry.'' [28] By removing the burden to prove harm or likely harm to competition in all cases, this interim final rule promotes fairness and equity in the livestock and poultry industries.

Section 201.3(a) may lower the costs to some livestock producers, swine production contract growers, and poultry growers should they bring legal action for an alleged violation of sections 202(a) and/or 202(b). However, § 201.3(a) may initially increase litigation costs for the livestock and poultry industries while precedent setting decisions are established. While this interim rule is a standalone rulemaking, it is worth noting that GIPSA's current thinking is also expressed in separate proposed rules, which will clarify to the industry the types of conduct and criteria that GIPSA believes violate section 202(a) and section 202(b) of the P&S Act.

Proposed § 201.210(a) specifies that any conduct or action by a packer, swine contractor, or live poultry dealer that is explicitly deemed to be an

[26] *Wheeler* v. *Pilgrim's Pride Corp.*, 591 F.3d 355(5th Cir. 2009) (9–7 decision *en banc*) (Judge Garza dissenting, joined by Judges Jolly, Barksdale, Dennis, Prado, Elrod and Haynes).

[27] *Been* v. *O.K. Indus., Inc.*, 495 F.3d 1217, 1238 (10th Cir. 2007).

[28] *https://www.gipsa.usda.gov/laws/law/PS_act.pdf.* Accessed on September 19, 2016.

''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device by the P&S Act is a per se violation of section 202(a). Section 201.210(b) provides examples of conduct or action that, absent demonstration of a legitimate business justification, are ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.210(c) specifies that any conduct or action that harms or is likely to harm competition is an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a). Many of the examples provided in § 201.210(b) relate to conduct or action that limits, by contract, the legal rights and remedies afforded by law to poultry growers, swine production contract growers, and livestock producers. Other examples specify conduct or actions that violate section 202(a).

As required by the 2008 Farm Bill, proposed § 201.211 specifies criteria the Secretary will consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b). The first four (4) criteria require the Secretary to consider whether one or more livestock producers, swine production contract growers, or poultry growers is treated more favorably as compared to other similarly situated livestock producers, swine production contract growers, or poultry growers. The fifth criterion in § 201.211 requires the Secretary to consider whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise be an undue or unreasonable preference or advantage.

Proposed §§ 201.210 and 201.211 will thus limit the application of § 201.3(a) by placing some parameters on conduct or action that constitutes unfair, unjustly discriminatory, and deceptive practices or devices under section 202(a), and on conduct or action that constitutes undue or unreasonable preferences or advantages under section 202(b). Proposed §§ 201.210 and 201.211 focus heavily on contracts between livestock producers and packers, swine production contract growers and swine contractors, and poultry growers and live poultry dealers.

While proposed §§ 201.210 and 201.211 focus heavily on contracts, § 201.3(a) is broad in nature. It applies to the use of all types of livestock and poultry procurement and growing arrangements by packers, swine contractors, and live poultry dealers, including packers' use of negotiated cash purchases of livestock. As discussed below, contracting broadly defined, is the primary method by which livestock are procured (especially for hogs) and the almost exclusive arrangement under which poultry are produced. A discussion of contracting in these industries is, therefore, useful in explaining the need for § 201.3(a) and laying the foundation for the economic analysis of 201.3(a).

Prevalence of Contracting in Cattle, Hog, and Poultry Industries

Contracting is an important and prevalent feature in the production and marketing of livestock and poultry. Although § 201.3(a) applies to the livestock and poultry industries in general, proposed §§ 201.210 and 201.211 primarily affect livestock and poultry grown or marketed under contract. For example, under § 201.210(b)(2), absent demonstration of a legitimate business justification, GIPSA considers conduct or action by packers, swine contractors, or live poultry dealers that limit or attempt to limit, by contract, the legal rights and remedies of livestock producers, swine production contract growers, or poultry growers as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.211 defines criteria for section 202(b) violations with respect to providing undue or unreasonable preferences or advantages to one or more livestock producers or contract growers as compared to other livestock producers or contract growers.

The type of contracting varies among cattle, hogs, and poultry. Broilers, the largest segment of poultry, are almost exclusively grown under production contracts, while a small percentage of cattle are custom fed and shipped directly for slaughter this activity is not subject to the jurisdiction of the P&S Act. Hog production falls between these two extremes. As shown in Table 1 below, over 96 percent of all broilers are grown under contractual arrangements and over 40 percent of all hogs are grown under contractual arrangements. Live poultry dealers typically own the broilers and provide the growers with feed and medications. Contract growers provide the housing, labor, water, electricity and fuel to grow the birds. Similarly, swine contractors typically own the slaughter hogs and sell the finished hogs to pork packers. The swine contractors typically provide feed and medication to the contract growers who own the growing facilities and provide growing services. With the exception of turkey production, the use of contract growing arrangements has remained relatively stable over the years that the Census of Agriculture has published data on commodities raised and delivered under production contracts as Table 1 shows.

TABLE 1—PERCENTAGE OF POULTRY AND HOGS RAISED AND DELIVERED UNDER PRODUCTION CONTRACTS [29]

Species	2002	2007	2012
Broilers	98.0	96.5	96.4
Turkeys	41.7	67.7	68.5
Hogs	42.9	43.3	43.5

Another contract category is marketing contracts, where producers market their livestock to a packer for slaughter under a verbal or written agreement. These are commonly referred to as Alternative Marketing Arrangements (AMAs). Pricing mechanisms vary across AMAs. Some AMAs rely on a spot market for at least one aspect of its price, while others involve complicated pricing formulas with premiums and discounts based on carcass merits. The livestock seller and packer agree on a pricing mechanism under AMAs, but usually not on a specific price.

USDA's Agricultural Marketing Service (AMS) reports the number of

[29] Agricultural Census, 2007 and 2012. *https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/* and *https://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/.*

cattle sold to packers under formula, forward contract, and negotiated pricing mechanisms. The following table illustrates the prevalence of contracting in the marketing of fed cattle.

TABLE 2—PERCENTAGE OF FED CATTLE SOLD BY TYPE OF PURCHASE [30]

Year	Formula	Forward contract	Negotiated
2005	30.4	5.0	64.6
2006	31.5	6.8	61.7
2007	33.2	8.3	58.5
2008	37.4	9.9	52.7
2009	43.7	7.0	49.3
2010	44.9	9.5	45.6
2011	48.4	10.9	40.7
2012	54.7	11.4	33.8
2013	60.0	10.2	29.8
2014	58.1	14.2	27.6
2015	58.2	16.5	25.3

GIPSA considers cattle sold under formula pricing methods as sold under AMA contracts. Thus, the first two columns in the above table are cattle marketed under contract and the third column represents the spot market for fed cattle. The data in the table above show that the contracting of cattle has increased significantly since 2005. Approximately 35 percent of fed cattle were marketed under contracts in 2005. By 2015, the percentage of fed cattle marketed to packers under contracts had increased to almost 75 percent, while negotiated spot market transactions have decreased to about 25 percent of all transactions.

As discussed above, over 40 percent of hogs are grown under production contracts. These hogs are then sold by swine contractors to packers under marketing contracts. The prevalence of marketing contracts in the sale of finished hogs, which includes production contract and non-production contract hogs, to packers is even more prevalent as shown in the table below.

TABLE 3—PERCENTAGE OF HOGS SOLD BY TYPE OF PURCHASE [31]

Year	Other marketing arrange-ments [32]	Formula [33]	Negotiated
2005	39.3	49.7	11.0
2006	44.0	46.4	9.6
2007	44.8	46.5	8.7
2008	43.9	47.6	8.5
2009	42.8	50.4	6.8
2010	45.4	49.4	5.2
2011	47.6	48.2	4.2
2012	47.7	48.6	3.6
2013	48.3	48.4	3.2
2014	45.9	51.4	2.7
2015	46.0	51.4	2.6

Similar to cattle, the percentage of hogs sold under marketing contracts has increased since 2005 to over 97 percent in 2015. The spot market for hogs has declined to 2.6 percent in 2015. As these data demonstrate, almost all hogs are marketed under some type of marketing contract.

Benefits of Contracting in Cattle, Hog, and Poultry Industries

Contracts have many benefits. They help farmers and livestock producers manage price and production risks, elicit the production of products with specific quality attributes by tying prices to those attributes, and smooth the flows of commodities to processing plants encouraging more efficient use of farm and processing capacities. Agricultural contracts can also lead to improvements in efficiency throughout the supply chain for products by providing farmers with incentives to deliver products consumers desire and produce products in ways that reduce processing costs and, ultimately, retail prices.

In 2007, RTI International conducted a comprehensive study of marketing practices in the livestock and red meat industries from farmers to retailers (the RTI Study).[34] The RTI Study analyzed the extent of use, price relationships, and costs and benefits of contracting, including AMAs. The RTI Study found that AMAs increased the economic efficiency of the livestock markets and yielded economic benefits to consumers, producers and packers.

The RTI Study found that efficiencies come from less volatility in volume and

[30] USDA's Agricultural Marketing Service. *https://mpr.datamart.ams.usda.gov/menu.do?path=Products*\Cattle\Weekly. Accessed on September 9, 2016

[31] USDA's Agricultural Marketing Service.

[32] Includes Packer Owned and Packer Sold, Other Purchase Arrangements.

[33] Includes Swine Pork Market Formula, Other Market Formula.

[34] RTI International, 2007, GIPSA Livestock and Meat Marketing Study, Prepared for GIPSA.

more intensive use of production and processing facilities, meaning less capital, labor, feed, and materials per pound of meat produced. Efficiencies also come from reduced transaction costs and from sending price signals to better match the meat attributes to consumer demand. Consumers benefit from lower meat prices and meat with desired attributes. In turn, the consumer benefits increase livestock demand, which provides benefits to producers.

Structural Issues in the Cattle, Hog, and Poultry Industries

As the above discussion highlights, there are important benefits associated with the use of agriculture contracts in the cattle, hog, and poultry industries. However, if there are large disparities in the bargaining power among contracting parties resulting from size differences between contracting parties or the use of market power by one of the contracting parties, the contracts may have detrimental effects on one of the contracting parties and may result in inefficiencies in the marketplace.

For example, a contract that ties a grower to a single purchaser of a specialized commodity or service, even if the contract provides for fair compensation to the grower, still leaves the grower subject to default risks should the contractor fail. Another example is a contract that covers a shorter term than the life of the capital (a poultry house, for example). The grower may face the hold-up risk that the contractor may require additional capital investments or may impose lower returns at the time of contract renewal. Hold-up risk is a potential market failure and is discussed in detail in the next section. These risks may be heightened when there are no alternative buyers for the grower to switch to, or when the capital investment is specific to the original buyer.[35] Some growers make substantial long-term capital investments as part of livestock or poultry production contracts, including land, poultry or hog houses, and equipment. Those investments may tie the grower to a single contractor or integrator. Costs associated with default risks and hold-up risks are important to many growers in the industry. The table below shows the number of integrators that broiler growers have in their local areas by percent of total farms and by total production.

TABLE 4—INTEGRATOR CHOICE FOR BROILER GROWERS[36]

Integrators in grower's area[37]	Percent of total			Can change to another integrator (percent of farms)
	Farms	Birds	Production	
Number:				
1	21.7	23.4	24.5	7
2	30.2	31.9	31.7	52
3	20.4	20.4	19.7	62
4	16.1	14.9	14.8	71
>4	7.8	6.7	6.6	77
No Response	3.8	2.7	2.7	Na

The data in the table show that 52 percent of broiler growers, accounting for 56 percent of total production, report having only one or two integrators in their local areas. This limited integrator choice may accentuate the contract risks. A 2006 survey indicated that growers facing a single integrator received 7 to 8 percent less compensation, on average, than farmers located in areas with 4 or more integrators.[38] If live poultry dealers already possess some market power to force prices for poultry growing services below competitive levels, some contracts can extend that power by raising the costs of entry for new competitors, or allowing for price discrimination.[39]

Many beef, pork, and poultry processing markets face barriers to entry, including; (1) Economies of scale; (2) high asset-specific capital costs with few alternative uses of the capital; (3) brand loyalty of consumers, customer loyalty to the incumbent processors, and high customer switching costs; and (4) governmental food safety, bio-hazard, and environmental regulations. Consistent with these barriers, there has been limited new entry.

However, an area where entry has been successful is in developing and niche markets, such as organic meat and free-range chicken. Developing and niche markets have a relatively small consumer market that is willing to pay higher prices, which supports smaller plant sizes. Niche processors are generally small, however, and do not offer opportunities to many producers or growers.

Economies of scale have resulted in large processing plants in the beef, pork, and poultry processing industries. The barriers to entry discussed above may have limited the entry of new processors, which limits the expansion of choice of processors to which livestock producers market their livestock. Barriers to entry also limit the expansion of choice for poultry growers who have only one or two integrators in their local areas with no potential entrants on the horizon. The limited expansion of choice of processors by livestock producers, swine production contract growers, and poultry growers may limit contract choices and the bargaining power of producers and growers in negotiating contracts.

One indication of potential market power is industry concentration.[40] The following table shows the level of concentration in the livestock and

[35] See Vukina and Leegomonchai, *Oligopsony Power, Asset Specificity, and Hold-Up: Evidence From The Broiler Industry, American Journal of Agricultural Economics,* 88(3): 589–605 (August 2006).

[36] MacDonald, James M. Technology, Organization, and Financial Performance in U.S. Broiler Production. USDA, Economic Research Service, June 2014.

[37] Percentages were determined from the USDA Agricultural Resource Management Survey (ARMS), 2011. ''Respondents were asked the number of integrators in their area. They were also asked if they could change to another integrator if they stopped raising broilers for their current integrator.'' Ibid. p. 30

[38] MacDonald, J. and N. Key. ''Market Power in Poultry Production Contracting? Evidence from a Farm Survey.'' *Journal of Agricultural and Applied Economics.* 44(4) (November 2012): 477–490.

[39] See, for example, Williamson, Oliver E. *Markets and Hierarchies: Analysis and Antitrust Implications,* New York: The Free Press (1975); Edlin, Aaron S. & Stefan Reichelstein (1996) ''Holdups, Standard Breach Remedies, and Optimal Investment,'' *The American Economic Review* 86(3): 478–501 (June 1996).

[40] For additional discussion see MacDonald, J.M. 2016 ''Concentration, contracting, and competition policy in U.S. agribusiness,'' *Competition Law Review,* No. 1–2016: 3–8.

poultry slaughtering industries for 2005–2015.

TABLE 5—FOUR-FIRM CONCENTRATION IN LIVESTOCK AND POULTRY SLAUGHTER [41]

Year	Steers & heifers (%)	Hogs (%)	Broilers (%)	Turkeys (%)
2005	80	64	n.a.	n.a.
2006	81	61	n.a.	n.a.
2007	80	65	57	52
2008	79	65	57	51
2009	86	63	53	58
2010	85	65	51	56
2011	85	64	52	55
2012	85	64	51	53
2013	85	64	54	53
2014	83	62	51	58
2015	85	66	51	57

The table above shows the concentration of the four largest steer and heifer slaughterers has remained relatively stable between 79 and 86 percent since 2005. Hog and broiler slaughter concentration has also remained relatively steady at over 60 percent and 50 percent, respectively.

The data in Table 5 are estimates of national concentration and the size differences discussed below are also at the national level, but the economic markets for livestock and poultry may be regional or local, and concentration in regional or local areas may be higher than national measures. For example, while poultry markets may appear to be the least concentrated in terms of the four-firm concentration ratios presented above, economic markets for poultry growing services are more localized than markets for fed cattle or hogs, and local concentration in poultry markets is greater than in hog and other livestock markets.[42] The data presented earlier in Table 4 highlight this issue by showing the limited ability a poultry grower has to switch to a different integrator. As a result, national concentration may not demonstrate accurately the options poultry growers in a particular region actually face.

Empirical evidence does not show a strong or simple relationship between increases in concentration and increases in market power. Other factors matter, including the ease of entry by new producers into a concentrated industry and the ease with which retail food buyers or agricultural commodity sellers can change their buying or marketing strategies in response to attempts to exploit market power.

For example, in 2009, the Government Accountability Office (GAO) reviewed 33 studies published since 1990 that were relevant for assessing the effect of concentration on commodity or food prices in the beef, pork, or dairy sectors.[43] Most of the studies found no evidence of market power, or found that the efficiency gains from concentration were larger than the market power effects. Efficiency gains would be larger if increased concentration led to reduced processing costs (likely to occur if there are scale economies [44] in processing), and if the reduced costs led to a larger effect on prices than the opposing impact of fewer firms. For example, with respect to beef processing, the GAO report concluded that concentration in the beef processing sector has been, overall, beneficial because the efficiency effects dominated the market power effects, thereby reducing farm-to-wholesale beef margins.

Several studies reviewed by the GAO did find evidence of market power in the retail sector, in that food prices exceeded competitive levels or that commodity prices fell below competitive levels. However, the GAO study also concluded that it was not clear whether market power was caused by concentration or some other factor. In interviews with experts, the GAO report concluded that increases in concentration may raise greater concerns in the future about the potential for market power and the manipulation of commodity or food prices.

Another factor GIPSA considered in proposing §§ 201.210 and 201.211 is the contrast in size and scale between livestock producers, swine production contract growers, and poultry growers and the packers, swine contractors, and live poultry dealers they supply. The disparity in size between large oligopsonistic buyers and atomistic sellers may lead to market power and asymmetric information. The 2012 Census of Agriculture reported 740,978 cattle and calf farms with 69.76 million head of cattle for an average of 94 head per operation. Ninety-one percent of these were family or individually-owned operations.[45] The largest one percent of cattle farms sold about 51 percent of the cattle sold by all cattle farms.

There were 33,880 cattle feeding operations in 2012 that sold 25.47 million head of fed cattle for an average of 752 head per feedlot. The 607 largest feedlots sold about 75 percent of the fed cattle, and averaged 32,111 head sold. About 80 percent of feedlots were family or individually owned.[46] As Table 5 shows, the four largest cattle packers processed about 85 percent, 25.47 million head, for an average of 5.41 million head per cattle packer. This means the average top four cattle packers had 57,574 times the volume of the average cattle farm, and 1,054 times the volume of the largest one percent of cattle farms. It also means the average top four cattle packers had 7,197 times the volume of the average feedlot, and

[41] The data on cattle and hogs were compiled from USDA's NASS data of federally inspected slaughter plants. Data on broilers and turkeys were compiled from Packers and Stockyards industry annual reports. Both data sources are proprietary.

[42] MacDonald and Key (2012) Op. Cit. and Vukina and Leegomonchai (2006) Op. Cit.

[43] United States Government Accountability Office. Concentration in Agriculture. GAO–09–746R. Enclosure II: Potential Effects of Concentration on Agricultural Commodity and Retail Food Prices.

[44] Scale economies are present when average production costs decrease as output increases.

[45] Census of Agriculture, 2012.

[46] Ibid.

169 times the volume of the very largest feedlots.

The USDA, National Agricultural Statistics Service 2012 livestock slaughter summary reported that in 2012, 113.16 million head of hogs were commercially slaughtered in the United States.[47] Table 5 shows that the top four hog packers processed about 64 percent of those hogs, which comes to an average of about 18.1 million head of hogs per top four packer. The 2012 Census of Agriculture reported 55,882 farms with hog and pig sales.[48] About 83 percent of the farms were family or individually owned. Of the 55,882 farms with hog and pig sales, 47,336 farms were independent growers raising hogs and pigs for themselves (sold an average of 1,931 head), 8,031 were swine production contract growers raising hogs and pigs for someone else (an average of 10,970 head per swine production contract grower), and 515 were swine contractors (sold an average of 38,058 head per swine contractor).[49]

The National Chicken Council states that in 2016, approximately 35 companies were involved in the business of raising, processing, and marketing chicken on a vertically integrated basis, while about 25,000 family farmers had production contracts with those companies.[50] That comes to about 714 family-growers per company. Collectively, the family-growers produced about 95 percent of the nearly 9 billion broilers produced in the United States in 2015. The other 5 percent were grown on company-owned farms. That means the average family-grower produced about 342,000 broilers. As Table 5 shows, the four largest poultry companies in the United States accounted for 51 percent of the broilers processed. That means the average volume processed by the four largest poultry companies was about 1.15 billion head, which was 3,357 times the average family grower's volume.

As the above discussion highlights, there are large size differences between livestock producers and meat packers. There are also large size differences between poultry growers and the live poultry dealers which they supply. These size differences may contribute to unequal bargaining power due to monopsony market power or oligopsony market power, or asymmetric information. The result is that the contracts bargained between the parties may have detrimental effects on livestock producers, swine production contract growers, and poultry growers due to the structural issues discussed above and may result in inefficiencies in the marketplace.

Hold-Up as a Potential Market Failure

Integrators demand investment in fixed assets from the growers. One example is specific types of poultry houses and equipment the integrator may require the grower to utilize in their growing operations. These investments may improve efficiency by more than the cost of installation. Typically, the improved efficiency would accrue to both the integrator and the grower. The integrator has lower feed costs, and the grower performs better relative to other poultry growers in a settlement group. If the grower bears the entire cost of installation, then the grower should be further compensated for the feed conversion gains that accrue to the integrator. The risk is that after the assets are installed, the cost to the grower is ''sunk.'' This means that if the integrator reneges on paying compensation for the additional capital investments, and insists on maintaining the lower price, the grower will accept that lower price rather than receive nothing. This allows the integrator to get the benefit of the efficiency gains, at no expense to them, with the grower bearing all of the cost. This reneging is termed ''hold-up'' in the economic literature.[51]

Hold-up can have two consequences that result in a misallocation of resources. If the growers do not anticipate hold-up, then growers will spend too much on investments because the integrator who demands them is not incurring any cost. That is inefficient. If the grower does anticipate hold-up, they will act as if the integrator were going to renege even when they were not, resulting in too little investment and a loss of potential efficiency gains.

Hold-up can be resolved with increased competition. If an integrator developed a reputation for reneging, and growers could go elsewhere, the initial integrator would be punished and disincentivized from reneging in the future. Unfortunately, in practice, many growers do not have the option of going elsewhere.

Data shown above in Table 4 indicate that there are few integrators in these markets, and that growers have limited choice. Table 5, above, indicates the level of concentration in the livestock and poultry slaughtering industries and shows that integrators and livestock packers operate in concentrated markets.

This rule would allow growers to file complaints against integrators that renege, giving some of the incentive benefit of competition, without compromising the efficiency of having a few large processors.

Contracting, Industry Structure, and Market Failure: Summary of the Need for Regulation

There are benefits of contracting in the livestock and poultry industries, as well as structural issues that may result in unequal bargaining power and market failures. These structural issues and market failures will be mitigated by relieving plaintiffs from the requirement to demonstrate competitive injury. For instance, contracting parties can alleviate hold-up problems if they are able to write complete contracts, and are able to litigate to enforce the terms of those contracts when there is an attempt to engage in ex-post hold-up. Because proving competitive injury is difficult and costly, removing that burden will facilitate the use of litigation by producers and growers to address violations of the Packers and Stockyards Act. If growers are able to seek legal remedies, then their contracts are easier to enforce. This will incentivize packers, swine contractors, and integrators to avoid exploitation of market power and asymmetric information, as well as behaviors that result in the market failure of hold-up. The result will be improved efficiency in the livestock and poultry markets.

GIPSA has a clear role to ensure that market failures are mitigated so that livestock and poultry markets remain fair and competitive. Section 201.3(a) seeks to fulfill that role by promoting fairness and equity for livestock producers, swine production contract growers, and poultry growers.

Costs of the Regulations Proposed on June 22, 2010

GIPSA issued a proposed rule on June 22, 2010, which included §§ 201.3, 201.210, and 201.211. GIPSA received and considered thousands of comments before finalizing § 201.3(a) and before proposing the current versions of §§ 201.210, and 201.211. The following provisions were proposed in 2010 but are not in § 201.3 or currently proposed §§ 201.210 and 201.211.

- Applicability to all stages of a live poultry dealer's poultry production, including pullets, laying hens, breeders, and broilers (§ 201.3(a)).

[47] Ibid.

[48] A pig is a generic term for a young hog.

[49] Agricultural Census, 2012.

[50] *http://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/.*

[51] See for example, Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, ''Vertical Integration, Appropriable Rents, and the Competitive Contracting Process,'' *The Journal of Law and Economics* 21, no. 2 (Oct., 1978): 297–326.

• Applicability to all swine production contracts, poultry growing arrangements and livestock production and marketing contracts, including formula and forward contracts (§ 201.3(b)).
• Requirement that packers, live poultry dealers, and swine contractors maintain records justifying differences in prices (§ 201.210(a)(5)).
• Provision prohibiting packers from purchasing livestock from other packers (§ 201.212(c)).
• Requirement that packers offer the same terms to groups of small producers as offered to large producers when the group can collectively meet the same quantity commitments (§ 201.211(a)).
• Requirement that packers refrain from entering into exclusive agreements with livestock dealers (§ 201.212(b)).
• Requirements that packers and live poultry dealers submit sample contracts to GIPSA for posting to the public (§ 201.213).

Although many thousands of the comments submitted contained general qualitative assessments of either the costs or benefits of the proposed rule, only two comments systematically described quantitative costs across the rule provisions. Comments from the National Meat Association (NMA) included cost estimates by Informa Economics (the Informa Study). The Informa Study projected costs of $880 million, $401 million, and $362 million for U.S. cattle and beef, hogs and pork, and poultry industries respectively.[52] However, these cost estimates were for all of the 2010 proposed changes, many of which do not apply. The Informa Study estimated $133.3 million to be one-time direct costs resulting from rewriting contracts, additional record keeping, etc.[53] The majority of the costs would be indirect costs. The Informa Study estimated $880.9 million in costs due to efficiency losses and $459.9 million in costs due to reduced demand caused by a reduction in meat quality resulting from fewer AMAs.

Comments from the National Chicken Council (NCC) included cost estimates prepared by Dr. Thomas E. Elam, President, FarmEcon LLC (the Elam Study).[54] The Elam Study estimated that the entire 2010 proposed rule would cost the chicken industry $84 million in the first year increasing to $337 million in the fifth year, with a total cost of $1.03 billion over the first five years.[55] The Elam Study identified $6 million as one-time administrative costs. Most of the costs would be indirect costs resulting from efficiency losses.[56] More than half of the costs would be due to a reduced rate of improvement in feed efficiency. Again, these cost estimates were for all of the 2010 proposed changes, many of which do not apply.

The Informa Study estimated that the proposed provision requiring packers to refrain from entering into exclusive agreements with livestock dealers would cost livestock auctions as much as $85.5 million.[57] Because GIPSA has no current plans to propose the ''exclusive agreements'' rule, those costs no longer apply. The Informa Study did not directly specify how much the estimates in the study attributed to each of the other provisions, but GIPSA expects that their omission will substantially reduce the cost of § 201.3(a).

Estimates of the costs in the Informa Study and the Elam Study were largely due to projections that packers, swine contractors, and live poultry dealers, would alter business practices in reaction to the proposed rule. For example, the Informa Study projected that packers would reduce the number and types of AMAs to avoid potential litigation,[58] and the Elam Study expected live poultry dealers to evaluate each load of feed delivered to growers to avoid litigation.[59]

The estimates from the Informa Study and the Elam Study may overstate costs because the studies relied on interviews of packers, swine contractors, live poultry dealers, and other stakeholders for much of the basis for the estimates of the willingness of packers, swine contractors, and live poultry dealers to alter their business practices. Moreover, neither study considered benefits from the proposed rule.

The Informa Study projected that the regulations proposed in 2010 would cause beef and pork packers to limit their involvement in vertical arrangements, and without those arrangements, they would not be able to produce the branded products they currently offer. The Informa Study projected that, as a result, beef and pork markets would lose $460 million, which is about half of the value added from branded products.[60]

GIPSA does not expect that the current § 201.3(a) would cause beef and pork markets to abandon half of the value added from branded products. Current § 201.3(a) does not prevent packers from offering quality incentives to hog or cattle feeders, and any vertical coordination among feeders and producers would be outside of GIPSA's jurisdiction.

Given the differences from the rule proposed in 2010, the estimates from the Elam Study likely overstated the costs of compliance to the poultry industry with current § 201.3(a) by at least $115 million over five years. The Informa Study estimates would overstate costs of compliance to the cattle, hog, and poultry industries with current § 201.3(a) by at least $500 million. If packers, swine contractors, and live poultry dealers overstated their willingness to alter their business practices, then the estimates could be overstated that much more.

Cost-Benefit Analysis of § 201.3(a)

Regulatory Alternatives Considered

Executive Order 12866 requires an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation and an explanation of why the planned regulatory action is preferable to the potential alternatives.[61] GIPSA considered three regulatory alternatives. The first alternative that GIPSA considered is the baseline to maintain the status quo and not finalize § 201.3(a). The second alternative that GIPSA considered is to issue § 201.3(a) as an interim final regulation. This is GIPSA's preferred alternative as will be explained below. The third alternative that GIPSA considered is issuing § 201.3(a) as an interim final regulation, but exempting small businesses, as defined by the Small Business Administration, from having to comply with the regulation.

Regulatory Option 1: Status Quo

If § 201.3(a) is never finalized, there are no marginal costs and marginal benefits as industry participants will not alter their conduct. From a cost standpoint, this is the least cost alternative compared to the other two alternatives. This alternative also has no marginal benefits. Since there are no changes from the status quo under this regulatory alternative, it will serve as the baseline against which to measure the other two alternatives.

[52] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Table 10, Page 53.

[53] Ibid. Page 53.

[54] See Elam, Dr. Thomas E. ''Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact.'' FarmEcon LLC, 2010.

[55] Ibid. Page 24

[56] Ibid. Page 24.

[57] Ibid. Page 49.

[58] Informa, page 30.

[59] Elam, page 18.

[60] Informa, pages 51 and 52.

[61] See Section 6(a)(3)(C) of Executive Order 12866.

Regulatory Alternative 2: The Preferred Alternative

Section 201.3(a) states that conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition. Given the applicability of the regulation to the entire livestock and poultry industries, it is difficult to predict how the industries will respond. Therefore, GIPSA believes that assigning a range to the expected costs of the regulation is appropriate.

At the lower boundary of the cost spectrum, GIPSA considers the scenario where the only costs are increased litigation costs and there are no adjustments by the livestock and poultry industries to reduce their use of AMAs or incentive pay systems, such as poultry grower ranking systems, and there are no changes to existing marketing or production contracts. For the upper boundary of the cost spectrum, GIPSA considers the scenario in which the livestock and poultry industries adjust their use of AMAs and incentive pay systems and makes systematic changes in its marketing and production contracts to reduce the threat of litigation.

A. Regulatory Alternative 2: Lower Boundary of Cost Spectrum—Litigation Costs of Preferred Alternative

GIPSA modeled the litigation costs by estimating the total cost of litigating a case filed under the jurisdiction of the P&S Act. The main costs are attorney fees to litigate a case in a court of law. Limited empirical data on actual historical litigation costs required GIPSA to use a cost engineering approach to estimate litigation costs. In considering the costs of the 2010 proposed rule, GIPSA, based on its expertise, assumed a cost of $3.5 million to litigate a case. GIPSA uses the same starting point here. The cost of litigating a case includes the costs to all parties including the respondent and the USDA in a case brought by the USDA and the costs of the plaintiff and the defendant in the case of private litigation.

GIPSA then examined the actual number of cases decided under the P&S Act from 1926 to 2014. The listing of court decisions and the court in which the decision was reached came from the National Agricultural Law Center at the University of Arkansas.[62] GIPSA then reviewed each case and classified it as either competition, financial, or trade practice cases. This is an internal classification system corresponding to the types of violations GIPSA investigates.

All of the cases were assigned a specific attorney fee based on a random sample from a normal distribution ranging between $250 thousand and $3.5 million for trade practice cases, $250 thousand to $3 million for financial cases, and $1.5 million to $5 million for competition cases. These ranges are based on GIPSA's expertise and the complexity of each type of case, with competition being the most complex and therefore the most costly to litigate. This expertise comes from GIPSA's experience litigating each type of case and monitoring private litigation under the P&S Act. GIPSA estimated the cost of litigating each case from 1926 to 2014 using the cost ranges outlined above.

GIPSA scaled the initial cost up or down based on the court making the decision and based on GIPSA's assumption that Supreme Court cases are more expensive than District court cases, which are more expensive than state court cases. For Supreme Court cases, GIPSA scaled up the cost by a factor of three. For District court cases, GIPSA left the costs unchanged except for the sole case litigated in the United States District Court for the District of Columbia, which GIPSA scaled up by a factor of 1.1. GIPSA scaled state courts down by a factor of 0.7.

After estimating the cost of each case, by case type, GIPSA averaged all cases decided each year to obtain an estimated annual average cost of litigation. GIPSA then conducted a Monte Carlo simulation by sampling from a normal distribution of estimated average annual litigation costs for each type of case to arrive at the final estimated annual average cost of litigating cases filed under the P&S Act.[63]

GIPSA recognizes the uncertainty in estimating litigation costs and conducted sensitivity analysis using a Monte Carlo simulation on the estimated average annual litigation costs. GIPSA used a normal distribution of estimated litigation costs and calculated estimated litigation costs at the 2.5th percentile (lower percentile) of the distribution, the mean (average), and the 97.5th percentile (upper percentile).

GIPSA then estimated a linear trend line through the data using the Ordinary Least Squares (OLS) linear regression technique and used the trend line to project the litigation costs for 2015–2017.[64] These are baseline litigation costs that GIPSA expects to occur without the regulation. The table below shows the estimated and projected baseline litigation costs for 2007–2017.[65]

TABLE 6—ESTIMATED AND PROJECTED BASELINE LITIGATION COSTS FOR 2007–2017[66]

Year	Lower percentile ($ millions)	Average ($ millions)	Upper percentile ($ millions)
2007	4.98	8.88	12.77
2008	2.16	5.12	8.08
2009	8.45	13.00	17.46
2010	6.82	11.25	15.60
2011	10.52	15.28	20.02
2012	6.49	10.10	13.81
2013	1.94	4.14	6.42
2014	3.56	6.74	10.03
2015	4.32	8.13	12.10
2016	4.45	8.28	12.31
2017	4.58	8.42	12.52

[62] *http://nationalaglawcenter.org/aglaw-reporter/case-law-index/packers-and-stockyards.* We note that this list is not exhaustive, but it is extensive.

[63] Monte Carlo simulation is a statistical technique that relies on repeated random sampling from a distribution to obtain numerical results.

[64] Ordinary least squares regression technique is a method for estimating the unknown parameters using an established statistical model based on existing data observations.

[65] The baseline litigation costs are those costs GIPSA expects to occur without implementation of § 201.3(a).

GIPSA then reviewed the complete history of all investigations conducted by its Packers and Stockyards Program since 2009 and separated out the investigations involving alleged violations of sections 202(a) and 202(b) of the P&S Act for cattle, hogs, and poultry because § 201.3(a) only applies to alleged violations of sections 202(a) and 202(b). The GIPSA investigation data are more robust, with more observations than the case data. There were never many cases in any given year. In addition, the data since 2009 are better predictors of the next ten years than cases that took place as far back as 1926.

Based on the history of investigations, GIPSA then allocated all of the projected baseline litigation costs for 2017 into section 202(a) and 202(b) violations for each species at the lower percentile, the average, and the upper percentile. These allocations appear in the tables below.

TABLE 7—ALLOCATION OF § 201.3(a) BASELINE LITIGATION COSTS FOR 2017 AT THE LOWER PERCENTILE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	1.00	0.65	2.01	3.66
202(b)	0.10	0.11	0.71	0.92
Total	1.10	0.76	2.72	4.58

TABLE 8—ALLOCATION OF § 201.3(a) BASELINE LITIGATION COSTS FOR 2017 AT THE AVERAGE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	1.84	1.20	3.70	6.73
202(b)	0.19	0.21	1.30	1.69
Total	2.02	1.41	4.99	8.42

TABLE 9—ALLOCATION OF § 201.3(a) BASELINE LITIGATION COSTS FOR 2017 AT THE UPPER PERCENTILE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	2.73	1.78	5.50	10.00
202(b)	0.28	0.31	1.93	2.52
Total	3.00	2.09	7.42	12.52

These allocations assume that all projected baseline litigation costs for 2017 will come only from section 202(a) and 202(b) violations. GIPSA then estimated the additional litigation costs the first full year the regulation is in place.

In order to estimate the additional expected litigation costs in 2017 assuming § 201.3(a) becomes effective in early 2017, GIPSA again utilized the complete history of all investigations conducted by its Packers and Stockyards Program since 2009. GIPSA based the additional litigation costs on the difference between the number of complaints received in 2015 on alleged conduct that may violate sections 202(a) and 202(b), by species, and the highest number of complaints GIPSA received in any year since 2009. By 2015, court decisions had established the requirement to demonstrate harm to competition, which likely resulted in fewer complaints of Section 202(a) and 202(b) violations, particularly in the poultry industry, than in previous years when this requirement was not fully realized by industry participants. GIPSA expects § 201.3(a) will result in additional new complaints filed with GIPSA that will be at the levels experienced between 2009 and 2015 before the requirement of harm to competition was fully realized. GIPSA tracks the number of complaints received through a complaint tracking system initiated in 2009. Thus, this difference, by species, is the increase in complaints GIPSA expects when the regulations are finalized. GIPSA then used these differences as scaling factors to estimate the litigation that GIPSA expects to occur in 2017, the first full year that § 201.3(a) becomes effective. The scaling factors appear in the table below:

TABLE 10—SCALING FACTORS FOR LITIGATION FROM § 201.3(a)

P&S Act section	Cattle	Hog	Poultry
202(a)	2.30	1.40	2.15
202(b)	2.30	1.20	2.15

[66] The litigation costs for 2007–2014 are estimated using Monte Carlo simulation at the lower percentile, the average, and the upper percentile and 2015–2017 are projected using the estimated trend lines using OLS and historical estimates. The cost of each case is measured using 2016 dollars.

The scaling factors run from 1.20 for hogs to 2.30 for cattle.

To finalize the estimated increase in litigation costs, GIPSA multiplied the scaling factors in the above table by the projected 2017 baseline litigation costs at the lower percentile, the average, and the upper percentile to arrive at the expected litigation costs in 2017. GIPSA then subtracted out the projected baseline litigation costs to arrive at the estimated additional litigation costs that GIPSA expects to occur assuming § 201.3(a) become effective in early 2017. These estimated litigation costs appear in the following tables.

TABLE 11—PROJECTED § 201.3(a) LITIGATION COSTS FOR 2017 AT THE LOWER PERCENTILE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	1.30	0.26	2.31	3.87
202(b)	0.13	0.02	0.81	0.97
Total	1.43	0.28	3.12	4.84

TABLE 12—PROJECTED § 201.3(a) LITIGATION COSTS FOR 2017 AT THE AVERAGE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	2.39	0.48	4.25	7.12
202(b)	0.24	0.04	1.49	1.77
Total	2.63	0.52	5.74	8.89

TABLE 13—PROJECTED § 201.3(a) LITIGATION COSTS FOR 2017 AT THE UPPER PERCENTILE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	3.55	0.71	6.32	10.58
202(b)	0.36	0.06	2.22	2.64
Total	3.91	0.77	8.54	13.22

GIPSA expects § 201.3(a) to result in an additional $4.84 million in litigation in 2017 at the lower percentile, $8.89 million in litigation in 2017 at the average, and $13.22 million in litigation in 2017 at the upper percentile. GIPSA also expects the majority of additional litigation to come from the poultry industry based on investigations GIPSA conducted from 2009 to 2015, many of which were based on industry complaints.

As discussed above, GIPSA considers the lower boundary of costs from § 201.3(a) to be increased litigation costs with no adjustments by the livestock and poultry industries to reduce their use of AMAs or incentive pay systems and no changes to existing marketing or production contracts. GIPSA also recognizes the uncertainty in estimating litigation costs and conducted a sensitivity analysis of litigation costs at the lower percentile, the average percentile, and the upper percentile. The sensitivity analysis shows that litigation may vary by as much as $8.38 million (upper percentile minus lower percentile). GIPSA believes the average litigation costs is the best available estimate of litigation costs and uses it as the lower boundary for the estimated litigation costs of § 201.3(a). The lower boundary cost estimates appear in the table below.

TABLE 14—LOWER BOUNDARY PROJECTED § 201.3(a) COSTS—PREFERRED ALTERNATIVE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	2.39	0.48	4.25	7.12
202(b)	0.24	0.04	1.49	1.77
Total	2.63	0.52	5.74	8.89

GIPSA estimates that § 201.3(a) will result in an additional $8.89 million in additional litigation in the livestock and poultry industries with $2.63 million in litigation in the cattle industry, $0.52 million in the hog industry, and $5.74 million in the poultry industry in the first full year § 201.3(a) would be in place.

B. Regulatory Alternative 2: Lower Boundary—Ten-Year Total Costs of the Preferred Alternative

To arrive at the estimated ten-year costs of § 201.3(a), GIPSA expects the litigation costs to be constant for the first five years while courts are setting precedents for the interpretation of § 201.3(a). GIPSA expects that case law with respect to the regulation will be settled after five years and by then, industry participants will know how GIPSA will enforce the regulation and how courts will interpret the regulation.

The effect of courts establishing precedents is that litigation costs will decline after five years as the livestock and poultry industries understand how the courts interpret the regulation.

To arrive at the estimated ten-year costs of § 201.3(a), GIPSA estimates that litigation costs for the first five years will occur at the same rate and at the same cost as in 2017. In the second five years, GIPSA estimates that litigation costs will decrease each year and return to the baseline in the sixth year after the courts have established precedents. GIPSA estimates this decrease in litigation costs to the baseline to be linear with the same decrease in costs each year. The total ten-year costs of § 201.3(a) at the lower boundary appears in the table below.

TABLE 15—LOWER BOUNDARY OF TEN-YEAR TOTAL COSTS OF § 201.3(a)

Year	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
2017	2.63	0.52	5.74	8.89
2018	2.63	0.52	5.74	8.89
2019	2.63	0.52	5.74	8.89
2020	2.63	0.52	5.74	8.89
2021	2.63	0.52	5.74	8.89
2022	2.19	0.43	4.79	7.41
2023	1.75	0.35	3.83	5.93
2024	1.31	0.26	2.87	4.44
2025	0.88	0.17	1.91	2.96
2026	0.44	0.09	0.96	1.48
Totals	19.70	3.90	43.07	66.67

Based on the analysis, GIPSA expects the lower boundary of the ten-year total costs of § 201.3(a) to be $66.67 million.

C. Regulatory Alternative 2: Lower Boundary—Net Present Value of Ten-Year Total Costs of the Preferred Alternative

The lower boundary ten-year total costs of § 201.3(a) in the table above show that the costs are constant in the first five years and then gradually decrease over the next five years. Costs to be incurred in the future are less expensive than the same costs to be incurred today. This is because the money that will be used to pay the costs in the future can be invested today and earn interest until the time period in which the cost is incurred. After the cost has been incurred, the interest earned will still be available.

To account for the time value of money, the costs of the regulation to be incurred in the future is discounted back to today's dollars using a discount rate. The sum of all costs discounted back to the present is called the net present value (NPV) of total costs. GIPSA relied on both a three percent and seven percent discount rate as discussed in Circular A–4.[67] GIPSA measured all costs using constant 2016 dollars.

GIPSA calculated the NPV of the ten-year total costs of the regulation using both a three percent and seven percent discount rate and the NPVs appear in the following table.

TABLE 16—NPV OF LOWER BOUNDARY OF TEN-YEAR TOTAL COST OF § 201.3(a)—PREFERRED ALTERNATIVE

Discount rate	Preferred alternative ($ millions)
3 Percent	58.62
7 Percent	50.03

GIPSA expects the NPV of the lower boundary of the ten-year total costs of § 201.3(a) to be $58.62 million at a three percent discount rate and $50.03 million at a seven percent discount rate.

D. Regulatory Alternative 2: Lower Boundary—Annualized NPV of Ten-Year Total Costs of the Preferred Alternative

GIPSA then annualized the NPV of the ten-year total costs (referred to as annualized costs) of § 201.3(a) at the lower boundary using both a three percent and seven percent discount rate as required by Circular A–4 and the results appear in the following table.[68]

TABLE 17—ANNUALIZED COSTS OF § 201.3(a)—PREFERRED OPTION

Discount rate	Preferred alternative ($ millions)
3 Percent	6.87
7 Percent	7.12

GIPSA expects the annualized costs of § 201.3(a) at the lower boundary to be $6.87 million at a three percent discount rate and $7.12 million at a seven percent discount rate.

E. Regulatory Alternative 2: Upper Boundary of Cost Spectrum—Preferred Alternative

As discussed above, the upper boundary of the cost spectrum occurs if the cattle, hog, and poultry industries adjust their use of AMAs and incentive pay systems and make systematic changes in their marketing and production contracts to reduce the threat of litigation. For the upper boundary cost estimate, GIPSA relied on the Informa Study and Elam Study. The Informa Study was prepared for the NMA and the Elam Study was prepared for the NCC. Both of these groups were opposed to the rule proposed on June 22, 2010 and GIPSA considers their studies to be upper boundary scenarios for meat and livestock industries and poultry industry costs.

GIPSA reviewed the Informa Study and the Elam Study and compared the provisions in the multiple proposed regulations in the June 22, 2010 rule against § 201.3(a). The Informa Study estimated both direct and indirect costs of the 2010 proposed rule. The Informa Study direct costs are estimates of actual costs of complying with all of the regulations proposed in 2010, such as new computer software and additional staff. The Informa Study estimated both direct one-time costs and on-going direct costs that would be incurred by the livestock industry each year. The Informa Study also estimated indirect costs to capture livestock and poultry industry adjustments to the 2010

[67] *https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.* Accessed on September 19, 2016.

[68] Ibid.

regulations. The Informa Study also included litigation costs.

The sources of indirect costs that the Informa Study estimated for the cattle industry are a reduction in production efficiencies due to a reduction in the use of AMAs and the corresponding reduction in premiums paid in branded beef programs and a reduction in beef quality. The RTI Study also found that hypothetical reductions in AMAs would reduce beef and cattle supplies, reduce the quality of beef, and increase retail and wholesale beef prices.[69]

For the hog industry, the Informa Study estimated the indirect costs as the reduction in operational efficiency from operating slaughter plants at less than full optimal utilization as well as revenue losses due to reductions in quality from reductions in premiums paid for higher quality hogs procured under AMAs.

For the poultry industry, the Informa Study estimated indirect costs resulting from a slowdown in the adoption of new technology that increases efficiency as integrators are unwilling to provide monetary incentives for growers to invest in new technology due to the threat of litigation for unfair, unjustly discriminatory, or deceptive payment practices.

The Informa Study recognized that the economic costs of the 2010 rule would take time to materialize. The Informa Study estimated that only the direct, one-time costs would occur shortly after implementation of the regulations in the 2010 rule and the more significant impacts, such as declining efficiency and quality degradation, would happen more slowly and might not reach the full impact until three or four years after the rule became effective.[70] The Informa Study further recognized that companies would find ways to adapt to the provisions of the regulation in the rule and the impact of the rule would be lessened over time.[71] The following table summarizes the full-impact of the Informa Study cost estimates on the impact of the June 22, 2010 proposed rule.

TABLE 18—TOTAL INFORMA STUDY COSTS FOR THE FULL-IMPACT YEAR[72]

	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
One-Time Direct Costs	38.7	68.7	26.0	133.4
Ongoing Direct Costs	61.5	73.8	33.4	168.7
Cost Increase Due to Efficiency Loss	401.9	176.7	302.2	880.8
Revenue Lost Due to Quality/Demand Impact	377.7	82.2	0.0	459.9
Total Informa Costs	879.8	401.4	361.6	1,642.8

At the full impact level, the Informa Study estimated the highest cost to be borne by the cattle industry at almost $880 million, followed by the hog and poultry industries. The Informa Study estimated that the total costs of the regulations proposed in 2010 could be as high as $1.64 billion and that this cost would not be fully borne until three or four years after implementation of the regulations.

The Elam Study estimated a similar impact on the poultry industry as the Informa Study. The Elam Study estimated that the costs of the 2010 proposed rule would increase over time and would cost the chicken industry $200.64 million in the third year after implementation, $266.94 in the fourth year, and $336.67 million in the fifth year, with a total cost of $1.03 billion over the first five years.[73] The Elam Study estimated $6 million as one-time administrative costs from re-drafting poultry grower contracts, additional record keeping, and submission of contracts to GIPSA.[74] The remainder of the costs estimated in the Elam Study were indirect costs resulting from efficiency losses and costs of testing and evaluating feed.

GIPSA expects the livestock and poultry industries to adapt to § 201.3(a) after a period of five years when the courts have presumably settled the case law and the livestock and poultry industries know how courts will interpret the regulation. This will cause the costs of § 201.3(a) to decline after a period of five years. GIPSA expects the livestock and poultry industries to adjust their business practices in a way to maximize profits and lessen the impact of the regulation over time.

GIPSA also compared the estimated impact on the poultry industry in the first five years as estimated in the Informa Study and the Elam Study. In the first four years, the poultry costs estimated in the Informa Study are higher than those estimated in the Elam Study. The Elam study has higher cost estimates in year five. Because the Informa Study cost estimates are higher than the Elam Study cost estimates and the Informa Study cost estimates decline in the later years as GIPSA expects, GIPSA relies on the Informa Study cost estimates to estimate the upper boundary of the costs of § 201.3(a).

1. Regulatory Alternative 2: Upper Boundary-Informa Study Estimates—Adjustment 1

In order to arrive at the upper boundary estimate of the costs of § 201.3(a), GIPSA made several downward adjustments to the Informa Study estimates presented in Table 18 above. The first adjustment is to reduce the Informa Study cost estimates by 25 percent. The Informa Study implicitly asserted that 75 percent of the total costs of the 2010 rule were caused by relieving the plaintiff of the burden of proving competitive injury.[75] Thus, the Informa Study implicitly asserted that provisions in regulations in the 2010 proposed rule other than § 201.3(a) are responsible for 25 percent of the total costs. Because GIPSA is only concerned with costs attributable to § 201.3(a), GIPSA is reducing the Informa Study cost estimates by 25 percent.

[69] RTI International, 2007, GIPSA Livestock and Meat Marketing Study. Prepared for Grain Inspection, Packers and Stockyard Administration.

[70] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Page 66.

[71] Ibid, Page 67.

[72] Ibid, Tables 7, 8, and 9.

[73] Elam, Dr. Thomas E. ''Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact.'' FarmEcon LLC, 2010, Table on Page 25.

[74] Ibid. Page 21.

[75] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Page 71.

2. Regulatory Alternative 2: Upper Boundary-Informa Study Estimates—Adjustment 2

The second downward adjustment that GIPSA made is to scale the Informa Study's estimates according to the timing of the economic impact the Informa Study estimated. The Informa Study expected the costs to increase in the first three years, peak in years three or four, and then decline through year ten. In order to simulate the costs that the Informa Study assigned to each year, GIPSA adjusted the costs in the full impact year in Table 18 above by the percentages listed in Table 19.

TABLE 19—IMPACT LEVEL OF INFORMA STUDY COSTS [76]

Year	Cattle (%)	Hog (%)	Poultry (%)
2017	40	29	49
2018	69	59	79
2019	100	79	100
2020	100	100	100
2021	100	96	81
2022	91	75	60
2023	75	54	30
2024	51	53	9
2025	38	29	9
2026	38	29	9

GIPSA then weighted the Informa Study's full-impact cost estimate for each year and each industry by the impact level from the table above.

3. Regulatory Alternative 2: Upper Boundary-Informa Study Estimates—Adjustment 3

The final downward adjustment GIPSA made is based on two factors. The first factor is that GIPSA expects the language in § 201.3(a) to result in limited industry adjustments and a continued role for the courts to interpret when a showing of harm or likelihood of harm to competition is necessary in order to prove a violation of section 202(a) or (b) of the P&S Act. The second factor is the fact that the courts have historically not required a showing of harm or likelihood of harm to competition in all livestock and poultry cases and GIPSA expects that trend to continue. GIPSA discusses the factors in turn and then estimates the third and final adjustment to the Informa Study estimates.

The first factor is that § 201.3(a) states that a finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. However, § 201.3(a) does not provide any guidance regarding the types of conduct or action where a finding of harm or likelihood of harm would or would not be necessary to prove a violation of section 202(a) or (b) of the P&S Act.[77] It is possible that without the guidance in the proposed regulations, courts will continue to exercise judicial discretion in determining when a finding of harm or likelihood of harm to competition is necessary in order to prove a violation of sections 202(a) and/or (b). However, this rule will provide the longstanding position of the Department of Agriculture for the courts to consider. Because some of the U.S. Courts of Appeals in areas of heavy agricultural production have ruled that GIPSA must demonstrate competitive injury or the likelihood of competitive injury in order to prove that certain conduct or action violates section 202(a) and (b), GIPSA anticipates that the federal district courts in those circuits will continue to apply this binding case law.

GIPSA acknowledges that final § 201.3(a) may motivate some private plaintiffs to file new lawsuits under sections 202(a) and/or 202(b) to test its parameters in an attempt to move courts to find in selected cases that harm or likely harm to competition need not be proven. If a U.S. Court of Appeals upholds a district court ruling that competitive harm or likelihood of competitive harm must be demonstrated in order to prove a violation of section 202(a) or (b), that result would not involve any change from the status quo of section 202(a) and 202(b) litigation. Packers, swine contractors, and live poultry dealers would have no reason to adjust their contracts or business practices with the result of few additional indirect costs being borne by the livestock and poultry industries. Similarly, plaintiffs would then need to consider the high costs (in terms of discovery of large amounts of data and the hiring of economic and statistical experts) to proceed to trial and may opt not to proceed with additional litigation.[78]

GIPSA expects the effects of § 201.3(a) on livestock and poultry industry participants to be mixed. A small number of livestock producers, swine production contract growers, and poultry growers may seek judicial enforcement of their rights under the P&S Act without showing harm or likely harm to competition. However, due to the uncertain outcome of litigation under sections 202(a) and/or 202 (b), GIPSA expects packers, swine contractors, and live poultry dealers will likely take a ''wait and see'' approach prior to making any significant changes in their business models, marketing arrangements, or other practices. Concerned with net profit and reports to stockholders or owners, such firms will rationally forego any large changes in their operations until it is clear that such changes are legally required. If such changes are not required, due to status quo rulings by courts requiring proof of competitive

[76] The Informa Study estimates are for years one through ten beginning with the first year of the implementation of the rule and are not specific to any one year. GIPSA uses 2017 as year one and 2026 as year ten. The Informa Study stated that in particular, the decline in beef and pork quality and subsequent damage to consumer demand will take time to materialize, while the efficiency losses in poultry would likely happen sooner, but will still be delayed. This is presumably because the breeding cycle for hogs and especially for cattle is longer than that for poultry.

[77] Proposed regulations 201.210 and 201.211 provide conduct and criteria for 202(a) and 202(b) violations.

[78] In the *Been* v. *O.K. Indus., Inc.* litigation, the plaintiffs' economic expert billed for more than 3,000 hours spent on economic analysis of data, building a monopsony case in accordance with the Tenth Circuit's 2007 opinion, writing reports, consulting with attorneys, and testifying at depositions and during the jury trial. The defendant's two economic experts presumably billed for a similarly significant amount of time.

injury or the likelihood of competitive injury, as GIPSA anticipates, then GIPSA expects that few changes will be made as a result of § 201.3(a).

GIPSA expects the status quo enforcement outcome of § 201.3(a) discussed above to be most likely in the cattle and hog industries. GIPSA has enforced the P&S Act and regulations against packers without proving harm or likelihood of harm to competition for decades, and the courts have upheld successful enforcement actions. It is primarily in the poultry industry that, the courts have declined to enforce, sections 202(a) and (b) of the P&S Act and regulations without a finding of harm or likelihood of harm to competition.

Therefore, due to the likelihood of status quo rulings, GIPSA estimates that the upper boundary cost estimate of the overall impact of § 201.3(a) on the cattle and hog industries will be considerably less than the Informa Study estimates after applying the first two adjustments.

The second factor is the recent outcome of cases decided under the P&S Act since 2000 and whether courts have required demonstration of harm or likely harm to competition. GIPSA examined the actual number of cases decided under the P&S Act from 2000 to 2014. This is the same listing of cases as in the estimation of litigation costs presented earlier, except that GIPSA only considered cases decided after 2000 to reflect the most current decisions reached by the courts. The listing of court decisions and the court in which the decision was reached came from the National Agricultural Law Center at the University of Arkansas.[79] GIPSA then reviewed each case since 2000 and classified it as either a competition, financial, or trade practice case. GIPSA then examined each case to determine which cases involved alleged violations of sections 202(a) and 202(b) and which of those cases the court required demonstration of harm or likelihood of harm to competition.

GIPSA found 22 cases which involved alleged violations of sections 202(a) and 202(b) and addressed the issue of demonstrating harm or likelihood of harm to competition. Of those 22 cases, GIPSA found that the courts required demonstration of harm or likelihood of harm to competition in eight cases and did not require demonstration of a harm or likelihood of harm to competition in 14 cases. However, these 14 cases where demonstration of harm or likelihood of harm to competition was not required were not evenly distributed among the cattle, hog, and poultry industries. Courts have only required a demonstration of harm or likelihood of harm to competition in 20 percent of the cases alleging violations of sections 202(a) and 202(b) in the cattle and hog industries since 2000. GIPSA found that the courts have required a demonstration of harm or likelihood of harm to competition in 50 percent of the cases alleging violations of sections 202(a) and 202(b) in the poultry industry since 2000. The fact that demonstration of harm or likelihood of harm to competition was not required in every case is consistent with § 201.3(a), which states that demonstration of harm or likelihood of harm to competition is not required in all cases. As these cases have all involved livestock packers, swine contractors, and live poultry dealers and are a matter of public record, GIPSA believes that packers, swine contractors, and live poultry dealers are already aware that courts have not required demonstration of a harm or likelihood of harm to competition in all cases. This is another reason why GIPSA expects packers, swine contractors, and live poultry dealers to likely take a ''wait and see'' approach.

Therefore, due to the likelihood of status quo rulings by courts and the rationality of livestock packers, swine contractors, and live poultry dealers to tend toward a ''wait and see'' approach, GIPSA estimates the upper boundary estimate to be between 20 percent of the Informa Study cattle and hog industry estimates, 50 percent of the Informa Study poultry industry estimate and zero percent of the Informa Study estimates after applying the first two adjustments. Zero percent would mean that there are no industry adjustments from § 201.3(a).

Given the uncertainty in how the industry will respond to § 201.3(a), GIPSA selected one half of 20 percent of the Informa Study estimates for cattle and hogs, one half of 50 percent of the poultry industry estimate from the Informa Study estimates as its point estimate. Thus, GIPSA applied ten percent of the cattle and hog Informa Study estimates and 25 percent of the poultry Informa Study estimates as its point estimate after applying the first two adjustments. The following table shows the estimated upper boundary costs for § 201.3(a) on an annual and ten-year cost basis based on the adjusted Informa Study cost estimates.

TABLE 20—UPPER BOUNDARY ANNUAL COSTS OF § 201.3(a)—PREFERRED ALTERNATIVE

Year	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
2017	28.14	12.49	35.87	76.49
2018	43.67	14.68	49.78	108.13
2019	63.08	19.82	62.93	145.82
2020	63.08	24.95	62.93	150.96
2021	63.08	23.85	50.72	137.65
2022	57.26	18.71	37.57	113.54
2023	47.55	13.58	18.78	79.92
2024	32.03	13.21	5.64	50.87
2025	24.26	7.34	5.64	37.24
2026	24.26	7.34	5.64	37.24
Totals	446.42	155.97	335.47	937.86

At the upper boundary in the first full year after implementation, GIPSA estimates that § 201.3(a) will result in an additional $76.49 million in direct and indirect costs in the livestock and poultry industries, with $28.14 million in the cattle industry, $12.49 million in the hog industry, and $35.87 million in the poultry industry. GIPSA expects the

[79] *http://nationalaglawcenter.org/aglaw-reporter/case-law-index/packers-and-stockyards.*

upper boundary of the ten-year total cost of § 201.3(a) to be $937.86 million.

F. Regulatory Alternative 2: Upper Boundary—NPV of Ten-Year Total Costs of the Preferred Alternative

GIPSA calculated the NPV of the ten-year total costs of the regulation using both a three percent and seven percent discount rate and the NPVs appear in the following table.

TABLE 21—NPV OF UPPER BOUNDARY OF TEN-YEAR TOTAL COST OF § 201.3(a)—PREFERRED ALTERNATIVE

Discount rate	Preferred option ($ millions)
3 Percent	818.97
7 Percent	692.49

GIPSA expects the NPV of the upper boundary of the ten-year total costs of § 201.3(a) to be $818.97 million at a three percent discount rate and $692.49 million at a seven percent discount rate.

G. Regulatory Alternative 2: Upper Boundary—Annualized Costs of the Preferred Alternative

GIPSA then annualized the costs of § 201.3(a) at the upper boundary using both a three percent and seven percent discount rate and the results appear in the following table.

TABLE 22—ANNUALIZED COSTS OF § 201.3(a)—PREFERRED OPTION

Discount rate	Preferred option ($ millions)
3 Percent	96.01
7 Percent	98.60

GIPSA expects the annualized costs of § 201.3(a) at the upper boundary to be $96.01 million at a three percent discount rate and $98.60 million at a seven percent discount rate.

H. Sensitivity Analysis of the Upper Boundary

In the section above, GIPSA explained that it chose 10 percent of the cattle and hog estimates from the Informa Study and 25 percent of the poultry estimate from the Informa Study as its point estimate for the upper boundary costs. Because of the uncertainty over the eventual impacts of this rule on industry behavior, GIPSA evaluates the sensitivity of its upper bound estimate to an alternative set of assumptions. GIPSA presents three alternative sets of assumptions for calculating the upper bound estimate.

For the first scenario, GIPSA applies the full adjustment to the Informa Study cost estimates, specifically, 20 percent for cattle and hogs and 50 percent for poultry. In that case, GIPSA's estimate of the upper bound would be twice as high as presented in the previous section. For the second scenario, § 201.3(a) is assumed to impact industry behavior for the poultry industry only, (that is, zero percent of the Informa Study estimate for cattle and hogs, and 25 percent of the estimate for poultry). In that scenario, the upper bound estimate would be the same as presented in Table 20, above, for poultry, and would be the lower boundary estimate for cattle and hogs as shown in Table 15. For a third scenario, all the Informa Study estimates are adjusted to zero assuming that there are no indirect costs of adjustment to the rule. In that case, the lower boundary estimate, only reflecting litigation costs, as shown in Tables 15 through 17 would be the result.

GIPSA calculated the NPV of the ten-year total costs of the regulation using both a three percent and seven percent discount rate for each of the three scenarios described above and the NPVs appear in the following table.

TABLE 23—SENSITIVITY ANALYSIS OF THE UPPER BOUNDARY ESTIMATE OF THE TEN-YEAR TOTAL COST OF § 201.3(a)—PREFERRED ALTERNATIVE—EXPRESSED IN NPV

Discount rate	Point estimate ($ millions)	Scenario 1 ($ millions)	Scenario 2 ($ millions)	Scenario 3 ($ millions)
3 Percent	818.97	1,637.94	319.43	58.62
7 Percent	692.49	1,384.98	276.18	50.03

Scenario 1: Adjustment to Informa of 20% for cattle and hogs, 50% for poultry.
Scenario 2: Adjustment to Informa of 0% for cattle and hogs, 25% for poultry.
Scenario 3: Adjustment to Informa of 0% for cattle and hogs, and poultry.

GIPSA then annualized the estimated costs of § 201.3(a) at the upper boundary for the three sensitivity scenarios using both a three percent and seven percent discount rate and the results appear in the following table.

TABLE 24—SENSITIVITY ANALYSIS OF THE UPPER BOUNDARY ESTIMATE OF THE TEN-YEAR TOTAL COST OF § 201.3(a)—PREFERRED ALTERNATIVE—ANNUALIZED

Discount rate	Point estimate ($ millions)	Scenario 1 ($ millions)	Scenario 2 ($ millions)	Scenario 3 ($ millions)
3 Percent	96.01	192.02	37.45	6.87
7 Percent	98.60	197.19	39.32	7.12

Scenario 1: Adjustment to Informa of 20% for cattle and hogs, 50% for poultry.
Scenario 2: Adjustment to Informa of 0% for cattle and hogs, 25% for poultry.
Scenario 3: Adjustment to Informa of 0% for cattle and hogs, and poultry.

I. Regulatory Alternative 2: Range of Annualized Costs of the Preferred Alternative

The following table shows the full range of the annualized costs of § 201.3(a) at both a three percent and seven percent discount rate.

TABLE 25—RANGE OF ANNUALIZED COSTS—PREFERRED OPTION

Discount rate	Lower boundary ($ millions)	Upper boundary ($ millions)
3 Percent	6.87	96.01
7 Percent	7.12	98.60

GIPSA estimates the annualized costs of § 201.3(a) will range from $6.87 million to $96.01 million at a three percent discount rate and from $7.12 million to $98.60 million at a seven percent discount rate.

J. Regulatory Alternative 2: Point Estimate of Annualized Costs of the Preferred Alternative

The range of potential costs is broad. The reason there is a broad range of potential costs is because § 201.3(a) has applicability to the livestock and poultry industries and it is difficult to predict how the industries will respond. If the industries do not change any of their current business practices, GIPSA expects additional litigation to be the only costs and the costs of the regulation will be closer to the lower boundary. If, however, the industries respond by reducing the use of AMAs and restricting their use of incentive pay, GIPSA expects the costs of the regulation to be closer to the upper boundary. Based on the uncertainty over how the industries will respond, GIPSA believes that the mid-point in the range of estimated annualized costs is the best available point estimate of the costs of § 201.3(a). The point estimate along with the lower and upper boundary estimates appear in the table below.

TABLE 26—POINT ESTIMATE OF ANNUALIZED COSTS—PREFERRED ALTERNATIVE

Discount rate	Lower boundary ($ millions)	Point estimate ($ millions)	Upper boundary ($ millions)
3 Percent	6.87	51.44	96.01
7 Percent	7.12	52.86	98.60

GIPSA expects the annualized costs of § 201.3(a) at the point estimate to be $51.44 million at a three percent discount rate and $52.86 million at a seven percent discount rate. Based on the discussion of GIPSA's expectation that the cattle, hog, and poultry industries will likely take a ''wait and see'' approach to how the courts will interpret § 201.3(a) and for courts to take a status quo approach, GIPSA believes the point estimates of the preferred alternative to be the best available estimates of the costs of § 201.3(a).

K. Regulatory Alternative 2: Sensitivity Analysis of Point Estimates of Annualized Costs

In its estimate of litigation costs presented above, GIPSA recognized the uncertainty in estimating litigation costs and conducted a sensitivity analysis. GIPSA estimated that the lower boundary of the first-year costs of § 201.3(a) were $4.84 million at the lower percentile, $8.89 million at the average percentile, and $13.22 million at the upper percentile.[80] GIPSA relied on the average estimate of litigation costs as the lower boundary of the litigation costs of § 201.3(a).

To consider the effects of the uncertainty in its estimation of litigation costs, GIPSA annualized its litigation costs estimates at the lower percentile, the average percentile, and the upper percentile and the results appear in the following table.

TABLE 27—ANNUALIZED RANGE OF ESTIMATED LITIGATION COSTS—PREFERRED ALTERNATIVE

Discount rate	Lower percentile ($ millions)	Average ($ millions)	Upper percentile ($ millions)
3 Percent	3.74	6.87	10.22
7 Percent	4.54	7.12	12.41

GIPSA then applied this uncertainty to its point estimates of the annualized costs of § 201.3(a) by subtracting the difference of the lower percentile of estimated litigation costs and the point estimate at both the three and seven percent discount rates and added the difference of the upper percentile of estimated litigation costs and the point estimate at both the three and seven percent discount rates. The results of the sensitivity analysis appear in the following table.

[80] See Tables 11–13 above.

TABLE 28—ANNUALIZED RANGE OF POINT ESTIMATES OF § 201.3(a)—PREFERRED ALTERNATIVE

Discount rate	Lower percentile ($ millions)	Point estimate ($ millions)	Upper percentile ($ millions)
3 Percent	49.87	51.44	53.11
7 Percent	51.57	52.86	55.50

GIPSA estimates that the point estimates of the annualized costs of § 201.3(a) will range from $49.87 million at the lower percentile to $53.11 million at the upper percentile using a three percent discount rate. At the seven percent discount rate, GIPSA estimates that the point estimate of the annualized costs will range from $51.57 million at the lower percentile to $55.50 million at the upper percentile. Given the size of the range between the upper and lower boundary of the estimated annualized costs, GIPSA's point estimate is not overly sensitive to the uncertainty in the estimated litigation costs. Thus, GIPSA believes the point estimates of the preferred alternative to be the best available estimate of the costs of § 201.3(a).

L. Regulatory Alternative 2: Benefits of the Preferred Alternative

GIPSA was unable to quantify the benefits of § 201.3(a). However, there are qualitative benefits of § 201.3(a) that merit discussion. The primary qualitative benefit of § 201.3(a) is ability of livestock producers, swine production contract growers, and poultry growers to have more protections and be treated more fairly, which may lead to more equitable contracts. A simple example is the inaccurate weighing of slaughter-ready poultry grown by a poultry grower for a live poultry dealer. The poultry grower is harmed if the true weight is above the inaccurate weight because the poultry grower's payment is typically tied to the poultry grower's efficiency in growing poultry, which in this case is artificially low due to the inaccurate weight of the live birds. The impact of this harm to the poultry grower is very small when compared to the entire industry and there is no discernable or provable harm to competition from this one instance. However because there is no discernible or provable harm or likely harm to competition, courts have been reluctant to find a violation of section 202(a) of the P&S Act in such a situation, despite the harm suffered by the individual poultry grower.

However, if similar, though unrelated, harm is experienced by a large number of poultry growers, the cumulative effect does result in a discernible and provable harm to competition. The individual harm is inconsequential to the poultry industry, but the sum total of all individual harm has the potential to be quite significant when compared to the poultry industry and therefore, courts have found harm or likely harm to competition in such a situation. Under proposed § 201.210(b)(8), failing to ensure accurate weights of live poultry, absent a legitimate business justification, will constitute an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) of the P&S Act. Whether or not the conduct harms or is likely to harm competition becomes irrelevant.

GIPSA expects § 201.3(a) to increase enforcement actions against live poultry dealers for violations of sections 202(a) and/or 202(b) when the conduct or action does not harm or is not likely to harm competition. Several appellate courts have disagreed with USDA's interpretation of the P&S Act that harm or likely harm to competition is not necessary in all cases to prove a violation of sections 202(a) and/or 202(b). In some cases in which the United States was not a party, these courts have concluded that plaintiffs could not prove their claims under sections 202(a) and/or (b) without proving harm to competition or likely harm to competition. One reason the courts gave for declining to defer to USDA's interpretation of the statute is that USDA had not previously enshrined its interpretation in a regulation. Interim final § 201.3(a) corrects the issue and courts may now give deference to USDA's interpretation.

GIPSA expects the result will be additional enforcement actions that will be successfully litigated and serve as a deterrent to violating sections 202(a) and/or 202(b). Benefits to the industries and the markets from additional enforcement will also arise from establishing parity of negotiating power between livestock producers, swine production contract growers, and poultry growers and packers, swine contractors, and live poultry dealers by reducing the ability to use market power with the resulting dead weight losses.[81]

Section 201.3(a) also provides additional protections for livestock producers, swine production contract growers, and poultry growers against unfair, unjustly discriminatory, and deceptive practices or devices and undue or unreasonable preferences, advantages, prejudices, or disadvantages since demonstration of harm to competition is required in all cases. GIPSA believes the standard articulated in § 201.3(a) is consistent with its mission ''[T]o protect fair trade practices, financial integrity, and competitive markets for livestock, meats, and poultry.'' [82] By making it clear that demonstration of harm or likely harm to competition is not necessary in all cases, this interim final rule promotes fairness and equity for livestock producers, swine production contract growers, and poultry growers.[83]

M. Regulatory Alternative 2: Cost-Benefit Summary of the Preferred Alternative

GIPSA estimates the annualized costs of § 201.3(a) to range from $6.87 million to $96.01 million at the three percent discount rate and from $7.12 million to $98.60 million at the seven percent discount rate. The range of potential costs is broad. GIPSA relied on its expertise to arrive at a point estimate range of expected annualized costs. GIPSA expects that the cattle, hog, and poultry industries will primarily take a ''wait and see'' approach to how courts will interpret § 201.3(a) and courts to take a status quo approach and only slightly adjust their use of AMAs and performance-based payment systems. GIPSA estimates that the annualized costs of § 201.3(a) will be $51.44 million at a three percent discount rate and $52.86 million at a seven percent discount rate based on an anticipated ''wait and see'' approach and industry adjustments.

[81] Nigel Key and Jim M. MacDonald discuss evidence for the effect of concentration on grower compensation in ''Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey'' selected paper American Agri. Economics Assn. meeting Orlando, FL, July 27–29, 2008.

[82] *https://www.gipsa.usda.gov/laws/law/PS_act.pdf.* Accessed on September 19, 2016.

[83] See additional discussion in Steven Y. Wu and James MacDonald (2015) ''Economics of Agricultural Contract Grower Protection Legislation,'' *Choices* 30(3): 1–6.

The primary benefit of § 201.3(a) is the increased ability for the enforcement of the P&S Act for violations of sections 202(a) and/or 202(b), which do not result in harm or likely harm to competition. This, in turn, will reduce instances of unfair, unjustly discriminatory, or deceptive practices or devices and undue or unreasonable preferences, advantages, prejudices, or disadvantages and increased efficiencies in the marketplace. The benefit of additional enforcement of the P&S Act will accrue to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers.

N. Regulatory Alternative 3: Small Business Exemption

The third regulatory alternative that GIPSA considered is issuing § 201.3(a) as an interim final regulation, but exempting small businesses, as defined by the Small Business Administration, from having to comply with it.[84] To estimate the expected costs of exempting small business, GIPSA relied on the percentage of small businesses in the cattle, hog, and poultry industries that are developed and presented in the Regulatory Flexibility Analysis section below.

To arrive at the estimated costs of § 201.3(a) based on exempting small businesses, GIPSA weighted the point estimates, lower boundary, and upper boundary of cost estimates by the percentage of cattle and hogs processed by packers that are large businesses and the percentage of contracts held by swine contractors and live poultry dealers that are large businesses. GIPSA estimates that small businesses account for 19.3 percent of the cattle slaughtered. For the hog industry, GIPSA estimates that small businesses slaughter 17.8 percent of hogs and that 65 percent of swine contractors are small businesses. GIPSA estimates that 10.27 percent of live poultry dealers are classified as small businesses.

O. Regulatory Alternative 3: Lower Boundary of Cost Spectrum—Litigation Costs of the Small Business Exemption

As discussed above, GIPSA considers the lower boundary of costs from § 201.3(a) to be increased litigation with no adjustments by the cattle, hog, and poultry industries to reduce their use of AMAs or incentive pay systems and there are no changes to existing marketing or production contracts. GIPSA used the average of the litigation cost estimates as the lower boundary for the estimated costs of § 201.3(a). GIPSA then weighted the lower boundary cost estimate under the preferred alternative by the percentage of large businesses in the cattle, hog, and poultry industries. The estimates appear in the table below. The preferred alternative is also shown for convenience.

TABLE 29—LOWER BOUNDARY ANNUAL TOTAL COSTS—SMALL BUSINESS EXEMPTION

Year	Preferred alternative ($ millions)	Small business exemption ($ millions)
2017	8.89	7.49
2018	8.89	7.49
2019	8.89	7.49
2020	8.89	7.49
2021	8.89	7.49
2022	7.41	6.24
2023	5.93	4.99
2024	4.44	3.74
2025	2.96	2.50
2026	1.48	1.25
Totals	66.67	56.16

At the lower boundary with a small business exemption, GIPSA estimates that § 201.3(a) will result in an additional $7.49 million in litigation costs in the cattle, hog, and poultry industries in the first full year following implementation. GIPSA expects the lower boundary of the ten-year total costs of § 201.3(a) with a small business exemption to be $56.16 million.

P. Regulatory Alternative 3: Lower Boundary—NPV of Total Costs of the Small Business Exemption

GIPSA calculated the lower boundary of the NPV of the ten-year total costs of the regulation under the small business exemption using both a three percent and seven percent discount and the NPVs appear in the following table. The preferred alternative is also shown for convenience.

TABLE 30—LOWER BOUNDARY NPV OF TEN-YEAR TOTAL COST—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	58.62	49.38
7 Percent	50.03	42.14

[84] See: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

GIPSA expects the NPV of the lower boundary of the ten-year total costs of § 201.3(a) under a small business exemption to be $49.38 million at a three percent discount rate and $42.14 million at a seven percent discount rate.

Q. Regulatory Alternative 3: Lower Boundary—Annualized Costs of the Small Business Exemption

GIPSA then annualized the NPV of the ten-year total costs of § 201.3(a) at the lower boundary using both a three percent and seven percent discount rate and the results appear in the following table. The preferred alternative is also shown for convenience.

TABLE 31—LOWER BOUNDARY OF ANNUALIZED COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	6.87	5.79
7 Percent	7.12	6.00

GIPSA expects the annualized costs of § 201.3(a) at the lower boundary with a small business exemption to be $5.79 million at a three percent discount rate and $6.00 million at a seven percent discount rate.

R. Regulatory Alternative 3: Upper Boundary of Cost Spectrum—Small Business Exemption

As discussed above, the upper boundary of the cost spectrum occurs if the cattle, hog, and poultry industries adjust their use of AMAs and incentive pay systems and make systematic changes in their marketing and production contracts to reduce the threat of litigation.

For the upper boundary cost estimates under the small business exemption, GIPSA weighted the upper boundary cost estimates under the preferred alternative by the percentage of large businesses in the cattle, hog, and poultry industries and the estimates appear in the table below. For convenience, the estimated costs of the preferred alternative are shown in addition to the costs of the small business exemption.

TABLE 32—UPPER BOUNDARY ANNUAL TOTAL COSTS—SMALL BUSINESS EXEMPTION

Year	Preferred alternative ($ millions)	Small business exemption ($ millions)
2017	76.49	60.08
2018	108.13	86.00
2019	145.82	115.60
2020	150.96	117.73
2021	137.65	106.32
2022	113.54	87.69
2023	79.92	60.87
2024	50.87	36.39
2025	37.24	27.68
2026	37.24	27.68
Totals	937.86	726.05

At the upper boundary with a small business exemption, GIPSA estimates that § 201.3(a) will result in an additional $60.08 million in direct and indirect costs in the cattle, hog, and poultry industries in the first full year following implementation. GIPSA expects the upper boundary of the ten-year total costs of § 201.3(a) with a small business exemption to be $726.05 million.

S. Regulatory Alternative 3: Upper Boundary—NPV of Ten-Year Total Costs of the Small Business Exemption

GIPSA calculated the upper boundary of the NPV of the ten-year total costs of the regulation under the small business exemption using both a three percent and seven percent discount and the NPVs appear in the following table. The preferred alternative is also shown for convenience.

TABLE 33—UPPER BOUNDARY NPV OF TEN-YEAR TOTAL COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	818.97	634.97
7 Percent	692.49	537.90

GIPSA expects the NPV of the upper boundary of the NPV of the ten-year total costs of § 201.3(a) under a small business exemption to be $634.97 million at a three percent discount rate and $537.90 million at a seven percent discount rate.

T. Regulatory Alternative 3: Upper Boundary—Annualized Costs of the Preferred Alternative

GIPSA then annualized the costs of § 201.3(a) at the upper boundary using both a three percent and seven percent discount rate and the results appear in the following table. The preferred alternative is also shown for convenience.

TABLE 34—UPPER BOUNDARY OF ANNUALIZED COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	96.01	74.44
7 Percent	98.60	76.58

GIPSA expects the annualized costs of § 201.3(a) at the upper boundary with a small business exemption to be $74.44 million at a three percent discount rate and $76.58 million at a seven percent discount rate.

U. Regulatory Alternative 3: Point Estimates—Annualized Costs of the Small Business Exemption

Using the same methodology, GIPSA also estimated the point estimates of the annualized costs of § 201.3(a) with a small business exemption using both a three percent and seven percent discount rate and the results appear in the following table. The preferred alternative is also shown for convenience.

TABLE 35—POINT ESTIMATE OF ANNUALIZED COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	51.44	40.11
7 Percent	52.86	41.29

GIPSA expects the annualized costs of § 201.3(a) at the point estimates with a small business exemption to be $40.11 million at a three percent discount rate and $41.29 million at a seven percent discount rate.

V. Regulatory Alternative 3: Range of Annualized Costs of the Small Business Exemption

The following table shows the range of the annualized costs of § 201.3(a) at both a three percent and seven percent discount rate under the small business exemption.

TABLE 36—RANGE OF ANNUALIZED COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Lower boundary ($ millions)	Point estimate ($ millions)	Upper boundary ($ millions)
3 Percent	5.79	40.11	74.44
7 Percent	6.00	41.29	76.58

GIPSA estimates the annualized costs of § 201.3(a) to range from $5.79 million to $74.44 million at the three percent discount rate and from $6.00 million to $76.58 million at the seven percent discount rate. The range of potential costs is broad and GIPSA relied on its expertise and the methodology discussed above to arrive at point estimates of the costs within the range that GIPSA expects to occur. GIPSA expects the most likely point estimates of annualized costs to be $40.11 million at a three percent discount rate and $41.29 million at a seven percent discount rate.

W. Regulatory Alternative 3: Benefits of the Small Business Exemption

The benefits of § 201.3(a) with a small business exemption are the same as in the preferred alternative except that the benefits for livestock producers, swine production contract growers, and poultry growers will only be captured by those livestock producers, swine production contract growers, and poultry growers selling or growing livestock and poultry for packers, swine contractors, and poultry dealers classified as large businesses.

X. Regulatory Alternative 3: Cost-Benefit Summary of the Small Business Exemption

GIPSA estimates the annualized costs of § 201.3(a) under a small business exemption to range from $5.79 million to $74.44 million at the three percent discount rate and from $6.00 million to $76.58 million at the seven percent discount rate. GIPSA expects the point estimates of the annualized costs to be $40.11 million at a three percent discount rate and $41.29 million at a seven percent discount rate.

Cost-Benefit Comparison of Regulatory Alternatives

The status quo option has zero marginal costs and benefits as GIPSA does not expect any changes in the cattle, hog, or poultry industries. GIPSA compared the annualized costs of the preferred alternative to the annualized costs of the small business exemption alternative by subtracting the annualized costs of the small business exemption alternative from the preferred alternative and the results appear in the following table.

TABLE 37—COSTS SAVINGS OF THE SMALL BUSINESS EXEMPTION ALTERNATIVE COMPARED TO THE PREFERRED ALTERNATIVE

Discount rate	Lower boundary ($ millions)	Point estimate ($ millions)	Upper boundary ($ millions)
3 Percent	1.08	11.33	21.57
7 Percent	1.12	11.57	22.01

The annualized cost savings of the small business exemption alternative is between $1.08 million and $21.57 million using a three percent discount rate and between $1.12 million and $22.01 million using a seven percent discount rate. At GIPSA's point estimates, the annualized costs of the small business exemption alternative is $11.33 million less than the preferred alternative using a three percent discount rate and $11.57 million less expensive using a seven percent discount rate.

The data presented in Table 4 above show that over 50 percent of broiler growers have only one or two integrators in their local area. This limited integrator choice may accentuate the risks of contracting. Poultry growers with contract growing arrangements with both small and large live poultry dealers face these risks.

Similarly, the potential market failures or unequal bargaining power among contracting parties due to monopsony or oligopsony market power or asymmetric information likely applies to both production and marketing contracts regardless of whether the packer, swine contractor, or live poultry dealer is large or small due to the regional nature of concentration. The result is that the contracts may have detrimental effects on one of the contracting parties and may result in inefficiencies in the marketplace.

One purpose of § 201.3(a) is to mitigate the risks of potential market failures or unequal bargaining power to all livestock producers, swine production contract growers, and poultry growers, not just the livestock producers, swine production contract growers, and poultry growers selling or growing livestock and poultry for large packers, swine contractors, and poultry dealers. The small business exemption would continue to subject the livestock producers, swine production contract growers, and poultry growers with contractual arrangements with small packers, swine contractors, and live poultry dealers to the contracting risks and potential market failures discussed above. GIPSA believes that the benefits of § 201.3(a) should be captured by all livestock producers, swine production contract growers, and poultry growers.

GIPSA considered three regulatory alternatives and believes the preferred alternative is the best option. All livestock producers, swine production contract growers, and poultry growers, regardless of the size of the firm with which they contract, will capture the benefits of § 201.3(a).

Regulatory Flexibility Analysis of the Preferred Option

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).[85] SBA considers broiler and turkey producers and swine contractors, NAICS codes 112320, 112330, and 112210 respectively, to be small businesses if sales are less than $750,000 per year. Live poultry dealers, NAICS 311615, are considered small businesses if they have fewer than 1,250 employees. Beef and pork packers, NAICS 311611, are defined as small businesses if they have fewer than 1,000 employees.

The Census of Agriculture (Census) indicates there were 558 farms that sold their own hogs and pigs in 2012 and that identified themselves as contractors or integrators. The Census provides the number of head sold from their own operations by size classes for swine contractors, but not the value of sales nor number of head sold from the farms of the contracted production. Thus, to estimate the entity size and average per-entity revenue by the SBA classification, the average value per head for sales of all swine operations is multiplied by production values for firms in the Census size classes for swine contractors. The estimates reveal that although about 65 percent of swine contractors had sales of less than $750,000 in 2012 and would have been classified as small businesses, these small businesses accounted for only 2.8 percent of the hogs produced under production contracts. Additionally, there were 8,031 swine producers in 2012 with swine contracts and about half of these producers would have been classified as small businesses.

Currently, there are 133 live poultry dealers that would be subject to § 201.3(a). According to U.S. Census data on County Business Patterns, there were 74 live poultry dealers that had more than 1,250 employees in 2013. The difference yields approximately 59 live poultry dealers that have fewer than 1,250 employees and would be considered as small businesses that would be subject to the interim final regulation.

GIPSA records for 2014 indicated there were 21,925 poultry production contracts in effect, of which 13,370, or 61 percent, were held by the largest six live poultry dealers, and 90 percent (19,673) were held by the largest 25 firms. These 25 firms are all in the large business SBA category, whereas the 21,925 poultry growers holding the other end of the contracts are almost all small businesses by SBA's definitions.

Poultry dealers classified as large businesses are responsible for about 89.7 percent of the poultry contracts. Assuming that small businesses will bear 10.3 percent of the costs in the first full year § 201.3(a) is effective, between $590,000[86] at the lower boundary and $3.7 million[87] at the upper boundary in additional costs would fall on live poultry dealers classified as small businesses. This amounts to average

[85] See: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.* Accessed on September 19, 2016.

[86] Lower bound cost estimate of $5.74 million (Table 12) × 10.27 percent of firms that are small businesses = $589 thousand.

[87] Upper bound cost estimate of $35.87 million (Table 20) × 10.27 percent of firms that are small businesses = $3.7 million.

estimated costs for each live poultry dealer classified as a small business of between $10,000 and $62,400.

As of June 2016, GIPSA records identified 359 beef and pork packers actively purchasing cattle or hogs for slaughter. Many firms slaughtered more than one species of livestock. Of the 359 beef and pork packers, 161 processed both cattle and hogs, 132 processed cattle but not hogs, and 66 processed hogs but not cattle. GIPSA records had a total of 293 cattle slaughterers and 227 hog slaughterers. Two hundred eighty-seven of the cattle slaughterers and 219 of the hog slaughterers would be classified as small businesses.

GIPSA estimates that small businesses accounted for 19.3 percent of the cattle and 17.8 percent of the hogs slaughtered in 2015. If the costs of implementing § 201.3(a) are proportional to the number of head processed, then in 2017, the first full year the regulation would be effective, GIPSA expects between $507,000 [88] and $5.4 million [89] in additional costs would fall on beef packers classified as small businesses. This amounts to a range of $1,800 to $18,900 for each beef packer classified as a small business. GIPSA expects, between $13,000 [90] and $308,000 [91] would fall on pork packers classified as small businesses, and between $12,500 [92] and $301,000 [93] would fall on swine contractors classified as small businesses. This amounts to average estimated costs for each pork packer classified as a small business of between $60 and $1,400, and for each swine contractor classified as a small business of between $35 and $831 in the first full year the regulation would be effective.

Annualized ten-year costs discounted at a three percent interest rate would fall between $392,000 and $8.7 million for the cattle industry, between $20,000 and $772,000 for the hog industry, and between $456,000 and $3.6 million for the poultry industry. This amounts to average estimated costs ranging from $1,400 to $30,400 for each beef packer, $45 to $1,800 for each pork packer, $27 to $1,053 for each swine contractor, and $7,700 to $61,000 for each live poultry dealer that is a small business. The total annualized ten-year costs for small businesses would be between $870,000 and $13.1 million.

Annualized ten-year costs discounted at a seven percent interest rate would fall between $406,000 and $8.8 million for the cattle industry, $20,000 and $785,000 for the hog industry, and $473,000 and $3.8 million for the poultry industry. This amounts to average estimate costs ranging from $1,400 to $30,700 for each beef packer, $40 to $1,800 for each pork packer, $23 to $1,100 for each swine contractor, and $8,000 to $64,100 for each live poultry dealer that is a small business. The total annualized ten-year costs for small businesses would be between $900,000 and $13.4 million.

The table below lists the expected additional costs associated with the proposed regulation and upper and lower bound estimates of the costs. It also lists the point estimate, upper bound, and lower bound annualized costs at three percent and seven percent interest rates.

TABLE 38—UPPER AND LOWER BOUND COSTS TO SMALL BUSINESSES OF § 201.3(a)

Estimate type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
First Year Costs:				
Lower Bound	0.507	0.025	0.590	1.122
Point Estimate	2.969	0.317	2.137	5.423
Upper Bound	5.430	0.609	3.684	9.723
10 years annualized at 3%:				
Lower Bound	0.392	0.020	0.456	0.867
Point Estimate	4.554	0.396	2.026	6.976
Upper Bound	8.716	0.772	3.596	13.084
10 years annualized at 7%:				
Lower Bound	0.406	0.020	0.473	0.899
Point Estimate	4.613	0.403	2.126	7.142
Upper Bound	8.820	0.785	3.780	13.385

In considering the impact on small businesses, GIPSA considered the average costs and revenues of each small business impacted by § 201.3(a). The number of small businesses impacted by § 201.3(a), by NAICS code, as well as the per entity, first-year and annualized costs at both the three percent and seven percent discount rates appear in the following table.

[88] Lower bound cost estimate of $2.63 million × 19.3 percent of slaughter in small businesses = $507 thousand.

[89] Upper bound cost estimate of $28.14 million × 19.3 percent of slaughter in small businesses = $5.4 million.

[90] Lower bound cost estimate of $520 thousand × 17.8 percent of slaughter in small business × 13.8 percent of costs attributed to packers = $13,000.

[91] Upper bound cost estimate of $12.49 million × 17.8 percent of slaughter in small business × 13.8 percent of costs attributed to packers = $308 thousand.

[92] Lower bound cost estimate of $520 thousand × 2.8 percent of contracted hogs produced by swine contractors that are small businesses × 86.2 percent of costs attributed to swine contractors = $12,500.

[93] Upper bound cost estimate of $12.49 million × 2.8 percent of contracted hogs produced by swine contractors that are small businesses × 86.2 percent of costs attributed to swine contractors = $301 thousand.

TABLE 39—PER ENTITY UPPER AND LOWER BOUND COSTS TO SMALL BUSINESSES OF § 201.3(a)

NAICS	Number of small business	Average cost per entity					
		First-year		Annualized costs 3%		Annualized costs 7%	
		Low ($)	High ($)	Low ($)	High ($)	Low ($)	High ($)
112210—Swine Contractor	363	35	831	27	1,053	23	1,071
311615—Poultry	59	9,996	62,443	7,727	60,957	8,010	64,066
311611—Cattle	287	1,767	18,920	1,366	30,369	1,416	30,732
311611—Hogs	219	59	1,405	45	1,781	47	1,811

The following table compares the average per entity first-year cost of § 201.3(a) to the average revenue per establishment for all firms in the same NAICS code.

TABLE 40—COMPARISON OF PER ENTITY FIRST-YEAR COST TO SMALL BUSINESSES OF § 201.3(a) TO REVENUES

NAICS	Number of small business	Average first-year cost per entity		Average revenue per establishment ($)	Cost as percent of revenue	
		Low ($)	High ($)		Low	High
112210—Swine Contractor	363	35	831	485,860	0.01	0.17
311615—Poultry	59	9,996	62,443	13,842,548	0.07	0.45
311611—Cattle	287	1,767	18,920	6,882,205	0.03	0.27
311611—Hogs	219	59	1,405	6,882,205	0.00	0.02

The following table compares the average per entity annualized cost at a seven percent discount rate of § 201.3(a) to the average revenue per establishment for all firms in the same NAICS code. The annualized costs are slightly higher at the seven percent rate than at the three percent rate, so only the seven percent rate is shown as it is the higher annualized cost.

TABLE 41—COMPARISON OF PER ENTITY ANNUALIZED COST TO SMALL BUSINESSES OF § 201.3(a) TO REVENUES

NAICS	Number of small business	Average annualized cost per entity		Average revenue per establishment ($)	Cost as percent of revenue	
		Low ($)	High ($)		Low (%)	High (%)
112210—Swine Contractor	363	23	1,071	485,860	0.00	0.22
311615—Poultry	59	8,010	64,066	13,842,548	0.06	0.46
311611—Cattle	287	1,416	30,732	6,882,205	0.02	0.45
311611—Hogs	219	39	1,811	6,882,205	0.00	0.03

The revenue figures in the above table come from Census data for live poultry dealers and cattle and hog slaughterers, NAICS codes 311615 and 311611, respectively.[94] As discussed above, the Census provides the number of head sold by size classes for farms that sold their own hogs and pigs in 2012 and that that identified themselves as contractors or integrators, but not the value of sales nor the number of head sold from the farms of the contracted production. Thus, to estimate average revenue per establishment, GIPSA used the estimated average value per head for sales of all swine operations and the production values for firms in the Census size classes for swine contractors

As the results in Tables 40 and 41 demonstrate, the costs of § 201.3(a) as a percent of revenue are small as they are less than one percent, with the exception of the upper boundary for swine contractors.[95]

Annualized costs savings of exempting small businesses would be between $870,000 and $13.1 million using a three percent discount rate and between $900,000 and $13.4 million using a seven percent discount rate. At GIPSA's point estimates, the annualized costs of the small business exemption alternative is $7.0 million less than the preferred alternative using a three percent discount rate and $7.1 million less expensive using a seven percent discount rate.

Exempting small businesses would continue to subject the livestock producers, swine production contract growers, and poultry growers with contractual arrangements with small packers, swine contractors, and live poultry dealers to the contracting risks and potential market failures discussed above. GIPSA believes that the benefits

[94] Source: *http://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html.* Accessed on November 29, 2016.

[95] There are significant differences in average revenues between swine contractors and cattle, hog, and poultry processors, resulting from the difference in SBA thresholds.

of § 201.3(a) should be captured by all livestock producers, swine production contract growers, and poultry growers.

Based on the above analyses regarding § 201.3(a), GIPSA certifies that this rule is not expected to have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). While confident in this certification, GIPSA acknowledges that individual businesses may have relevant data to supplement our analysis. We would encourage small stakeholders to submit any relevant data during the comment period.

B. Executive Order 12988

This interim final rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect, although in some instances they merely reiterate GIPSA's previous interpretation of the P&S Act. This interim final rule will not pre-empt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule. Nothing in this interim final rule is intended to interfere with a person's right to enforce liability against any person subject to the P&S Act under authority granted in section 308 of the P&S Act.

C. Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or the distribution of power and responsibilities between the Federal Government and Indian tribes.

Although GIPSA has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under Executive Order 13175, GIPSA offered opportunities to meet with representatives from Tribal Governments during the comment period for the proposed rule (June 22 to November 22, 2010) with specific opportunities in Rapid City, South Dakota, on October 28, 2010, and Oklahoma City, Oklahoma on November 3, 2010. All tribal headquarters were invited to participate in these venues for consultation. GIPSA has received no specific indication that the rule will have tribal implications and has received no further requests for consultation as of the date of this publication. If a Tribe requests consultation, GIPSA will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications herein are not expressly mandated by Congress.

D. Paperwork Reduction Act

This interim final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the federal government.

E. E-Government Act Compliance

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

List of Subjects in 9 CFR Part 201

Contracts, Livestock, Poultry, Trade practices.

For the reasons set forth in the preamble, we amend 9 CFR part 201 as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. Section 201.3 is amended by redesignating the existing text as paragraph (b), adding new paragraph (a), and adding a heading to paragraph (b) to read as follows:

§ 201.3 Applicability of regulations in this part.

(a) *Scope of sections 202(a) and (b) of the Act.* The appropriate application of sections 202(a) and (b) of the Act depends on the nature and circumstances of the challenged conduct or action. A finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. Certain conduct or action can be found to violate sections 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition.

(b) *Effective dates.* * * *

Larry Mitchell,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2016–30424 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 51

[Docket ID OCC–2016–0017]

RIN 1557–AE07

Receiverships for Uninsured National Banks

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is adopting a final rule addressing the conduct of receiverships for national banks that are not insured by the Federal Deposit Insurance Corporation (FDIC) (uninsured banks) and for which the FDIC would not be appointed as receiver. The final rule implements the provisions of the National Bank Act (NBA) that provide the legal framework for receiverships of such institutions. The final rule adopts the rule as proposed without change.

DATES: This final rule is effective on January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Mitchell Plave, Special Counsel, Legislative and Regulatory Activities Division, (202) 649–5490, or for persons who are deaf or hard of hearing, TTY, (202) 649–5597, or Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 649–5500, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Introduction

On September 13, 2016, the OCC published a proposed rule to implement the provisions of the NBA that provide the legal framework for receiverships for uninsured banks,[1] 12 U.S.C. 191—200,

[1] All Federal savings associations (FSAs), including trust-only FSAs, are required to be insured. For this reason, this final rule does not apply to FSAs, given that receiverships for FSAs would be conducted by the FDIC.

with comments due by November 14, 2016.[2] The OCC received 11 comments concerning the proposal. For the reasons discussed in section III of the **SUPPLEMENTARY INFORMATION**, the OCC is adopting the rule as proposed, without change.

II. Background

As of December 2, 2016, the OCC supervised 52 uninsured banks, all of which are national trust banks.[3] Uninsured national trust banks have fundamentally different business models compared to commercial and consumer banks and savings associations and therefore face very different types of risks. National trust banks typically have few assets on the balance sheet, usually composed of cash on deposit with an insured depository institution, investment securities, premises and equipment, and intangible assets. These banks exercise fiduciary and custody powers, do not make loans, do not rely on deposit funding, and consequently have simple liquidity management programs. In view of these differences, the OCC typically requires these banks to hold capital in a specific minimum amount; as a result they hold capital in amounts that exceed substantially the ''well capitalized'' standard that applies when national banks calculate their capital pursuant to the OCC's rules in 12 CFR part 3.

The business model of national trust banks is to generate income in the form of fees by offering fiduciary and custodial services that generally fall into one or more of a few broad categories. Some national trust banks focus on institutional asset management, providing trust and custodial services for investment portfolios of pension plans, foundations and endowments, and other entities, often with an investment management component. A few other national trust banks serve primarily as a fiduciary and custodian to facilitate the establishment of Individual Retirement Accounts by customers of an affiliated mutual fund complex or broker-dealer firm. Some national trust banks provide custodial services, such as corporate trust accounts, under which the bank performs services for others in connection with their issuance, transfer, and registration of debt or equity securities. Other custody accounts may be a holding facility for customer securities, where the bank assists institutional customers with global settlement and safekeeping of the customer's securities.

Many of the uninsured national trust banks are subsidiaries or affiliates of a full-service insured national bank or are affiliates of an insured state bank. Other uninsured national trust banks are not affiliated with an insured depository institution, but are affiliated with an investment management firm or other financial services firm. Still other uninsured national trust banks have no affiliation with a larger parent company.[4]

The OCC appoints and oversees receivers for uninsured banks under the provisions of the NBA [5] and the substantial body of case law applying the statutory provisions and common law receivership principles to national bank receiverships.[6] The FDIC is the required receiver only for an insured national (or state) bank.[7] Based on the statutory history of the NBA and FIRREA, it is likely that the Federal Deposit Insurance Act (FDIA) would not apply to an OCC receivership of an uninsured bank conducted by the OCC, and that such a receivership would be governed exclusively by the NBA, the common law of receivers, and cases applying the statutes and common law to national bank receiverships. While FIRREA and the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) greatly expanded the FDIC's powers in resolving failed insured depository institutions, the OCC believes that those additional powers are not available to the OCC as receiver of uninsured banks under the NBA.

The OCC has not appointed a receiver for an uninsured bank since shortly after the Congress established the FDIC in response to the banking panics of 1930–1933. National trust banks face very different types of risks because of the fundamentally different business model of national trust banks compared to commercial and consumer banks and savings associations. These risks include operational, compliance, strategic, and reputational risks without the credit and liquidity risks that additionally affect the solvency of commercial and consumer banks. While any of these risks can result in the precipitous failure of a bank or savings association, from a historical perspective, trust banks have been more likely to decline into a weakened condition, allowing the OCC and the institution the time needed to find other solutions for rehabilitating the institution or to successfully resolve the institution without the need to appoint a receiver.

The OCC believes it would nevertheless be beneficial to financial market participants and the broader community of regulators for the OCC to clarify the receivership framework for uninsured banks. Although the OCC conducted 2,762 receiverships pursuant to this framework in the years prior to the creation of the FDIC,[8] and the associated legal issues are the subject of a robust body of published judicial precedents, the details have not been widely articulated in recent jurisprudence or legal commentary. This final rule may also facilitate synergies with the ongoing efforts of U.S. and international financial regulators since the financial crisis to enhance our readiness to respond effectively to the different critical financial distresses that could manifest themselves unexpectedly in the diverse types of financial firms presently operating in the market.

III. Public Comments on the Proposed Rule

The OCC received 11 comments from the public in response to the OCC's notice of proposed rulemaking and the alternatives the OCC discussed therein. The commenters included individuals, a state trust company, and a think tank, as well as representatives of consumer groups, financial reform advocacy groups, state banking regulators, banking institutions, and bitcoin firms. These submissions offered issues and viewpoints about selected portions of the proposed rule's regulatory provisions for the OCC's consideration; these are discussed in connection with the discussion of the OCC's rationale for issuing the associated portions of the final rule, in Section III of this **SUPPLEMENTARY INFORMATION**.

[2] Receiverships for Uninsured National Banks, 81 FR 62835 (September 13, 2016) (Proposed Rule).

[3] The OCC may charter national banks whose operations are limited to those of a trust company and related activities (national trust bank). *See, e.g.*, 12 U.S.C. 27(a); 12 CFR 5.20(*l*).

[4] For additional discussion of the business model of uninsured national trust banks, *see* Proposed Rule, 81 FR at 62836–62837.

[5] 12 U.S.C. 191–200.

[6] For a discussion of the statutory history relating to receiverships of national banks conducted by the OCC, under the NBA, and by the FDIC, pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), *see* Proposed Rule, 81 FR at 62836.

[7] Section 11(c)(2)(A)(ii) of the FDIA provides that the FDIC ''shall'' be appointed receiver, and ''shall'' accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution by the appropriate Federal banking agency, notwithstanding any other provision of Federal law. 12 U.S.C. 1821(c)(2)(A)(ii). The term ''Federal depository institution'' includes national banks. 12 U.S.C. 1813(c)(4).

[8] *Annual Report of the Comptroller of the Currency for the Year Ended October 31, 1934* at 33 (discussing the status of active and closed receiverships under the jurisdiction of the Comptroller between 1865 and 1934).

As part of the notice of proposed rulemaking, the OCC also asked for the public's input on a number of specific questions and received comments on two of these questions. One question was whether any unique considerations would be raised by applying the proposed rule's framework for receivership of uninsured national banks, which are all national trust banks at present, to other uninsured banks that would be organized to engage in the delivery of banking services in new and innovative ways, such as special purpose national banks engaged in financial technology (fintech) activities.[9]

On this receivership framework question, two commenters expressed concerns that the earlier-established legal regime for receiverships under the NBA and associated judicial precedent does not include select elements subsequently created for insured depository institutions under FIRREA and FDICIA, and thus might not be as effective outside the trust bank sphere in application to the receivership of special purpose national banks engaged in fintech activities. These commenters said the OCC should refrain from chartering these special purpose national banks until the law changes to address this difference. One commenter expressed concern that the rule's incorporation of the NBA's priority requirements for payment of receivership claims, which include no preference for consumer claims over other general creditors, might have the effect of distorting incentives among debt investors across special purpose national banks, and more broadly contribute to moral hazard.

The OCC understands these comments to be urging, in effect, changes in the statutory receivership provisions underlying the rule. Absent Congressional action to do so, however, the current provisions of the NBA are the ones that would govern should it become necessary to appoint a receiver for an uninsured national bank. The OCC believes it is best to be clear, through a regulation implementing those NBA provisions, about the framework that would apply in order to avoid clouding the ongoing discussion about the chartering of special purpose national banks engaged in fintech activities with uncertainty about how uninsured institutions are resolved.

More broadly, some commenters said the OCC should consider receivership and cost issues in deciding whether to charter special purpose national banks engaged in fintech activities, or the terms on which they could be chartered. Two commenters said the nature of a fintech firm's business diverges widely from banks, and that creditor loss rates in a receivership for an uninsured special purpose national bank engaged in fintech activities may exceed levels that are tolerable in the resolution of a chartered bank. These commenters said this was a contra-indication for chartering such banks, but one of the commenters further elaborated that the OCC can and should exercise particularly close supervision of these firms and thereby reduce the risk of receiverships ever taking place. Another commenter said that fintech firms do not have national trust banks' track record for remaining solvent and avoiding receivership, and the OCC should mitigate potential concerns about receivership costs by imposing capital support agreements and similar obligations in chartering special purpose national banks that engage in fintech activities.

In contrast to these views about the uniqueness of special purpose national banks engaged in fintech activities, one commenter said that a fintech firm, such as a digital currency exchange, performs a function comparable to a national trust bank that obtains payments on behalf of customers and provides security for those funds, and therefore such institutions do not pose unique considerations for the receivership framework. Another commenter said the functions of special purpose national banks that engage in fintech activities could be even simpler than a national trust bank, such as a special purpose national bank that provides fintech payment services where each customer transaction is brief and segregated. For special purpose national banks engaged in fintech activities involving lending, this commenter stated the customer relationships are somewhat longer but still discrete, and that the OCC could adequately eliminate concerns about the impact of a receivership by ensuring the bank's plans for back-up servicing and orderly wind-up were robust.

Some commenters discussed additional topics not touching on the receivership issues covered by the notice of proposed rulemaking, but more germane to the desired framework for creating, regulating, and supervising special purpose national banks that engage in fintech activities or uninsured national trust banks. These broader comments do not pertain to the OCC's adoption of the final rule for uninsured banks and many of them implicate issues that the OCC would need to evaluate on a case-by-case basis in connection with a decision on whether to charter a particular special purpose national bank that engages in fintech activities. The OCC has recently published and invited comment on a paper discussing these issues.[10] We will consider the broader comments on fintech chartering submitted as part of this rulemaking together with those we receive in response to the paper.

In the second question asked in the preamble to the Proposed Rule, the OCC asked for alternatives that would take into account the cost considerations that could arise for the OCC if the administrative expenses of an uninsured national bank receivership exceeded the assets in the receivership.[11] In response to this question, one commenter urged the OCC not to impose assessment costs for special purpose national banks that engage in fintech activities on insured national banks, and another commenter further urged the OCC not to impose assessment costs for such banks on uninsured national trust banks. The OCC continues to consider what approach to assessments would be appropriate should it approve charters for special purpose national banks engaged in fintech activities. Any resulting modification to the OCC's assessment structure would be proposed for public comment in a separate rulemaking.

IV. The Final Rule

Overview

The final rule incorporates the framework set forth in the NBA for the Comptroller to appoint a receiver for an uninsured bank, generally under the same grounds for appointment of the FDIC as receiver for insured national banks. The uninsured bank may challenge the appointment in court, and the NBA affords jurisdiction to the appropriate United States district court for this purpose. The OCC will provide the public with notice of the appointment, as well as instructions for submitting claims against the uninsured bank in receivership. The Comptroller

[9] *See* Proposed Rule, 81 FR at 62837 (discussing the OCC's initiative on responsible innovation in the Federal banking system, and the OCC's authority to charter special purpose banks that engage in selected core non-depository services within the business of banking).

[10] *See Exploring Special Purpose National Bank Charters for Fintech Companies* (Dec. 2016), *available at https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf.*

[11] *See* Proposed Rule, 81 FR at 62838 (discussing the receiver's priority claim to liquidation proceeds for administrative expenses, the OCC's potential direct expenses for its receivership functions, and funding alternatives, such as building resources to defray these costs through the OCC's regulations governing the OCC's collection of assessments from uninsured national banks).

may appoint any person as receiver, including the OCC or another government agency. The receiver carries out its duties under the direction of the Comptroller.

The final rule also follows the statutory framework under the NBA with respect to claims, under which persons with claims against an uninsured bank in receivership will file their claims with the receiver for the failed uninsured bank, for review by the OCC. In the event the OCC denies the claim, the only remedy available to the claimant is to bring a judicial action against the uninsured bank's receivership estate and assert the claim *de novo.* A person is also free to initiate a claim by bringing an action against the receivership estate in court for adjudication and then submit the judgment to the OCC to participate in ratable dividends of liquidation proceeds along with other approved and adjudicated claims.[12]

Approved or adjudicated claims are paid solely out of the assets of the uninsured national bank in receivership. This reflects the legal distinction between the OCC as regulatory agency and the OCC acting in a receivership capacity. In the former, the OCC oversees national banks, FSAs, and Federal branches and Federal agencies, supervising them under the charge of assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction. As receiver, the OCC appoints and oversees receivers for uninsured national banks, thereby facilitating the winding down of bank operations, assets, and accounts while minimizing disruptions to customers and creditors of the institution. Under the ''separate capacities'' doctrine, which has long been recognized in litigation involving the FDIC, it is well established that the agency, when acting in one capacity, is not liable for claims against the agency acting in its other capacity.[13]

As provided in the final rule, the receiver liquidates the assets of the uninsured bank, with court approval, and pays the proceeds into an account as directed by the OCC. The categories of claims and the priority thereof for payment are set out in the final rule. The final rule also clarifies certain powers held by the receiver.

[12] *See First Nat'l Bank of Bethel* v. *Nat'l Pahquioque Bank,* 81 U.S. 383, 401 (1871).

[13] For a discussion of the separate capacities doctrine and related case law, *see* Proposed Rule, 81 FR at 62838.

Section-by-Section Analysis

Section 51.1 of the final rule identifies the purpose and scope of the final rule and clarifies that the rule applies to receiverships conducted by the OCC under the NBA for national banks that are not insured by the FDIC.[14] The final rule does not extend to receiverships for uninsured Federal branches, although elements of the framework may be similar for uninsured Federal branch receiverships, which would also be resolved under provisions of the NBA.

Section 51.2 of the final rule is based on 12 U.S.C. 191 and 192 and concerns appointment of a receiver. The final rule sets out the Comptroller's authority to appoint any person, including the OCC or another government agency, as receiver for an uninsured bank and provides that the receiver performs its duties subject to the approval and direction of the Comptroller.[15] If the Comptroller were to appoint the OCC as receiver, the OCC would act in a receivership capacity with respect to the uninsured bank in receivership, rather than in the OCC's supervisory capacity.

As discussed earlier, this dual capacity (OCC as supervisor versus OCC as receivership sponsor for an uninsured bank) recognizes that, while the NBA makes the receivership oversight and claims review functions of the Comptroller part of the OCC's responsibilities, the receivership oversight role is unique and distinct from the OCC's role as a Federal regulatory agency and supervisor of national banks and FSAs. This is comparable to the dual capacity of the FDIC's receivership function for insured depository institutions pursuant to the FDIA.

Section 51.2 of the final rule also provides that the Comptroller may require the receiver to post a bond or other security and the receiver may hire staff and professional advisors, with the approval of the Comptroller, if needed to carry out the receivership. This section also identifies the grounds for appointment of a receiver for an uninsured bank and notes that uninsured banks may seek judicial review of the appointment pursuant to 12 U.S.C. 191.

Section 51.3 of the final rule provides that the OCC will provide notice to the public of the appointment of a receiver for the uninsured bank. The final rule specifies that one component of this notice will include publication in a newspaper of general circulation selected by the OCC for three consecutive months, as required by 12 U.S.C. 193. As a component of the OCC's notice to the public about the receivership, the OCC will also provide instructions for creditors and other claimants seeking to submit claims with the receiver for the uninsured bank.

As noted in the proposed rule, the OCC believes that the purpose of section 193 may be better served by publication through means in addition to the statutorily required publication in a newspaper. For example, the OCC could provide direct notice to customers and creditors of the uninsured bank to the extent the uninsured bank's records included current contact information. The OCC could also arrange to provide notice through electronic channels that customers would typically use to contact the uninsured bank, such as the uninsured bank's Web site. The OCC believes that an effective set of notice protocols would best be established on a case-by-case basis, in light of a specific uninsured bank's fiduciary and custodial activities, the types of customers served by the bank, coordination with other notice protocols under way for any related entity that is also undergoing resolution activity, and similar factors. The OCC requested comment on alternative means of communicating with customers of uninsured banks.

One commenter, a trade association for banks, suggested that the OCC employ notice mechanisms that are consistent with the way in which the failed bank typically communicates with its clients and counterparties. The commenter suggested, for example, that a receiver for an institution with clients in other countries should communicate with those clients in the language typically used by the institution in its communications with those clients. The OCC agrees that this approach would be appropriate in such cases and reiterates that effective forms of notice, beyond the statutorily required notice in a newspaper, will be evaluated on a case-by-case basis.

[14] A nationwide organization of state regulators requested clarity on how the NBA receivership framework for uninsured national banks and the OCC's proposed rule thereunder would interact with the processes established for debtors and creditors pursuant to the U.S. Bankruptcy Code. The OCC is not aware of any opinion of a U.S. Bankruptcy Court, or any other U.S. court, finding that an uninsured national bank is eligible to be a debtor subject to a petition under the Code.

[15] *But see* 12 U.S.C. 1821(c)(6) (Comptroller may appoint the FDIC as conservator or receiver and the FDIC has discretion to accept such appointment); *id.* section 1821(c)(2)(C) (FDIC ''not subject to any other agency'' when acting as conservator or receiver''). Read together, these provisions likely mean that the provision in § 51.2 concerning oversight of the receiver by the Comptroller would not apply to the FDIC acting as conservator or receiver for an uninsured institution, should the Comptroller appoint the FDIC and the FDIC accept such an appointment.

Section 51.4 of the final rule addresses the submission of claims to the receiver for an uninsured bank. Under § 51.4(a), a person with a claim against the receivership may submit a claim to the OCC, which will consider the claim and make a determination concerning its validity and approved amount. This process reflects the provisions in 12 U.S.C. 193 and 194 regarding presentation of claims and payment of dividends on claims that are proved to the satisfaction of the Comptroller. Section 51.4 also provides that the Comptroller will establish a deadline for filing claims with the receiver, which could not be earlier than 30 days after the three-month publication of notice required by § 51.3. This provision reflects NBA case law that permits the Comptroller to establish a date for filing claims against the receiver for a failed bank.[16]

Section 51.4(b) of the final rule clarifies that persons with claims against an uninsured bank in receivership may present their claims to a court of competent jurisdiction for adjudication in addition to, or as an alternative to, filing a claim with the OCC. If successful in court, such persons will be required to submit a copy of the final judgment to the OCC to participate in ratable dividends of liquidation proceeds along with claims against the bank in receivership submitted to, and approved by, the OCC. The final rule requires submission of a copy of the court's final judgment to the OCC. This provision is based on 12 U.S.C. 193 and 194.

In this regard, the receivership regime established by the NBA differs somewhat from the approach set out in other resolution regimes, such as the bankruptcy provisions of the United States Code and the receivership provisions of the FDIA. Under those resolution regimes, creditors and claimants must generally submit their claims to the receivership estate for centralized administration and disposition, and claims that are not submitted by the claims deadline are barred from any participation in liquidation payments. The NBA provisions are different in that claimants are provided the opportunity to submit claims to the OCC for evaluation, but are not foreclosed from pursuing judicial resolution by filing litigation (or continuing a pre-existing lawsuit) in a court of competent jurisdiction against the uninsured bank in receivership.

[16] *See Queenan* v. *Mays,* 90 F.2d 525, 531 (10th Cir. 1937).

The claims filing deadline established by the Comptroller pursuant to § 51.4(a) of the final rule is the date by which claimants seeking review under the OCC's claims process must make their submission. Nevertheless, a claimant that has not made a submission to the OCC by the deadline is not barred from initiating judicial claims against the uninsured bank in receivership solely by virtue of missing the claims deadline.[17]

The NBA's receivership provisions are like the receivership regime established by the FDIC under the FDIA, however, in that the avenue available to a party whose claim has been denied by the FDIC or OCC, when performing the agencies' receivership claims functions, is to file (or continue) a *de novo* judicial action asserting the facts and legal theory of the claim against the receivership of the bank. The NBA does not contemplate or support further action by the claimant in an administrative or judicial forum against the OCC seeking review of the claim determination.

Section 51.4(c) of the final rule provides that if a person with a claim against an uninsured bank in receivership also has an obligation owed to the bank, the claim and obligation will be set off against each other and only the net balance remaining after set-off will be considered as a claim. To this end, § 51.4(a) also includes language referring to claims for set-off. The right of set-off where parties have mutual obligations has long been recognized as an equitable principle.[18] Well-settled case law has held that a receivership creditor's or other claimant's equitable right to a set-off is not precluded by the ratable distribution requirement of the NBA, provided such set-off is otherwise legally valid.[19] If, after set-off, an amount is owed to the creditor, the creditor may file a claim for the net amount remaining as any other general creditor. Conversely, if, after set-off, an amount is owed to the bank, the creditor does not have a claim and the net amount remaining is an asset of the uninsured bank, which the receiver may obtain in connection with marshalling the assets (as described further in § 51.7(a) of the final rule).

The OCC requested comment on whether there are additional characteristics of set-offs or other situations in which set-off may arise that should be included in the rule. One commenter, a trade association for banks, said that the administration of set-offs may be complex, given that the trust and fiduciary business is a fee-based industry. The commenter offered the example of instances in which fees have been accrued or are otherwise in the process of payment to one or more service providers at the time of receivership. The commenter suggested that the final rule acknowledge that a given resolution may involve bespoke, fact-specific set-off situations that would need to be carefully considered, while also serving the need for the receiver or a successor fiduciary to be in a position to continue providing fiduciary services during the receivership.

The OCC believes that, on balance, it is not necessary to make this kind of an addition to the language of the final rule. Section 51.4 as a whole is designed to make the basic framework of claim submission transparent to creditors of the uninsured bank, and set-off is included as an element of this framework. As the commenter states, the OCC's determination of particular claims will require consideration of fact-specific situations prior to reaching a disposition, and this extends to considerations of set-offs. The final rule is designed to accommodate with flexibility the consideration of such factors in the context in which each claim is postured.

Section 51.5 of the final rule sets out the order of priorities for payment of administrative expenses of the receiver and claims against the uninsured bank in receivership. Under this section, the OCC will pay these expenses and claims in the following order: (1) administrative expenses of the receiver; (2) unsecured creditors, including secured creditors to the extent their claim exceeds their valid and enforceable security interest; (3) creditors of the uninsured bank, if any, whose claims are subordinated to general creditor claims; and (4) shareholders of the uninsured bank. The order is based on case law and, in the

[17] *See First Nat'l Bank of Bethel* v. *Nat'l Pahquioque Bank,* 81 U.S. 383, 401 (1871); *Queenan* v. *Mays,* 90 F.2d 525, 531 (10th Cir. 1937). As noted earlier, it is incumbent on a claimant that pursues the judicial route and ultimately obtains judicial relief to submit the final judicial determination and award to the OCC, in order to participate in the OCC's periodic ratable dividends of liquidation proceeds of the receivership estate. Except with respect to a valid and enforceable security interest in specific property of the uninsured bank established as part of a final judicial determination, there are no assets or funds available to a successful judicial claimant other than the ratable dividend process set out in 12 U.S.C. 194 and described in § 51.8 of the final rule.

[18] *See, e.g., Scammon* v. *Kimball,* 92 U.S. 362 (1876); *Blount* v. *Windley,* 95 U.S. 173, 177 (1877); *Carr* v. *Hamilton,* 129 U.S. 252 (1889).

[19] *See Scott* v. *Armstrong,* 146 U.S. 499, 510 (1892); *InterFirst Bank of Abilene, N.A.* v. *FDIC,* 777 F.2d 1092, 1095–1096 (5th Cir. 1985); *FDIC* v. *Mademoiselle of California,* 379 F.2d 660, 663 (9th Cir. 1967).

case of the first priority for administrative expenses, on 12 U.S.C. 196.[20]

A creditor or other claimant with a security interest that was valid and enforceable as to its terms prior to the appointment of the receiver is entitled to exercise that security interest, outside the priority of distributions set out in the final rule.[21] If the collateral value exceeds the amount of the claim as it was immediately prior to the receiver's appointment, the surplus remains an asset of the uninsured bank, and the receiver may obtain it in connection with marshalling the assets (as further described in § 51.7(a) of the final rule).[22]

Liens arising from judicial determinations after the initiation of the receivership, as well as contractual liens that are triggered due to the appointment of a receiver or other post-appointment events, are not enforceable. This is because recognition of these liens would afford these claimants a priority that is not recognized under the established legal priorities described in § 51.5 of the final rule. Similarly, a secured creditor is not entitled to a priority distribution of any portion of the claim that is not covered by the value of the collateral because the creditor is in the position of a general unsecured creditor for that portion of the claim and must participate in ratable liquidation distributions on par with other unsecured creditors.[23]

Assets held by the uninsured bank at the time of the receiver's appointment in a fiduciary or custodial capacity, as identified on the bank's books and records, are not general assets of the bank. Section 51.8(b) of the final rule reiterates this point. In the same vein, the claim of the customer for the return of the customer's fiduciary or custodial assets is separate from, and not subject to, the priority set out in § 51.5. Fiduciary and custodial customers of the bank have direct claims on those assets pursuant to their fiduciary or custodial account contracts. However, the priority of a fiduciary or custodial customer's other claims against the bank, if any, would remain subject to the priority described in § 51.5. For example, a fiduciary customer's claim for a refund of prepaid investment management fees that were attributable to periods after the receiver returned the fiduciary assets to the customer generally would be a general unsecured claim covered by § 51.5(b). The claims process described in § 51.4(b) is available to a fiduciary customer, for both a direct claim for the return of fiduciary assets, as well as a receivership claim for amounts the customer believes it is owed by the bank.

The OCC requested comment on whether there are other Federal statutes regarding specific types of claims that may be applicable to a receivership of an uninsured bank under the NBA and that would give certain claims a different priority, such as claims owed to the Federal government. One commenter, a coalition that advocates for reform in the financial services industry, agreed that customer assets held by a bank in a fiduciary capacity should not be considered assets of the bank, but questioned why other claims of the customer, such as a claim for a refund of prepaid investment management fees that were attributable to periods after the receiver returned the fiduciary assets to the customer, would be treated as a unsecured general creditor claim. The commenter suggested that such customer funds would have less protection in a receivership for an uninsured bank than they would under certain modern receivership and bankruptcy statutes that set forth claim priorities which include preference to customer claims over other general creditor claims.

The OCC is required, by statute, to pay claims on a ratable basis. As discussed in connection with the description of § 51.8 of the final rule, this requirement has been interpreted by the courts as requiring the OCC to make distributions on OCC-approved claims and judicial awards on an equal footing, determining the amount of each creditor's claim as it stands at the point of insolvency. As a result, the controlling ratable payment statute does not support a rule that makes distinctions in distribution priority between customer and general creditor claimants.

Section 51.6 of the final rule provides that all administrative expenses of the receiver for an uninsured bank will be paid out of the assets of the receivership before payment of claims against the receivership. This reflects the requirements in 12 U.S.C. 196. The final rule also states that receivership expenses will include pre-receivership and post-receivership obligations that the receiver determines are necessary and appropriate to facilitate the orderly liquidation or other resolution of the uninsured bank in receivership. To further illustrate the kinds of expenses that § 196 affords a first priority claim on the uninsured bank's receivership assets, § 51.6 enumerates examples of such administrative expenses, such as wages and salaries of employees, expenses for professional services, contractual rent pursuant to an existing lease or rental agreement, and payments to third-party or affiliated service providers, when the receiver determines these expenses are of benefit to the receivership.

Section 51.7 of the final rule contains provisions describing the powers and duties of the receiver and the disposition of fiduciary and custodial accounts. As described in § 51.7, the receiver will take over the assets and operation of the uninsured bank, take action to realize on debts owed to the uninsured bank, sell the property of the bank, and liquidate the assets of the uninsured bank for payment of claims against the receivership. Section 51.7(a)(1)–(5) lists some of the major powers and duties for the receiver set out in 12 U.S.C. 192 and clarified by the courts, including taking possession of the books and records of the bank, collecting on debts and claims owed to the bank, selling or compromising bad or doubtful debts (with court approval), and selling the bank's real and personal property (also with court approval).

Section 51.7(b) of the final rule provides for the receiver to close the uninsured bank's fiduciary and custodial appointments, or transfer such accounts to a successor fiduciary or custodian under 12 CFR 9.16 or other applicable Federal law. The uninsured banks currently in existence focus on fiduciary and custodial services, so this function of the receiver will be of primary importance. This provision recognizes that the receiver's power to wind up the affairs of the uninsured bank in receivership, acting with court approval to make disposition of bank assets, should properly encompass the power to transfer fiduciary or custodial appointments and any associated assets in appropriate circumstances.

Transfer of fiduciary appointments may occur under the terms of the instrument creating the relationship, if it provides for transfer, or under a fiduciary transfer statute, if one is applicable. The OCC believes there are strong public policy interests in endeavoring to replace fiduciaries and custodians expeditiously, without an interruption in service to their customers, if transfer can be arranged to a qualified successor, maintaining the

[20] *See Ticonic Nat'l Bank* v. *Sprague,* 303 U.S. 406, 410–411 (1938); *Merrill* v. *Nat'l Bank of Jacksonville,* 173 U.S. 131, 146 (1899); *Scott* v. *Armstrong,* 146 U.S. 499, 510 (1892); *Bell* v. *Hanover Nat'l Bank,* 57 F. 821, 822 (C.C.S.D.N.Y. 1893).

[21] *Ticonic Nat'l Bank* v. *Sprague,* 303 U.S. 406, 410–411 (1938); *Bell* v. *Hanover Nat'l Bank,* 57 F. 821, 822 (C.C.S.D.N.Y. 1893).

[22] *Bell* v. *Hanover Nat'l Bank,* 57 F. 821, 822 (C.C.S.D.N.Y. 1893).

[23] *Merrill* v. *Nat'l Bank of Jacksonville,* 173 U.S. 131, 146 (1899).

same duties and standards of care with respect to the customers that previously pertained to their accounts at the uninsured bank in receivership. The alternative, given that the uninsured bank must be wound down and cannot provide services in the future, is to stop managing and reinvesting the customer's assets, stop responding to directions to transfer or receive assets in custody, close the accounts, and seek instructions from the account holders or the courts regarding return of associated assets. For institutional customers, this is likely to cause significant interruption of the intricate machinery of their financial operations. For individuals, it can potentially result in loss of asset value in adverse markets, or loss of income due to foregone reinvestments.

Across the United States, there are disparate and often conflicting legal rules restricting or conditioning transfers of an appointment of a fiduciary for a beneficiary residing within the state. Depending on the geographic area across which the uninsured bank has established fiduciary relationships with its customers, and the standardization of its fiduciary account agreements or appointing instruments, it may be practicable for the receiver to transition an uninsured bank's fiduciary and custody accounts to a qualified successor through the mechanisms provided by applicable local law. On the other hand, if faced with dispersed customers, diverse account agreements or appointments of different vintage, or even the absence of an applicable law of transfer for customers in certain states, reliance on these methods may be so cumbersome as to effectively prevent accomplishment of the transfers in a timely way.

In order to address these potential problems, the OCC, relying on the support of existing case law, is including language in the final rule to make it clear that the uninsured bank receiver's power under 12 U.S.C. 192 to sell, with court approval, the real and personal property of the bank includes the power to transfer the bank's fiduciary accounts and related assets, subject to the approval of the court exercising jurisdiction over the receiver's efforts to transfer the bank's assets. The final rule is consistent with case law recognizing that a receiver for a national bank may properly arrange asset purchase and liability assumption transactions to move the business of a failed bank to a successor on an integrated basis, as part of the power to transfer assets, as well as analogous case law concerning the transfer of fiduciary and custodial assets by the FDIC, acting as receiver of failed insured depository institutions.[24]

Section 51.7(c) of the final rule incorporates, in general terms, the powers, duties, and responsibilities of receivers for national banks under the NBA and under judicial precedents determining the authorities and responsibilities of receivers for national banks. Examples of these powers include: (1) the authority to repudiate certain contracts, including: (a) purely executory contracts, upon determining that the contracts would be unduly burdensome or unprofitable for the receivership estate,[25] (b) contracts that involve fraud or misrepresentation,[26] and (c) in limited cases, non-executory contracts that are contrary to public policy; [27] (2) the authority to recover fraudulent transfers; [28] and (3) the authority to enforce collection of notes from debtors and collateral, regardless of the existence of side arrangements that would otherwise defeat the collectability of such notes.[29]

Section 51.7(d) of the final rule requires the receiver to make periodic reports to the OCC concerning the status and proceedings of the receivership.

Section 51.8 of the final rule contains provisions regarding the payment of dividends on claims against the uninsured bank and the distribution of any remaining proceeds to shareholders. This section provides that, after administrative expenses of the receivership have been paid, the OCC will make ratable dividends from available receivership funds based on the priority of claims in proposed § 51.5 for claims that have been proved to the OCC's satisfaction or adjudicated in a court of competent jurisdiction, as provided in 12 U.S.C. 194. The OCC will make payment of dividends, if any, periodically, at the discretion of the OCC, as the receiver liquidates the assets of the uninsured bank.

The final rule's inclusion of the ''ratable dividend'' requirement is designed to incorporate the associated standards about the proper application of this statutory directive, which the judiciary has articulated over the years. The ratable dividend requirement directs the OCC to make distributions on OCC-approved claims and judicial awards on an equal footing, determining the amount of each creditor's claim as it stands at the point of insolvency. As one example, a court's award of interest on an unpaid debt to the date of a judgment rendered in the plaintiff's favor after the receiver was appointed does not increase the amount of the plaintiff's claim for purposes of making ratable dividends. As another example, the ratable dividend requirement generally restricts claims against the bank receivership for debts that were not due and owing at the appointment of the receiver and arose for the first time as a consequence of the appointment or a post-appointment event.

The OCC requested comment on alternatives to the proposed rule's approach to paying dividends on claims, under which the OCC would exercise its discretion under section 194 to determine the timing of the distributions on established claims. Under one alternative presented in the proposed rule, the OCC would refrain from paying any dividends until all claims have been submitted and validated, with final allowed claim amounts established. As we noted in the proposal, this approach presents the possibility that proven claims may be delayed for a significant amount of time pending more protracted resolution of other claims. Under a second option presented in the proposed rule, the OCC would make ongoing dividends on proven claims, subject to the receiver's retaining a percentage of the funds on hand at the time of the distribution as a pool of dividends for catch-up distributions to a successful plaintiff later.

The OCC did not receive comments on these alternative approaches for making ratable distributions on claims against a receivership. For this reason, and because the proposed rule's approach to payment of dividends provides the OCC with the discretion to tailor the dividend process to facts and circumstances of a particular receivership, the final rule adopts § 51.8 as proposed.

Section 51.8(a)(2) of the final rule recognizes the basic legal premise under the NBA receivership provisions and judicial interpretations thereof that any dividend payments to creditors and other claimants of an uninsured bank will be made solely from receivership

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[24] *See NCNB Texas National Bank* v. *Cowden,* 895 F.2d 1488 (5th Cir. 1990) (holding that the FDIC, as receiver of insolvent bank, had authority to transfer fiduciary appointments to a bridge bank prior to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

[25] *Bank One Texas* v. *Prudential Life Ins. Co.,* 878 F. Supp. 943, 964–66 (N.D. Tex. 1995).

[26] A. Corbin, *Corbin on Contracts* § 228 at 320 (1952) (addressing contracts voidable for fraud, duress, or mistake).

[27] *Cf. Fidelity Deposit Co. of Md.* v. *Conner,* 973 F.2d 1236, 1241 (5th Cir. 1992).

[28] *See Peters* v. *Bain,* 133 U.S. 670 (1890) (applying state substantive law to determine whether to void a transfer); *Rogers* v. *Marchant,* 91 F.2d 660, 663 (4th Cir. 1937).

[29] *D'Oench, Duhme & Co., Inc.* v. *FDIC,* 315 U.S. 447, 458 (1942). A. Corbin, *Corbin on Contracts,* § 228 at 320 (1952) (addressing contracts voidable for fraud, duress or mistake).

funds, if any, paid to the OCC by the receiver after payment of the expenses of the receiver. This provision is also consistent with the established dichotomy of the OCC's supervisory and receivership capacities in the NBA, as discussed earlier.

Section 51.8(b) of the final rule similarly recognizes that assets held by an uninsured national bank at the time of the receiver's appointment in a fiduciary or custodial capacity, as designated on the bank's books and records, are not part of the bank's general assets and liabilities held in connection with its other business and will not be considered a source for payment for unrelated claims of creditors and other claimants. This provision is intended to make clear that the receiver will segregate identified fiduciary and custodial assets and either transfer those assets to other fiduciaries or custodians as described in connection with § 51.7(b), or close the accounts and endeavor to make the associated assets available to the account holders or their representatives through other means.

One commenter, a trade association for banks, agreed with the treatment of fiduciary assets in the proposed rule, but questioned whether § 51.8(b) indicates with sufficient clarity that fiduciary assets will not be treated as assets of the bank in receivership. As stated in the final rule, fiduciary and custodial assets ''will not be considered as part of the bank's general assets. . .''. The OCC reiterates that, under this section, assets held by an uninsured bank in a fiduciary or custodial capacity, as designated on the bank's books and records, are not part of the bank's general assets and liabilities held in connection with its other business and will not be a source for payment for unrelated claims of creditors and other claimants.

Section 51.8(d) of the final rule provides that, after all administrative expenses and claims have been paid in full, any remaining proceeds will be paid to shareholders in proportion to their stock ownership, also as provided in 12 U.S.C. 194.

Section 51.9 of the final rule contains provisions for termination of receiverships in which there are assets remaining after all administrative expenses and all claims had been paid. This is the scenario addressed by 12 U.S.C. 197. In such a case, section 197 requires the Comptroller to call a meeting of the shareholders of the bank at which the shareholders would decide whether to continue oversight by the Comptroller, or whether to end the receivership and appoint a liquidating agent to continue the liquidation of the remaining assets, under the direction of the board of directors and shareholders, as in a liquidation that had commenced under 12 U.S.C. 181.

There may be other circumstances under which termination would take place, such as when there are no receivership assets remaining after completion of receivership activities. Under this scenario, the receiver for an uninsured bank has liquidated all of the bank's assets, closed or transferred all fiduciary accounts to a successor fiduciary, paid all administrative expenses, and either paid creditor claims in full and distributed the remaining proceeds to shareholders, as provided in § 51.8(c) of the final rule, or made ratable dividends of all remaining proceeds to creditors as provided in § 51.8(a), but no additional assets remain in the estate. Under these circumstances, the provisions in 12 U.S.C. 197 for termination would not apply.

V. Regulatory Analysis

A. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*), the OCC may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control number. The final rule contains no information collection requirements under the PRA.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* generally requires that, in connection with a rulemaking, an agency prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities. However, the regulatory flexibility analysis otherwise required under the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined in regulations promulgated by the Small Business Administration (SBA) to include commercial banks and savings institutions, and trust companies, with assets of $550 million or less and $38.5 million or less, respectively) and publishes its certification and a brief explanatory statement in the **Federal Register** together with the rule.

The OCC currently supervises approximately 1,032 small entities. The scope of the final rule extends to uninsured banks. The maximum number of OCC-supervised small uninsured banks that could be subject to the receivership framework described in the final rule is approximately 18.[30] Accordingly, the OCC certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

OCC Unfunded Mandates Reform Act of 1995 Determination

The OCC has analyzed the final rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532). Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation). As detailed in the **SUPPLEMENTARY INFORMATION**, the OCC currently supervises 52 uninsured banks, all of which are uninsured trust banks, and has not appointed a receiver for an uninsured bank since 1933. Unlike commercial and consumer banks and savings associations, which generally face credit and liquidity risks, national trust banks primarily face operational, reputational, and strategic risks. While any of these risks could result in the precipitous failure of a bank or savings association, from a historical perspective, trust banks have been more likely to decline into a weakened condition, allowing the OCC and the institution the time needed to find other solutions for rehabilitating the institution or to successfully resolve the institution without the need to appoint a receiver. As such, we believe the OCC is unlikely to place an uninsured trust bank into receivership. For this reason, and because the final rule does not impose any implementation requirements, the OCC concludes that the final rule will not result in an expenditure of $100 million or more by state, local, and tribal governments, or by the private sector, in any one year.

List of Subjects in 12 CFR Part 51

Administrative practice and procedure, Banks, Banking, National banks, Procedural rules, Receiverships.

[30] Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if we should classify an institution we supervise as a small entity. We used December 31, 2015, to determine size because a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. *See* footnote 8 of the U.S. SBA's *Table of Size Standards.*

Authority and Issuance

For the reasons set forth in the preamble and under the authority of 12 U.S.C. 16, 93a, 191–200, 481, 482, 1831c, and 1867 the Office of the Comptroller of the Currency adds part 51 to chapter I of title 12, Code of Federal Regulations to read as follows:

PART 51—RECEIVERSHIPS FOR UNINSURED NATIONAL BANKS

Sec.

Authority: 12 U.S.C. 16, 93a, 191–200, 481, 482, 1831c, and 1867.

§ 51.1 Purpose and scope.

(a) *Purpose.* This part sets out procedures for receiverships of national banks conducted by the Office of the Comptroller of the Currency (OCC) under the receivership provisions of the National Bank Act (NBA). These receivership provisions apply to national banks that are not insured by the Federal Deposit Insurance Corporation (FDIC).

(b) *Scope.* This part applies to the appointment of a receiver for uninsured national banks (uninsured banks) and the operation of a receivership after appointment of a receiver for an uninsured bank under 12 U.S.C. 191.[31]

§ 51.2 Appointment of receiver.

(a) *In general.* The Comptroller of the Currency (Comptroller) may appoint any person, including the OCC or another government agency, as receiver for an uninsured bank. The receiver performs its duties under the direction of the Comptroller and serves at the will of the Comptroller. The Comptroller may require the receiver to post a bond or other security. The receiver, with the approval of the Comptroller, may employ such staff and enter into contracts for professional services as are necessary to carry out the receivership.

(b) *Grounds for appointment.* The Comptroller may appoint a receiver for an uninsured bank based on any of the grounds specified in 12 U.S.C. 191(a).

(c) *Judicial review.* If the Comptroller appoints a receiver for an uninsured bank, the bank may seek judicial review of the appointment as provided in 12 U.S.C. 191(b).

§ 51.3 Notice of appointment of receiver.

Upon appointment of a receiver for an uninsured bank, the OCC will provide notice to the public of the receivership, including by publication in a newspaper of general circulation for three consecutive months. The notice of the receivership will provide instructions for creditors and other claimants seeking to submit claims with the receiver for the uninsured bank.

§ 51.4 Claims.

(a) *Submission of claims for consideration by the OCC.* (1) Persons who have claims against the receivership for an uninsured bank may present such claims, along with supporting documentation, for consideration by the OCC. The OCC will determine the validity and approve the amounts of such claims.

(2) The OCC will establish a date by which any person seeking to present a claim against the uninsured bank for consideration by the OCC must present their claim for determination. The deadline for filing such claims will not be less than 30 days after the end of the three-month notice period in § 51.3.

(3) The OCC will allow any claim against the uninsured bank received on or before the deadline for presenting claims if such claim is established to the OCC's satisfaction by the information on the uninsured bank's books and records or otherwise submitted. The OCC may disallow any portion of any claim by a creditor or claim of a security, preference, set-off, or priority which is not established to the satisfaction of the OCC.

(b) *Submission of claims to a court.* Persons with claims against an uninsured bank in receivership may present their claims to a court of competent jurisdiction for adjudication. Such persons must submit a copy of any final judgment received from the court to the OCC, to participate in ratable dividends along with other proved claims.

(c) *Right of set-off.* If a person with a claim against an uninsured bank in receivership also has an obligation owed to the bank, the claim and obligation will be set off against each other and only the net balance remaining after set-off shall be considered as a claim, provided such set-off is otherwise legally valid.

§ 51.5 Order of priorities.

The OCC will pay receivership expenses and proved claims against the uninsured bank in receivership in the following order of priority:

(a) Administrative expenses of the receiver;

(b) Unsecured creditors of the uninsured bank, including secured creditors to the extent their claim exceeds their valid and enforceable security interest;

(c) Creditors of the uninsured bank, if any, whose claims are subordinated to general creditor claims; and

(d) Shareholders of the uninsured bank.

§ 51.6 Administrative expenses of receiver.

(a) *Priority of administrative expenses.* All administrative expenses of the receiver for an uninsured bank shall be paid out of the assets of the bank in receivership before payment of claims against the receivership.

(b) *Scope of administrative expenses.* Administrative expenses of the receiver for an uninsured bank include those expenses incurred by the receiver in maintaining banking operations during the receivership, to preserve assets of the uninsured bank, while liquidating or otherwise resolving the affairs of the uninsured bank. Such expenses include pre-receivership and post-receivership obligations that the receiver determines are necessary and appropriate to facilitate the orderly liquidation or other resolution of the uninsured bank in receivership.

(c) *Types of administrative expenses.* Administrative expenses for the receiver of an uninsured bank include:

(1) Salaries, costs, and other expenses of the receiver and its staff, and costs of contracts entered into by the receiver for professional services relating to performing receivership duties; and

(2) Expenses necessary for the operation of the uninsured bank, including wages and salaries of employees, expenses for professional services, contractual rent pursuant to an existing lease or rental agreement, and payments to third-party or affiliated service providers, that in the opinion of the receiver are of benefit to the receivership, until the date the receiver repudiates, terminates, cancels, or otherwise discontinues the applicable contract.

§ 51.7 Powers and duties of receiver; disposition of fiduciary and custodial accounts.

(a) *Marshalling of assets.* In resolving the affairs of an uninsured bank in receivership, the receiver:

(1) Takes possession of the books, records and other property and assets of the uninsured bank, including the value

[31] This part does not apply to receiverships for uninsured Federal branches or uninsured Federal agencies.

of collateral pledged by the uninsured bank to the extent it exceeds valid and enforceable security interests of a claimant;

(2) Collects all debts, dues and claims belonging to the uninsured bank, including claims remaining after set-off;

(3) Sells or compromises all bad or doubtful debts, subject to approval by a court of competent jurisdiction;

(4) Sells the real and personal property of the uninsured bank, subject to approval by a court of competent jurisdiction, on such terms as the court shall direct; and

(5) Deposits all receivership funds collected from the liquidation of the uninsured bank in an account designated by the OCC.

(b) *Disposition of fiduciary and custodial accounts.* The receiver for an uninsured bank closes the bank's fiduciary and custodial appointments and accounts or transfers some or all of such accounts to successor fiduciaries and custodians, in accordance with 12 CFR 9.16, and other applicable Federal law.

(c) *Other powers.* The receiver for an uninsured bank may exercise other rights, privileges, and powers authorized for receivers of national banks under the NBA and the common law of receiverships as applied by the courts to receiverships of national banks conducted under the NBA.

(d) *Reports to OCC.* The receiver for an uninsured bank shall make periodic reports to the OCC on the status and proceedings of the receivership.

(e) *Receiver subject to removal; modification of fees.* (1) The Comptroller may remove and replace the receiver for an uninsured bank if, in the Comptroller's discretion, the receiver is not conducting the receivership in accordance with applicable Federal laws or regulations or fails to comply with decisions of the Comptroller with respect to the conduct of the receivership or claims against the receivership.

(2) The Comptroller may reduce the fees of the receiver for an uninsured bank if, in the Comptroller's discretion, the Comptroller finds the performance of the receiver to be deficient, or the fees of the receiver to be excessive, unreasonable, or beyond the scope of the work assigned to the receiver.

§ 51.8 Payment of claims and dividends to shareholders.

(a) *Claims.* (1) After the administrative expenses of the receivership have been paid, the OCC shall make ratable dividends from time to time of available receivership funds according to the priority described in § 51.5, based on the claims that have been proved to the OCC's satisfaction or adjudicated in a court of competent jurisdiction.

(2) Dividend payments to creditors and other claimants of an uninsured bank will be made solely from receivership funds, if any, paid to the OCC by the receiver after payment of the expenses of the receiver.

(b) *Fiduciary and custodial assets.* Assets held by an uninsured bank in a fiduciary or custodial capacity, as designated on the bank's books and records, will not be considered as part of the bank's general assets and liabilities held in connection with its other business, and will not be considered a source for payment of unrelated claims of creditors and other claimants.

(c) *Timing of dividends.* The payment of dividends, if any, under paragraph (a) of this section, on proved or adjudicated claims will be made periodically, at the discretion of the OCC, as the receiver liquidates the assets of the uninsured bank.

(d) *Distribution to shareholders.* After all administrative expenses of the receiver and proved claims of creditors of the uninsured bank have been paid in full, to the extent there are receivership assets to make such payments, any remaining proceeds shall be paid to the shareholders, or their legal representatives, in proportion to their stock ownership.

§ 51.9 Termination of receivership.

If there are assets remaining after full payment of the expenses of the receiver and all claims of creditors for an uninsured bank and all fiduciary accounts of the bank have been closed or transferred to a successor fiduciary and fiduciary powers surrendered, the Comptroller shall call a meeting of the shareholders of the uninsured bank, as provided in 12 U.S.C. 197, for the shareholders to decide the manner in which the liquidation will continue. The liquidation may continue by:

(a) Continuing the receivership of the uninsured bank under the direction of the Comptroller; or

(b) Ending the receivership and oversight by the Comptroller and replacing the receiver with a liquidating agent to proceed to liquidate the remaining assets of the uninsured bank for the benefit of the shareholders, as set out in 12 U.S.C. 197.

Dated: December 15, 2016.

Thomas J. Curry,

Comptroller of the Currency.

[FR Doc. 2016–30666 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 4

[Docket No. FDA–2008–N–0424]

RIN 0910–AF82

Postmarketing Safety Reporting for Combination Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or Agency) is issuing regulations to set forth postmarketing safety reporting requirements for combination products. Specifically, this final rule describes the postmarketing safety reporting requirements that apply when two or more different types of regulated medical products (drugs, devices, and/or biological products, which are referred to as ''constituent parts'' of a combination product) comprise a combination product and the combination product or its constituent parts have received FDA marketing authorization. The rule is intended to promote and protect the public health by setting forth the requirements for postmarketing safety reporting for these combination products, and is part of FDA's ongoing effort to ensure the consistency and appropriateness of the regulatory requirements for combination products.

DATES: *Effective date:* This rule is effective on January 19, 2017.

Compliance dates: Some provisions of the rule have a compliance date that is the same as the effective date of this rule, and other provisions of the rule have a later compliance date as discussed in section III.I, Effective Date and Compliance Dates.

FOR FURTHER INFORMATION CONTACT: John Barlow Weiner, Associate Director for Policy, Office of Combination Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5129, Silver Spring, MD 20933, 301–796–8930, *john.weiner@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

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Executive Summary

Purpose of the Final Rule

The Agency has not previously issued regulations on postmarketing safety reporting specifically for combination products, which are products comprised of: (1) A drug and a device; (2) a device and a biological product; (3) a biological product and a drug; or (4) a drug, a device, and a biological product. Instead, the Agency has applied provisions to combination products from the postmarketing safety reporting regulations applicable to the constituent parts (*i.e.,* reporting requirements specific to drugs, devices, and biological products). These regulations for drugs, devices, and biological products share many similarities; however, each set of regulations has certain unique reporting requirements, standards, and timeframes based in part on the characteristics of the type of product. These variations among the regulations and lack of clarity on how to apply these requirements to combination products can result in inconsistent and incomplete postmarketing safety reporting for combination products and their constituent parts.

The purpose of this final rule is to ensure consistent, complete postmarketing safety reporting requirements for combination products that have received FDA marketing authorization, while avoiding duplicative reporting. The term ''postmarketing safety'' is used in this rule because this rule concerns certain postmarket events, including manufacturing events, device malfunctions, and events causing injury to users, and the reporting requirements that relate to product and patient safety arising from these events. The final rule supports the underlying purpose of postmarketing safety reporting for all medical products, namely to protect the public health by ensuring continued safety and effectiveness of the product once it is placed on the market.

Summary of the Major Provisions of the Final Rule

This final rule requires that a ''combination product applicant'' (an entity holding the application(s), as the term ''application'' is defined in 21 CFR 4.101 of this rule, for a combination product) and a ''constituent part applicant'' (an entity holding the application to market a drug, device, or biological product as a constituent part of a combination product the constituent parts of which are marketed under applications held by different applicants) comply with postmarketing safety reporting requirements applicable to the product based on the application type (*e.g.,* new drug application, premarket approval application, biologics license application) under which the combination product or constituent part received marketing authorization. In addition to these application-type based reporting requirements, the final rule requires combination product applicants to submit additional specified reports based on the constituent parts included in the combination product (*e.g.,* malfunction reports if the combination product includes a device, field alert reports if it includes a drug, and biological product deviation reports if it includes a biological product). The final rule requires constituent part applicants to share certain postmarketing safety information they receive with one another. The rule also specifies how combination product and constituent part applicants must submit postmarketing safety reporting information to the Agency and what records they must maintain.

The Agency received 16 sets of comments on the proposed rule. Commenters largely sought clarification of the scope of the proposed rule, how reporting requirements, timelines, and reporting standards from the underlying regulations for drugs, devices, and biological products apply, and how and what information must be shared between constituent part applicants. Several commenters, while supporting rulemaking to address postmarketing safety reporting for combination products, recommended alternative approaches. After considering the comments received on the proposed rule, the Agency has made clarifications and other revisions in the final rule to, among other things: (1) Clarify that the final rule applies only to combination product and constituent part applicants; (2) clarify when a single report may suffice to comply with more than one reporting requirement; and (3) incorporate biological product deviation reporting and device correction and removal reporting requirements applicable to combination product applicants.

Legal Authority

The legal framework underlying this final rule is twofold. The first aspect is that drugs, devices, and biological products do not lose their discrete regulatory identities when they become constituent parts of a combination product. In general, the postmarketing safety reporting requirements specific to each constituent part of a combination product also apply to the combination product itself. Although the constituent parts of combination products retain their regulatory identities, the Federal Food, Drug, and Cosmetic Act (FD&C Act) also recognizes combination products as a category of products that are distinct from products that are solely drugs, devices, or biological products. FDA has the authority to develop regulations to ensure sufficient and appropriate ongoing assessment of the risks associated with combination products.

The second aspect of the framework is founded on the postmarketing safety reporting regulatory scheme associated with the application under which the combination product received marketing authorization, plus any applicable requirements associated with the additional six specified report types listed in this rule. Although similar in effect to the first aspect of the framework, this aspect is based on the legal authority FDA used to issue each of its existing regulations for postmarketing safety reporting for drugs, devices, and biological products.

Costs and Benefits

The final rule will generate one-time administrative costs from reading and understanding the rule, assessing current compliance, modifying existing standards of practice, changing storage and reporting software, and training personnel on the requirements under this rule. Firms that do not currently comply with the reporting requirements identified in 21 CFR 4.102(c) of this rule will also incur annual reporting costs from the submission of field alert reports, 5-day reports, 15-day reports, malfunction reports, correction or removal reports, and biological product deviation reports. The annualized total costs of the rule are between $1.36 and $2.68 million at a 7 percent discount rate and between $1.35 and $2.65 million at a 3 percent discount rate.

The final rule will benefit firms through reduced uncertainty about the reporting requirements for their specific combination product and through decreased duplicative reporting. The final rule will also benefit public health by helping to ensure that important safety information is submitted and directed to the appropriate Agency components, so that the Agency may receive and review this information in a timely manner.

I. Background

As set forth in 21 CFR part 3, a combination product is a product comprised of a drug and a device; a device and a biological product; a biological product and a drug; or a drug, a device, and a biological product. A combination product includes the following: (1) A product comprised of two or more regulated components, *i.e.,* drug/device, biologic/device, drug/biologic, or drug/device/biologic, that are physically, chemically, or otherwise combined or mixed and produced as a single entity (''single-entity'' combination products); (2) two or more separate products packaged together in a single package or as a unit and comprised of drug and device products, device and biological products, or biological and drug products (''co-packaged'' combination products); (3) a drug, device, or biological product packaged separately that, according to its investigational plan or proposed labeling, is intended for use only with an approved individually specified drug, device, or biological product where both are required to achieve the intended use, indication, or effect and where upon approval of the proposed product the labeling of the approved product would need to be changed; *e.g.,* to reflect a change in intended use, dosage form, strength, route of administration, or significant change in dose (a type of ''cross-labeled'' combination product); or (4) any investigational drug, device, or biological product packaged separately that, according to its proposed labeling, is for use only with another individually specified investigational drug, device, or biological product where both are required to achieve the intended use, indication, or effect (another type of ''cross-labeled'' combination product).[1] For purposes of this rulemaking and consistent with 21 CFR 4.2, the drugs, devices, and/or biological products included in a combination product are referred to as ''constituent parts'' of the combination product.

A. Rationale for Rulemaking

In the proposed rule (74 FR 50744 at 50745 to 50751, October 1, 2009), FDA described its rationale and goals for the proposed rulemaking. To date, the Agency has not issued regulations on postmarketing safety reporting (PMSR) specifically for combination products. Instead, the Agency has applied provisions to combination products from the PMSR regulations applicable to the constituent parts of the combination product (*i.e.,* the reporting requirements specific to drugs, devices, and biological products). These requirements for drugs, devices, and biological products share many similarities and have a common underlying purpose, namely to protect the public health by ensuring a product's continued safety and effectiveness once placed on the market. However, each set of regulations has certain reporting standards and timeframes with unique requirements based in part on the characteristics of the type of product.

FDA held a public hearing on November 25, 2002, entitled ''FDA Regulation of Combination Products'' (Ref. 1) and a public workshop on July 8, 2003, entitled ''Innovative Systems for Delivery of Drugs and Biologics: Scientific, Clinical and Regulatory Challenges'' (Ref. 2) to discuss postmarketing safety reporting, among other issues pertaining to combination products. In developing the proposed rule, we carefully considered the comments offered by stakeholders, including written comments submitted to the docket that we opened to facilitate further input on combination product issues. Two common themes from the comments were the need for consistency in postmarketing safety reporting requirements for combination products and the importance of avoiding unnecessarily duplicative reporting. Some stakeholders suggested that FDA consider developing an entirely new postmarketing safety reporting scheme for combination products, but we concluded that because of the broad similarities in the postmarketing safety reporting regulations for drugs, devices, and biological products and industry's familiarity and experience with current postmarketing safety reporting requirements, the most appropriate approach would be to rely on existing rules and to explain how to comply with them.

FDA is issuing this final rule to ensure appropriate and consistent PMSR requirements for combination products that have received FDA marketing authorization by describing how combination product applicants and constituent part applicants must comply with the PMSR regulations for drugs, devices, and biological products, and also to eliminate unnecessary PMSR requirements for such combination products.

B. The Proposed Rule

Entities subject to the proposed rule included those subject to PMSR duties under 21 CFR parts 314, 600, 606, and 803, except for user facilities and distributors as defined under part 803.

Those four sets of regulations expressly address PMSR for: (1) Drugs (part 314); (2) biological products (parts 600 and 606); and (3) devices (part 803). These sets of regulations have certain similarities. For example, the PMSR regulations for biological products, devices, and drugs each requires reports of death and other serious adverse events; each provides for expedited reporting for certain types of safety events; and each provides for followup and non-expedited reports. However, there are also certain significant differences in these sets of regulations designed, in part, to address the distinct characteristics and potential safety issues related to a particular type of product (*i.e.,* drug, device, and biological product).

Accordingly, we proposed to require that entities comply with the PMSR requirements associated with the combination product's application type (*e.g.,* requirements under part 314 for a combination product approved under a new drug application (NDA), or under part 803 for a combination product approved under a premarket approval application (PMA)) and also comply

[1] As discussed in response to Comment 1, this rule addresses only PMSR requirements for combination products that have received marketing authorization. It does not describe reporting requirements for investigational combination products.

with certain specified additional reporting provisions that are not associated with that application type but are associated with a constituent part(s) of the combination product. The additional reporting requirements specified in the proposed rule were: (1) 5-Day reports under § 803.53; (2) device malfunction reports under § 803.50; (3) 15-day ''alert reports'' for drugs and biological products under §§ 314.80 and 600.80; (4) field alert reports for drugs under § 314.81; and (5) expedited blood fatality reports under § 606.170. The Agency identified these five types of reports as addressing particular safety issues related to the type of article (drug, biological product, and device) and, therefore, appropriate to apply to combination products that include that type of article regardless of the application type for the combination product, to ensure consistent and appropriate PMSR for the combination product.

The proposed rule also addressed circumstances in which the constituent parts of a combination product are marketed under separate applications, or are legally marketed by different reporters without separate applications. For constituent parts marketed under separate applications, we proposed that the reporter must comply with the reporting requirements associated with that application type. In addition, we proposed for constituent parts marketed under separate applications held by different entities or legally marketed by separate entities without an approved or cleared marketing application, that each of these entities would have a duty to share within 5 calendar days information it receives about the event, either with the other entity or entities for the combination product or with FDA. We further proposed that entities that receive postmarketing safety information from another such entity, would have to investigate the event and comply with applicable reporting obligations under the rule.

We proposed that reporters submit their reports and maintain records for them in accordance with the requirements of the underlying regulations from which the reporting duty arises (parts 314, 600, 606, or 803).

Following publication of the proposed rule, FDA participated in a workshop on January 21, 2010, entitled ''Understanding Implications of the Postmarket Safety for Combination Products Proposed Rule,'' sponsored by the Advanced Medical Technology Association, the Combination Products Coalition, and the Regulatory Affairs Professional Society. At this workshop, the Agency provided a summary of the proposed rule, and stakeholders then worked in groups to identify issues on which to comment.

II. Overview of the Final Rule

The final rule follows the approach presented in the proposed rule, with certain simplifications, clarifications, additions, and other changes, generally made in light of comments received, as described in sections II.A through II.F. The goal of the final rule remains the same as for the proposed rule, to ensure consistent and appropriate postmarketing safety reporting for combination products, while enabling this reporting to be as efficient as possible. Accordingly, this rulemaking seeks to apply those postmarketing safety reporting requirements to combination products necessary to ensure their safety and effectiveness, clarify how to comply with reporting requirements applicable to combination products, and enable efficiencies including submission of a single report if multiple reporting duties apply to an event. Following is a section-by-section overview of the final rule, and then a summary chart of the requirements presented in the rule.

A. Section 4.100—What is the scope of this subpart?

The scope of the rule remains largely the same as proposed. As in the proposed rule, § 4.100(a) reflects that the rule describes PMSR requirements for combination products. We have revised § 4.100(a) to clarify that the rule only applies to ''combination product applicants'' and ''constituent part applicants'' (as defined in § 4.101); this rule does not apply to any other entities. We have also revised § 4.100(b) to clarify that the rule does not apply to investigational combination products or to combination products that have not received marketing authorization. We have eliminated proposed § 4.102 as that section was largely duplicative of proposed § 4.100.

B. Section 4.101—How does FDA define key terms and phrases in this subpart?

We eliminated unnecessary definitions, including terms not used in this final rule. We also simplified certain definitions, using cross-references to definitions provided in other provisions of Title 21 of the CFR without restating those definitions. We made these changes for clarity and to minimize the need for amendments to this rule if a change is made in the future to the terminology or definitions in the cross-referenced provisions.[2]

The final rule newly includes definitions for ''biological product deviation report'' (BPDR) (by reference to §§ 600.14 and 606.171), and ''correction or removal report'' (by reference to 21 CFR 806.10), because the final rule incorporates these reporting requirements as discussed in relation to § 4.102(c) in section III.C. Similarly, we added a definition for ''Product Development Protocol'' (PDP) (by reference to section 515(f) of the FD&C Act (21 U.S.C. 360e(f))) and de novo classification request (by reference to section 513(f)(2) of the FD&C Act (21 U.S.C. 360c(f)(2))) because the final rule addresses these types of applications.

In addition, we included definitions for ''applicant'', ''combination product applicant'', ''constituent part applicant'', and ''device application'' to help clarify which entities are subject to which duties under this rule. Specifically, we clarified that an applicant is the person holding an application under which a combination product or constituent part has received marketing authorization, and that there is a combination product applicant if there is one applicant that either holds the application for a combination product or, holds the applications for each constituent part if the constituent parts of the combination product are marketed under separate applications (as could be the case for the constituent parts of a cross-labeled combination product). We also clarified that a constituent part applicant is the applicant for a constituent part of a combination product the constituent parts of which marketed under applications held by different applicants. We defined the term ''device application'' to mean a PMA, PDP, humanitarian device exemption (HDE), *de novo* classification request (request for classification under section 513(f)(2) of the FD&C Act), or premarket notification (510(k)) submission, so that we could simplify and clarify the rule by using this term to refer to all such submission types, rather than listing them each, where appropriate in the rule.

[2] We understand that provisions cross-referenced in this rule may be revised in the future, and we want to ensure that it is clear that those provisions as revised continue apply to combination products under this rule, without having to amend this rule each time to provide such clarity. However, if the Agency determines that a future revision to a cross-referenced provision is not appropriate to apply to combination products under this rule, or its application to combination products is unclear under this rule, we intend to amend this rule or otherwise clarify.

C. Section 4.102—What reports must you submit to FDA for your combination product or constituent part?

The requirements listed in § 4.102 include those that were in § 4.103 of the proposed rule with certain adjustments and additional requirements to address, in part, comments received on the proposed rule.

Specifically, we have eliminated the requirement to comply with blood fatality reporting requirements as described in § 606.170 for combination products that received marketing authorization under an application other than a biologics license application (BLA). We have also revised the requirement for all combination product applicants to submit 15-day reports as described in §§ 314.80 and 600.80, to permit these reports to be submitted within 30 days rather than 15 days for combination products that received marketing authorization under a device application.

In addition, we have incorporated BPDR and correction and removal reporting requirements for combination product applicants to ensure that the issues addressed by these reporting requirements, for biological products and devices, respectively, are also addressed for combination products that include these types of constituent parts. We have also made other adjustments in § 4.102 for clarity.

Following is a description of § 4.102 as finalized, including explanations of changes from § 4.103 of the proposed rule.

1. Section 4.102(a)

A new § 4.102(a) clarifies that all applicants must comply with the applicable PMSR requirements with respect to their product. A constituent part applicant must comply with applicable requirements for the constituent part it is marketing, and a combination product applicant must comply with applicable requirements for the combination product it is marketing.

2. Section 4.102(b)

As in § 4.103(a) of the proposed rule, § 4.102(b) lists the PMSR requirements that apply based on the application type for the product. Section 4.102(b) clarifies that combination product applicants and constituent part applicants must comply with the requirements identified under § 4.102(b)(1) through (3) that are applicable based on their product's application type. In addition, § 4.102 clarifies that this rule does not require a combination product applicant to submit multiple reports relating to the same event when one report could be used to satisfy both § 4.102(b) and (c). Specifically, if the applicant has submitted one type of report and that report: Includes all of the information that would also be required in another type of report; is required to be submitted in the same manner under this rule as that other report; and is submitted within applicable deadlines, the submission of the single report will be considered to satisfy both reporting obligations.

The requirements of § 4.102(b) are as follows:

a. Section 4.102(b)(1). Combination product applicants and constituent part applicants must comply with the PMSR requirements under parts 803 and 806 if their product received marketing authorization under a device application.

b. Section 4.102(b)(2). Combination product applicants and constituent part applicants must comply with the PMSR requirements under part 314 if their product received marketing authorization under an NDA or abbreviated new drug application (ANDA).

c. Section 4.102(b)(3). Combination product applicants and constituent part applicants must comply with the PMSR requirements under parts 600 and 606 if their product received marketing authorization under a BLA.

3. Section 4.102(c)

This provision applies only to combination product applicants, not to constituent part applicants. It states which requirements combination product applicants must meet in addition to those associated with the product's application type, to ensure consistent and appropriate PMSR for combination products. Like § 4.102(b), it also states how applicants can submit a single report to comply with multiple reporting requirements.

As indicated previously, § 4.102(c) does not require blood fatality reporting for combination products that received marketing authorization under a device application, NDA, or ANDA, and permits combination product applicants for combination products that received marketing authorization under a device application to submit 15-day reports within 30 days rather than 15 days.

We removed the requirement under this rule to make blood fatality reports for combination products that received marketing authorization under a device application, NDA, or ANDA, because facilities at which such events occur are currently required to make blood fatality reports irrespective of the type of application under which the product received marketing authorization. Because these facilities must make such reports, we concluded that it would be unnecessary for a combination product applicant (who is not also the operator of the facility) to report the same information as well.

In light of comments received (as discussed more fully in response to Comments 7, 8, 10), we modified the 15-day report requirement to permit these reports to be made within 30 days for combination products that received marketing authorization under a device application. We made this change based on several factors, including the following. We determined that the Agency would continue to be able to respond in a timely manner to these reports if submitted within 30 days rather than 15 days for such combination products. Further, we determined that permitting such reports to be made within 30 days would enable better alignment of reporting for device-led combination products because this timing would be consistent with the timing for submission of medical device reports. This alignment could be expected to improve the efficiency, clarity and completeness of reports for this class of combination products and to eliminate unnecessary complexity and potential for confusion.[3]

Section 4.102(c) includes additional reporting requirements not in the proposed rule to address specific safety concerns related to medical devices and biological products. Combination product applicants must submit correction and removal reports as described in § 806.10 and comply with related recordkeeping requirements as described in § 806.20 for combination products that include a device constituent part; and combination product applicants must submit BPDRs

[3] We considered whether to make a corresponding change for combination products that received marketing authorization under an NDA or ANDA (drug-led combination products) or under a BLA (biologic-led combination products), to require that malfunction reports be submitted within 15 days to align with the deadline for 15-day reports, in the interest of simplifying and clarifying requirements for such combination product applicants as well. However, we determined that the nature of events triggering, and the information required for, malfunction reports might make it difficult to provide a meaningful report within 15 days in some cases. As indicated in the final rule, if an event triggers both a 15-day report and a malfunction report for such a combination product, the combination product applicant can opt to comply with both reporting requirements in a single report submitted within 15 days. If the applicant determines that additional time is needed to investigate the device malfunction, the applicant can submit a followup report to the initial 15-day report with the additional information.

as described in §§ 600.14 and 606.171 for combination products that include a biological product constituent part. Having considered the unique safety issues that these additional requirements address in light of comments received, we concluded that this rule should ensure that these additional requirements are addressed by all combination product applicants for combination products that include constituent parts to which these requirements relate.

In many cases, correction and removal reporting requirements arise in relation to manufacturers' recalls in response to adverse events that may also trigger medical device reporting requirements under part 803. In such cases, submission of a medical device report (MDR) that contains all the information required by part 806 will suffice to comply with both sets of reporting requirements. Under § 806.10(f), no separate correction or removal report is required to be submitted if a report of the correction or removal has been submitted under part 803. However, in some instances, a correction or removal will not be associated with a reportable adverse event, or the action that a manufacturer takes in response will not trigger a 5-day reporting requirement, but the action must still be reported as described in part 806 to ensure, in part, appropriate coordination between the manufacturer and the Agency. In such cases, the correction or removal report currently should be submitted to the appropriate Agency field office.

Further, some corrections and removals may not trigger reporting requirements under part 803 or part 806, but may trigger recordkeeping requirements under part 806, and these recordkeeping requirements must be satisfied for combination products that include a device constituent part. Accordingly, we have incorporated the correction and removal reporting and recordkeeping requirements under § 4.102(c) to ensure that combination product applicants comply with these requirements.

With respect to BPDRs, as discussed more fully in response to Comment 13 in section III, we concluded that these reports are akin to field alert reports for drugs, and that it was important for BPDRs to be submitted for combination products that include biological product constituent parts to enable the applicant and the Agency to address the deviation in a timely, appropriate manner. Further, we note that in most instances, a biological product deviation that is reportable under §§ 600.14 and 606.171 is not associated with an adverse experience. Accordingly, we have included in § 4.102(c) BDPR requirements for all combination product applicants whose combination products contain a biological product constituent part.

The requirements applicable to combination products applicants under § 4.102(c) are now specified as follows:

a. Section 4.102(c)(1). Combination product applicants whose combination products received marketing authorization under a BLA, NDA, or ANDA and include a device constituent part must also submit: (i) 5-Day reports as described in §§ 803.3 and 803.53 and supplemental or followup reports as described in § 803.56; (ii) Malfunction reports as described in § 803.50 and supplemental or followup reports as described in § 803.56; and (iii) Correction or removal reports as described in § 806.10 and comply with recordkeeping requirements as described in § 806.20.

b. Section 4.102(c)(2). Combination product applicants whose combination products received marketing authorization under a BLA or a device application and include a drug constituent part must also submit: (i) Field alert reports as described in § 314.81 and (ii) 15-day reports and followup reports as described in § 314.80, within 30 calendar days instead of 15 calendar days if the combination product received marketing authorization under a device application.

c. Section 4.102(c)(3). Combination product applicants whose combination products received marketing authorization under an NDA, ANDA, or device application, and include a biological product constituent part must also submit: (i) BPDRs as described in §§ 600.14 and 606.171 and (ii) 15-day reports and followup reports as described in § 600.80, within 30 calendar days instead of 15 calendar days if the combination product received marketing authorization under a device application.

4. Section 4.102(d)

This provision replaces and has been revised as compared to proposed § 4.103(c) to: (a) Clarify that it applies only to combination product applicants; (b) identify the content expected in periodic safety reports for combination products that received marketing authorization under an NDA, ANDA, or BLA; and (c) provide that additional reporting is required for combination products that received marketing authorization under a device application only upon notification by the Agency if the Agency determines additional or clarifying safety information is required to protect the public health. Section 4.102(d) has two paragraphs stating the following requirements:

a. Section 4.102(d)(1). Combination product applicants for combination products that received marketing authorization under an NDA, ANDA, or BLA must include in their periodic safety reports, in addition to information required under § 314.80 or 600.80, respectively, a summary and analysis of reports that the applicant submitted in accordance with § 4.102(c)(1)(i) and/or (ii) (5-day and malfunction reporting requirements).

b. Section 4.102(d)(2). Combination product applicants for combination products that received marketing authorization under a device application do not have to make periodic reports under this rule but must submit additional reports regarding postmarketing safety events in accordance with written requests by the Agency that will be made only if the Agency determines that protection of the public health requires additional or clarifying safety information. Any such written request will specify the safety information to include in such reports and the reason or purpose for the request.

D. Section 4.103—What information must you share with other constituent part applicants for the combination product?

As discussed more fully in response to Comment 18 in section III, the final rule makes clear that the duties to share information within 5 calendar days under § 4.103 (replacing § 4.104 in the proposed rule) apply only to constituent part applicants. In addition, we clarified and simplified these requirements. Constituent part applicants must share only information they receive regarding events that involve a death or serious injury within the meaning of § 803.3 or an adverse experience within the meaning of § 314.80(a) or § 600.80(a), and must share this information only with each other; we have eliminated the alternative of sharing the information with FDA as unnecessary and inefficient. Also, we have removed as unnecessary the content of proposed § 4.104(b) regarding how to respond to information received from another constituent part applicant. Section 4.102(b) states which PMSR requirements apply to constituent part applicants, and those PMSR requirements prescribe under what circumstances an entity subject to them must submit a report regarding information that the entity receives.

We have added a new § 4.103(b) addressing recordkeeping for this information sharing duty. This provision has been added to provide constituent part applicants appropriate clarity and certainty regarding what records to keep and what documentation the Agency will consider adequate to demonstrate compliance with the information-sharing requirement.

E. Section 4.104—How and where must you submit postmarketing safety reports for your combination product or constituent part?

This section has been revised as compared to proposed § 4.105, to clarify where and how to submit postmarketing safety reports for constituent part applicants (§ 4.104(a)) and combination product applicants (§ 4.104(b)).

1. Section 4.104(a)

Constituent part applicants must make all reports in accordance with the existing regulations applicable to that type of product (for example, making reports in accordance with the requirements of part 314 if the constituent part is a drug). Like an applicant for a non-combination product, a constituent part applicant holds an application for a single type of article (drug, device, or biological product) and is required to make postmarketing safety reports to FDA only for events concerning its product. Accordingly, these reports are most appropriately submitted to the same Agency components in the same manner as they would be by any applicant holding an application for the same type of product.

2. Section 4.104(b)

Combination product applicants are required to submit postmarketing safety reports concerning the combination product, including each of that combination product's constituent parts. The nature of the events and the appropriate Agency component to contact regarding them can vary however. In light of these considerations, § 4.104(b) draws a distinction between individual case study reports (ICSRs) (Ref. 3) for safety events experienced by individual users of combination products [4] and other safety reports.

Section 4.104(b) requires that combination product applicants must submit all ICSRs (15-day reports, malfunction reports, serious injury or death reports, and 5-day reports) applicable to the combination product in the manner specified in the PMSR regulations associated with the application type for the combination product. See §§ 4.104(b)(1) and (2).

This approach to submission of ICSRs by combination product applicants best assures the clarity, completeness, and efficiency of such reporting. Having all ICSRs submitted in the same manner to the Center with the lead for the application enables multiple reporting requirements for an event to be satisfied by submitting a single report and ensures that all such reports relating to the same event will be captured in a single series (see also response to Comment 24).

In addition, under § 4.104(b), all BPDRs, field alert reports, and correction and removal reports must be submitted as described in the regulations from which these reporting requirements arise. The Agency currently receives these reports through differing mechanisms and Agency components based on such factors as logistical considerations and expertise to take the lead in assessing and addressing the issues raised in the report. For example, field alert reports for drugs currently must be submitted to FDA district offices as described in part 314, and BPDRs currently must be submitted to the Center for Biologics Evaluation and Research (CBER) or the Center for Drug Evaluation and Research (CDER) as appropriate based on which of these two Centers would ordinarily have jurisdiction over the type of biological product included in the combination product, as described in parts 600 and 606. These existing reporting systems are designed to assure timely, effective resolution of the matters raised in these reports.

As discussed in response to Comment 28 and in section III.A., the Agency anticipates issuing a guidance to provide recommendations on how applicants may adopt more streamlined, effective approaches to making reports under this rule.

F. Section 4.105—What are the postmarketing safety reporting recordkeeping requirements for your combination product or constituent part?

As discussed more fully in section III, response to Comment 26, we revised this section (replacing § 4.106 in the proposed rule) to clarify and simplify the recordkeeping requirements associated with PMSR obligations for combination product applicants and constituent part applicants. Section 4.105(a) describes the recordkeeping requirements for constituent part applicants and § 4.105(b) describes the requirements for combination product applicants, as follows:

1. Section 4.105(a)

Constituent part applicants must comply with the recordkeeping requirements prescribed in the underlying PMSR regulations identified in § 4.102(b) as applicable to the product based on its application type. In addition, they must retain the records required in § 4.103 (information sharing) for the longest retention period (if more than one period applies) required for records under the PMSR regulations applicable to their constituent part (as explained in response to Comment 26).

2. Section 4.105(b)

Combination product applicants must maintain records relating to their postmarketing safety reports for whichever is the longest required record-keeping period under the PMSR requirements applicable to the combination product applicant under § 4.102. Because both parts 314 and 600 currently require recordkeeping for 10 years, at this time the recordkeeping period for combination product applicant PMSR records would be at least 10 years.

[4] ''Individual case study report'' or ICSR is the internationally recognized term of art referring to reports of an adverse event, including a malfunction, experienced by an individual user of the product. This term is used to refer to such reports in international standards, and FDA implementing materials, regarding proper methods for submitting ICSRs to regulatory bodies for drugs, biologics, and devices.

TABLE 1—REQUIREMENTS FOR BOTH CONSTITUENT PART APPLICANTS AND COMBINATION PRODUCT APPLICANTS [1]

[See § 4.102(b) of this rule]

Source of PMSR requirements	Application Types		
	ANDA/NDA	BLA	Device application
Part 314	X		
Part 600		X	
Part 606		X	
Part 803			X
Part 806			X

[1] In addition to the requirements in table 1, constituent part applicants must share certain adverse event information with other constituent part applicant(s) for the combination product. (See § 4.103 of this rule).

TABLE 2—ADDITIONAL REQUIREMENTS ONLY FOR COMBINATION PRODUCT APPLICANTS [1]

[See § 4.102(c) of this rule]

Combination product includes	Reporting requirement	Application Type		
		ANDA/NDA	BLA	Device application
Drug	§ 314.81, Field Alert Reports	See table 1	X	X
	§ 314.80, 15-Day Reports (initial and followup)		X	X
Biologic	§§ 600.14 and 606.171, Biological Product Deviation Reports.	X	See table 1	X
	§ 600.80, 15-day Reports (initial and followup)	X		X
Device	§§ 803.53 and 803.56, 5-Day Reports (initial and supplemental or followup).	X	X	See table 1
	§§ 803.50 and 803.56, Malfunction Reports (initial and supplemental or followup).	X	X	
	Part 806, Correction or Removal Reports and Records	X	X	

[1] In addition to the requirements in table 2, the rule addresses other reporting requirements for combination product applicants as follows: (1) Combination products that received marketing authorization under an NDA, ANDA, or BLA: Include a summary and analysis of malfunction (§§ 803.50 and 803.56) and 5-day (§§ 803.53 and 803.56) reports submitted during the report interval in the periodic safety reports (see § 4.102(d)(1)) and (2) combination products that received marketing authorization under a device application: Submit additional reports when notified by the Agency because FDA has determined the information is required to protect the public health (see § 4.102(d)(2)).

III. Comments on the Proposed Rule

We received comments from 15 entities and one individual on the proposed rule. Commenters included trade organizations and manufacturers of drugs, devices, biological products, and combination products. Many commenters sought clarification on particular points or recommended adjustments to specific aspects of the proposed rule. Several commenters, while supporting rulemaking to address PMSR for combination products, recommended alternative approaches as discussed in Comment 27.

To make it easier to identify comments and our responses, the word ''Comment'' appears before the descriptions of the comments, and the word ''Response'' appears before our response. We have also numbered comments to help distinguish among them. The number assigned to each comment is purely for organizational purposes and does not signify relative value or importance of comments or the order in which they were received. Certain comments are grouped together under a single number because the subject matter of the comments was similar.

A. Section 4.100—What is the scope of this subpart?

(Comment 1) Some commenters sought clarification of safety reporting requirements for investigational combination products through guidance or expansion of the scope of the rule, including for investigational combination products that contain a legally marketed article as a constituent part. One commenter asked if the Agency is planning to publish guidance on this issue. One commenter asked that the Agency clearly lay out the responsibilities of the manufacturer of an approved product in the investigational setting.

(Response 1) Safety reporting for investigational products is an important issue for combination products, just as it is for drugs, devices, and biological products. However, this rule only discusses the PMSR requirements for combination products that have received marketing authorization. As stated in § 4.100(b), this rule does not apply to investigational combination products. The safety reporting requirements for investigational new drugs are in 21 CFR 312.32, and the safety reporting requirements for investigational devices are in 21 CFR 812.150. The Agency intends to continue developing guidance relating to this topic for combination products. If you have questions regarding how to comply with the reporting requirements for your investigational combination product, please raise them with the review division in CDER, CBER, or the Center for Devices and Radiological Health (CDRH) that is responsible for reviewing your application, or with the Office of Combination Products (OCP) as needed.

(Comment 2) Some commenters requested that the Agency clarify which entities and products are subject to this rule. Some commenters proposed clarifying that this rule applies only to application holders. Other commenters sought clarification of the rule's applicability to devices marketed under a 510(k) clearance and to non-applicants, including contract manufacturers. One commenter asked for clarification of whether the rule

would apply to component suppliers. One commenter sought clarification of which entities have reporting requirements under this rule for combination products composed of constituent parts marketed under separate applications. One commenter proposed that the Agency prepare a comprehensive list of products by class, product code or other designations that are subject to this rule.

(Response 2) As also discussed in section II (discussions of §§ 4.100 and 4.101), in light of comments received, we have amended this rule to clarify which entities it addresses and what PMSR requirements apply to them. We have clarified that this rule applies only to ''combination product applicants'' and ''constituent part applicants,'' as those terms are defined in § 4.101. We also have clarified the final rule to state which requirements apply to combination product applicants and which apply to constituent part applicants.

Under § 4.101 of this rule, the term ''applicant'' is defined to mean a person holding an application (BLA, NDA, ANDA, PMA, HDE, PDP, *de novo* classification request or premarket notification (510(k)) submission) under which a combination product or constituent part has received marketing authorization (see also definitions for ''application'' and ''device application''); ''combination product'' is defined to mean a product meeting the definition for this term under § 3.2(e); and the term ''constituent part'' is defined as in § 4.2 to mean a drug, device, or biological product that is part of a combination product. The term ''combination product applicant'' is defined to mean an applicant holding the application(s) for a combination product (*i.e.,* either holding the application for the entire combination product or the applications for each constituent part—in some cases the constituent parts of a combination product are marketed under their own marketing authorizations, as might be the case for a cross-labeled combination product for example), and ''constituent part applicant'' is defined to mean an applicant for a constituent part of a combination product the constituent parts of which are marketed under applications held by different applicants. In other words, if a single entity holds the application(s) under which a combination product is marketed, that entity is the combination product applicant; there are no constituent part applicants for that combination product. If instead, one applicant receives marketing authorization to market a constituent part of a combination product and another applicant receives marketing authorization to market another constituent part of that combination product, each of those entities is a constituent part applicant for their constituent part of that combination product. Importers, component manufacturers and suppliers, and any other entities that do not meet the definition of combination product applicant or constituent part applicant, are not subject to this rule.[5]

To illustrate how these definitions are used to determine who is subject to this rule, take the example of a prefilled syringe that received marketing authorization under an NDA or ANDA held by entity A, which purchases the syringe components for this product from entity B, which manufactures the syringe components. Entity A is the only applicant for the combination product, and, therefore, is the combination product applicant and must comply with the provisions of this rule applicable to combination product applicants. There are no constituent part applicants for the combination product. Entity B has no reporting duties under this rule (nor does it have any under part 803 or 806 for the syringe components[6]). (It bears noting that entity A is responsible not only for reporting but also for conducting any necessary quality investigations for the combination product as a whole and may need to coordinate with entity B for such investigations and to address safety issues relating to the device constituent part for the combination product.) If entity B were also to manufacture and separately market under a 510(k) complete, finished, empty syringes, not as part of a combination product, entity B would be subject to reporting requirements under parts 803 and 806, but would not be subject to this rule for this device. Entity A would remain the sole applicant for the combination product, *i.e.,* the combination product applicant. Similarly, if entity B manufactured syringes to supply to entity A for inclusion in kits for which entity A received marketing authorization under an NDA or ANDA, entity A would still be the sole applicant for the combination product, *i.e.,* the combination product applicant, since it holds the NDA or ANDA under which the kits received marketing authorization, and, therefore, only entity A would be subject to this rule.

To take another example, if entity C receives marketing authorization under a PMA or 510(k) to market an imaging device as a constituent part of a cross-labeled combination product, and entity D receives marketing authorization under an NDA or ANDA to market a contrast agent drug as a constituent part of that same cross-labeled combination product, then entities C and D are both constituent part applicants, and both are subject to the provisions of this rule applicable to constituent part applicants. There is no combination product applicant for this product.

Regarding one commenter's request for the Agency to develop a comprehensive list of products subject to this rule, we note that combination products are marketed for diverse medical purposes and include a wide variety of constituent parts, making a comprehensive listing impractical to compile. The definition of combination product is provided at § 3.2(e), and additional information regarding product classification is available on the Web page for OCP. In addition, regulated entities may seek feedback from OCP regarding the classification of their products, including by submitting a request for designation (RFD) in accordance with part 3 to obtain a formal decision from the Agency of whether their product is a drug, device, biological product, or combination product. Guidance for how to prepare an RFD is available on OCP's Web page (*http://www.fda.gov/CombinationProducts/default.htm*).

[5] We note that all entities that are not subject to this rule but that have reporting requirements under other regulations must comply with those requirements, including, as appropriate, with respect to events relating to a combination product. For example, although they are not applicants under this rule, entities marketing unapproved combination products must comply with all applicable PMSR requirements, for instance under 21 CFR part 310, for their products. Similarly, all entities subject to PMSR requirements under parts 314, 600, 606, 803, and 806 must comply with those requirements including for events relating to a combination product.

We note that non-applicants subject to reporting requirements under 314.80 and 600.80 may provide their reports to the applicant rather than the Agency. Similarly, non-applicants subject to reporting requirements under part 803 may request a reporting exemption from CDRH under § 803.19. Accordingly, entities that are not combination product applicants or constituent part applicants, as those terms are defined under this rule (importers, for example), who have reporting duties under part 803 in relation to a combination product may request a reporting exemption, subject to § 803.19. We intend to provide further information on these topics for combination products in guidance.

[6] Parts 803 and 806 apply to, among others, device ''manufacturers,'' and under §§ 803.3 and 806.2, device ''manufacturers'' include entities that manufacture components which are devices that are ready to be used and are intended to be commercially distributed and intended to be used as is, or are processed by a licensed practitioner or other qualified person to meet the needs of a particular patient.

B. Section 4.101—How does FDA define key terms and phrases in this subpart?

(Comment 3) One commenter thought we should clarify what we mean by ''combination product,'' and in particular whether we mean to include products that combine only two or more of the same type of article, such as a drug and a drug.

(Response 3) This rule defines combination products as those products falling within the scope of § 3.2(e). Under § 3.2(e), a combination product must include: A drug and either a device or biological product; a device and either a drug or biological product; a biological product and either a drug or device; or a drug, device, and a biological product. A product that includes only multiple drugs, multiple devices, or multiple biological products is not a combination product as defined in § 3.2(e).

(Comment 4) Some commenters proposed that we clarify what products fall within the scope of ''cross-labeled'' combination products as described in § 3.2(e)(3), with some noting that the preamble to the part 3 regulation (56 FR 58754, November 21, 1991) states that most drugs, devices, and biological products intended for concomitant use are not combination products. One commenter stated that the Agency must issue ''guidance on cross-labeled combination products'' before the effective date of this rule ''for meaningful implementation of this rule.''

(Response 4) While we disagree that we must issue guidance on cross-labeled combination products prior to the effective date for this final rule, we agree that clarifying when separately distributed articles constitute a combination product would be helpful. This issue may be relevant not only for purposes of postmarketing safety reporting, but to all aspects of the regulation of such combination products. Whether a drug, device, and/or biological product together constitute a cross-labeled combination product generally would be determined during the premarket review process, but sponsors may, for example, wish to clarify the matter earlier in product development. If sponsors have questions regarding whether a drug, device, and/or biological product that are intended to be separately distributed, but intended to be used with one another constitute a cross-labeled combination product, we encourage them to contact OCP. If sponsors wish to obtain a formal classification determination from the Agency, they may submit an RFD to OCP (see Comment 2).

FDA intends to publish a guidance that provides recommendations on how to comply with the requirements under this rule for combination products, including cross-labeled combination products.

(Comment 5) Two commenters noted that the definition of ''constituent part'' incorrectly cited § 3.1(e), a non-existent provision, rather than § 3.2(e), which is the citation for the ''combination product'' definition.

(Response 5) We have corrected this error by revising the definition to cite to § 4.2 as ''constituent part'' is defined in that section.

(Comment 6) Some commenters expressed concerns regarding the definition of ''constituent part'' for this rule and asked how constituent parts of combination products compare to components of devices. Some commenters specifically raised concerns that the definition of constituent part would result in certain entities, which are currently not subject to reporting requirements, becoming subject to PMSR requirements under this rule. Some commenters proposed revising the definition for ''constituent part'' and adding a definition for ''component'' in this rule to clarify that components of drugs, devices, and biological products are not constituent parts.

(Response 6) The purpose of the term ''constituent part'' is to identify the drug, device, and/or biological products that are part of a combination product. We believe the questions and concerns raised in these comments are fully addressed by the revisions we have made to the rule. As discussed in sections II.A and B (discussions of §§ 4.100 and 4.101) and in response to Comment 2, we have included definitions of ''combination product applicant'' and ''constituent part applicant,'' and clarified that this rule applies only to these two categories of entities.

The term ''component'' is defined elsewhere in Title 21 for drugs and devices (see 21 CFR parts 210, 212, and 820). Because the term ''component'' is not used in this rule, we determined it is not necessary to define the term as part of this rulemaking.

C. Section 4.102—What reports must you submit to FDA for your combination product or constituent part?

(Comment 7) Several commenters requested that the Agency clarify under what circumstances this rule might require the submission of multiple reports in relation to the same event. In this regard, some commenters sought clarification of what reports ''supersede'' others and under what circumstances the submission of one type of report applicable to a combination product would obviate the need to submit a second type of report for the same event. Another commenter sought clarification of reporting requirements for combination products comprised of constituent parts marketed under separate constituent part applications.

(Response 7) Under this rule, combination product applicants and constituent part applicants must submit reports as required by the PMSR requirements applicable to that applicant under § 4.102. Constituent part applicants are subject to only one set of PMSR requirements under this rule (in addition to the duty to share information with other constituent part applicants for the combination product, in accordance with § 4.103 as discussed in section II.D). Specifically, constituent part applicants must comply only with the PMSR requirements listed under § 4.102(b) based on the application type for their constituent part (*e.g.,* parts 803 and 806 PMSR requirements if the constituent part received marketing authorization under a device application). Combination product applicants also must comply with the PMSR requirements applicable to their combination product under § 4.102(b) based on the application type for their combination product. In addition, combination product applicants must comply with the PMSR requirements identified in § 4.102(c) as applicable based on the types of constituent parts (drug, device, and/or biological product) that the combination product includes.

We have clarified when a single report may suffice to comply with more than one reporting requirement for combination product applicants.[7] If a combination product applicant submits a report that satisfies multiple applicable reporting requirements, including all submission deadlines, for reports required to be submitted in the same manner, then the applicant does not need to submit any additional reports to satisfy those reporting requirements. As an example, a combination product applicant who holds an NDA for a drug-device combination product must submit both

[7] Constituent part applicants are subject only to the PMSR regulations applicable to their type of constituent part (drug, device, or biological product) (in addition to the duty to share information with other constituent part applicants for the combination product, in accordance with § 4.103 of this rule, as discussed elsewhere in this preamble). Accordingly, any circumstances under which they may be able to comply with more than one reporting requirement through a single report are identified in those PMSR regulations (see, *e.g.,* § 806.10(f)).

15-day reports as described in § 314.80 and malfunction reports as described in § 803.50, for an event that triggers both duties. That applicant could satisfy both requirements by submitting a single report within 15 days that includes all of the information that would be required in both types of reports for the event.

(Comment 8) Some commenters sought clarification of the standards for submitting a report under this rule. One commenter requested clarification of whether limitations established under §§ 314.80 and 600.80 for 15-day reporting requirements with respect to postmarketing studies apply to combination products under this rule. Other commenters sought clarification of the standard for when to submit an expedited report under § 314.80 or § 600.80, which state that events must be reported if ''associated with'' the use of the product, ''whether or not considered'' drug or biologic related. Other commenters requested clarification of how to interpret aspects of the device reporting standards in part 803, such as the meaning of ''reasonably suggests'' in relation to whether the event is reportable, the meaning of ''unreasonable risk of substantial harm to the public health'' in relation to 5-day reports, and the meaning of ''caused or contributed,'' a term defined under § 803.3.

(Response 8) The standards in this rule for when to submit a report are those established in the underlying PMSR regulations listed in § 4.102(b) and (c), including any exceptions provided in those underlying regulations. The standards and definitions for the underlying PMSR requirements, such as the definition of ''caused or contributed'' in § 803.3, remain applicable for combination products and their constituent parts.

For instance, if you are a combination product applicant for a drug-device combination product, in deciding whether you must submit a 15-day report for a serious, unlabeled adverse event, you must determine if the event was ''associated with'' the use of the combination product, and if so, you must submit the report regardless of whether you believe the combination product caused or contributed to the event. Similarly, in deciding whether you must submit a malfunction report, you must assess, among other things, whether the information ''reasonably suggests'' that the product malfunctioned. If the information does not ''reasonably suggest'' that a malfunction occurred, then a malfunction report would not be required.

If you are a combination product applicant and your combination product received marketing authorization under a device application, in deciding whether you must submit a serious injury or death report, you must consider whether the information ''reasonably suggests'' that the combination product may have caused or contributed to the death or serious injury in which case you must submit a report even if the event does not trigger submittal of a 15-day report.

In some cases, a report required under § 4.102(c) for a combination product applicant may address a constituent part; in others, it may address the combination product as a whole. For example, correction or removal that triggers a correction or removal report may involve the entire combination product. Bacteriological contamination or a significant change or deterioration to the drug constituent part that triggers a field alert report may relate to an aspect of manufacturing for the drug alone, or may also relate to an aspect of the manufacture of the combination product as a whole that is affecting the drug constituent part. A manufacturing deviation or other event that may affect the safety, purity, or potency of a biological product constituent part and trigger a BPDR may involve the biological product alone, or the combination product as a whole. In all cases, the report should fully present the issues, including with respect to each constituent part and the combination product as a whole, as applicable, to ensure an appropriate response to the event.

(Comment 9) One commenter sought clarification of what adverse events would be considered ''unexpected,'' for purposes of §§ 314.80 and 600.80 with regard to combination products. Another commenter asked whether a serious adverse event that is expected under the drug labeling for a combination product and that does not involve a device malfunction should be reported in an expedited manner. In relation to these issues, other commenters also raised whether this rule will ''require labeling specific to the combination product,'' and whether a distinct understanding of ''expectedness'' would need to be developed with respect to combination products marketed under a device application as opposed to an NDA or BLA due to differences in product review and labeling.

(Response 9) Under this rule, a serious adverse event could trigger a requirement for submission of a 15-day report as described in § 314.80 or § 600.80 by a combination product applicant or a drug or biological product constituent part applicant if the event is not listed in the current FDA-approved labeling for the combination product.

While this rule does not establish any labeling requirements, we recognize that there is a question of what labeling is relevant to a determination of whether an adverse event is unexpected for purposes of 15-day reports described in §§ 314.80 and 600.80, if the constituent parts of the combination product have their own labeling.

Our goal is to ensure timely, complete reporting without creating unnecessary redundancy of reporting. Combination product labeling must meet the labeling requirements for each constituent part, including all required information regarding the risks associated with the use of the combination product. The term ''expectedness'' for purposes of § 314.80 or § 600.80 should be interpreted in the same manner regardless of the type of application(s) under which the combination product received marketing authorization.

Accordingly, in determining whether an adverse experience is unexpected, it is appropriate to consider all of the FDA-approved labeling for the combination product. For example, if the constituent parts of a cross-labeled combination product have their own labeling, and the event is addressed in the labeling for either constituent part, the event is expected for the combination product.

(Comment 10) One commenter proposed that the requirements for submitting postmarketing 15-day reports and MDRs be consolidated for combination products, arguing that this would eliminate duplicative reporting as much as possible and improve efficiency. Other commenters proposed applying only the reporting requirements associated with the application type if it is unclear which constituent part or parts contributed to the event.

(Response 10) We agree with the goal of consolidating requirements and avoiding unnecessary redundancy in reporting for combination products. To this end, we have not required submission of serious injury and death reports under part 803 for combination products that received marketing authorization under a BLA, NDA, or ANDA and that include a device constituent part, based on the premise that the requirements of §§ 600.80 and 314.80, respectively, ensure timely reporting of such events for such combination products. In addition, as discussed in section II.C, discussion of § 4.102(c), we have revised the requirement for combination product

applicants to submit 15-day reports to permit these reports to be submitted within 30 days for combination products that received marketing authorization under a device application, so that the timing for these reports corresponds to the timing for related MDRs for such combination products, specifically serious injury, death, and malfunction reports. Further, we have clarified that applicants need not submit multiple types of reports for the same event if they are able to satisfy the requirements of each in a single report.

As discussed in the preamble to the proposed rule, there are certain significant differences in the PMSR regulations for drugs, devices, and biological products, that address distinct characteristics and potential safety issues associated with the particular type of product, and the public health benefit of these unique provisions would be lost if the combination product were subject solely to the reporting requirements associated with the application type (74 FR 50744 at 50746). For example, malfunction reports can address distinct issues that are not captured by other reporting requirements and need to be submitted for all combination products that include a device constituent part. Specifically, malfunction reports ensure that the Agency receives notice of malfunctions of combination products and device constituent parts if that product or a similar one marketed by that applicant would be likely to cause or contribute to a death or serious injury if the malfunction were to recur.

(Comment 11) One commenter argued that the proposed rule included provisions that could result in inconsistent reporting requirements. This commenter stated that an applicant for a drug-device combination product marketed under a single application would have a duty to address adverse events caused by the device under 15-day reporting requirements while, if a drug-device combination product were marketed under separate applications for the drug and device, the 15-day reporting requirements would extend only to the adverse events caused by the drug.

(Response 11) This final rule clarifies these reporting requirements, which we do not consider to be inconsistent. As the commenter indicates, 15-day reports are required for combination product applicants and for drug and biological product constituent part applicants. The scope of these reporting requirements depends on the type of product (drug, biological product, device, combination product) that is marketed by the applicant. A combination product applicant must report unexpected serious adverse events associated with its product, *i.e.,* the combination product. A drug or biological product constituent part applicant must report unexpected serious adverse events associated with its product, *i.e.,* the drug or biological product, and also must share information it receives with the other constituent part applicant(s) for that combination product in accordance with § 4.103. The other constituent part applicant(s) then must comply with any applicable PMSR requirements for its product with respect to that event, including preparation and submission of reports as appropriate.

(Comment 12) One commenter sought clarification of when the clock starts for a 5-day report (as described in §§ 803.3 and 803.53).

(Response 12) This rule does not affect or change when the clock starts for reporting requirements. The clock starts for a 5-day report for a combination product as it would for a device. As required under § 803.53(a), the clock begins when you become aware that a reportable event necessitates remedial action to prevent an unreasonable risk of substantial harm to the public health. Or, as required under § 803.53(b), the clock begins when you receive a written request from FDA for the submission of a 5-day report. Additional information on the timing requirements associated with 5-day reports is in the CDRH guidance document ''Medical Device Reporting for Manufacturers'' available at *http://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/ucm359566.pdf.*

(Comment 13) One commenter proposed BPDRs as an additional type of required report to include among the specified required reports listed in proposed § 4.103(b), arguing that BPDRs serve a purpose similar to field alert reports and, therefore, would be appropriate to include as well.

(Response 13) We agree with this comment. To ensure the completeness of postmarketing safety reports for combination products that include a biological product constituent part, including combination products that received marketing authorization under an NDA, ANDA, or device application, we are explicitly including BPDRs under § 4.102(c). Similar to field alert reports for drugs, BPDRs address events associated with manufacturing that represent a deviation from current good manufacturing practice, applicable regulations, applicable standards or established specifications, or represent an unexpected or unforeseeable event that may affect the safety, purity, or potency of the product. Therefore, we are adding BPDRs to the list of types of reports under § 4.102(c) that a combination product applicant must submit if the combination product includes a biological product constituent part.

(Comment 14) One commenter sought clarification of the application of part 806 device correction and removal reporting requirements within the proposed PMSR system for combination products. The commenter also sought confirmation that part 806 reporting requirements can be met for combination products through part 803 reporting, as they can for devices that are not constituent parts of combination products.

(Response 14) To address this comment, we have expressly incorporated under § 4.102(c) correction and removal reporting described in § 806.10 and associated recordkeeping requirements described in § 806.20. We have made this change to provide clarity, promote efficiency, and ensure the completeness of postmarketing safety reports for combination products that include a device constituent part.

Part 806 implements, in part, section 519(g) of the FD&C Act (21 U.S.C. 360i), which was enacted due to Congressional concern that device manufacturers were carrying out product corrections or removals without notifying FDA or not doing so in a timely fashion (H.R. Rep. No. 101–808, at 29 (1990); S. Rep. No. 101–513, at 23 (1990)). Congress explained that industry's failure to report corrections and removals, particularly those undertaken to reduce risks associated with the use of a device, ''denies the agency the opportunity to fulfill its public health responsibilities by evaluating device-related problems and the adequacy of corrective actions'' (S. Rep. No. 101–513, at 23), and ''has seriously interfered with the FDA's ability to take prompt action against potentially dangerous devices'' (H. R. Rep. No. 101–808, at 29).

FDA believes that correction and removal reporting and recordkeeping for combination products containing a device constituent part is necessary to protect the public health as envisioned by Congress, by ensuring that the Agency has current and complete information regarding those actions taken by applicants to reduce risks to health caused by their products. Reports of such actions will improve the Agency's ability to evaluate problems and to take prompt action against potentially dangerous combination products, regardless of the type of

application under which the combination product received marketing authorization.

As for all of the PMSR requirements incorporated into this rule by reference, the standards for how to report under § 806.10 and for recordkeeping under § 806.20 are not affected by this rule, including not having to submit an 806 report if the correction or removal is addressed in a report submitted under part 803 (§ 806.10(f)). To enable efficient reporting and avoid unnecessarily redundant reports, this rule provides that part 803 reporting requirements can be satisfied through submission of drug or biological product reports, as explained in response to comment 7. Similarly, part 806 reporting requirements also can be satisfied through submission of an MDR or 15-day report, so long as the report includes all of the information needed to comply with the requirements of part 806 and is filed within 10 working days of initiating the correction or removal, as described in § 806.10.

In circumstances in which a 15-day report or MDR is not triggered but reporting under part 806 is required, reports of corrections or removals should be sent to the FDA in the same manner as for other such reports unless otherwise specified by the Agency. Currently, reports required under part 806 are submitted to the district office for the district in which the reporting facility is located, on the basis that the district office can best monitor the firm's removal or corrections activities in a timely fashion. Combination product applicants for combination products with a device constituent part who initiate a correction or removal that is not required to be reported to FDA under 806.10, must maintain a record of the correction or removal as described in § 806.20.

(Comment 15) Some commenters sought clarification of the applicability of section 227 of the Food and Drug Administration Amendments Act of 2007 (FDAAA) concerning the reporting of malfunctions to FDA, including the use of summary reporting, for Class I devices and for Class II devices that are not permanently implantable, life supporting, or life sustaining. Some commentators sought clarification of how the status of ''life-supporting'' or ''life-sustaining'' would apply to combination products, and whether the intended use of the combination product would determine the status of the device constituent part. One commenter sought clarification of how such a class-based approach would be applied to combination products approved under NDA or BLA, for which no express classification may have been made for the device constituent part.

(Response 15) FDA issued a notice in the **Federal Register** (76 FR 12743, March 8, 2011) clarifying that Class I and II device manufacturers and importers must continue to submit malfunction reports in accordance with part 803, pending future action by FDA to address the malfunction reporting requirements for Class I and Class II devices addressed in FDAAA. Accordingly, combination product applicants for combination products that include a device constituent part, and constituent part applicants for device constituent parts, must comply with part 803 requirements as described in this rule pending such further Agency action. At this time, therefore, malfunction reporting duties are the same for all combination products that include a device constituent part, regardless of whether the combination product or device constituent part would be considered life-supporting or life-sustaining, and regardless of whether the device constituent part would be considered a Class I, II, or III device.

(Comment 16) One commenter sought clarification of whether the periodic reports addressed in proposed § 4.103(c) should be considered ''expedited'' reports for purposes of this rule.

(Response 16) FDA has retitled this provision to ''Other reporting requirements for combination product applicants'' for clarity because it addresses periodic safety reports for drug and biologic-led combination products and also addresses under what circumstances additional reports for device-led combination products are required upon Agency request. This rule does not modify the timing of periodic safety reports. The purpose of § 4.102(d) is to clarify which combination product applicants must submit periodic safety reports and other safety reports, and what information they must include in such reports. The intent of § 4.102(d), in conjunction with § 4.102(a), (b), and (c) is to ensure that the Agency obtains complete, timely postmarketing safety information regarding combination products while avoiding unnecessary burden to applicants.

(Comment 17) One commenter proposed the reorganization of proposed 4.103(b) to parallel the structure of § 4.103(a).

(Response 17) We have not adopted this approach because § 4.102(c) is intended to address a different issue than § 4.102(b). Section 4.102(b) (like proposed § 4.103(a)) addresses requirements that constituent part applicants and combination product applicants must satisfy for their marketed products depending upon the type of application under which it received marketing authorization, and structuring the provision based on the type of application that the applicant holds provides a clear, efficient way to identify such requirements. In contrast, the purpose of § 4.102(c) (like proposed § 4.103(b)) is to state which additional requirements a combination product applicant must satisfy based on the types of constituent parts included in the combination product, which are most clearly and efficiently listed by constituent part type (drug, biological product, or device).

D. Section 4.103—What information must you share with other constituent part applicants for the combination product?

(Comment 18) Some commenters requested clarification of whether proposed § 4.104(a) applied if there were a single application holder for the combination product but the combination product included an article approved under another application held by another entity for independent marketing not related to the combination product. Other commenters asked for clarification of which applicants for constituent parts of combination products could be subject to proposed § 4.104(a) and (b) if the combination product were not approved under a single application. Some commenters proposed an approach under which, if there is a single application for the combination product, the holder of that application would report to FDA in accordance with proposed § 4.103, and FDA would then decide whether any other application holders for articles included in the combination product should be notified and whether to seek additional reports from them.

(Response 18) As reflected in the preamble to the proposed rule (see 74 FR 50744 at 50749 to 50750), proposed § 4.104(a) was intended to apply if the constituent parts of the combination product were being marketed by different entities, including when the constituent parts received marketing authorization under separate applications held by different applicants. As explained in the response to Comment 2, we have revised the rule to apply to combination product applicants and constituent part applicants, in part to clarify which entities are subject to it. Accordingly, we have revised this provision to clarify that it applies solely to constituent part applicants. Section 4.103 of this final rule is not intended to establish any

duties for entities who hold a marketing authorization to market a product not as part of a combination product, even if the same article is part of a combination product for which another entity received marketing authorization (*e.g.,* the second entity might have combined the article with another product to make a co-packaged or single-entity combination product, or market the article for a new use with another product as a cross-labeled combination product).

For example, if entity A holds an approved application to market a cross-labeled combination product that includes a device and a drug, and entity B holds an approved application to market the drug for a different use (*i.e.,* not as part of the combination product), then entity A would be the combination product applicant for that combination product, and neither entity A nor B would be a constituent part applicant for that combination product. Therefore, § 4.103 would not require either entity A or B to share information with the other.

In contrast, if entity A holds an approved PMA to market a device as one constituent part of a cross-labeled combination product (*i.e.,* entity A is the constituent part applicant for the device constituent part of the combination product), and entity B holds an approved NDA to market a drug as the other constituent part of that combination product (*i.e.,* entity B is the constituent part applicant for the drug constituent part of the combination product), then § 4.103 would require both entities A and B to share postmarketing safety information with each other for the specified types of events relating to that combination product.

Regarding the issue of which entities would be subject to proposed § 4.104(b), we have decided to eliminate the provision as unnecessary. Constituent part applicants that receive information from another constituent part applicant must comply with the same duties under § 4.102(b) with respect to this information as they must with respect to any information they receive regarding a postmarketing safety issue for their product, including the duty to submit postmarketing safety reports as required.

(Comment 19) Some commenters argued that the 5-day deadline under proposed § 4.104(a) for information sharing was too short. Some commenters recommended instead tying the timeframe to the nature of the event. Some argued that it is not warranted or useful to share information automatically within a 5-day timeframe because it leaves entities little time to evaluate the information before sharing it and could result in unnecessary redundancy of reporting.

(Response 19) We disagree with these comments. The provision calls for sharing information that the constituent part applicant receives regarding an adverse event relating to the combination product, and does not require the applicant to prepare a report in accordance with any of the regulatory reporting requirements established under parts 314, 600, 606, 803, or 806. The duty under § 4.103 does not require a constituent part applicant to analyze, investigate, or organize the information or take any other actions beyond forwarding the information as received to the other constituent part applicant(s) for the combination product and maintaining certain records. Accordingly, we believe 5 calendar days is a reasonable deadline that does not impose undue burden, while enabling timely reporting by the constituent part applicant(s) with whom the information is shared.

Such an expedited sharing of information is important to ensure timely, complete reporting with regard to adverse events that may have been brought to the attention of only one constituent part applicant for a combination product. Enabling each constituent part applicant to review in a timely manner the information related to the combination product enhances efficiency and thoroughness of reporting because each constituent part applicant evaluates the information with respect to its own constituent part and with regard to the reporting requirements applicable to that type of constituent part.

(Comment 20) Some commenters stated that the information sharing requirements of proposed § 4.104 should be eliminated; some said these requirements are unnecessary depending on the nature of the event, and likely to produce unnecessary, duplicative reporting. Some commenters proposed that the information sharing requirements under proposed § 4.104 should apply only if the event is potentially reportable and that proposed § 4.104(a) should not apply if the applicant determines that the event does not concern the other constituent part(s) of the combination product. Other commenters proposed that if it can be determined that the event is attributable to only one constituent part, then reporting requirements should apply only to the application holder for that constituent part. Some commenters proposed that the rule be revised such that, in the event that constituent parts of a combination product are being marketed under separate applications, and it is unclear which constituent part(s) contributed to the event, the rule would require compliance only with the reporting requirements for the constituent part providing the primary mode of action for the combination product.[8] One commenter argued that requiring separate reporting to the centers responsible for each constituent part would be overly burdensome. Some commenters sought clarification for when an applicant should report to another applicant or to FDA under proposed § 4.104(a). Some commenters requested clarification regarding when FDA would notify application holder(s) for the constituent part(s) of a combination product if FDA receives information from another application holder for that combination product. One commenter proposed eliminating the option of sharing the information with FDA arguing that including FDA in the process would slow communications and not provide any benefit. One commenter proposed that subsequent information received relating to the same event be shared only with FDA or with another applicant in the same time-frame as a report would be required to be submitted to FDA.

(Response 20) The best way for the Agency to receive complete reports for combination products is to ensure that each constituent part applicant has an opportunity to review the information received regarding the specified types of events (serious injuries, deaths, and other adverse events) for the combination product. Accordingly, we disagree with the proposals to narrow or eliminate the information sharing requirement. We do not agree this requirement will produce unnecessarily duplicative reporting. The trigger for a constituent part applicant to submit a report to the Agency is not the mere act of receiving information but a determination that the event is reportable under the PMSR requirements applicable to that applicant. The Agency may receive multiple reports regarding the same event because of § 4.103 (formerly § 4.104 in the proposed rule), but this approach ensures that the Agency has the benefit of each constituent part applicant's expertise and familiarity regarding its own constituent part in

[8] The term ''primary mode of action'' is defined at § 3.2 as the mode of action that provides the most important therapeutic action of the combination product, *i.e.,* that is expected to make the greatest contribution to the overall therapeutic effects of the combination product.

assessing the information with respect to that constituent part.

Regarding the issue of sharing information with FDA as opposed to other constituent part applicants, we have eliminated the option of sharing information with FDA as unnecessary and inefficient. We agree that timely, complete reporting by each constituent part applicant is best assured by having constituent part applicants share information they receive directly with one another.

We also agree that when any constituent part applicant shares information relating to an event with the other constituent part applicant(s), the information sharing duty ends with respect to that event. When information is shared, each constituent part applicant must investigate and report to the Agency, under the applicable PMSR requirements, regarding the event as they would for any event for which they receive information. The constituent part applicants may find it helpful to share with one another additional and followup information they receive or develop relating to the event, but this is not required by this rule.

(Comment 21) Some commenters stated that disclosure of event information to another company might involve disclosure of confidential and proprietary information. One commenter proposed that the information be shared with the other applicant if practicable and if it does not raise concerns regarding confidentiality or proprietary information.

(Response 21) Section 4.103 does not require the sharing of trade secret or confidential commercial information with other constituent part applicants. Further, we have revised this section to specify that the information required to be shared concern events that involve a death or serious injury as described in § 803.3, or an adverse experience as described in § 314.80(a) or § 600.80(a). Such information is likely to be received from health care facilities, consumers, and other sources, and therefore, unlikely to contain trade secret or confidential commercial information.

In regard to the Federal Health Insurance Portability and Accountability Act (HIPAA), we note that HIPAA only applies to covered entities (*i.e.,* health plans, covered health care providers, and health care clearinghouses), and their business associates, and thus is unlikely to apply to constituent part applicants. Moreover, even if a constituent part applicant is a HIPAA covered entity or business associate, we note that HIPAA permits the disclosure of protected health information (PHI), such as information that identifies a particular patient, if such disclosures are required by other law. The HIPAA Privacy Rule permits the use or disclosure of PHI ''to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.'' 45 CFR 164.512(a)(1). Because § 4.103 of this rule requires constituent part applicants to share with each other information received, including PHI, regarding certain events related to the combination product, a constituent part applicant, which is subject to HIPAA, would be permitted by HIPAA to make such disclosure.

(Comment 22) Some commenters sought clarification of the start time for meeting the reporting deadlines under proposed § 4.104(b). One commenter recommended that it be the day the information is received from the reporter subject to proposed § 4.104(a).

(Response 22) While the content of proposed § 4.104(b) has been removed from the rule as unnecessary, we note that the start time for determining the submission deadline for postmarketing safety reports is the same as for information received from any other source, and depends on the type of report and the regulation from which the requirement for the report arises.

(Comment 23) Some commenters asked for the Agency to provide examples of the application of proposed § 4.104, including guidance on what information to include in reports under this provision. One commenter asked for guidance on the process for submitting information to the Agency under proposed § 4.104.

(Response 23) Section 4.103 requires the transmittal of information received. Constituent part applicants do not need to modify, organize, or evaluate the information; they must only forward the information to the other constituent part applicant(s) for the combination product. As discussed in Comment 18, we have eliminated the alternative of sharing the information with FDA as unnecessary and inefficient. We intend to provide additional information regarding how to comply with § 4.103 in guidance.

E. Section 4.104—How and where must you submit postmarketing safety reports for your combination product or constituent part?

(Comment 24) Some commenters sought clarification of how to comply with the submission requirements for different types of reports for a combination product. One commenter proposed that the rule expressly state reports be submitted to ''the approved application'' if there is only one reporter for the combination product. Another proposed that reports for a combination product marketed under one application be submitted to the lead center, while those for combination products marketed under separate applications for different constituent parts in some, but not all, cases be submitted to the center responsible for the particular constituent part's application. One commenter noted a need to clarify how to make electronic submissions for combination products.

(Response 24) As discussed in section II.E (discussion of § 4.104), we have revised the rule to clarify how and where to submit postmarketing safety reports for constituent part applicants and for combination product applicants. In keeping with comments received, § 4.104(a) requires constituent part applicants to submit their reports in the same manner as any other applicant holding the same kind of application for a product (*e.g.,* a constituent part applicant holding a PMA for a device constituent part must submit reports in the same manner as any other applicant holding a PMA for a device).

We have drawn a distinction between types of postmarketing safety reports submitted by combination product applicants. With regard to ICSRs, we have adopted an approach consistent with comments suggesting that reports be submitted to the lead center and in accordance with the procedures associated with the application type for the combination product. Specifically, § 4.104(b) requires such combination product applicants to submit 5-day, 15-day, and malfunction reports, if required for their product, in the manner described in the PMSR regulations associated with the application type for the combination product. For example, if the combination product received marketing authorization under an NDA, then 5-day, 15-day, and malfunction reports, and all followup reports, would be submitted how and where described in part 314 for 15-day reports and followup reports to them. This approach promotes efficiency and ensures that all such reports relating to the same event are pooled together, and that multiple ICSR reporting requirements for the same event can be satisfied through a single submission (so long as that submission meets the content and deadlines for each reporting requirement).

At the same time, it is appropriate for specific components of the Agency to have the lead for addressing certain distinct types of reports, in light of such factors as the issues raised in the

reports, logistical considerations for Agency response, and efficient engagement of appropriate Agency expertise. Specifically, correction or removal reports, field alert reports, and BPDRs are currently directed to specific Agency offices to ensure efficient, effective assessment and response. Accordingly, under § 4.104(b), all combination product applicants must direct field alert reports and BPDRs to the same Agency components that currently receive them, in accordance with the underlying regulations for these reports. For example, if the combination product includes a biological product, BPDRs must be submitted to the appropriate component within CDER or CBER in accordance with parts 600 and 606, based upon which of these two Centers would ordinarily have jurisdiction over the biological product included in the combination product. Part 806 does not specify where to submit correction or removal reports. Accordingly, neither does this rule, but applicants currently should submit them to the appropriate FDA district office, unless the information is included in an ICSR for the event, as explained in response to Comment 14. See Recalls, Corrections and Removals (Devices) (*http://www.fda.gov/medicaldevices/deviceregulationandguidance/postmarketrequirements/recallscorrectionsandremovals/default.htm*).

The Agency intends to provide guidance concerning procedural and technical details of complying with these requirements, including how to comply with the Centers' electronic reporting requirements. We seek to take best advantage of information technology and other resources to maximize the benefit of PMSR while minimizing the burden.

(Comment 25) Several commenters sought guidance regarding the content, format, and completeness of applicable forms, and appropriate terminology to use with respect to different types of events and constituent parts for combination products.

(Response 25) Applicants should provide relevant information in as complete and clear a manner as possible, consistent with the parameters of the FDA form. Also, we intend to update relevant FDA forms, if appropriate, including the instructions for how to complete them, and to develop guidance that provides recommendations for meeting PMSR requirements under this rule.

F. Section 4.105—What are the postmarketing safety reporting recordkeeping requirements for your combination product or constituent part?

(Comment 26) A commenter proposed that the same recordkeeping requirements apply to all types of reports for a combination product.

(Response 26) We agree with the premise that a uniform set of record retention requirements apply to all reports relating to a combination product marketed by a single applicant, *i.e.,* a combination product applicant. Accordingly, § 4.105(b) requires that combination product applicants maintain all PMSR records for the longest time period established in the recordkeeping requirements associated with the PMSR provisions applicable to the combination product. This approach allows combination product applicants to maintain all these PMSR records for a product under one record retention scheme, and helps ensure that potentially interrelated records all remain available for events and for the combination product. Because both parts 314 and 600 currently require record retention for 10 years, at this time, all combination product applicants must retain PMSR records for at least 10 years.

In contrast to combination product applicants, constituent part applicants market only a drug, device, or biological product rather than a complete combination product. This distinction is acknowledged and reflected in the approach taken throughout the rule in establishing PMSR requirements for constituent part applicants. The requirements for record retention by constituent part applicants align with the overall approach of the rule. Specifically, § 4.105(a)(1) requires that constituent part applicants comply with the underlying recordkeeping requirements, including timeframes, established in the PMSR requirements identified in § 4.102(b) as applicable based on their product's application type. This ensures that constituent part applicants comply with the same requirements as any other applicant marketing a drug, device, or biological product.

The essential difference between constituent part applicants and other applicants for drugs, devices, and biological products is the distinct relationship of constituent part applicants' products to one another as parts of a combination product. The information sharing requirements of § 4.103 reflect this distinct relationship and the overarching need for coordination between constituent part applicants to ensure the safety and effectiveness of the combination product. As explained in section II (discussion of § 4.103), § 4.103(b) includes an explicit recordkeeping requirement in relation to the information constituent part applicants are required to share with one another under § 4.103(a). Section 4.103 is intended to ensure complete, timely reporting for the combination product as a whole. To support this goal, while at the same time aligning the record retention requirement for the records required under § 4.103(b) with the overall approach of this rule for constituent part applicants, § 4.105(a)(2) requires constituent part applicants to maintain the specified records of information shared for the retention period established in the PMSR recordkeeping requirements for that constituent part applicant's constituent part if there is only one period established, and the longest recordkeeping requirement established in those requirements if those requirements establish more than one record retention period. We believe that this retention period will ensure that the information remains available to the applicants and the Agency for a sufficiently long period to inform investigation of events and responses to them for the combination product, and enable the Agency to assess compliance with § 4.103, without imposing undue burden on constituent part applicants. This approach also avoids the complexities of tying the retention period for records relating to the information sharing provision to the record retention requirements applicable to the other constituent part applicant(s).

G. Alternate Approaches

(Comment 27) Several commenters proposed that the Agency adopt a wholly different PMSR approach for combination products, with some supporting the Agency's proposed approach as an interim measure until a unified framework is developed either for combination products in particular or for all FDA-regulated medical products. Some commenters proposed adopting the most stringent set of PMSR requirements applicable to the combination product. Others called for developing a harmonized approach for combination products, with one commenter calling for a public meeting to address the issue and another for such a system to be put in place after a single reporting porthole is established for all regulated products. One commenter called for FDA to develop a

PMSR system for combination products consistent with Global Harmonization Task Force guidelines, International Organization for Standardization standards, and European Commission guidelines. This comment emphasized that such other approaches rely on the ''primary intended action'' of the combination product to determine what PMSR requirements should apply. Some commenters recommended applying only the reporting requirements applicable to the application type. One commenter emphasized challenges of complying with multiple reporting systems.

(Response 27) The Agency has considered alternate approaches to PMSR for combination products, including in relation to the public hearing held on November 25, 2002, and the workshop held on July 8, 2003. We have considered such options and presented in the preamble (74 FR 50744 at 50745 to 50747) the Agency's reasons for pursuing the approach described in the proposed rule. In finalizing this rule, FDA again determined that the approach described in this rule allows FDA to receive complete, timely postmarketing safety information regarding combination products, which is necessary to assure the continued safety and effectiveness of such products, using established standards and systems, while minimizing unnecessary duplication and burdens on combination product and constituent part applicants.

H. Guidance and Agency Internal Coordination and Training

(Comment 28) Various commenters requested that the Agency address implementation of this rule through guidance. Commenters noted the importance of ensuring that this rule is as clear as possible. Most commenters requested that the guidance present how the rule would apply to different types of combination products and different types of events. Several commenters requested that this guidance include a decision tree, flow charts, tables, algorithm, or other organizational and explanatory tools to clarify how to comply with the reporting requirements applicable to a combination product. One commenter asked for guidance on whether to cross-reference reports submitted to different locations, such as field alert reports and 15-day reports. Some commenters proposed that the Agency issue guidance prior to publication of this rule. One commenter called for the guidance to address how Agency personnel will coordinate to ensure compliance and how the Agency will monitor implementation of this rule's requirements. One commenter called for the Agency to ensure that the lead center has appropriate expertise to address adverse event reports for a combination product and that training, guidance, and cross-assignment of staff might be helpful in this regard. Another commenter proposed that the Agency take appropriate measures to ensure timely, effective communication between Agency components with respect to postmarketing safety reports for combination products. Some commenters also noted the importance of appropriate training and other Agency personnel considerations.

(Response 28) We intend to publish guidance that provides recommendations on how to comply with the requirements under this rule for combination product applicants and constituent part applicants, including such matters as cross-referencing of reports. We appreciate the comments received on this issue and look forward to further feedback in response to the publication of this final rule and of the draft guidance we may issue. With regard to the requests that we issue guidance prior to issuance of this final rule, we clarified and revised the rule in certain respects, and we did not believe it would be appropriate to anticipate the content of this final rule by publishing guidance concerning its content prior to its finalization.

We agree that appropriate training of Agency staff and timely, effective coordination among Agency components to address postmarketing safety reports for combination products are important efforts that the Agency continues to address.

I. Effective Date and Compliance Dates

(Comment 29) Some commenters proposed that the Agency delay the effective date for this rule, arguing that 180 days would not provide sufficient time to take steps to come into compliance, including to develop, validate, and implement new systems, alter procedures and commercial arrangements, and train staff as needed to comply with this rule's requirements. Some proposed making the effective date 1 year after issuance. One commenter proposed 2 years.

(Response 29) We do not agree that it would be appropriate to delay the effective date of this rule. However, in light of these comments, and in consideration of the costs of this rule as discussed in section VIII, we have decided to extend the compliance date with respect to certain provisions of the rule for combination product applicants and constituent part applicants, for a period of 18 months following the effective date of this rule.

The duties for both combination product and constituent part applicants under § 4.102(a) and (b), and for constituent part applicants under §§ 4.104(a) and 4.105(a)(1) are generally the same as for any other entity holding such an application for its product, and we expect all applicants subject to this rule already to be in compliance with these provisions for their products as these provisions generally refer to existing regulations that such applicants have generally followed (see 74 FR 50744 at 50745). Accordingly, the effective date for the rule is 30 days after the date of its publication and the compliance date for these provisions is the same as the effective date for this rule. However, with respect to the requirements of § 4.102(c) and (d) for combination product applicants, the requirements of §§ 4.103 and 4.105(a)(2) for constituent part applicants, and the requirements of §§ 4.104(b) and 4.105(b) for combination product applicants, the compliance date will be 18 months following the effective date of this rule.

J. Miscellaneous

(Comment 30) Some comments concerned coordination of various Agency activities related to adverse events including then pending Agency rulemakings concerning electronic reporting, adverse event report database management and searchability, forms referenced in this and other rulemakings, and harmonization efforts with foreign regulatory agencies.

(Response 30) The Agency has taken into account such coordination considerations. Pending FDA rulemakings were one consideration in deciding to streamline this rule by using cross-references to requirements of the underlying regulations listed in § 4.102, without repeating the substance of those requirements. As noted in section II (see discussion of § 4.101), this approach will minimize the need to revise this regulation should the underlying regulations be amended. Similar considerations have informed our determination to reference in § 4.104 the reporting procedures required in the underlying regulations. As discussed in Response 25, we intend to update relevant FDA forms, if appropriate, including the instructions for how to complete them, and to develop guidance that provides recommendations for meeting PMSR requirements under this rule.

With respect to international harmonization, we remain committed to such efforts, including with respect to PMSR requirements for combination

products. A practical challenge for combination products in particular is that international collaboration and harmonization efforts are at an early stage for these products. At the same time, there is a current need to clarify FDA's PMSR requirements for this class of products. We have taken an approach that integrates underlying PMSR approaches for drugs, devices, and biological products, which have benefited in various respects from international harmonization efforts. We are committed to continuing to work with our foreign counterparts on PMSR and other issues for combination products.

IV. Legal Authority

The Agency derives its authority to issue the regulations in proposed part 4 subpart B from 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360b–360f, 360h–360j, 360*l,* 360hh–360ss, 360aaa–360bbb, 371(a), 372–374, 379e, 381, 383, and 394, and 42 U.S.C. 216, 262, 263a, 264, and 271. For a drug approved under an NDA or an ANDA, section 505(k) of the FD&C Act (21 U.S.C. 355) requires the applicant to submit reports concerning clinical experience and other data or information with respect to the drug to FDA and to establish and maintain related records. Section 505(k) provides the Agency with authority to specify by regulation which data or information must be submitted in such reports. FDA used this statutory authority, among others, in issuing the Agency's regulation concerning postmarketing reporting of adverse drug experiences and other postmarketing reports including field alert reports. The regulations for postmarketing reporting of adverse drug experiences and for field alert reports are set forth in § 314.80 and § 314.81, respectively.

For a device, section 519 of the FD&C Act requires manufacturers and importers to establish and maintain records, make reports, and provide information, as FDA may reasonably require to assure that such device is not adulterated or misbranded and to otherwise assure its safety and effectiveness. FDA utilized this statutory authority, in addition to other authorities, in issuing the MDR regulation and the correction and removal regulation, found in parts 803 and 806, respectively.

For a biological product, section 351 of the Public Health Service Act (PHS Act) (42 U.S.C. 262) requires FDA to approve a BLA on the basis of a demonstration that the product is safe, pure, and potent (section 351(a)(2)(C) of the PHS Act). Section 351(a)(2)(A) of the PHS Act requires FDA to establish by regulation requirements for the approval, suspension, and revocation of BLAs. Section 351(b) of the PHS Act also prohibits falsely labeling a biological product. FDA used section 351of the PHS Act as statutory authority, along with other sources of statutory authority, in issuing the postmarketing reporting of adverse experiences regulation for biological products. This regulation is found in § 600.80. In proposing § 600.80, FDA indicated that information made available to the Agency through the adverse experience reports contemplated under § 600.80 could establish that a biological product is not safe or properly labeled and that the license should be revoked (55 FR 11611 at 11613, March 29, 1990). FDA used section 351 of the PHS Act as statutory authority, along with other sources of statutory authority, in issuing the BPDR regulations for biological products. These regulations are found in §§ 600.14 and 606.171. In issuing these regulations, FDA stated that these reports would enable FDA to respond when public health may be at risk, provide FDA with uniform data to track trends that may indicate broader threats to the public health, and help ensure facilities are taking appropriate actions to investigate and correct biological product deviations. (65 FR 66621 at 66623, November 7, 2000).

There is considerable overlap in the PMSR requirements for drugs, devices, and biological products. The regulatory schemes for adverse event reporting for drugs and biological products are identical in most respects. The MDR regulation has many similarities to the drug and biological product PMSR regulations. Overall, the regulatory framework governing PMSR for each type of product is intended to achieve the same general goals.

Nevertheless, these three sets of regulations differ somewhat because each is tailored to the characteristics of the types of products for which it was designed. For instance, each set of regulations contains certain specific requirements pertaining to particular products or types of postmarketing safety events that are not found in the other sets of regulations. The additional requirements for combination product applicants that FDA considers necessary are as follows: 5-day reports, 15-day reports, malfunction reports, correction or removal reports, field alert reports, and BPDRs. As set forth in this rule, it is crucial that these additional requirements be met if they apply.

The legal framework underlying this proposed rule is twofold. The first is that drugs, devices, and biological products do not lose their discrete regulatory identities when they become constituent parts of a combination product. In general, the PMSR requirements specific to each constituent part of a combination product also apply to the combination product itself. Therefore, all combination products are subject to at least two sets of PMSR requirements. For example, in the case of a device and biological product combination product, the PMSR requirements applicable to devices and to biological products would apply to the combination product. However, this rule is intended to clarify that a combination product applicant may comply only with the PMSR requirements associated with the application under which the combination product received marketing authorization and certain, specified PMSR requirements associated with the other constituent part(s). Taking the example of a device-biologic combination product, if the combination product has an approved BLA, the combination product applicant (holder of the BLA) would use parts 600 and 606 to make postmarketing safety reports for the combination product. In addition, as explained in this rule, the combination product applicant must also comply with all of the specified requirements that apply to the product. Thus, in this case, the combination product applicant must also comply with the reporting requirements for 5-day reports, correction or removal reports, and malfunction reports if the criteria for such reports are met. Under this legal framework, if you demonstrate compliance with the applicable requirements of the set of regulations (*e.g.,* biological product PMSR) associated with the approved application (*e.g.,* BLA), and comply with any applicable specified additional provisions (*e.g.,* 5-day reports, correction or removal reports, and malfunction reports), you will be considered to have satisfied all applicable PMSR requirements associated with the combination product, including its constituent parts.

The legal authority for this streamlining approach is based on the following. Although combination products retain the regulatory identities of their constituent parts, the FD&C Act also recognizes combination products as a category of products that are distinct from products that are solely drugs, devices, or biological products. For example, section 503(g)(4)(A) of the FD&C Act (21 U.S.C. 353b(g)(4)(A)) requires OCP to ''designate'' a product as a combination product as well as to

ensure ''consistent and appropriate postmarket regulation of like products subject to the same statutory requirements.'' Further, section 563 of the FD&C Act (21 U.S.C. 360bbb–2) governs the ''classification'' of products as ''drug, biological product, device, or a *combination product* subject to section 503(g)'' (emphasis added). In this respect, the FD&C Act identifies a combination product as a distinct type of product that could be subject to specialized regulatory controls. In addition, for the efficient enforcement of the FD&C Act under section 701 (21 U.S.C. 371), FDA has the authority to develop regulations to ensure sufficient and appropriate ongoing assessment of the risks associated with combination products.

The second legal framework for this rule is founded on the postmarket safety reporting regulatory scheme associated with the application under which the combination product is approved, plus any applicable requirements associated with the additional six specified report types listed in this rule. Although similar in effect to the previously discussed framework, this approach is based on the legal authority FDA used to issue each of its three existing regulations for postmarketing safety reporting for drugs, devices, and biological products. In the context of this rule, such authority would include, but not be limited to, sections 505(k) and 519 of the FD&C Act, and section 351 of the PHS Act. Under this authority FDA is now issuing additional requirements based on the six additional specified report types. This means that in the case, for example, of a device-biologic combination product, approved under a BLA, section 351 of the PHS Act (in addition to other applicable authorities) would provide the authority for FDA to require postmarketing safety reporting in accordance with parts 600 and 606. Furthermore, section 351 of the PHS Act also would provide the authority for the Agency to require additional reporting for the device-biologic combination product (5-day reports, malfunction reports, and correction or removal reports) if the criteria for such reports are met.

V. Analysis of Environmental Impact

FDA has determined under 21 CFR 25.30(a), 25.30(h), and 25.31(a) through (c) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Paperwork Reduction Act of 1995

This final rule contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The title, description and respondent description of the information collection provisions are shown in the following paragraphs with an estimate of the annual reporting and recordkeeping burdens. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

Title: Postmarketing Safety Reporting for Combination Products.

Description: This final rule describes the PMSR requirements for combination products. In the development of this final rule, the Agency considered the fact that a combination product is subject to the PMSR provisions applicable to its constituent parts (drug, device, and/or biological product). The Agency reviewed each set of regulations governing PMSR for new drugs (part 314), biological products (parts 600 and 606), and devices (parts 803 and 806). The review determined that each set of regulations contains many substantially similar requirements.

Given the broad similarities in the PMSR regulations, the Agency determined that, to ensure consistent, appropriate PMSR for combination products that received marketing authorization under a single application, we need only require that combination product applicants comply with the regulatory requirements for PMSR associated with the application, and with additional, specified provisions from the other set(s) of PMSR requirements applicable to the other constituent part(s) of the combination product. This approach recognizes and addresses PMSR considerations relevant to each type of constituent part of a combination product while avoiding unnecessary redundancy and burden.

Specifically, the additional reporting requirements specified in this rule, along with any associated followup reports, are: (1) Submission of a ''5-day report'' as described in § 803.53 if the combination product contains a device constituent part; (2) submission of a ''malfunction report'' as described in § 803.50 if the combination product contains a device constituent part; (3) submission of a ''correction or removal report'' as described in § 806.10 if the combination product contains a device constituent part; (4) submission of a ''field alert report'' as described in § 314.81 if the combination product contains a drug constituent part; (5) submission of a 15-day report as described in § 314.80 or § 600.80 if the combination product contains a drug or biological product constituent part, respectively; and (6) submission of a ''BPDR'' as described in §§ 600.14 and 606.171 if the combination product contains a biological product constituent part.

For combination products for which the constituent parts received marketing authorization under separate applications held by different entities, the Agency has determined that compliance with the PMSR requirements associated with the application type for the constituent part is sufficient. In addition, constituent part applicants must share safety information they receive related to certain events with the other constituent part applicant(s).

We note that the PMSR information collections for drugs, biological products, and devices found in §§ 314.80, 314.81, 600.80, 600.81, 606.170, 606.171, 803.50, 803.53, 803.56, 806.10, and 806.20 have already been approved and are in effect. The pertinent PMSR information collection provisions for § 314.80(c) and (e), as well as for § 314.81(b) are approved under OMB control numbers 0910–0001, 0910–0230, and 0910–0291. The information collection provisions for §§ 600.80 and 600.81 are approved under OMB control number 0910–0308. Those for § 606.170 are approved under OMB control number 0910–0116. Those for § 606.171 are approved under OMB control number 0910–0458. The information collection provisions for §§ 803.50, 803.53, and 803.56 are approved under OMB control numbers 0910–0291 and 0910–0437. The information collection provisions for §§ 806.10 and 806.20 are approved under OMB control number 0910–0359.

While this rule serves to permit combination product applicants to comply with a streamlined subset of the PMSR requirements applicable to all of their constituent parts, we recognize that some combination product applicants have been complying with only the reporting requirements associated with their application type. As a result, the information collection described here refers to the reporting and recordkeeping requirements for the six additional report types specified in this rule. It also refers to the new information sharing and related recordkeeping requirement applicable to constituent parts marketed under separate applications.

These requirements are necessary to ensure: (1) Consistent PMSR for combination products and constituent parts, (2) that the Agency receives necessary information to promote and protect the public health, (3) appropriate ongoing assessment of risks, and (4) consistent and appropriate postmarketing regulation of combination products. This rule enables applicants to comply with these requirements while avoiding unnecessary duplicative reporting, for example, by limiting the number of PMSR requirements with which combination product applicants must comply and by authorizing applicants to submit only a single, complete report for an event even if multiple reporting duties apply to the same event.

Description of Respondents: This rule applies to combination product applicants and constituent part applicants. Any person holding the application(s) under which a combination product received marketing authorization is a combination product applicant. Any person holding an application under which a constituent part (drug, device, or biological product) of a combination product received marketing authorization is a constituent part applicant if the other constituent part received marketing authorization under an application held by a different person.

FDA estimates the burden for this information collection as follows:

TABLE 3—ESTIMATED ANNUAL REPORTING BURDEN

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
4.102(c)(1)(i) Submitting 5-day reports	15	98	1,470	1.21	1,779
4.102(c)(1)(ii) Submitting malfunction reports	15	98	1,470	1.21	1,779
4.102(c)(1)(iii) Submitting correction or removal reports	20	1	20	10	200
4.102(c)(2)(i) Submitting field alerts	92	10.8	994	8	7,949
4.102(c)(2)(ii) and (3)((ii) Submitting 15-day reports	1	1	1	1	1
4.102(c)(3) Submitting BPDRs	24	6	144	2	288
4.102(d)	1	1	1	1	1
Totals *					11,709

TABLE 4—ESTIMATED ANNUAL RECORDKEEPING BURDEN

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
4.103(b)/4.105(a)(2) Records of information shared by constituent part applicants.	33	18	594	.1 (6 minutes)	59
4.105(b) additional record-keeping by device-led combination products.	279	.45	126	.5 (30 minutes)	63
4.105(b) additional recordkeeping by drug and biologic-led combination products.	186	6	1,116	.5 (30 minutes)	558
Totals					680

TABLE 5—ESTIMATED ANNUAL THIRD PARTY DISCLOSURE BURDEN

21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
4.103 Sharing information with other constituent part applicants.	33	18	594	.35 (21 minutes)	208

Based on FDA's experience regarding receipt of postmarketing safety reports for combination products, the Agency estimates that there will be 401 reporters (who will keep corresponding records) submitting a total of 11,709 reports annually under § 4.102(c) and (d) and 33 reporters (who will keep corresponding records) sharing information eighteen times annually under § 4.103. Further, FDA estimates, based on its experience with information collection regarding postmarketing safety reporting provisions for drugs, biological products, and devices, that each report (or information sharing event under § 4.103) may take from approximately 20 minutes to 10 hours, depending on report type, to prepare and submit, and from approximately 6 to 30 minutes to fulfill the corresponding recordkeeping requirements. FDA believes that there are no significant new operating and maintenance costs associated with this collection of information because, in order to legally market their products, all applicants are required to develop and maintain systems for reporting and maintaining records of postmarketing safety events. Therefore, appropriate mechanisms for PMSR should already be in place, and combination product applicants and constituent part applicants will accrue no significant additional costs to fulfill the requirements set forth here.

In addition, we estimate that there will no significant new costs for 15-day reporting (§ 4.102(c)(2)(ii) and (3)(ii)) and periodic reporting (§ 4.102(d)(1)) under the rule because there is significant overlap between the types of events that trigger a 15-day report for drugs and biological products and the

events that trigger expedited reporting for devices. We also estimate there will be no significant new costs for other non-expedited reporting (§ 4.102(d)(2)) because of the expected rarity of the agency seeking such additional information.

Before the effective date of this final rule, FDA will publish a notice in the **Federal Register** announcing OMB's decision to approve, modify, or disapprove the information collection provisions in this final rule. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the Agency displays a currently valid OMB control number.

VII. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the Agency has concluded that the final rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.[9]

VIII. Economic Analysis of Impacts

A. Introduction

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the final rule. We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the final rule essentially describes the application of existing postmarketing safety reporting regulations to certain combination products, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $146 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

The full analysis of economic impacts is available in the docket for this final rule at *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm.*

B. Summary of Costs and Benefits

The final rule will generate one-time administrative costs from reading and understanding the rule, assessing current compliance, modifying existing standards of practice, changing storage and reporting software, and training personnel on the requirements under this rule. Firms that do not currently comply with the reporting requirements specified by the final rule will also incur annual reporting costs from the submission of field alert reports, 5-day reports, malfunction reports, correction or removal reports, and biological product deviation reports, as applicable. The annualized total costs of the rule are between $1.36 and $2.68 million at a 7 percent discount rate and between $1.35 and $2.65 million at a 3 percent discount rate.

The final rule will benefit firms through reduced uncertainty about the reporting requirements for their specific combination product and through decreased potentially duplicative reporting. The final rule will also benefit public health by helping to ensure that important safety information is submitted and directed to the appropriate components within the Agency, so that we may receive and review this important information in a timely manner for the protection of public health.

TABLE 6—SUMMARY OF BENEFITS, COSTS, AND DISTRIBUTIONAL EFFECTS OF FINAL RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Benefits:							
Annualized				2016	7	10	
Monetized ($millions/year)				2016	3	10	
Annualized				2016	7	10	
Quantified				2016	3	10	

[9] The rule clarifies which PMSR requirements apply when drugs, devices, and biological products are used to create combination products. The Agency notes that there are no express preemption provisions of the FD&C act applicable to prescription drugs or biological products. Section 521 of the FD&C Act (21 U.S.C. 360k) contains an express preemption provision that applies to devices; nonetheless, the Supreme Court concluded in *Medtronic, Inc.* v. *Lohr,* 581 U.S. 470, 500–01 (1996), that requirements not applicable to a particular device do not preempt State law under section 521. Device adverse event reporting requirements, like the good manufacturing practice requirements at issue in the *Medtronic* case, are general requirements that do not preempt under section 521 of the FD&C Act.

TABLE 6—SUMMARY OF BENEFITS, COSTS, AND DISTRIBUTIONAL EFFECTS OF FINAL RULE—Continued

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Qualitative	Firms will benefit from reduced uncertainty about reporting requirements. The rule will benefit public health by helping to ensure Agency components' timely receipt of postmarketing safety reports.						
Costs:							
Annualized		$1.36	$2.68	2016	7	10	
Monetized ($millions/year)		$1.35	$2.65	2016	3	10	
Annualized				2016	7	10	
Quantified				2016	3	10	
Qualitative							
Transfers:							
Federal				2016	7	10	
Annualized				2016	3	10	
Monetized ($millions/year)	From:			To:			
Other				2016	7	10	
Annualized				2016	3	10	
Monetized ($millions/year)	From:			To:			
Effects:	State, Local or Tribal Government: Small Business: Wages: Growth:						

IX. References

The following references are on display in the Division of Dockets Management, Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *http://www.regulations.gov.* FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. FDA Regulation of Combination Products, November 25, 2002, accessed at: *http://www.fda.gov/downloads/CombinationProducts/MeetingsConferencesWorkshops/UCM117123.pdf.*

2. Innovative Systems for Delivery of Drugs and Biologics: Scientific, Clinical and Regulatory Challenges, July 8, 2003, accessed at: *http://www.fda.gov/ohrms/dockets/dockets/03n0203/03n0203.htm.*

3. Individual Case Study Reports, accessed at: (*http://www.fda.gov/ForIndustry/DataStandards/IndividualCaseSafetyReports/default.htm*).

List of Subjects in 21 CFR Part 4

Biological products, Combination products, Drugs, Medical devices, Regulation of combination products, Reporting and recordkeeping requirements, Safety.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 4 is amended as follows:

PART 4—REGULATION OF COMBINATION PRODUCTS

■ 1. The authority citation for part 4 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360b–360f, 360h–360j, 360l, 360hh–360ss, 360aaa–360bbb, 371(a), 372–374, 379e, 381, 383, 394; 42 U.S.C. 216, 262, 263a, 264, 271.

■ 2. Add subpart B, consisting of §§ 4.100 through 4.105, to read as follows:

Subpart B—Postmarketing Safety Reporting for Combination Products

Sec.

Subpart B—Postmarketing Safety Reporting for Combination Products

§ 4.100 What is the scope of this subpart?

(a) This subpart identifies postmarketing safety reporting requirements for combination product applicants and constituent part applicants.

(b) This subpart does not apply to investigational combination products, combination products that have not received marketing authorization, or to persons other than combination product

applicants and constituent part applicants.

(c) This subpart supplements and does not supersede other provisions of this chapter, including the provisions in parts 314, 600, 606, 803, and 806 of this chapter, unless a regulation explicitly provides otherwise.

§ 4.101 How does the FDA define key terms and phrases in this subpart?

Abbreviated new drug application (ANDA) has the same meaning given the term ''abbreviated application'' in § 314.3(b) of this chapter.

Agency or we means Food and Drug Administration.

Applicant means, for the purposes of this subpart, a person holding an application under which a combination product or constituent part of a combination product has received marketing authorization (such as approval, licensure, or clearance). For the purposes of this subpart, applicant is used interchangeably with the term ''you.''

Application means, for purposes of this subpart, a BLA, an NDA, an ANDA, or a device application, including all amendments and supplements to them.

Biological product has the meaning given the term in section 351 of the Public Health Service Act (42 U.S.C. 262).

Biological product deviation report (BPDR) is a report as described in §§ 600.14 and 606.171 of this chapter.

Biologics license application (BLA) has the meaning given the term in section 351 of the Public Health Service Act (42 U.S.C. 262) and § 601.2 of this chapter.

Combination product has the meaning given the term in § 3.2(e) of this chapter.

Combination product applicant means an applicant that holds the application(s) for a combination product.

Constituent part has the meaning given the term in § 4.2.

Constituent part applicant means the applicant for a constituent part of a combination product the constituent parts of which are marketed under applications held by different applicants.

Correction or removal report is a report as described in § 806.10 of this chapter.

De novo classification request is a submission requesting *de novo* classification under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act.

Device has the meaning given the term in section 201(h) of the Federal Food, Drug, and Cosmetic Act.

Device application means a PMA, PDP, premarket notification submission, *de novo* classification request, or HDE.

Drug has the meaning given the term in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act.

Field alert report is a report as described in § 314.81 of this chapter.

Fifteen-day report is a report required to be submitted within 15 days as described in § 314.80 of this chapter or § 600.80 of this chapter, as well as followup reports to such a report.

Five-day report is a report as described in §§ 803.3 and 803.53 of this chapter, as well as supplemental or followup reports to such a report as described in § 803.56 of this chapter.

Humanitarian device exemption (HDE) has the meaning given the term in § 814.3 of this chapter.

Malfunction report is a report as described in § 803.50 of this chapter as well as supplemental or followup reports to such a report as described in § 803.56 of this chapter.

New drug application (NDA) has the meaning given the term ''application'' in § 314.3(b) of this chapter.

Premarket approval application (PMA) has the meaning given the term in § 814.3 of this chapter.

Premarket notification submission is a submission as described in § 807.87 of this chapter.

Product Development Protocol (PDP) is a submission as set forth in section 515(f) of the Federal Food, Drug, and Cosmetic Act.

§ 4.102 What reports must you submit to FDA for your combination product or constituent part?

(a) *In general.* If you are a constituent part applicant, the reporting requirements applicable to you that are identified in this section apply to your constituent part, and if you are a combination product applicant, the reporting requirements applicable to you that are identified in this section apply to your combination product as a whole.

(b) *Reporting requirements applicable to both combination product applicants and constituent part applicants.* If you are a combination product applicant or constituent part applicant, you must comply with the reporting requirements identified in paragraphs (b)(1), (b)(2), or (b)(3) of this section for your product based on its application type. If you are a combination product applicant, you are required to submit a report as specified in this paragraph unless you have already submitted a report in accordance with paragraph (c) of this section for the same event that: Includes the information required under the applicable regulations identified in this paragraph, is required to be submitted in the same manner under § 4.104, and meets the deadlines under the applicable regulations identified in this paragraph.

(1) If your combination product or device constituent part received marketing authorization under a device application, you must comply with the requirements for postmarketing safety reporting described in parts 803 and 806 of this chapter with respect to your product.

(2) If your combination product or drug constituent part received marketing authorization under an NDA or ANDA, you must comply with the requirements for postmarketing safety reporting described in part 314 of this chapter with respect to your product.

(3) If your combination product or biological product constituent part received marketing authorization under a BLA, you must comply with the requirements for postmarketing safety reporting described in parts 600 and 606 of this chapter with respect to your product.

(c) *Reporting requirements applicable only to combination product applicants.* If you are a combination product applicant, in addition to compliance with paragraph (a) of this section, you must also comply with the reporting requirements identified under this paragraph as applicable to your product based on its constituent parts. If you are a combination product applicant, you are required to submit a report as specified in this paragraph unless you have already submitted a report in accordance with paragraph (b) of this section for the same event that: Includes the information required under the applicable regulations for the report identified in this paragraph; is required to be submitted in the same manner under § 4.104 of this chapter; and, unless otherwise specified in this paragraph, meets the deadlines under the applicable regulations for the report identified in this paragraph.

(1) If your combination product contains a device constituent part, you must submit:

(i) Five-day reports;

(ii) Malfunction reports; and

(iii) Correction or removal reports, and maintain records as described in § 806.20 of this chapter for corrections and removals not required to be reported.

(2) If your combination product contains a drug constituent part, you must submit:

(i) Field alert reports; and

(ii) Fifteen-day reports as described in § 314.80 of this chapter, which must be

submitted within 30 calendar days instead of 15 calendar days if your combination product received marketing authorization under a device application.

(3) If your combination product contains a biological product constituent part, you must submit:

(i) Biological product deviation reports; and

(ii) Fifteen-day reports as described in § 600.80 of this chapter, which must be submitted within 30 calendar days instead of 15 calendar days if your combination product received marketing authorization under a device application.

(d) *Other reporting requirements for combination product applicants.* (1) If you are the combination product applicant for a combination product that contains a device constituent part and that received marketing authorization under an NDA, ANDA, or BLA, in addition to the information otherwise required in the periodic safety reports you submit under § 314.80 or § 600.80 of this chapter, your periodic safety reports must also include a summary and analysis of the reports identified in paragraphs (c)(1)(i) and (ii) of this section that were submitted during the report interval.

(2) If you are the combination product applicant for a combination product that received marketing authorization under a device application, in addition to the reports required under paragraphs (b) and (c) of this section, you must submit reports regarding postmarketing safety events if notified by the Agency in writing that the Agency requires additional information. We will specify what safety information is needed and will require such information if we determine that protection of the public health requires additional or clarifying safety information for the combination product. In any request under this section, we will state the reason or purpose for the safety information request, specify the due date for submitting the information, and clearly identify the reported event(s) related to our request.

§ 4.103 What information must you share with other constituent part applicants for the combination product?

(a) When you receive information regarding an event that involves a death or serious injury as described in § 803.3 of this chapter, or an adverse experience as described in § 314.80(a) of this chapter or § 600.80(a) of this chapter, associated with the use of the combination product, you must provide the information to the other constituent part applicant(s) for the combination product no later than 5 calendar days of your receipt of the information.

(b) With regard to information you must provide to the other constituent part applicant(s) for the combination product, you must maintain records that include:

(1) A copy of the information you provided,

(2) The date the information was received by you,

(3) The date the information was provided to the other constituent part applicant(s), and

(4) The name and address of the other constituent part applicant(s) to whom you provided the information.

§ 4.104 How and where must you submit postmarketing safety reports for your combination product or constituent part?

(a) If you are a constituent part applicant, you must submit postmarketing safety reports in accordance with the regulations identified in § 4.102(b) that are applicable to your product based on its application type.

(b) If you are a combination product applicant, you must submit postmarketing safety reports required under § 4.102 in the manner specified in the regulation applicable to the type of report, with the following exceptions:

(1) You must submit the postmarketing safety reports identified in § 4.102(c)(1)(i) and (ii) in accordance with § 314.80(g) of this chapter if your combination product received marketing authorization under an NDA or ANDA or in accordance with § 600.80(h) of this chapter if your combination product received marketing authorization under a BLA.

(2) You must submit the postmarketing safety reports identified in § 4.102(c)(2)(ii) and (c)(3)(ii) in accordance with § 803.12(a) of this chapter if your combination product received marketing authorization under a device application.

§ 4.105 What are the postmarketing safety reporting recordkeeping requirements for your combination product or constituent part?

(a) If you are a constituent part applicant:

(1) You must maintain records in accordance with the recordkeeping requirements in the applicable regulation(s) described in § 4.102(b).

(2) You must maintain records required under § 4.103(b) for the longest time period required for records under the postmarketing safety reporting regulations applicable to your product under § 4.102(b).

(b) If you are a combination product applicant, you must maintain records in accordance with the longest time period required for records under the regulations applicable to your product under § 4.102.

Dated: December 14, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30485 Filed 12–19–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 92, 93, 570, 574, 578, 880, 881, 883, 884, 886, 891, 905, 983

[Docket No. FR 5890–F–02]

RIN 2501–AD75

Narrowing the Digital Divide Through Installation of Broadband Infrastructure in HUD-Funded New Construction and Substantial Rehabilitation of Multifamily Rental Housing

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: Through this rule, HUD continues its efforts to narrow the digital divide in low-income communities served by HUD by providing, where feasible and with HUD funding, broadband infrastructure to communities in need of such infrastructure. In this final rule, HUD requires installation of broadband infrastructure at the time of new construction or substantial rehabilitation of multifamily rental housing that is funded or supported by HUD, the point at which such installation is generally easier and less costly than when undertaken as a stand-alone effort. The rule, however, recognizes that installation of broadband infrastructure may not be feasible for all new construction or substantial rehabilitation, and, therefore, it allows limited exceptions to the installation requirements. Installing unit-based broadband infrastructure in multifamily rental housing that is newly constructed or substantially rehabilitated with or supported by HUD funding will provide a platform for individuals and families residing in such housing to participate in the digital economy and increase their access to economic opportunities.

DATES: *Effective date:* January 19, 2017.

FOR FURTHER INFORMATION CONTACT: If you have any questions, please contact the following people (the telephone numbers are not toll-free):

Office of Community Planning and Development programs: Clifford Taffet,

General Deputy Assistant Secretary for Community Planning and Development, Room 7100, 202–708–2690.

Office of Multifamily Housing programs: Katie Buckner, Office of Recapitalization, Office of Housing, Room 6226, 202–402–7140.

Office of Public and Indian Housing programs: Dominique Blom, Deputy Assistant Secretary for Public Housing Investments, Office of Public and Indian Housing, Room 4130, 202–402–4181.

The address for all individuals is Department of Housing and Urban Development; 451 7th Street SW.; Washington, DC 20410–0500. Persons with hearing or speech impairments may access these numbers through TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free telephone number).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of this Rule

The purpose of this rule is to require installation of broadband infrastructure at the time of new construction or substantial rehabilitation of multifamily rental housing that is funded or supported by HUD. This rule does not require a funding recipient to undertake new construction or substantial rehabilitation, but when a funding recipient does choose to pursue such activity for multifamily rental housing with HUD funding, this rule requires installation of broadband infrastructure. While the rule only requires affected funding recipients to install one form of broadband infrastructure, HUD suggests that funding recipients consider whether installing more than one form of broadband infrastructure would be beneficial to encourage competition among service providers on quality and price. Installing unit-based broadband infrastructure in multifamily rental housing that is newly constructed or substantially rehabilitated with or supported by HUD funding will provide a platform for individuals and families residing in such housing to participate in the digital economy, and increase their access to economic opportunities.

B. Summary of Major Provisions of this Rule

This rule requires installation of broadband infrastructure at the time of new construction or substantial rehabilitation of multifamily rental units funded by the following programs:

1. Choice Neighborhoods Implementation Grant program;
2. Community Development Block Grant (CDBG) program, including the CDBG Disaster Recovery program;
3. Continuum of Care program;
4. HOME Investment Partnerships program;
5. Housing Opportunities for Persons With AIDS program;
6. Housing Trust Fund program;
7. Project-Based Voucher program;
8. Public Housing Capital Fund program;
9. Section 8 project-based housing assistance payments programs, including, but not limited to, the Section 8 New Construction, Substantial Rehabilitation, Loan Management Set-Aside, and Property Disposition programs; [1] and
10. Section 202 and Section 811 Supportive Housing for the Elderly and Persons with Disabilities programs.

The requirements of the rule do not apply to multifamily rental housing that only has a mortgage insured by HUD's Federal Housing Administration or with a loan guaranteed under a HUD loan guarantee program.

HUD defines broadband infrastructure as cables, fiber optics, wiring, or other permanent (integral to the structure) infrastructure—including wireless infrastructure—as long as the installation results in broadband infrastructure in each dwelling unit meeting the Federal Communications Commission's (FCC's) definition in effect at the time the pre-construction estimates are generated. Currently, the FCC defines broadband speeds as 25 Megabits per second (Mbps) download, 3 Mbps upload.[2] In addition, for programs that do not already have a definition of substantial rehabilitation, HUD defines substantial rehabilitation as work on the electrical system with estimated costs equal to or greater than 75 percent of the cost of replacing the entire electrical system, or when the estimated cost of the rehabilitation is equal to or greater than 75 percent of the total estimated cost of replacing the multifamily rental housing after the rehabilitation is complete. The definition of substantial rehabilitation for purpose of the installation of broadband infrastructure does not affect definitions of rehabilitation already in place for other purposes.

C. Costs and Benefits of This Rule

The costs and benefits of this rule are difficult to quantify, but they can be described qualitatively. This rule only requires that the broadband infrastructure provided be able to receive high-speed Internet that is ''accessible'' in each unit. It does not require those recipients of funding undertaking new construction or substantial rehabilitation to provide broadband service to current or future residents even if residents pay for such service. Furthermore, the definition of broadband infrastructure in the rule includes coaxial cable television (TV) wiring that supports cable modem access or even permanent infrastructure that would provide broadband speeds to dwelling units wirelessly. The rule also provides for exceptions to the installation requirements where the installation is too costly to provide due to location or building characteristics.

A recent survey by the National Association of Homebuilders found that 4 percent of the surveyed multifamily housing developers never installed landline wires and jacks in multifamily units completed in the past 12 months.[3] In recent years, HUD's competitive grants for new construction under the Choice Neighborhoods program have sought the provision of broadband access. Therefore, this rule would simply codify what is considered common practice in the private market today when new construction or substantial rehabilitation is undertaken.

Given the wide range of technologies that may be employed to meet the requirements of this rule, it is not possible to specify the cost of the technology and how much additional burden this may be for owners or developers building or providing substantial rehabilitation to HUD-assisted rental housing. If the broadband infrastructure consists of wiring connected to proximate telephone or cable company networks, the cost is not expected to be significant, as all electrical work in a multifamily project is estimated to be only about 10 percent of the construction cost; [4] thus, running an additional cable through existing electrical conduits would be a minimal

[1] This rule applies to all projects with project-based Section 8 housing assistance payment (HAP) contracts (other than Mod Rehab or Mod Rehab Single Room Occupancy (SRO) projects), regardless of whether the properties receive specific funding to pay directly for substantial rehabilitation or new construction, as defined in this rule.

[2] Federal Communications Commission, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, GN Docket No. 14–126, Rel. Feb. 4, 2015, at para. 45 (available at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-10A1.pdf*).

[3] NAHB, Multifamily Market Survey 3rd Quarter 2015. November 2015. There were 90 responses, and of the responses, 18 percent indicated it was not applicable, presumably because they had not completed any projects in the past 12 months. The survey covers all multifamily construction including lower quality Class B and Class C. It does not provide details on the developers or projects that did not install landlines.

[4] *2015 National Building Cost Manual.* Ed. Ben Moselle. Carlsbad, CA: Craftsman Book Company. *https://www.craftsman-book.com/media/static/previews/2015_NBC_book_preview.pdf,* pg. 19.

incremental cost. If the broadband infrastructure is wireless, the cost will be for the equipment, which varies greatly by the design and size of the project, as does the cost per unit. Given that the costs of installation of broadband infrastructure are only a portion of the 10 percent of construction costs, the requirement imposed by this rule is not expected to measurably reduce the size of the housing or the number of units to be constructed. At most, installation of broadband infrastructure may reduce the provision of other amenities or nonessential finishes, but HUD considers even these reductions unlikely. Additionally, the rule only applies to new construction or substantial rehabilitation that is supported with HUD-provided resources, not to existing buildings where substantial rehabilitation is not contemplated.

Materials on the benefits of narrowing the digital divide are voluminous. Having broadband Internet in the home increases household income [5] and yields higher education achievement for students.[6] On July 2015, the Council of Economic Advisers issued the report ''Mapping the Digital Divide,'' which examines progress in the United States in narrowing the digital divide and the work that still needs to be done, especially in the Nation's poorest neighborhoods and most rural communities.[7] However, this rule's limited scope in only requiring the installation of infrastructure instead of providing Internet access also limits the benefits of the rule. The benefit of the rule is that where broadband Internet service can be made available, the tenant, residing in housing with broadband infrastructure, will be assured of the ability to access broadband Internet service, whether they choose and are able to afford Internet service or not. This puts broadband Internet service within reach, especially where other charitable and public social programs, including HUD's ConnectHome program, provide free or reduced-cost service.

[5] Ericsson, Arthur D. Little, and Chalmers University of Technology. Socioeconomic Effects of Broadband Speed. September 2013. *http://www.ericsson.com/res/thecompany/docs/corporate-responsibility/2013/ericsson-broadband-final-071013.pdf.*

[6] Davidson, Charles M. and Michael J. Santorelli. ''The Impact of Broadband on Education.'' December 2010. *https://www.uschamber.com/sites/default/files/legacy/about/US_Chamber_Paper_on_Broadband_and_Education.pdf,* pg. 24.

[7] See Council of Economic Advisers. ''Mapping the Digital Divide.'' *Issue Brief.* July 2015. *https://www.whitehouse.gov/sites/default/files/wh_digital_divide_issue_brief.pdf.*

II. Background

On March 23, 2015, President Obama issued a Presidential memorandum on ''Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training.'' [8] In this memorandum, the President noted that access to high-speed broadband is no longer a luxury, but it is a necessity for American families, businesses, and consumers. The President further noted that the Federal Government has an important role to play in developing coordinated policies to promote broadband deployment and adoption, including promoting best practices, breaking down regulatory barriers, and encouraging further investment.

On May 18, 2016, at 81 FR 31181, HUD published a proposed rule seeking to require the installation of broadband infrastructure on all new construction or substantial rehabilitation in multifamily projects supported by HUD. This proposed rule was an outgrowth of the President's memorandum and HUD's own Digital Opportunity Demonstration, known as ''ConnectHome.'' The comment period on the proposed rule closed on July 18, 2016. HUD received 25 comments on the proposed rule from a variety of commenters, including State or local government economic development offices, the National Association of Home Builders, Internet service providers, housing authorities, and nonprofit organizations.

III. Changes From the Proposed Rule

HUD is not changing any of the substantive requirements that were in the proposed rule. Rather, in response to questions raised by public comments, HUD is offering two clarifications in the regulatory text.

First, in the definition in 24 CFR 5.100, HUD is basing the threshold for substantial rehabilitation on the pre-rehabilitation estimates for the work. HUD recognizes that, in the course of rehabilitation, certain cost or work changes may result in the project exceeding the threshold to be defined (for the purposes of installing broadband infrastructure) as substantial rehabilitation. However, in these instances, the funding recipients are already facing higher costs than expected, and to add additional, unplanned-for requirements would be an undue burden.

[8] See Barack Obama. ''Presidential Memorandum—Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training.'' March 23, 2015. *https://www.whitehouse.gov/the-press-office/2015/03/23/presidential-memorandum-expanding-broadband-deployment-and-adoption-addr.*

Second, HUD has clarified the point in the planning process for new construction or substantial rehabilitation at which a project must be, as of the effective date of this rule, to not be subject to the rule's requirements. Due to the different nature of each program covered by this rule, a tailored approach was necessary, instead of a single declaration for all of the programs.

In addition to these two regulatory changes, HUD will offer some future clarifying guidance on how funding recipients are to determine whether installing broadband infrastructure would be infeasible for a given project. This is to be a case-by-case determination, and is very fact-specific. The ultimate decision, however, will be up to the funding recipient, who will also have to maintain adequate documentation of the determination.

IV. Public Comments and HUD Responses

Adoption of the Internet Franchise Policy Framework

A commenter urged HUD to adopt the policy framework of the Internet Franchise (found at *https://webpass.net/franchise*), which the commenter stated directly addresses the issues in HUD's rule and would eliminate the need for rulemaking in this area. The commenter stated that creating a new set of rules for a small subset of properties—those supported by HUD—is not helpful. HUD should adopt broadly applicable Internet access rules that can be a model for the whole country.

HUD Response: HUD appreciates the suggestion but believes the approach provided in HUD's rule is the appropriate approach for HUD programs. In addition, HUD is not able to regulate Internet access for housing not assisted by HUD.

Capacity or Speed

Commenters asked that HUD encourage the installation of infrastructure that is ''future-proofed'' against higher Internet speeds than what meets the current broadband definition, perhaps by encouraging fiber optic connections to accomplish that goal or by requiring that the infrastructure have capacity of 150 percent of the current standards. Commenters also suggested that, rather than just considering bandwidth capacity, HUD should require that the technology allow for the use of common Internet applications (including voice-over-Internet protocols, or VOIP, and other streaming services).

Commenters suggested that HUD find ways to provide incentives to provide the highest level of broadband capacity.

Commenters also asked how HUD intended to communicate and implement new speed standards from the FCC.

HUD Response: HUD is not mandating that funding recipients install a specific type of infrastructure. Rather, HUD has specifically written the definition of broadband infrastructure to allow funding recipients to choose the form of infrastructure that is most appropriate for their circumstances, including future technologies that we cannot imagine today.

HUD believes that, rather than requiring installation of infrastructure meeting a standard higher than the FCC's then-current definition of ''advanced telecommunications capability,'' it is enough to install infrastructure that meets that definition, especially as in some areas that speed is more than what may be currently available. Further, HUD believes that by requiring that each unit has access to infrastructure that allows broadband speeds, every family will be able to use Internet applications, such as VOIP, as desired. However, this is established as the minimum. Nothing prevents funding recipients from aiming higher, and nothing prevents other local authorities from establishing higher standards as a local requirement for funding or from using HUD funding to pay for the cost differential of getting to that higher level.

In addition, by tying the infrastructure requirements to the FCC's definition, future changes by the FCC will automatically be incorporated into HUD's requirements. When the definition is revised in the future, HUD will evaluate the most appropriate way to notify its funding recipients covered by this rule of the change.

Costs

Commenters responded to HUD's estimates on the cost of installing broadband infrastructure. Many commented that the estimates of the costs of labor and material were too low, particularly when a project is undergoing rehabilitation. Commenters stated that the costs would vary widely across the country, depending on the construction type, the number of units involved, and the regional labor costs. Commenters also stated that HUD should account for operation and maintenance costs for the infrastructure, which may be significant. Commenters stated that the study by the National Association of Home Builders did not specifically address broadband access, and, therefore, it should not be used as evidence that installing broadband is already current practice.

Commenters also suggested that HUD has not justified the costs of compliance with the rule with enough benefits. Some commenters stated that in rural areas, limited access to broadband equipment installers can inflate installation and service costs.

HUD Response: The benefits of narrowing the digital divide through expansion of Internet service are well documented. The Council of Economic Advisers Brief, issued in March 2016, and entitled ''The Digital Divide and Economic Benefits of Broadband Access,'' demonstrates such benefits. (See *https://www.whitehouse.gov/sites/default/files/page/files/20160308_broadband_cea_issue_brief.pdf.*) HUD understands that the costs of installing broadband infrastructure will vary given the geographic area in which the construction or substantial rehabilitation is to take place and that, given such variations, the costs of labor and materials will not be uniform across the Nation. Some costs may be lower because the jurisdiction in which the installation is occurring may already have a strong broadband infrastructure in place that would reduce the cost of a HUD funding recipient to provide such infrastructure. However, given the comments received, HUD has revised its costs analyses found in Section V of this preamble.

Whatever the cost of the installation of a broadband infrastructure, that cost is borne by HUD in the funds awarded to the funding recipient, or the HUD funds are taken into account when leveraging them for rehabilitation funding. There is no mandate in any of the HUD programs covered by this rule to undertake new construction or substantial rehabilitation.

While HUD funds will cover the cost of installation of the broadband infrastructure, HUD understands that, in tight budgetary times, installing broadband infrastructure may be too expensive for the construction budget to incorporate, given other construction or rehabilitation requirements such as energy efficiency features or improvements or accessible housing features needed by the elderly or persons with disabilities. In such cases, the final rule provides that a funding recipient may be exempted from compliance if the cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden.

HUD will continue to explore the possibilities of reducing the cost of broadband infrastructure, including allowing HUD funds to be used for operation or maintenance costs or facilitating group purchases to reduce the costs of the infrastructure itself.

Exceptions

Many commenters weighed in on the exceptions to the broadband infrastructure requirements. Several requested examples of projects that would fall under the listed exceptions or more detailed definitions of the provided exceptions. Commenters suggested that, in addition to the exemptions currently included, HUD provide an exception for scattered-site properties with 1 to 4 units.

Some commenters stated that having a building in a rural location should not exempt the housing provider from providing broadband infrastructure as, while the connection to the building may be more expensive, a rural location does not increase the price of installing infrastructure in the building itself. Other commenters stated that requiring the installation of infrastructure where broadband is not currently available could result in the buildings having obsolete infrastructure when broadband access is provided.

Regarding the feasibility determination, some commenters believed that the owner should be the proper entity to determine whether installing broadband infrastructure is feasible, while others stated that HUD should make that determination, moving as quickly as possible to avoid delays in projects. Commenters also requested additional information on the infeasibility exception, particularly what documentation developers should maintain about any determination of feasibility, and any specific formula or source of pre-rehabilitation estimates that HUD will require. Commenters asked at what point a project would be considered infeasible; some stated that the threshold of feasibility should be set such that costs of broadband installation that are over 5 percent of the construction budget should be considered infeasible.

Commenters suggested that HUD should consider the costs of maintaining and operating the infrastructure in determining feasibility. Commenters reminded HUD that, in the future, increased speed requirements could impact the feasibility of installing broadband infrastructure. Commenters also suggested that HUD encourage installation of broadband infrastructure in common areas if it is too expensive to install in every unit.

HUD Response: This rule only applies to buildings with more than 4 rental

units, so HUD does not believe an exemption for scattered-site properties is needed.

For the existing exemptions from the rule's requirements, this rule places the burden of determining whether or not an exemption applies and documenting the basis for the determination on the funding recipient. HUD will provide additional guidance with examples and possible ways to make such determinations. HUD also appreciates and supports the suggestion that if a funding recipient determines that providing broadband infrastructure to every unit is too expensive, the funding recipient should consider providing broadband infrastructure to common areas at the property.

HUD notes that a building's location in a rural area not currently served by broadband does not necessarily mean that broadband will not be available in the foreseeable future. In addition, the current unavailability of broadband service to a property does not automatically mean that installing the broadband infrastructure is cost prohibitive. However, HUD acknowledges that, in some situations, the fact that broadband will not be available to a property for an extended time period could be a legitimate justification for meeting the ''location'' exemption, particularly if the window before broadband service is available is long enough to potentially render any infrastructure installed now obsolete by the time such service is available.

In some programs, maintenance and operating costs are considered eligible expenses of the funding program, and, therefore, there is no need to consider those costs when determining the cost feasibility of installing the broadband infrastructure in the first place. At this time, it is beyond the scope of this rulemaking to amend other program regulations (which are sometimes based on statutory limitations) to allow such costs when it is not currently allowable. However, HUD will continue to look for situations in which program regulations can be revised to allow Internet operation and maintenance costs to be eligible uses of program funds.

Effectiveness Timeline

Commenters also asked for additional detail on the timing of when the requirements of the new rule would apply. Some stated that for substantial rehabilitation, HUD should state that any project beyond the earliest stage of project budget development should be exempted from the rule. Commenters also suggested that the rule should not apply if a request for proposals (RFP) has been issued for a given project.

HUD Response: HUD fully recognizes that imposing additional requirements on projects that have already established budgets would have negative impacts on those new construction or substantial rehabilitation plans. HUD has, therefore, put specific applicability language into each program's regulations specifying the date or point in the development process after which projects will be subject to these new requirements. HUD intends in particular to issue additional guidance for the Project-Based Voucher (PBV) program and any substantial rehabilitation that may occur after a Housing Assistance Payments (HAP) contract has been signed.

However, HUD encourages funding recipients who are currently developing projects for new construction or substantial rehabilitation that would not be covered by this rule to seriously consider whether they can include broadband infrastructure in those construction or rehabilitation plans.

Infrastructure Design

Commenters suggested other changes to HUD's requirements for the broadband infrastructure. Several stated that the broadband wiring should enter the building at a central point and then flow to each unit and common space in the building. Commenters stated that HUD should encourage building owners to consider ways to future proof the infrastructure, including how to replace broken wires and how to make access points easily accessible. Others wrote that HUD should specify that buildings using wireless should have sufficient access points to ensure that each unit has fast, reliable service.

Commenters also stated that HUD should require broadband infrastructure be provided for common areas and meeting spaces.

Some commenters objected to HUD allowing broadband over power lines (BPL) or very-high-bit-rate digital subscriber lines (VDSL), as the commenters felt those technologies needed significant improvements and more widespread adoption to become viable ways of receiving broadband.

HUD Response: This final rule does not require a specific form of broadband infrastructure, as long as the infrastructure meets the speed requirements and complies with State and local building codes. This rule does not supersede any State or local building codes that may apply to the installation of broadband infrastructure. HUD expects funding recipients to consider the costs of installation, as well as operation and maintenance, when deciding which form of broadband infrastructure to install. HUD also encourages all funding recipients to include broadband infrastructure in a way that conforms to standards for resilient construction.

In addition, HUD is not requiring the installation of broadband infrastructure in common areas and meeting spaces, but HUD highly encourages funding recipients to do so when possible. In projects where installing such infrastructure in individual units is cost prohibitive, HUD encourages funding recipients to install broadband infrastructure in common areas, unless the recipient determines that is also cost prohibitive.

Internet Service Providers (ISPs)

Several commenters stated that HUD should encourage housing providers to install broadband infrastructure that enables multiple competitive providers in the same project, or a managed solution to allow for subsidized services. Commenters stated that HUD should prohibit owners from entering into arrangements with providers that limit other providers' access to inside wiring, interfering with the right of residents to request or receive broadband service from a specific provider, or entering into exclusive marketing arrangements in HUD-supported housing.

Commenters stated that infrastructure running from the street to the building should have sufficient conduit capacity to allow for use by multiple providers.

HUD Response: As noted in response to the prior comments, HUD leaves the precise nature or manner of installation of broadband infrastructure to standards and requirements set by State and local codes. HUD does recognize that it is important to provide as much choice as possible regarding service providers. However, sometimes, exclusive contracts allow for the provision of broadband service at a much lower rate than would otherwise be available. HUD therefore declines at this time to restrict housing providers' ability to enter into limited service contracts, but would like to recommend caution for public housing agencies (PHAs) considering exclusivity contracts.

Programs

Commenters were divided on whether HUD should include additional programs beyond those in the proposed rule. Some wrote that HUD should not include more programs. Others asked that HUD include all programs providing housing assistance for low-income populations, which may make the regulation easier to enforce in general. Commenters also stated that HUD should include all multifamily

programs, while reconsidering including Continuum of Care (CoC) programs, as they help with shelter needs, not long-term housing solutions.

HUD Response: The number of HUD programs that provide for new construction and substantial rehabilitation has not expanded greatly over the years. HUD's Choice Neighborhoods program was the successor to HUD's HOPE VI program. HUD's Housing Trust Fund program is a new program that provides, among other things, for the production of affordable housing. If future HUD programs, whether existing or new, provide for the new construction or substantial rehabilitation of multifamily rental housing, HUD will incorporate these requirements into those programs. In addition, CoC funds long-term housing solutions as well as temporary housing solutions. Therefore, HUD finds it appropriate to include broadband infrastructure in these projects.

Sanctions

Commenters suggested some sanctions HUD could consider. Some stated that HUD should fine owners for inappropriate use of exemptions from the requirements, perhaps using the funds for digital literacy programs. Commenters stated that HUD could, in egregious cases, disqualify recipients from future HUD funding. Other commenters suggested that instead of sanctions, HUD could require funding recipients to develop ways to bring the Internet to a project's residents.

HUD Response: For every HUD program, there are corrective and remedial actions available to HUD for funding recipients who do not follow their regulatory requirements. These corrective and remedial actions vary among programs, depending on existing statutory and regulatory authority. At this time, developing additional program-specific remedies is outside the scope of this rulemaking. However, in the event that a funding recipient does not follow the requirements of this rule, HUD will use the options currently available to pursue such violations.

Substantial Rehabilitation

Commenters suggested that HUD reconsider applying the requirements to substantial rehabilitation projects. Others suggested that HUD expand the definition to include other trigger activities, such as updating or replacing coaxial cables, installing fiber optics, or installing Ethernet. Commenters stated that the definition of substantial rehabilitation should not include the electrical system standard, because work on electrical systems does not always translate easily into providing broadband infrastructure.

Commenters addressed HUD's question about how to determine whether a rehabilitation project rises to the level of substantial rehabilitation. Some stated that HUD should rely on pre-rehabilitation cost estimates because, if there are unexpected expenses that take the project over the substantial rehabilitation threshold, adding broadband requirements on top of those expenses may be too much for the project. However, other comments stated that HUD should use actual costs to judge the substantial threshold.

Commenters also asked how the standard applies to scattered sites, where only a single unit or a few units are being renovated.

HUD Response: HUD believes that it is important to include substantial rehabilitation in this rule to maximize the number of families who can benefit from the rule, while minimizing costs as much as possible. In addition, HUD believes that maintaining the electrical system standard as one way to determine substantial rehabilitation is appropriate, as such work would likely result in exposing a building's basic infrastructure in such a way as to allow for the installation of broadband infrastructure.

HUD appreciates the responses to the question about which construction costs to use when determining whether or not work rises to the level of substantial rehabilitation. HUD has decided that the percentage-of-cost threshold for substantial rehabilitation should be based on the pre-rehabilitation cost estimates, and this has been incorporated into the substantial rehabilitation definition.

Because this rule only affects structures with more than 4 rental units, scattered-site housing with fewer than 4 rental units is not covered by the rule.

Additional HUD Support for Broadband

Commenters stated that HUD should couple the rule with additional support for subsidies and digital literacy programs, including treating the provision of broadband service as an eligible expenditure in affordable rental housing. Others asked for additional funding for the infrastructure costs themselves. Commenters further stated that HUD could leverage its size and buying power to secure broadband service at lower prices. Some suggested that HUD should explore additional subsidies to use ''white space'' in the over-air spectrum in rural areas for wireless Internet or to subsidize seniors or families with children.

Commenters also suggested that HUD should coordinate with the United States Department of Agriculture (USDA) to work with ''last mile'' connection issues.

HUD Response: This rule, and HUD's broadband rule providing for assessing Internet service needs in the consolidated planning process, are not HUD's final responses to narrowing the digital divide. Through HUD's ConnectHome initiative, HUD is striving to narrow the digital divide in the housing arena. In addition, HUD has and will continue to work with other Federal agencies, such as the USDA and the National Telecommunications and Information Administration.

HUD encourages funding recipients to make their own connections with other programs, or to establish local requirements to accomplish these goals. HUD will continue to seek out opportunities to foster such partnerships at the national and local level. Several HUD programs can be used to pay for such complementary services, and HUD encourages funding recipients to leverage those resources. HUD will also continue to explore ways to expand the eligibility of such complementary services and for infrastructure work in HUD programs. However, Congress, not HUD, establishes program funding levels, so we are unable to provide additional programmatic funds at this time.

Other Comments

Commenters asked HUD to expand the scope of the rule beyond new construction and substantial rehabilitation to also include existing facilities. Commenters also disagreed with HUD's encouragement to deploy competing infrastructure or delivery mechanisms.

HUD Response: As noted in responses above, this rule and its companion broadband rule regarding the consolidated planning process are not HUD's final responses to narrowing the digital divide. HUD is continuing to examine other areas for which HUD has authority and oversight to determine whether there are other avenues HUD can take to narrow the digital divide. At this time, however, it is outside the scope of this rulemaking to require funding recipients to retrofit existing buildings with broadband infrastructure unless rehabilitation work is being undertaken with HUD program funding.

V. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined to be a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order).

As discussed, this rule furthers HUD's efforts to narrow the digital divide in low-income communities served by HUD. Specifically, HUD is requiring installation of broadband infrastructure at the time of new construction or substantial rehabilitation of multifamily rental housing that is funded by HUD. As noted in the Executive Summary, the costs and benefits of this rule are difficult to quantify, but they can be described qualitatively.

A. Benefits

The benefits of narrowing the digital divide are well documented. In just one example, a study conducted by a former chair of the President's Council of Economic Advisers used data on the amount of time Internet users spend online to estimate that Internet access produces thousands of dollars of consumer surplus per user each year.[9] As noted above, however, the benefits of Internet technology have not been evenly distributed and research shows that there remain substantial disparities in both Internet use and the quality of access. This digital deficit is generally concentrated among older, less educated, and less affluent populations,[10] as well as in persons with disabilities.[11]

Additionally, individuals with vision, learning, and physical disabilities affecting manual dexterity rely on assistive technologies to interact with computers and the Internet, and such technologies function best on broadband Internet. Without access to broadband infrastructure, these individuals may have limited access to basic services that are now offered online.

HUD recognizes that the rule's limited scope in only requiring the installation of infrastructure, instead of providing Internet access, also limits the benefits of the rule. Specifically, the benefit of the rule is that where broadband Internet can be made available at a limited price, the tenants, residing in housing with broadband infrastructure, will be assured of the ability to access broadband Internet service, whether they choose and are able to afford Internet service or not. This rule, therefore, would put broadband Internet service within reach where other charitable and public social programs, including HUD's ConnectHome program, provide free or reduced-cost service.

B. Costs

It is not possible to specify the exact costs that recipients and owners may incur as a result of the rule, given the variety of available technologies that may be used to satisfy the new broadband requirements. However, available data indicate that any costs associated with this rule will be minimal.

As is displayed on Table I, broadband Internet access can be provided using two general technologies: Wired and wireless, each with several specific technologies. Broadband can be delivered over wired lines using very-high-bit-rate digital subscriber lines (VDSL), cable lines, power lines (BPL), or fiber optic platforms. Using wireless technologies, broadband can be provided using satellite, fixed wireless, mobile wireless, and Wi-Fi platforms.

TABLE I—TYPES OF BROADBAND TECHNOLOGIES

Platform	Connection type	Access requirement	
		Part of infrastructure	Not part of infrastructure
Wired:			
Digital Subscriber Line (VDSL)	Copper wire	Yes	Router & Modem.
Cable Modem	Copper wire	Yes	Router & Modem.
Fiber	Fiber Optic wire	Yes	Router & Modem.
Broadband over Power Lines (BPL).	Copper wire	Yes	Router & Modem.
Wireless:			
Satellite	Over the Air—satellite	None	Router & Modem.
Fixed Wireless	Over the Air—Longer Range Directional Equipment.	None	Router & Modem.
Mobile Wireless	Over the Air—Cellular	None	Router & Modem.
Wireless Fidelity (Wi-Fi)	Over the Air—Short-Range Wireless Technology.	None	Router & Modem.

Whereas wired lines technologies may require some sort of physical infrastructure consisting of internal wiring within the dwelling unit, wireless technologies do not require any additional physical infrastructure

[9] Council of Economic Advisers July 2015 report, *supra,* citing Austan Goolsbee and Peter J. Klenow, *Valuing Consumer Products by the Time Spent Using Them: An Application to the Internet* National Bureau of Economic Research Working Paper No. 11995 (February 2006) available online at: *http://www.nber.org/papers/w11995.*

[10] Ibid.

[11] Eve Hill, Department of Justice, Testimony before the Senate Committee on Health, Education, Labor, and Pensions (February 7, 2012), available online at *http://www.justice.gov/sites/default/files/testimonies//attachments/02/07/12/02-07-12-crt-hill-testimony.pdf.*

within the building. With wireless technology, the signal travels through the air to the customer, who uses a connection technology, such as a modem, to access the services. For wireless technologies, the infrastructure cost to the property boundary (connection to the service provider) is nil ($0.00). However, the availability of wireless broadband service is limited and evolving, so HUD expects many builders will install wired broadband infrastructure to ensure that the requirements of this rule are met.

Building costs of installing wired infrastructure are limited to in-dwelling wiring, as this is all that is required by the rule. Within the unit or the building, the electrical work consists of running cable (meeting the requirements of category (Cat) 5e or Cat 6 wire), installing jacks and plates, and minor construction work (such as drilling and patching walls). Fiber optic cables are rarely run in the dwelling unit but are installed by the service provider outside the unit; the non-fiber optic wiring then makes broadband accessible within the unit. Depending on the market, some of the cost is also borne by the service provider.

The average per-unit cost for wiring for broadband Internet is approximately $200 (see Table II). These costs are simply estimates of one method of complying with the requirements of the rule. Labor costs will also vary based on the region and whether the installation is being done as part of substantial rehabilitation or new construction. At most, installation of broadband infrastructure may reduce the provision of other amenities or nonessential finishes, but even these reductions are considered unlikely.

TABLE II—SAMPLE COST TO INSTALL ELECTRICAL WIRING (1 WIRING) [12]

Item	Quantity	Low	High
Electrical Wiring Labor (Hours)—Labor estimate to install electrical wiring, route, secure, and connect new NMB–B wiring run for single receptacle, up to a 40′ run. Includes planning, equipment, and material acquisition, area preparation and protection, setup, and cleanup.	2.1 hours	$160.07	$205.10
Electrical Wiring Materials and Supplies—Cost of related materials and supplies typically required to install electrical wiring including connectors, fittings, and mounting hardware.	1 Wiring (unit)	20.00	25.00
Total Costs (1 Wiring)		180.07	230.10

HUD also notes that the rule is drafted so as to minimize the costs of the new installation requirements. For example, the rule does not mandate any rehabilitation or construction, and the decision to undertake such activities appropriately remains with recipients and owners. Rather, the scope of the regulatory changes is limited to requiring the installation of broadband infrastructure if the recipient or owner elects to undertake new construction or substantial rehabilitation. The rule minimizes the economic impacts on recipients and owners by recognizing that the installation of broadband infrastructure is generally less burdensome and costly at the time of new construction or substantial rehabilitation than when such installation is undertaken as a stand-alone effort.

Moreover, this rule only requires the installation of broadband infrastructure that is ''accessible'' in each unit. The rule does not require recipients or owners to provide a regular subscription to broadband Internet service (even at a cost) to residents. Also minimizing the economic costs of the regulatory changes is the fact that the definition of broadband infrastructure includes cable television, fiber optic cabling, and wireless infrastructure providing appropriate broadband connectivity to the individual units. As discussed above in this Executive Summary, multifamily HUD or standard-market new construction typically provides telephone landline and cable TV connectivity. Further, HUD's competitive grants for new construction under the Choice Neighborhoods program have, in recent years, sought the provision of broadband.

A review of HUD internal databases, summarized on Table III, shows that, in 2013, 58,677 units within the targeted programs were newly constructed or rehabilitated. However, HUD's data did not contain specific information to be able to determine how many of the units that underwent rehabilitation met the definition of ''substantial rehabilitation'' contained in the rule, so the number of affected units would be smaller than is contained in the table. In addition, data on affected units newly constructed using CDBG funding are unavailable, as grantee reports do not separate multifamily from single-unit new construction.

TABLE III—HUD-ASSISTED NEW CONSTRUCTION AND SUBSTANTIAL REHABILITATION

	Sec. 8 RAD	811 PRAC	202 PRAC	Sec. 8 202	HOPE VI	PIH	CDBG	HOME Rental	Totals
New Construction									
2012		506	2,405		146	703			
2013	110	583	2,034		44	297		19,424	22,492
2014	100	482	1,592					11,596	
Rehabilitation									
2012			25			36			

[12] *http://www.homewyse.com/services/cost_to_install_electrical_wiring.html.*

TABLE III—HUD-ASSISTED NEW CONSTRUCTION AND SUBSTANTIAL REHABILITATION—Continued

	Sec. 8 RAD	811 PRAC	202 PRAC	Sec. 8 202	HOPE VI	PIH	CDBG	HOME Rental	Totals
2013	199	15	.....	109	.....	16	20,918	14,928	36,185
2014	.....	28	15	.....	.....	.....	15,716	6,965	.....
FY 2013 Totals	.....	.....	.....	.....	.....	.....	.....	.....	58,677

Further, a review found that multifamily (5-plus units) HUD or standard-market new construction typically provides telephone landlines and many provide cable TV connectivity.[13] A recent survey by the National Association of Homebuilders found that just 4 percent of the surveyed multifamily housing developers did not install landline wires and jacks in multifamily units completed in the past 12 months.[14] [15] In recent years, HUD's competitive grants for new construction under the Choice Neighborhoods program have required the provision of broadband.[16] Therefore, this rule simply codifies what is considered common practice in at least one program.

Accordingly, most recipients and owners already meet the standards established in the rule, and the new regulatory requirements will impose minimal, if any, new economic costs. HUD has addressed those rare situations where the new requirements may prove too costly by allowing exceptions to the installation requirements where the installation is documented to be economically infeasible due to location or building characteristics.

[13] For example, under ''Class 4 Low Average Quality'' the Craftsman 2015 National Building Cost Manual lists cable TV as a standard feature. Only ''Class 5'' minimum quality does not list cable or a computer network as a standard feature. All electrical work is estimated to be 10 percent of project cost. *2015 National Building Cost Manual, supra,* p. 19.

[14] NAHB, Multifamily Market Survey, *supra.*

[15] Note that HUD's definition of accessibility is more restrictive than the FCC's because HUD considers only the building itself.

[16] United States Department of Housing and Urban Development. ''Choice Neighborhoods Planning Grants Notice of Funding Availability,'' *supra,* p. 32. ''Broadband Access. All FY2014 and FY2015 Implementation Grantees will be required, as part of their Transformation Plan, to include infrastructure that permits unit-based access to broadband Internet connectivity in all new units. Grantees may use Choice Neighborhoods funds to provide unit-based broadband Internet connectivity, which includes the costs of installing broadband infrastructure and hardware in units, but not the costs of Internet service for residents. Regular and informed Internet adoption can increase access to the job market, as well as health, education, financial and other services. Further, in-home broadband Internet access is an attractive, and in most cases, standard amenity that can be used to market the mixed-income community created through the Transformation Plan.''

The docket file is available for public inspection online at *www.regulations.gov* under the docket number and title of this rule.

Impact on Small Entities

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This rule provides that for new construction or substantial rehabilitation of multifamily rental housing funded by HUD, as part of the new construction or substantial rehabilitation to be undertaken, such activity must include installation of broadband infrastructure. None of the programs covered by this rule require a funding recipient to undertake new construction or substantial rehabilitation. Instead, new construction and substantial rehabilitation are eligible activities that funding recipients may take using HUD funds. Therefore, small entities will not incur any costs they would not otherwise incur by voluntarily undertaking new construction or substantial rehabilitation, since the costs of these activities, including the installation of broadband infrastructure, are funded by HUD. For these reasons, this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule will not impose any Federal mandates on any State, local, or tribal governments or the private sector within the meaning of the UMRA.

Paperwork Reduction Act

The information collection requirements contained in this rule were submitted to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) for review and approval and are pending or are covered by OMB control numbers 2577–0269, 2577–0191, 2506–0165, 2506–0077, 2506–0085, 2506–0170, 2506–0199, 2506–0171, 2506–0133, 2577–0169, 2577–0157, 2502–0587, 2502–0612, 2502–0462, and 2502–0608. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

Environmental Review

A Finding of No Significant Impact (FONSI) with respect to the environment was made at the proposed rule stage in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). That FONSI remains applicable to this final rule and is available for public inspection online at *www.regulations.gov* under the docket number and title of this rule.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempts State law within the meaning of the Executive order.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers applicable to the programs that would be affected by this rule are: 14.218, 14.225, 14.228, 14.239, 14.241, 14.267, 14.850, 14.871, and 14.872.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs-housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs-housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 92

Administrative practice and procedure, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 93

Administrative practice and procedure, Grant programs-housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs-education, Grant programs-housing and community development, Guam, Indians, Loan programs-housing and community development, Low and moderate income housing, Northern Mariana Islands, Pacific Islands Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

24 CFR Part 574

Community facilities, Grant programs-housing and community development, Grant programs-social programs, HIV/AIDS, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 578

Community development, Community facilities, Grant programs-housing and community development, Grant programs-social programs, Homeless, Reporting and recordkeeping requirements.

24 CFR Part 880

Grant programs-housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 881

Grant programs-housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 883

Grant programs-housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 884

Grant programs-housing and community development, Rent subsidies, Reporting and recordkeeping requirements, Rural areas.

24 CFR Part 886

Grant programs-housing and community development, Lead poisoning, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 891

Aged, Grant programs-housing and community development, Individuals with disabilities, Loan programs-housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 905

Grant programs-housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 983

Grant programs-housing and community development, Low and moderate income housing, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR parts 5, 92, 93, 570, 574, 578, 880, 881, 883, 884, 886, 891, 905, and 983 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority citation for part 5 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d), Sec. 327, Pub. L. 109–115, 119 Stat. 2936, Sec. 607, Pub. L. 109–162, 119 Stat. 3051, E.O. 13279, and E.O. 13559.

■ 2. In § 5.100, add the definitions of ''Broadband infrastructure'' and ''Substantial rehabilitation'' in alphabetical order, to read as follows:

§ 5.100 Definitions.

* * * * *

Broadband infrastructure means cables, fiber optics, wiring, or other permanent (integral to the structure) infrastructure, including wireless infrastructure, that is capable of providing access to Internet connections in individual housing units, and that meets the definition of ''advanced telecommunications capability'' determined by the Federal Communications Commission under section 706 of the Telecommunications Act of 1996 (47 U.S.C. 1302).

* * * * *

Substantial rehabilitation, for the purposes of determining when installation of broadband infrastructure is required as part of substantial rehabilitation of multifamily rental housing, unless otherwise defined by a program, means work that involves:

(1) Significant work on the electrical system of the multifamily rental housing. ''Significant work'' means complete replacement of the electrical system or other work for which the pre-construction cost estimate is equal to or greater than 75 percent of the cost of replacing the entire electrical system. In the case of multifamily rental housing with multiple buildings with more than 4 units, ''entire system'' refers to the electrical system of the building undergoing rehabilitation; or

(2) Rehabilitation of the multifamily rental housing in which the pre-construction estimated cost of the rehabilitation is equal to or greater than 75 percent of the total estimated cost of replacing the multifamily rental housing after the rehabilitation is complete. In the case of multifamily rental housing with multiple buildings with more than 4 units, the replacement cost must be the replacement cost of the building undergoing rehabilitation.

* * * * *

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 3. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839.

■ 4. Amend § 92.251 by revising the introductory text of paragraph (a)(2) and adding paragraphs (a)(2)(vi) and (b)(1)(x) to read as follows:

§ 92.251 Property standards.

(a) * * *

(2) *HUD requirements.* All new construction projects must also meet the requirements described in this paragraph:

* * * * *

(vi) *Broadband infrastructure.* For new commitments made after January 19, 2017 for a new construction housing project of a building with more than 4

rental units, the construction must include installation of broadband infrastructure, as this term is defined in 24 CFR 5.100, except where the participating jurisdiction determines and, in accordance with § 92.508(a)(3)(iv), documents the determination that:

(A) The location of the new construction makes installation of broadband infrastructure infeasible; or

(B) The cost of installing the infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden.

(b) * * *

(1) * * *

(x) *Broadband infrastructure.* For new commitments made after January 19, 2017 for a substantial rehabilitation project of a building with more than 4 rental units, any substantial rehabilitation, as defined in 24 CFR 5.100, must provide for installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the participating jurisdiction determines and, in accordance with § 92.508(a)(3)(iv), documents the determination that:

(A) The location of the substantial rehabilitation makes installation of broadband infrastructure infeasible;

(B) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(C) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

* * * * *

PART 93—HOUSING TRUST FUND

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

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 4568.

■ 6. Amend § 93.301 by revising the introductory text of paragraph (a)(2) and adding paragraphs (a)(2)(vi) and (b)(1)(x) to read as follows:

§ 93.301 Property standards.

(a) * * *

(2) *HUD requirements.* All new construction projects must also meet the requirements described in this paragraph:

* * * * *

(vi) *Broadband infrastructure.* For new commitments made after January 19, 2017 for a new construction housing project of a building with more than 4 rental units, the construction must include installation of broadband infrastructure, as this term is defined in 24 CFR 5.100, except where the grantee determines and, in accordance with § 93.407(a)(2)(iv), documents the determination that:

(A) The location of the new construction makes installation of broadband infrastructure infeasible; or

(B) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden.

(b) * * *

(1) * * *

(x) *Broadband infrastructure.* For new commitments made after January 19, 2017 for a substantial rehabilitation project of a building with more than 4 rental units, any substantial rehabilitation, as defined in 24 CFR 5.100, must provide for installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the grantee determines and, in accordance with § 93.407(a)(2)(iv), documents the determination that:

(A) The location of the substantial rehabilitation makes installation of broadband infrastructure infeasible;

(B) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(C) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

* * * * *

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 7. The authority citation for part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301–5320.

■ 8. In § 570.202, add paragraph (g) to read as follows:

§ 570.202 Eligible rehabilitation and preservation activities.

* * * * *

(g) *Broadband infrastructure.* Any substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units, for which CDBG funds are first obligated by the recipient on or after April 19, 2017, must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the recipient determines and, in accordance with § 570.506, documents the determination that:

(1) The location of the substantial rehabilitation makes installation of broadband infrastructure infeasible;

(2) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(3) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

■ 9. In § 570.204 add paragraph (a)(5) to read as follows:

§ 570.204 Special activities by Community-Based Development Organizations (CBDOs).

(a) * * *

(5) Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units, for which CDBG funds are first obligated by the recipient on or after April 19, 2017, must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the recipient determines and, in accordance with § 570.506, documents the determination that:

(i) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(ii) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(iii) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

* * * * *

■ 10. Add paragraph (c)(5) to § 570.482 to read as follows:

§ 570.482 Eligible activities.

* * * * *

(c) * * *

(5) *Broadband infrastructure in housing.* Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units, for which CDBG funds are first obligated by the State's grant recipient on or after July 18, 2017, must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the State or the State's grant recipient determines and documents the determination that:

(i) The location of the new construction or substantial

rehabilitation makes installation of broadband infrastructure infeasible;

(ii) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(iii) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

* * * * *

■ 11. In § 570.506, redesignate paragraph (c) as paragraph (c)(1) and add a new paragraph (c)(2) to read as follows:

§ 570.506 Records to be maintained.

* * * * *

(c) * * *

(2) Where applicable, records which either demonstrate compliance with the requirements of § 570.202(g) or § 570.204(a)(5) or document the State's or State's grant recipient's basis for an exception to the requirements of those paragraphs.

* * * * *

PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS

■ 12. The authority citation for part 574 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12901–12912.

■ 13. Add § 574.350 to subpart D to read as follows:

§ 574.350 Additional standards for broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 574.3, of a building with more than 4 rental units, for which HOPWA funds are first obligated by the grantee or project sponsor on or after January 19, 2017 must include installation of broadband infrastructure, as this term is defined in 24 CFR 5.100, except where the grantee or project sponsor determines and, in accordance with § 574.530, documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

PART 578—CONTINUUM OF CARE PROGRAM

■ 14. The authority citation for part 578 continues to read as follows:

Authority: 42 U.S.C. 11371 *et seq.,* 42 U.S.C. 3535(d).

■ 15. In § 578.45, add paragraph (d) to read as follows:

§ 578.45 Rehabilitation.

* * * * *

(d) *Broadband infrastructure.* Any substantial rehabilitation, as defined by 24 CFR 5.100, of a building with more than 4 rental units and funded by a grant awarded after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the grantee determines and, in accordance with § 578.103, documents the determination that:

(1) The location of the substantial rehabilitation makes installation of broadband infrastructure infeasible;

(2) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(3) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

■ 16. In § 578.47, add paragraph (c) to read as follows:

§ 578.47 New construction.

* * * * *

(c) *Broadband infrastructure.* Any new construction of a building with more than 4 rental units and funded by a grant awarded after January 19, 2017 must include installation of broadband infrastructure, as this term is defined in 24 CFR 5.100, except where the grantee determines and, in accordance with § 578.103, documents the determination that:

(1) The location of the new construction makes installation of broadband infrastructure infeasible; or

(2) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden.

PART 880—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR NEW CONSTRUCTION

■ 17. The authority citation for part 880 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), 12701, and 13611–13619.

■ 18. Add § 880.212 to subpart B to read as follows:

§ 880.212 Broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and that is subject to a Housing Assistance Payments contract executed or renewed after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

PART 881—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR SUBSTANTIAL REHABILITATION

■ 19. The authority citation for part 881 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), 12701, and 13611–13619.

■ 20. Add § 881.212 to subpart B to read as follows:

§ 881.212 Broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and that is subject to a Housing Assistance Payments contract executed or renewed after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

PART 883—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—STATE HOUSING AGENCIES

■ 21. The authority citation for part 883 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

■ 22. Add § 883.314 to subpart C to read as follows:

§ 883.314 Broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and that is subject to a Housing Assistance Payments contract executed or renewed after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

PART 884—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM, NEW CONSTRUCTION SET–ASIDE FOR SECTION 515 RURAL RENTAL HOUSING PROJECTS

■ 23. The authority citation for part 884 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

■ 24. Add § 884.125 to subpart A to read as follows:

§ 884.125 Broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and that is subject to a Housing Assistance Payments contract executed or renewed after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

PART 886—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—SPECIAL ALLOCATIONS

■ 25. The authority citation for part 886 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

■ 26. Add § 886.140 to subpart A to read as follows:

§ 886.140 Broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and that is subject to a Housing Assistance Payments contract executed or renewed after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

■ 27. Add § 886.340 to subpart C to read as follows:

§ 886.340 Broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and that is subject to a Housing Assistance Payments contract executed or renewed after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

PART 891—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

■ 28. The authority citation for part 891 continues to read as follows:

Authority: 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d), and 8013.

■ 29. In § 891.120, add paragraph (f) to read as follows:

§ 891.120 Project design and cost standards.

* * * * *

(f) *Broadband infrastructure.* Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and funded by a grant awarded after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

■ 30. Add § 891.550 to subpart E to read as follows:

§ 891.550 Broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and funded by a grant awarded after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of

its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

PART 905—THE PUBLIC HOUSING CAPITAL FUND PROGRAM

■ 31. The authority citation for part 905 continues to read as follows:

Authority: 42 U.S.C. 1437g, 42 U.S.C. 1437z–2, 42 U.S.C. 1437z–7, and 3535(d).

■ 32. In § 905.312, add paragraph (e) to read as follows:

§ 905.312 Design and construction.

* * * * *

(e) *Broadband infrastructure.* Any new construction or substantial rehabilitation, as substantial rehabilitation is defined in 24 CFR 5.100, of a building with more than 4 rental units and funded by a grant awarded or Capital Funds allocated after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the PHA determines and, in accordance with § 905.326, documents the determination that:

(1) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(2) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(3) The structure of the housing to be rehabilitated makes installation of broadband infrastructure infeasible.

PART 983—PROJECT-BASED VOUCHER (PBV) PROGRAM

■ 33. The authority citation for part 983 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 34. Add § 983.157 to subpart D to read as follows:

§ 983.157 Broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and where the date of the notice of owner proposal selection or the start of the rehabilitation while under a HAP contract is after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

Dated: December 15, 2016.

Nani A. Coloretti,

Deputy Secretary.

[FR Doc. 2016–30708 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AB76

Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains an amendment to a final regulation that describes how states may design and operate payroll deduction savings programs for private-sector employees, including programs that use automatic enrollment, without causing the states or private-sector employers to have established employee pension benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA). The amendment expands the final regulation beyond states to cover qualified state political subdivisions and their programs that otherwise comply with the regulation. This final rule affects individuals and employers subject to such programs.

DATES: This rule is effective 30 days after the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Janet Song, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Background

A. The 2016 Final Safe Harbor Regulation

On August 30, 2016, the Department issued a final regulation establishing a safe harbor pursuant to which state governments can establish payroll deduction savings programs for private-sector employees, including programs with automatic enrollment, without causing either the state or the employers of those employees to have established employee pension benefit plans subject to ERISA. The Department published the safe harbor regulation in response to legislation in some states, and strongly-expressed interest in others, to encourage private-sector employees to save for retirement by giving those employees broader access to retirement savings arrangements through their employers. The safe harbor regulation became effective on October 31, 2016.

As the Department noted in the final regulation's preamble, concerns that tens of millions of America's workers do not have access to workplace retirement savings arrangements led some states to establish state-administered programs that allow private-sector employees to contribute salary withholdings to tax-favored individual retirement accounts described in 26 U.S.C. 408(a), individual retirement annuities described in 26 U.S.C. 408(b), and Roth IRAs described in 26 U.S.C. 408A (collectively, IRAs). California, Connecticut, Illinois, Maryland, and Oregon, for example, have adopted laws along these lines.[1] Those programs generally require certain employers that do not offer workplace savings arrangements to automatically deduct a specified amount of wages from their employees' paychecks, unless an employee affirmatively chooses not to participate in the program, and to remit those payroll deductions to state-administered programs consisting of IRAs established for each participating employee. All of these state initiatives allow employees to stop payroll deductions at any time once they have begun, and they typically require that employers provide employees with program-generated information, including information on employees' rights and various program features. None of the programs, however,

[1] California Secure Choice Retirement Savings Trust Act, Cal. Gov't Code §§ 100000–10044 (2012); Connecticut Retirement Security Program Act, P.A. 16–29 (2016); Illinois Secure Choice Savings Program Act, 820 Ill. Comp. Stat. 80/1–95 (2015); Maryland Small Business Retirement Savings Program Act, Ch. 24 (H.B. 1378) (2016); Oregon Retirement Savings Board Act, Ch. 557 (H.B. 2960) (2015).

currently require employers to make matching or other employer contributions to employee accounts, while some programs expressly prohibit employer contributions and other programs do not address that issue.

The Department also noted in the 2016 final safe harbor regulation's preamble that some stakeholders had expressed concern that their payroll deduction savings programs might cause either the state or the covered employers to inadvertently establish ERISA-covered plans, despite the states' express intent to avoid such a result. The states' concern is based in part on ERISA's broad definition of ''employee pension benefit plan'' and ''pension plan,'' which ERISA defines, in relevant part, as ''any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program . . . provides retirement income to employees . . . .'' [2] That definition's broad scope is further evident in the fact that the Department and the courts have broadly interpreted the phrase ''established or maintained'' as requiring only minimal involvement by an employer or employee organization.[3] Thus, for example, it is possible for an employer to establish an ERISA plan simply by purchasing insurance products for an individual employee or employees. Given these expansive definitions, which Congress deemed essential to ERISA's purpose of protecting plan participants by ensuring the security of promised benefits, ERISA applies to nearly all benefit arrangements that private-sector employers establish for their employees.

The states' desire to avoid inadvertently creating ERISA plans through their payroll deduction savings programs stems from the fact that, with certain exceptions, ERISA preempts state laws that relate to ERISA-covered employee benefit plans.[4] Thus, if a state program requires private employers to take actions that effectively cause those employers to establish ERISA-covered plans, the state law underlying the program would likely be preempted. Similarly, if the state-sponsored program itself were deemed to be an ERISA plan, ERISA would likely preempt any state law that mandates private-sector employers to enroll their employees in that program. It is important to note in this regard that although ERISA does exempt from its scope benefit plans that states establish for their own employees, the state payroll deduction savings programs at issue here would not fit that definition.[5]

The Department responded to these concerns by publishing the 2016 final safe harbor regulation, which described specific conditions pursuant to which state payroll deduction savings programs, including those with automatic enrollment, would not result in the state or private-sector employers having established ERISA-covered employee pension benefit plans. The 2016 final safe harbor regulation thus helps states to establish and operate payroll deduction savings programs in a manner that reduces the risk that ERISA would preempt their laws and programs. That final regulation did not, however, include within its scope payroll deduction savings programs established by state political subdivisions.

B. Proposed Amendment to the 2016 Safe Harbor Regulation

1. Expanding the Safe Harbor To Include Political Subdivisions

On August 30, 2016, the Department published in the **Federal Register** a proposed rule amending the 2016 final safe harbor regulation to include within its scope laws and programs established by certain state political subdivisions.[6] The proposed amendment addressed certain public comments the Department received after it first published the safe harbor regulation in 2015 as a proposed rule.[7] In particular, several commenters had expressed the view that the Department's definition of ''State'' in the 2015 proposed safe harbor regulation was too narrow because it did not include political subdivisions. Some of these commenters identified New York City as being interested in offering a program. The 2015 proposal defined the term ''State'' by referencing section 3(10) of ERISA, which provides, in relevant part, that the term State ''includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, [and] Wake Island.'' That definition excludes from the safe harbor any payroll deduction savings program established by state political subdivisions, such as a cities or counties.

Although the Department retained the section 3(10) definition in the 2016 final safe harbor regulation, the Department nevertheless agreed with commenters that there may be good reasons for expanding the safe harbor, subject to certain conditions, to cover political subdivisions and their programs. While it is not clear to the Department how many such political subdivisions eventually will have an interest in establishing programs of the kind described in the final safe harbor regulation, thus far the Department has only received written letters of interest from representatives of Seattle, Philadelphia and New York City.[8] Accordingly, the Department proposed amending the 2016 final safe harbor regulation to add to § 2510.3–2 paragraph (h) the term ''or qualified political subdivision'' wherever the term ''State'' appears. That change would cause the regulation's safe harbor to apply to ''qualified'' political subdivision payroll deduction savings programs in the same manner as it applies to state programs.

The proposed amendment also added a new subparagraph (h)(4) to define the term ''qualified political subdivision'' as any governmental unit of a state, including any city, county, or similar governmental body that met three criteria. First, the political subdivision must have the authority, under state law, whether implicit or explicit, to require employers' participation in the

[2] 29 U.S.C. 1002(2)(A). ERISA's Title I provisions ''shall apply to any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce . . . .'' 29 U.S.C. 1003(a). Section 4(b) of ERISA includes express exemptions from coverage under Title I for governmental plans, church plans, plans maintained solely to comply with applicable state laws regarding workers compensation, unemployment, or disability, certain foreign plans, and unfunded excess benefit plans. 29 U.S.C. 1003(b).

[3] *Donovan* v. *Dillingham,* 688 F.2d 1367 (11th Cir. 1982); *Harding* v. *Provident Life and Accident Ins. Co.,* 809 F. Supp. 2d 403, 415–419 (W.D. Pa. 2011); DOL Adv. Op. 94–22A (July 1, 1994).

[4] ERISA section 514(a), 29 U.S.C. 1144(a).

[5] ERISA section (3)(32), 29 U.S.C. 1002(32).

[6] *See* 81 FR 59581 (August 30, 2016).

[7] *Id. See also* 80 FR 72006 (November 18, 2015). On the same day that the 2015 proposed rule was published, the Department also published an Interpretive Bulletin explaining the Department's views concerning the application of ERISA section 3(2)(A), 29 U.S.C. 1002(2)(A), section 3(5), 29 U.S.C. 1002(5), and section 514, 29 U.S.C. 1144, to certain state laws designed to expand retirement savings options for private-sector workers through state-sponsored ERISA-covered retirement plans. 80 FR 71936 (codified at 29 CFR 2509.2015–02). Although discussed in the context of a state as the responsible governmental body, in the Department's view the principles articulated in the Interpretive Bulletin regarding marketplace arrangements and sponsorship of ERISA-covered plans also apply with respect to laws of a political subdivision, provided applicable conditions in the bulletin can be and are satisfied by the political subdivision. A number of commenters asked the Department to amend the Interpretive Bulletin to reflect this view. Such an amendment is beyond the scope of this rulemaking.

[8] *See, e.g.,* Comment Letter #4 (Seattle City Councilmember Tim Burgess); Comment letter #5 (City of Philadelphia Controller); Comment Letter #20 (New York City Mayor).

payroll deduction savings program. Second, the political subdivision must have a population equal to or greater than the population of the least populous state.[9] Third, the political subdivision cannot be within a state that has a statewide retirement savings program for private-sector employees.[10]

The Department's goal in defining ''qualified political subdivision'' in this way was to reduce the number of political subdivisions that can fit within the safe harbor and focus the authority on those subdivisions most likely to have the capacity to implement successful programs. As the Department noted in the proposed rule's preamble, the U.S. Census Bureau reports that there are approximately 90,000 local governmental units in the United States, many of which could be considered ''political subdivisions'' for purposes of the proposed regulation.[11] Given this large number, the Department was concerned that expanding the safe harbor to all political subdivisions would result in overlapping programs within a given state.[12] The Department also had some concerns about expanding the safe harbor to very small political subdivisions, as the U.S. Census Bureau has reported that approximately 83% of state subdivisions have populations of less than 10,000 people.[13] These statistics led the Department to propose to further limit the types of political subdivisions that can fall within the safe harbor to those that are sufficiently large and sophisticated to have the ability to oversee and safeguard payroll deduction savings programs.

2. Criteria Limiting Political Subdivision Eligibility for the Safe Harbor

The first proposed criterion limiting the potential number of political subdivisions eligible for the safe harbor requires that the political subdivision have either explicit or implicit authority under state law to establish and operate a payroll deduction savings program and to require employers within its jurisdiction to participate. In the case of programs with automatic enrollment, that authority must encompass the power to require employers to execute payroll deduction wage withholdings.[14] This criterion will effectively limit the safe harbor's scope to so-called ''general-purpose'' subdivisions, which are political subdivisions that have the authority to exercise traditional sovereign powers, such as the power of taxation, the power of eminent domain, and the police power. It includes county governments, municipal governments, and township governments.[15] According to the U.S. Census Bureau, there are approximately 40,000 ''general-purpose'' political subdivisions in the United States.[16] By contrast, ''special-purpose'' subdivisions, such as utility districts or transit authorities, ordinarily would not have this kind of authority under state law. Thus, the Department expects that this criterion alone will reduce the universe of political subdivisions potentially eligible for the safe harbor from the approximate total of 90,000 U.S. political subdivisions to approximately 40,000.

The second proposed criterion limiting the number of potentially-eligible political subdivisions requires that the political subdivision have a population equal to or greater than the population of the least populous U.S. state (excluding the District of Columbia and the territories listed in section 3(10) of the ERISA). Based on the most recent U.S. Census Bureau statistics available, the least populous U.S. state had approximately 600,000 residents.[17] This criterion will significantly reduce the possibility of overlap by further limiting the universe of potentially-eligible political subdivisions from approximately 40,000 to a subset of approximately 136.[18]

The proposal's third criterion further limited the safe harbor to political subdivisions in states that do not offer their own statewide retirement savings program for private-sector employees.[19] As presented in the proposal, this criterion would have applied to state retirement savings programs described in the safe harbor rule itself, 29 CFR 2510.3–2(h), and also to programs described or referenced in the Department's Interpretive Bulletin found at 29 CFR 2509.2015–02. This criterion excluded from the safe harbor approximately 48 additional political subdivisions that otherwise meet the proposal's population threshold, thereby further limiting the universe of potentially eligible political subdivisions to approximately 88 as of the date of the proposed rule.

3. Solicitation of Comments on the Proposed Amendment

The Department solicited public comments on all aspects of the proposed amendment, including comments on criteria the Department did not specifically address in the proposal, but which might be useful in refining the qualified political subdivision definition. In addition, the Department also requested comments on other facets of the safe harbor more generally. In response to these solicitations, the Department received approximately 27 written comments, many of which are discussed under the topical headings below.

[9] For this purpose, the term ''state'' does not include the non-state authorities listed in section 3(10) of ERISA. Thus, it does not include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and Wake Island.

[10] The proposal's paragraph (h)(4) definition would not, however, apply for other purposes under ERISA, such as for determining whether an entity is a political subdivision for purposes of the definition of a ''governmental plan'' in section 3(32) of ERISA, 29 U.S.C. 1002(32).

[11] This figure represents the U.S. Census Bureau's count for 2012 (the most recent data available). The U.S. Census Bureau produces data every 5 years as a part of the Census of Governments in years ending in ''2'' and ''7.'' *See* U.S. Census Bureau, Government Organization Summary Report: 2012 Census of Governments (*http://www.census.gov/govs/cog/index.html*).

[12] This could occur in situations where, for example, an employer operates in a state (or states) with multiple political subdivisions.

[13] U.S. Census Bureau, County Governments by Population-Size Group and State: 2012 Census of Governments; U.S. Census Bureau; Subcounty Governments by Population-Size Group and State: 2012 Census of Governments (*http://www.census.gov/govs/cog/index.html*).

[14] This criterion not only limits the number of political subdivisions that would be eligible for the safe harbor, it also is central to the Department's analysis under section 3(2) of ERISA and the conclusion that employers are not establishing or maintaining ERISA-covered plans. Other criteria in (h)(4) also serve this purpose by reducing the likelihood that an employer might become involved with the arrangement beyond the limits of the safe harbor.

[15] *See* U.S. Census Bureau, Government Organization Summary Report: 2012 Census of Governments (*http://www.census.gov/govs/cog/index.html*).

[16] The U.S. Census Bureau's count of general-purpose political subdivisions for 2012 was 38,910 (3,031 counties, 19,519 municipalities, and 16,360 townships). *Id.*

[17] Wyoming was the least populated state in the U.S., with a population of 586,107. *See* U.S. Census Bureau, Annual Estimates of the Resident Population for States: 2015 Population Estimate (*https://www.census.gov/popest/data/state/totals/2015/index.html*).

[18] As of 2015, there were approximately 136 general-purpose political subdivisions with populations equal to or greater than the population of Wyoming.

[19] Eight states have already adopted laws to implement some form of statewide retirement savings program for private-sector employees. California Secure Choice Retirement Savings Trust Act, Cal. Gov't Code §§ 100000–100044 (2012); Connecticut Retirement Security Program Act, Pub. Act. 16–29 (2016); Illinois Secure Choice Savings Program Act, 820 Ill. Comp. Stat. 80/1–95 (2015); Maryland Small Business Retirement Savings Program Act, ch. 324 (H.B. 1378) (2016); Mass. Gen. Laws Ch. 29, § 64E (2012); New Jersey Small Business Retirement Marketplace Act, Public Law 2015, Ch. 298; Oregon Retirement Savings Board Act, Ch. 557 (H.B. 2960) (2015); Washington State Small Business Retirement Savings Marketplace Act, Wash. Rev. Code §§ 43.330.730–750 (2015).

II. Final Rule

A. General Overview

The final rule largely adopts the proposal's general structure. Specifically, it amends paragraph (h) of § 2510.3–2 by adding the term ''or qualified political subdivision'' wherever the term ''State'' appears in the regulation. Thus, with these amendments, the final regulation's safe harbor provisions generally apply in the same manner to qualified political subdivision payroll deduction savings programs as they apply to state programs.

The final rule also adopts proposed new subparagraph (h)(4), but with modifications. In the final rule, paragraph (h)(4) defines the term ''qualified political subdivision'' as any governmental unit of a state, including any city, county, or similar governmental body that meets four criteria.[20] First, the political subdivision must have implicit or explicit authority under state law to require employers' participation in the payroll deduction savings program. 29 CFR 2510.3–2(h)(4)(i).[21] Second, the political subdivision must have a population equal to or greater than the population of the least populous state.[22] 29 CFR 2510.3–2(h)(4)(ii)(A). Third, the political subdivision cannot be within a state that has enacted a mandatory statewide payroll deduction savings program for private-sector employees; nor can the political subdivision have geographic overlap with another political subdivision that has enacted such a program. 29 CFR 2510.3–2(h)(4)(ii)(B).[23] Fourth, the political subdivision must implement and administer a retirement plan for its employees. 29 CFR 2510.3–2(h)(4)(ii)(C).[24] Compliance with the latter three conditions is determined as of the date the political subdivision's program is enacted.

B. The Authority Test

The final rule adopts the proposal's requirement that in order to be ''qualified'' a political subdivision must have the ''authority, implicit or explicit, under State law to require employers' participation in the program . . . .'' § 2510.3–2(h)(4)(i). This provision serves two purposes. The main purpose is to ensure that the political subdivision has the authority under state law to require employers within its jurisdiction to participate in the payroll deduction savings program and, in the case of programs with automatic enrollment, to require wage withholding. This is not to say, however, that a state law must explicitly authorize the political subdivision to establish a payroll deduction savings program; rather, it means that the political subdivision must have some measure of legal authority, even if implicit, to establish and operate the program and to compel employers to participate.[25] The provision's second purpose is to limit the qualified political subdivision definition—and by extension to limit the safe harbor's scope—to general-purpose subdivisions, a limitation that greatly reduces the approximate number of potentially-eligible subdivisions from 90,000 to 40,000. For these reasons, and noting that the Department did not receive significant or notable comments on this particular provision, the Department incorporates this provision in the final rule without change.

C. The Population Test

The final rule adopts the proposal's population test for safe harbor qualification, with one modification. As noted above, the final rule states, in relevant part, that a political subdivision must have ''a population equal to or greater than the population of the least populated State,'' and defines the term ''State'' to have the same meaning as in section 3(10) of ERISA (excluding the District of Columbia and territories listed in that section). 29 CFR 2510.3–2(h)(4)(ii)(A).[26] The final rule modifies the proposal by adding to (h)(4)(ii) the phrase ''[a]t the time of the enactment of the political subdivision's payroll deduction savings program,'' and applying this requirement to the population test, as well as the two other conditions that a political subdivision must satisfy to be a qualified political subdivision.

The Department has two primary policy reasons for adopting the population test. First, it is important that the safe harbor not include political subdivisions that may not have the experience, capacity, and resources to establish and oversee payroll deduction savings programs. Second, the Department is interested in reducing the possibility that employers would be subject to a multiplicity of overlapping political subdivision programs. It is the Department's view that the population test is an important measure in achieving both of those purposes. In the preamble to the proposed rule, the Department articulated these policy considerations for public notice and comment.

The Department received a number of comments on this issue that reflected apparently conflicting viewpoints. Some commenters supported the population test because they agree with the Department that population size correlates with a political subdivision having the experience, capacity, and resources to implement the necessary structures to establish and oversee payroll deduction savings programs and meet the safe harbor regulation's various requirements.[27] These commenters state that political subdivisions with larger populations are more likely to share states' concerns about the effect of inadequate retirement savings on social welfare programs. Other commenters disagreed with the population test's underlying premise, as they believe that a population test is arbitrary and does not prove either that the least populated state has sufficient capacity to establish and oversee a payroll deduction savings program or that political subdivisions with lesser populations are *per se* incapable of competently overseeing such a program.

The Department agrees with those commenters who recognize a relationship between population, on the one hand, and resources, experience, and capacity on the other. This is because larger cities and counties (in terms of population) likely have, among other things, a larger tax base and governmental infrastructure, which provides access to greater resources, experience, and capacity than smaller

[20] This new definition does not apply for other purposes under ERISA, such as for determining whether an entity is a political subdivision for purposes of the definition of a ''governmental plan'' in section 3(32) of ERISA, 29 U.S.C. 1002(32).

[21] This provision reduces the approximate number of potentially eligible political subdivisions from 90,000 to 40,000.

[22] This provision reduces the approximate number of potentially eligible political subdivisions from 40,000 to 128. For purposes of this provision, the term ''state'' does not include the non-state authorities listed in section 3(10) of ERISA. Thus, it does not include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and Wake Island.

[23] This provision reduces the approximate number of potentially eligible political subdivisions from 128 to 80.

[24] This provision reduces the approximate number of potentially eligible political subdivisions from 80 to 51.

[25] This particular purpose is central to the Department's analysis under section 3(2) of ERISA and to its conclusion that employers are not establishing or maintaining ERISA-covered plans. 81 FR 59464, 70–71 (Aug. 30, 2016).

[26] The U.S. Census Bureau currently identifies Wyoming as the least populous state, with approximately 600,000 residents.

[27] *See* Comment Letter #11 (Corporation for Enterprise Development); Comment Letter #14 (AARP); Comment Letter #17 (AFSCME).

cities and counties.[28] In this regard, population can serve as one indicator of whether a city or county is likely to have sufficient resources, experience, and capacity to safely and competently establish and oversee a payroll deduction savings program. By keying off the least populated state, the final regulation's population test effectively establishes a federal floor, such that no political subdivision could qualify for the safe harbor unless the subdivision has a level of capacity and resources equal to or greater than the capacity and resources of the least populated state, using population as a proxy for capacity and resources.

The provisions of the Department's safe harbor pertaining to state payroll deduction savings programs assume that even the least populated states have the capacity and resources to manage a payroll deduction savings program. In the Department's view, political subdivisions that are the population size of small states could, in the right circumstances, have similar capacity and resources as their state counterparts of the same size. For that reason, the Department has decided not to flatly exclude such entities from coverage under the safe harbor. At the same time, however, the Department notes that states necessarily have a breadth of responsibilities, administrative systems, and experience that may not be matched by political subdivisions of equal size. Accordingly, the final regulation also adopts the demonstrated capacity test for these subdivisions, as discussed below. Together these tests ensure a high likelihood that qualified political subdivisions will have sufficient resources, experience, and capacity to safely and competently establish and oversee a payroll deduction savings programs. The application of both the size restriction and the demonstrated capacity test reduce the possibility that employers would be subject to a multiplicity of overlapping political subdivision programs. The population test directly advances this important policy interest by limiting the universe of political subdivisions potentially eligible for the safe harbor from approximately 40,000 general purpose political subdivisions to a far smaller number. As of 2015, there were approximately 136 general-purpose political subdivisions with populations equal to or greater than the population of Wyoming.

Even though the final regulation excludes smaller political subdivisions from the safe harbor, the Department acknowledges that cities and counties are not *per se* incapable of competently overseeing a payroll deduction savings program solely because they fail the final rule's population test. Indeed, many localities that fall below the population threshold may have sufficient experience, capacity, and resources to safely establish and oversee payroll deduction savings programs in a manner that sufficiently protects employees. Nevertheless, based on the public record, the Department's view continues to be that smaller political subdivisions do not, in general, have experience, resources, and capacity comparable to that of the least populous state, and therefore the Department chooses not to extend safe harbor status to such localities and their programs. It is also important to note that the final regulation does not—and the Department could not—bar smaller localities from establishing and maintaining payroll deduction savings programs for private-sector employees that fall outside the Department's safe harbor regulation.

As noted above, the Department did make one technical improvement to the proposed population test. Public comments raised concerns about the possibility that fluctuating populations could cause a qualified political subdivision to fall below the required population threshold—and therefore drop outside the safe harbor—after it had already enacted a payroll deduction savings program. To eliminate this possibility and its attendant uncertainty, the final rule contains new language to clarify that such cities and counties would not lose their qualified status merely because of population fluctuations. In that regard, the final regulation adds to paragraph (h)(4)(ii) the phrase ''[a]t the time of the enactment of the political subdivision's payroll deduction savings program.''

Finally, some commenters suggested that, because population size is only a rough indicator of a political subdivision's capacity and ability to safely operate a payroll deduction savings program, the Department should consider pairing the population test with some other more refined test or indicator. As mentioned above, the Department agrees that the population test could be improved by being paired with an additional criterion to gauge whether a sufficiently-large political subdivision should nonetheless fail to qualify under the safe harbor for lack of experience. The section below discusses the changes made to accomplish this result.

D. Demonstrated Capacity Test

The final regulation adopts a ''demonstrated capacity'' test in addition to the population test. As noted in the preceding sections, the population test removed from the safe harbor a significant number of smaller political subdivisions based solely on their size. The demonstrated capacity test, on the other hand, focuses on a political subdivision's ability to operate a payroll deduction savings program by requiring direct and objectively verifiable evidence of a political subdivision's experience, capacity, and resources to operate or administer such programs. The two tests (population test and demonstrated capacity test) combine to ensure a strong likelihood that political subdivisions that meet the safe harbor have sufficient experience, capacity, and resources to safely establish and oversee payroll deduction savings programs in a manner that sufficiently protects private-sector employees and that would not require employer involvement beyond the limits of the safe harbor regulation.

The Department adopted this new test in response to a significant number of commenters that strongly support this idea. These commenters encouraged the Department to consider two different approaches for developing a demonstrated capacity test. The first suggested approach focuses on whether the political subdivision has implemented and administers a retirement plan for its own employees.[29] The second suggested approach focuses on whether the political subdivision has an existing infrastructure for assessing and collecting income, sales, use or other similar taxes.[30] The apparent rationale behind these suggested approaches is that political subdivisions that are sophisticated enough to operate a retirement plan or levy and collect their own taxes should possess sufficient experience, capacity, and resources to safely establish and oversee a payroll deduction savings program. In addition, retirement plan administration and tax administration entail administrative activities that are highly comparable to the type of administrative activity that would be necessary to establish and oversee a successful

[28] For similar reasons, the population test also would reduce the likelihood of employer involvement beyond the limits of the safe harbor regulation. For instance, larger cities and counties with greater resources, experience and capacity likely will be better able to assert and maintain complete control over their programs such that there will be few or no occasions for participating employers to exercise their own discretion or control with respect to the program.

[29] *See, e.g.,* Comment Letter #16 (Investment Company Institute).

[30] *See, e.g.,* Comment Letter #19 (Georgetown University Center for Retirement Initiatives).

payroll deduction savings program for private-sector employees.

The final regulation adopts the suggested plan sponsorship approach as the sole basis for a demonstrated capacity test. Thus, in order to be qualified for the safe harbor under the final regulation, a political subdivision must implement and administer its own retirement plan. The Department agrees with the commenters that administering a public retirement plan for the political subdivision's own employees is sufficiently similar to establishing and overseeing a payroll deduction savings program for employees of other entities that successfully performing the former is strong evidence of an ability to successfully perform the latter. Both endeavors require, for example, receiving contributions, custodianship, investing assets or selecting investment options, deciding claims, furnishing account statements, meeting reporting requirements, distributing benefit payments, or selecting and overseeing others to perform some or all of these tasks. A political subdivision that does not implement and administer a retirement plan for its own employees, on the other hand, will fail to qualify under the safe harbor even if it passes the population test and all the other safe harbor conditions set forth in the qualified political subdivision definition.

The Department declined to adopt as part of the demonstrated capacity test the second of the commenters' suggested approaches, *i.e.,* the existence of a tax infrastructure. In support of that approach, the commenters suggested that a political subdivision's levying and collecting its own income, wage, or similar taxes may provide evidence that the political subdivision has the capacity to establish and oversee payroll deduction savings programs. The commenters noted that effective tax and program administration require political subdivisions to safely and efficiently exchange data and money with employers in a timely and ongoing fashion, usually by way of electronic payroll and other systems. In the Department's view, however, plan sponsorship is a better and more directly relevant indicator of a subdivision's ability to sponsor and administer a retirement savings program. Additionally, the Department is unable to verify the precise number of political subdivisions that both levy and collect their own income, wage, or similar taxes. Without such information, the Department is unable to assess the effect of this suggested approach on the safe harbor's scope. For these reasons, the Department declined to include this approach in the final rule's demonstrated capacity test.

Finally, the new test does not prescribe the type or size of plan a political subdivision must implement and administer in order to meet the safe harbor's new ''plan administration'' criterion. Thus, a political subdivision can satisfy this criterion by administering a defined benefit plan, an individual account plan, or both. Although a number of commenters suggested that the Department consider a plan size requirement, such as a minimum level of assets under management or number of participants covered, the Department declines to adopt these suggestions in the final rule.[31] As long as the plan provides retirement benefits for some or all of the political subdivision's employees, and provided that the political subdivision administers the plan directly or is responsible for selecting and overseeing others performing plan administration, the retirement plan is a ''plan, fund, or program'' within the meaning of paragraph (h)(4)(ii)(C) of the final regulation.

E. Consumer Protections

The final rule eliminates lingering ambiguity regarding the requirement in proposed paragraph (h)(1)(iii) that the state or political subdivision must assume responsibility for the security of payroll deductions. The Department previously attempted to clarify this requirement in the preamble to the final regulation dealing with state payroll deduction savings programs.[32] Despite those earlier efforts, commenters on the proposal continued to ask the Department to further clarify the meaning of this requirement. A number of commenters specifically focused on the need to clarify and strengthen proposed paragraph (h)(1)(iii), with some specifically stressing the importance of clear and strong standards protecting payroll deductions.[33] Many commenters also raised a generic concern that the proposal does not contain sufficient consumer protections as compared to the protections ERISA would offer.[34] The Department received similar comments on the 2015 proposed rule for state payroll deduction savings programs. Many of those commenters specifically referenced and supported a rule similar to the Department's regulation at 29 CFR 2510.3–102 (defining when participant contributions become ''plan assets'' for the purpose of triggering ERISA's protections).

In response to these concerns, the final rule clarifies and strengthens the requirement that states and political subdivisions must assume responsibility for the security of payroll deductions. Specifically, paragraph (h)(1)(iii) contains a new sub-clause clarifying that this requirement—to assume responsibility for the security of payroll deductions—includes two subsidiary requirements. The first subsidiary requirement is that states and political subdivisions must require that employers promptly transmit wage withholdings to the payroll deduction savings program. The second subsidiary requirement is that states and political subdivisions must provide an enforcement mechanism to ensure employer compliance with the first subsidiary requirement. These new requirements protect employees by ensuring that their payroll deductions are transmitted to their IRAs as quickly as possible, where they become subject to applicable Internal Revenue Code provisions, including the protective prohibited transaction provisions found in section 4975 of the Code.[35] States and political subdivisions may meet the new requirements in a variety of ways, including, for example, through legislation, ordinance, or administrative rulemaking.

The final regulation does not prescribe what is meant for wage withholdings to be transmitted ''promptly.'' Instead, each state and qualified political subdivision is best positioned to calibrate the appropriate timeframe for its own program. Nevertheless, in the interest of providing certainty to states and political subdivisions, the final regulation contains a special safe harbor for promptness. Paragraph (h)(5) provides that, for purposes of paragraph (h)(1)(iii), employer wage withholdings are ''deemed to be transmitted promptly'' if such amounts are

[31] *See, e.g.,* Comment Letter #9 (New York City Comptroller).

[32] 81 FR 59470 (August 30, 2016).

[33] *See, e.g.,* Comment Letter #12 (AFL–CIO); Comment Letter #16 (ICI) (incorporating comments from January 19, 2016 letter pertaining to state payroll deduction savings programs); Comment Letter #22 (American Council of Life Insurers) (''The inclusion of a payroll deduction transmission timing requirement in a safe harbor—especially one that provides for auto-enrollment—will provide a powerful incentive for those seeking to use the safe harbor protection to ensure that employee payroll deductions are transmitted safely, appropriately, and in a timely manner as non-compliance will subject the plan to ERISA's Title I requirements.'').

[34] *See, e.g.,* Comment Letter #12 (AFL–CIO); Comment Letter #16 (ICI); Comment Letter #17 (AFSCME); Comment Letter #18 (U.S. Chamber of Commerce); Comment Letter #22 (American Council of Life Insurers); Comment Letter #26 (Economic Studies at Brookings).

[35] *See* 81 FR 59469 (August 30, 2016).

transmitted to the program as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event later than the last day of the month following the month in which such amounts would otherwise have been payable to the employee in cash. This standard is closely aligned with the rules in 29 CFR 2510.3–102 for plans involving SIMPLE IRAs, as described in section 408(p) of the Internal Revenue Code.[36] Paragraph (h)(5) is not, however, the only method of complying with the promptness requirement in paragraph (h)(1)(iii) of the final regulation.

F. Overlap

The proposed rule limited the safe harbor to political subdivisions that are not located in a state that establishes a statewide retirement savings program for private-sector employees.[37] The purpose behind this criterion was to reduce the number of political subdivisions that could potentially meet the safe harbor, thereby mitigating the potential for overlap or duplication between political subdivision programs and state programs. In the proposal's preamble, the Department interpreted the term ''state-wide retirement savings program'' to include retirement savings programs described in the Department's Interpretive Bulletin found at 29 CFR 2509.2015–02, such as the voluntary marketplace and exchange models adopted by Washington State and New Jersey.[38]

A number of commenters expressed concern that including non-mandatory state programs within this limiting criterion is overly broad.[39] The commenters noted that where a state establishes the types of voluntary programs described in the Interpretive Bulletin, such as voluntary marketplaces and exchanges, there is little risk that employers would be subject to overlapping requirements or duplication because statewide information marketplaces and exchanges are merely vehicles for providing employees access to information about retirement savings options.[40] Thus, such programs would not impose upon employers any obligations that might conflict or overlap with a political subdivision's mandatory payroll deduction savings program. These commenters urged the Department to clarify in the final rule that a political subdivision is precluded from meeting this safe harbor condition only when the political subdivision is in a state that establishes a mandatory statewide payroll deduction savings program that requires employers to participate.

Commenters also expressed concern that the proposed rule's provision excluding a political subdivision from the safe harbor if the state subsequently enacts its own payroll deduction savings program could, in certain circumstances, result in legitimate political subdivision programs automatically dropping out of the safe harbor.[41] Specifically, the commenters pointed out that under the proposed rule, a political subdivision could be ''qualified'' at the time it enacts a payroll deduction savings program, but then suffer automatic disqualification if its state subsequently enacts a statewide program.[42] This is because the proposed rule excludes from the safe harbor any political subdivision that is in a state that ''enacts'' its own program, without regard to whether the political subdivision had enacted its own program before the state acted.

1. Clarifying ''Statewide Retirement Savings Program''

The Department agrees with the commenters that this criterion was overly broad. Accordingly, the final rule modifies the proposed rule to clarify that in order to be eligible for the safe harbor a political subdivision must not be located in a state that has enacted a *mandatory* statewide payroll deduction savings program for private sector employees. *See* § 2510.3(h)(4)(ii)(B). This modified language will continue to exclude from the safe harbor political subdivisions located in states (such as California, Connecticut, Illinois, Maryland, and Oregon) that have enacted a mandatory state payroll deduction savings program, as well as other political subdivisions that seek to enact a safe harbor program after the state in which they are located has already done so. Revised paragraph (h)(4)(ii)(B) does not, however, exclude from the safe harbor political subdivisions located in states that have enacted only *voluntary* programs such as those Massachusetts, New Jersey, and Washington State had enacted as of the date this final rule was published.[43]

2. Timing—Political Subdivisions Enacting Programs Before the State

The Department agrees with commenters that an otherwise-qualified political subdivision that has relied on the safe harbor to enact a payroll deduction savings program should not automatically lose its qualified status when its state subsequently enacts its own program. To allow an otherwise-qualified, pre-existing program to precipitously drop outside the safe harbor due to actions outside of its control would impose upon affected employers and participants undesirable uncertainty and complexities.[44] The final rule therefore revises paragraph (h)(4) to exclude from the safe harbor political subdivisions that are located in a state that already has enacted a *mandatory* statewide payroll deduction savings program *before the political subdivision enacts its own program.* Thus, if a state enacts such a program after the political subdivision has done so, the political subdivision does not automatically fall outside the safe harbor. Rather, in such instances it is incumbent upon the state and the political subdivision to determine how to coordinate the potentially overlapping programs in a way that does not require employer involvement beyond the limits of the safe harbor regulation, whether that means carving out the political subdivision from the state program, incorporating the political subdivision's program into the state program, or employing some other alternative.

3. Elimination of Overlapping Political Subdivision Programs

Some commenters asked the Department to clarify how the safe harbor would apply to political subdivisions that each enact a mandatory payroll deduction savings program for employees within their potentially overlapping jurisdictions. Some of those commenters further suggested that the Department should

[36] 29 CFR 2510.3–102(b)(2). *See, e.g.,* DOL Advisory Opinion 83–25A (May 24, 1983).

[37] *See* paragraph (h)(4)(iii) of the proposed rule; 81 FR 59581, 92 (Aug. 30, 2016).

[38] 81 FR 59581, 85 (Aug. 30, 2016).

[39] *See, e.g.,* Comment Letter #3 (Washington State Department of Commerce); Comment Letter #4 (Seattle City Councilmember Tim Burgess); Comment Letter #7 (Economic Opportunity Institute); Comment Letter #9 (New York City Comptroller); Comment Letter #14 (AARP); Comment Letter #17 (AFSCME); Comment Letter #19 (Georgetown University Center for Retirement Initiatives); Comment Letter #20 (New York City Mayor); Comment Letter #26 (Economic Studies at Brookings).

[40] *See* Comment Letter #9 (New York City Comptroller).

[41] *See, e.g.,* Comment Letter #4 (Seattle City Councilmember Tim Burgess); Comment Letter #8 (American Retirement Association).

[42] *See* Comment Letter #8 (American Retirement Association); Comment Letter #20 (New York City Mayor).

[43] Mass. Gen. Laws ch. 29, § 64E (2012); New Jersey Small Business Retirement Marketplace Act, Public Law 2015, ch. 298; Washington State Small Business Retirement Savings Marketplace Act, Wash. Rev. Code §§ 43.330.730–750 (2015).

[44] *See, e.g.,* Comment Letter #8 (American Retirement Association); Comment Letter #20 (New York City Mayor).

establish a rule that the larger political subdivision's program (*e.g.,* a county program) should take priority over any political subdivision program within its jurisdiction (*e.g.,* a city program), regardless of which program was first enacted.[45]

As a practical matter, and in view of the fact that only three political subdivisions have expressed a potential interest in establishing payroll deduction savings programs, the Department does not anticipate that there will be overlapping programs among political subdivisions. After careful deliberation, however, the Department decided to address concerns regarding the potential for conflicting requirements by modifying the proposed rule to preclude potentially overlapping political subdivision programs. As explained in the proposed rule's preamble, the Department has taken substantial measures to mitigate the potential that overlapping programs could simultaneously meet the safe harbor,[46] but there remains some potential for overlap. To eliminate any remaining potential for overlap, the Department has decided to extend the first-in-time coordination rule (the provisions of paragraph (h)(4)(ii)(B) of the rule that exclude from the safe harbor an otherwise qualified political subdivision when the state in which it is located has already enacted a mandatory payroll deduction savings program) to apply in situations where a mandatory payroll deduction savings program has already been enacted in another political subdivision. Thus, to the extent that a political subdivision meets the other conditions to be qualified but has a geographic overlap with another political subdivision that has already enacted a mandatory payroll deduction saving program for private-sector employees, the former political subdivision would be precluded from enacting a mandatory payroll deduction saving program that would satisfy the safe harbor. The Department has determined that this first-in-time rule will eliminate the few remaining situations in which the possibility of overlap among political subdivisions might otherwise exist.

G. Petition Process

Some commenters suggested that political subdivisions could petition or apply to the Department for an individual opinion or decision regarding whether or not the political subdivisions qualify for the safe harbor. These commenters propose that such a process could be available for political subdivisions that meet at least some of the four conditions in paragraph (h)(4) of the final regulation, but fail to meet all of the conditions. For example, the process could be available for a city or county that satisfies the demonstrated capacity test but not the population test, or vice-versa. These commenters envision a process in which the petitioner or applicant would present to the Department its best case for safe harbor status using a list of factors or criteria to be developed by the Department. This approach would give ''close-call'' cities and counties an avenue to obtain qualified status, while reserving to the Department the ability to deny potentially unsafe or improper applicants.

The Department declines to adopt this suggestion. The qualified political subdivision definition in paragraph (h)(4) of the final rule consists of four criteria, each of which is a bright-line measure that is either met or not. These objective criteria enable interested parties to readily determine whether or not they meet the definition. The commenters' suggested petition or application process, by contrast, is inherently subjective, and thus runs entirely counter to the Department's objective approach. Moreover, under the commenters' proposed model, the outcome in any particular case would depend on, among other things, the Department's view of the relevant facts and its weighing and balancing of a given list of factors or criteria. The present public record provides little, if any, direction on the type of criteria or factors the Department could or should adopt under such an approach, or whether each individual criterion or factor should be given equal weight. Apart from these significant shortcomings, the commenters' suggested proposal also raises Departmental budgetary and resource issues that are beyond the scope of this rulemaking.

H. Responsibility and Liability for Program Operations

The proposal required that states and political subdivisions assume and retain full responsibility for the payroll deduction savings programs they implement and administer. More specifically, the proposal provided that states and political subdivisions must assume responsibility (i) for investing employee savings or for selecting investment alternatives; (ii) for the security of payroll deductions and employee savings; and (iii) for operating and administering their programs, even if they delegate those functions to service or investment providers.[47] The proposal thus made it clear that in order for a program to qualify for the safe harbor, states and political subdivisions must assume and retain responsibility for operating and administering their programs.

At least one commenter requested that the Department clarify what it means for a state or political subdivision to assume and retain full responsibility for program operations, especially where the state or political subdivision chooses to delegate some of its responsibilities to third-party experts.[48] In the commenter's view, this requirement effectively prevents states and political subdivisions from delegating responsibilities and liabilities to third-party experts who are willing to assume such duties and liabilities. This commenter argues that this provision exposes states and political subdivisions to broader responsibility—and greater liability for third-party management—than they would have under ERISA's fiduciary standards, or possibly even under state statutes or common law. The commenter therefore asked the Department to modify the proposal to clarify that states and political subdivisions can delegate some of their management responsibility and attendant liability to third-party service or investment providers, on the condition that the state or political subdivision prudently selects and appropriately monitors those service providers.

The final regulation contains no such modification. The essence of the regulation's requirement that states and political subdivisions assume and retain full responsibility for operating and administering their payroll deduction savings programs is simply that states and political subdivisions must retain ultimate authority over those programs. Such authority includes, for example, determining whether or not to hire and fire qualified third-party service providers, and determining the scope of those service providers' duties. In drafting this rule, the Department fully anticipated that states and political subdivisions might choose to delegate program administration to qualified service providers that the states or political subdivisions oversee.[49] In that

[45] *See, e.g.,* Comment Letter #6 (American Payroll Association); Comment Letter #15 (American Benefits Council); Comment Letter #20 (New York City Mayor); Comment Letter #23 (Financial Services Institute).

[46] *See* 81 FR 59581, 59585–86.

[47] *See* §§ 2510.3–2(h)(1)(ii), (h)(1)(iii), and (h)(2)(ii), respectively.

[48] *See* Comment Letter #20 (New York City Mayor).

[49] *See* § 2510.3–2(h)(2)(ii) (states and political subdivisions may, without falling outside the safe harbor, utilize service or investment providers to

regard, the Department recognizes that prudently-selected third parties with relevant program administration and investment experience and expertise may, in many circumstances, be better equipped than a state or political subdivision to discharge the specialized duties associated with operating and managing payroll deduction savings programs. Thus, given that this requirement does not preclude sponsoring states and political subdivisions from delegating or assigning some or all of their administrative responsibilities to third-party service providers, states and political subdivisions would not lose their safe harbor status by doing so. It is important to note, however, that this requirement does not in any way govern the assignment of liability between states and political subdivisions and those to whom they delegate such responsibilities. Rather, issues of liability, such as whether and how states or political subdivisions and their service providers allocate liabilities among themselves, are matters for state and local law, and for applicable provisions of the Internal Revenue Code.

I. Timing

A few commenters asked the Department to delay extending the safe harbor to qualified political subdivisions until after the Department has had a chance to accumulate and fully analyze experience data on state-sponsored payroll deduction savings programs.[50] Among the concerns these commenters raised are the potential for overlapping programs; the uncertainty that a political subdivision could establish a program and then drop out of the safe harbor due to fluctuating populations; political subdivisions' assumed inferior level of financial sophistication, expertise and resources to properly manage payroll deduction savings programs; the inherently subjective nature of attempting to differentiate between sophisticated and unsophisticated political subdivisions; and a perceived lack of consumer protections. The commenters also suggested that a delay in implementing the final rule would allow more time for states to establish statewide programs, thereby alleviating the need for potentially overlapping political subdivisions to establish separate programs.

Although the Department declines the commenters' requests to delay implementing this final rule, the final rule reflects that the Department did take the commenters' concerns into account. As noted above in this preamble, the final rule addresses the commenters' concerns about potentially overlapping programs by adopting a new condition that further reduces the number of political subdivisions that can meet the safe harbor. That condition requires that in order to be eligible for the safe harbor a political subdivision must already administer a public-employee retirement program. The Department believes that this condition—which a number of commenters supported—measures, in objective terms, a political subdivision's ability to operate and administer a payroll deduction savings program for private-sector employees. The final rule also clarifies that an otherwise-qualified political subdivision will not automatically drop outside the safe harbor due to a drop in population, and it adds important consumer protections by requiring that employers remit employee wage withholdings to state and political subdivision programs in a timely manner. Moreover, the final rule does not preclude a state from moving forward with establishing its own payroll deduction savings program simply because a political subdivision within its borders has already done so.

The Department also notes that one very large political subdivision has already taken steps to establish a payroll deduction savings program for its private-sector employee residents, and, based on the comments the Department has received, it seems two others have expressed a potential interest in doing so.[51] As noted throughout this preamble, facilitating political subdivisions' ability to encourage their residents to save for retirement by enrolling them in payroll deduction savings programs furthers important state, federal, and Departmental goals and policies. For these reasons, and considering the modifications the Department already made to the final rule, the Department judges it appropriate to implement the final rule at this time.

III. Regulatory Impact Analysis

A. Executive Order 12866 and 13563 Statement

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and review by the OMB. Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as an ''economically significant'' action); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal requirements, the President's priorities, or the principles set forth in the Executive Order.

OMB has determined that this regulatory action is not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, it has determined that the action is significant within the meaning of section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed the final rule and the Department provides the following assessment of its benefits and costs.

B. Background

As discussed in detail above in Section I of this preamble, several

operate and administer their payroll deduction savings programs as long as the state or political subdivision retains full responsibility for operating and administering the program).

[50] Comment Letter #8 (American Retirement Association); Comment Letter #15 (American Benefits Council); Comment Letter #18 (U.S. Chamber of Commerce).

[51] *See, e.g., The New York City Nest Egg: A Plan for Addressing Retirement Security in New York City, Office of the New York City Comptroller (October 2016).*

commenters on the 2015 proposal [52] urged the Department to expand the safe harbor for state payroll deduction savings programs to include payroll deduction savings programs established by state political subdivisions. In particular, the commenters argued that an expansion of the safe harbor is necessary, because otherwise the safe harbor would not benefit employees of employers in political subdivisions that are located in states that have not adopted a statewide program and expressed a strong interest in establishing such programs.

In response, on August 30, 2016, the Department published a proposed rule [53] that would amend the 2016 final safe harbor regulation for state programs to include within its scope laws and programs established by certain state political subdivisions. The Department received and carefully reviewed the public comments submitted in response to the proposal. The Department now is publishing a final rule that amends paragraph (h) of § 2510.3–2 to cover payroll deduction savings programs of qualified political subdivisions defined in paragraph (h)(4) of the final rule. The Department discusses the benefits and costs attributable to the final rule below.

C. Benefits and Costs

In analyzing benefits and costs associated with this final rule, the Department focuses on the direct effects, which include both benefits and costs directly attributable to the rule. These benefits and costs are limited, because as stated above, the final rule would merely establish a safe harbor describing the circumstances under which qualified political subdivisions with authority under state law could establish payroll deduction savings programs that would not give rise to ERISA-covered employee pension benefit plans. It does not require qualified political subdivisions to take any actions nor employers to provide a retirement savings programs to their employees.

The Department also addresses indirect effects associated with the final rule, which include (1) potential benefits and costs directly associated with the requirements of qualified political subdivision payroll deduction savings programs, and (2) the potential increase in retirement savings and potential cost burden imposed on covered employers to comply with the requirements of such programs. Indirect effects vary by qualified political subdivisions depending on their program requirements and the degree to which the final rule might influence how political subdivisions design their payroll deduction savings programs.

Although the Department estimates that approximately 51 political subdivisions are potentially eligible to use this final rule,[54] the Department understands that many qualified political subdivisions may not be interested in establishing payroll deduction savings programs. As noted above, commenters have identified only three cities—New York City, Philadelphia, and Seattle—as having any potential interest to date. Therefore, the direct benefits and direct costs attributable to this final rule could be quite limited.

1. Direct Benefits

The Department believes that political subdivisions and other stakeholders would directly benefit from expanding the scope of the Department's final safe harbor regulation to include payroll deduction savings programs established by qualified political subdivisions. As with the states, this action will provide political subdivisions with clear guidelines to determine the circumstances under which programs they create for private-sector workers would not give rise to the establishment of ERISA-covered plans. The Department expects that the final rule will reduce legal costs, including litigation costs political subdivisions might otherwise incur, by (1) removing uncertainty about whether such political subdivision payroll deduction savings programs give rise to the establishment of plans that are covered by Title I of ERISA, and (2) creating efficiencies by eliminating the need for multiple political subdivisions to incur the same costs to determine that their programs would not give rise to the establishment of ERISA-covered plans. However, these benefits will be limited to qualified political subdivisions meeting all criteria set forth in this final rule. Those governmental units of a state, including any city, county, or similar governmental body that are not eligible to use the safe harbor may incur legal costs if they elect to establish their own payroll deduction savings programs.

In order to constitute a ''qualified political subdivision,'' the proposed rule required the political subdivision to have a population equal to or greater than the population of the least populous state. Several commenters asserted that based on this provision, it is possible that fluctuating populations could cause a previously qualified political subdivision to fall below the required population threshold and fall outside the safe harbor after it has established its program. To eliminate this possibility and reduce uncertainty, the Department clarified in the final rule that political subdivisions satisfying the population threshold when they enact a payroll deduction savings program would not lose their qualified status solely due to subsequent population fluctuations. This change will especially benefit political subdivisions close to the population threshold and encourage them to establish payroll deduction savings programs, because they will not have to continuously monitor their population if their population is equal to or greater than the population of the least populous state when their program is enacted.

In response to comments, the final rule clarifies that a qualified political subdivision would not automatically lose its qualified political subdivision status if the state establishes a payroll deduction savings program after the political subdivision has done so. Political subdivisions will benefit from this provision, because they will not have to be concerned that their programs will fall outside the safe harbor if the state subsequently establishes a program. The Department notes that in such situations, it expects that the state and qualified political subdivision will coordinate potentially overlapping programs to ensure a smooth transition. Although they may incur some costs associated with communication and coordination, these costs would be smaller compared to the costs that employers and participants may face if the qualified political subdivision's program experiences any disruptions or unexpected changes due to the lack of communication and coordination between the state and qualified political subdivision.

The Department estimates that there are approximately eight combinations where political subdivisions could potentially establish conflicting payroll deduction savings programs due to overlapping boundaries. In the final rule, the Department mitigated the possibility that political subdivisions with overlapping geographic boundaries could each become qualified political subdivisions by providing that a

[52] *See* 80 FR 72006 (November 18, 2015).

[53] *See* 81 FR 59581 (August 30, 2016).

[54] This estimate is based on the population estimates from the U.S. Census Bureau, the Census of Government data from the U.S. Census Bureau about defined benefit (DB) plans for local government employees, and BrightScope data about defined contribution (DC) plans for local government employees. For qualified political subdivision with overlapping boundaries, it counts only one per combination as the final rule precludes overlapping programs.

political subdivision that geographically overlaps with another political subdivision cannot be qualified if the overlapping subdivision already has enacted a mandatory payroll deduction savings program for private sector employees. Thus, the final rule benefits employers by providing certainty that they will not be subject to a multiplicity of overlapping political subdivision programs. It also benefits qualified political subdivisions by providing clarity regarding the circumstances under which political subdivisions with overlapping boundaries can enact payroll deduction savings programs that qualify for the safe harbor.

The final rule also clarifies the requirement that states and political subdivisions assume responsibility for the security of payroll deduction contributions in paragraph (h)(1)(iii). A number of commenters specifically focused on the need to clarify and strengthen this provision and some specifically stressed the importance of clear and strong standards protecting payroll deductions. The Department received similar comments on the 2015 proposed rule for state payroll deduction savings programs. In response to these comments, the Department buttressed paragraph (h)(1)(iii) in the final rule by including a new sub-clause clarifying that states and political subdivisions must (1) require that employers promptly transmit wage withholdings to the payroll deduction savings program, and (2) provide an enforcement mechanism to ensure that withheld wages are promptly transmitted.

These new requirements will benefit employees by ensuring that their payroll deductions are transmitted as quickly as possible to their IRAs, where they become subject to applicable Internal Revenue Code provisions, including the protective prohibited transaction provisions found in section 4975 of the Code. States and political subdivisions may adopt the new required protections in a variety of ways, including, for example, through legislation, ordinance, or administrative rulemaking. The provision also benefits states and political subdivisions that create payroll deduction savings programs and employers by providing clarity regarding the specific actions that are necessary to comply with the requirement for states and political subdivisions to assume responsibility for the security of payroll deductions.[55]

The Department notes that the final rule would not prevent political subdivisions from identifying and pursuing alternative policies, outside of the safe harbor, that also would not require employers to establish or maintain ERISA-covered plans. Thus, while the final rule would reduce uncertainty about political subdivision activity within the safe harbor, it would not impair political subdivision activity outside of it. This final regulation is a safe harbor and as such, it does not require employers to participate in qualified political subdivision payroll deduction savings programs; nor does it purport to define every possible program that does not give rise to the establishment of ERISA-covered plans.

2. Direct Costs

The final rule does not require any new action by employers or the political subdivisions. It merely establishes a safe harbor describing certain circumstances under which qualified political subdivision-required payroll deduction savings programs would not give rise to an ERISA-covered employee pension benefit plan and, therefore, would reduce the risks of being preempted by ERISA. Political subdivisions may incur legal costs to analyze the rule and determine whether their programs fall within the safe harbor. However, the Department expects that these costs will be less than the costs that would be incurred in the absence of the final rule. If a qualified political subdivision interested in developing its own payroll deduction savings program overlaps with another qualified political subdivision, it would also need to monitor the activities by the qualified political subdivision with an overlapping boundary and communicate with it to avoid any potential complications in relying on this safe harbor rule as the final rule precludes overlapping payroll deduction savings programs. Only one qualified political subdivision, out of approximately eight possible combinations, with a potentially overlapping boundary expressed interest in establishing its own payroll deduction savings program to the Department. Thus, the Department expects the monitoring and communication costs to be relatively small.

Qualified political subdivisions may incur administrative and operating costs including mailing and form production costs. These potential costs, however, are not directly attributable to the final rule; they are attributable to the political subdivision's creation of the payroll deduction savings program pursuant to its authority under state law.

Some commenters expressed the concern that smaller political subdivisions without the experience or capabilities to administer a payroll deduction savings program may contemplate creating and operating their own programs if the safe harbor rule is extended to all political subdivisions without any restrictions. This final rule addresses this concern by requiring political subdivisions to have a population equal to or greater than the least populous state and have a demonstrated capacity to operate a payroll deduction savings program in order to be qualified. The premise underlying these requirements is that political subdivisions that meet them are likely to have sufficient existing resources, experience, and infrastructure to create and implement payroll deduction savings programs.

3. Uncertainty

The Department is confident that the final rule will benefit political subdivisions and many other stakeholders otherwise beset by uncertainty by clarifying the circumstances under which qualified political subdivisions can create payroll deduction savings programs, including programs with automatic enrollment, without causing the political subdivision or employer to create an ERISA-covered employee benefit pension plan. However, the Department is unsure of the magnitude of the benefits, costs and transfer impacts of these programs, because they will depend on the qualified political subdivisions' independent decisions on whether and how best to take advantage of the safe harbor and on the cost that otherwise would have been attached to uncertainty about the legal status of the qualified political subdivisions' actions. The Department is also unsure of (1) the final rule's effects on political subdivisions that do not meet the safe harbor criteria, (2) whether any of these ineligible political subdivisions are currently developing their own payroll deduction savings programs, and (3) the extent to which ineligible political subdivisions would be discouraged from designing and implementing payroll deduction savings programs. The Department cannot predict what actions political subdivisions will take,

[55] The final regulation does not specifically define what is meant for wage withholdings to be transmitted ''promptly.'' Instead, each state and qualified political subdivision is best positioned to calibrate the appropriate timeframe for its own program. Nevertheless, in the interest of providing certainty to states and political subdivisions, the final regulation added paragraph (h)(5) to the rule, which contains a special safe harbor for promptness. For more detailed information, see the discussion about consumer protection in the preamble.

stakeholders' propensity to challenge such actions' legal status, either absent or pursuant to the final rule, or courts' resultant decisions.

4. Indirect Effects: Impact of Qualified Political Subdivision Payroll Deduction Savings Programs

As discussed above, the impact of qualified political subdivision payroll deduction savings programs is directly attributable to the qualified political subdivision legislation that creates such programs. As discussed below, however, under certain circumstances, these effects could be indirectly attributable to the final rule. For example, it is conceivable that more qualified political subdivisions could create payroll deduction savings programs due to the clear guidelines provided in the final rule and the reduced risk of an ERISA preemption challenge, and therefore, the increased prevalence of such programs would be indirectly attributable to the final rule. However, such an increase would be bounded by the eligibility restrictions for political subdivisions. With the authority, population and demonstrated capacity tests, and the preclusion of overlapping programs, the number of political subdivisions that are potentially eligible to use the safe harbor is very small (51). Moreover, as stated above, the Department is aware of only three political subdivisions that have expressed an interest in creating such programs. An additional possibility is that the rule would not change the prevalence of political subdivision payroll deduction savings programs, but would accelerate the implementation of programs that would exist anyway. With any of these possibilities, there would be benefits, costs and transfer impacts that are indirectly attributable to this rule, via the increased or accelerated creation of political subdivision-level payroll deduction savings programs.

The possibility exists that the final rule could result in an acceleration or deceleration of payroll deduction savings programs at the state level depending on the circumstances. For example, if multiple cities in a state set up robust, successful payroll deduction savings programs, a state that might otherwise create its own program could conclude that a statewide program no longer is necessary. On the other hand, states could feel pressure to create a statewide program if a city in the state does so in order to provide retirement income security for all of its citizens. However, problems could arise if the state and city programs overlap. Therefore, the Department solicited comments regarding whether the final regulation should clarify the status of a payroll deduction savings program of a qualified political subdivision when the state in which the subdivision is located establishes a statewide retirement savings program after the qualified political subdivision establishes and operates its program. Many commenters suggested that the Department should leave to the state to determine the appropriate relationship between the political subdivision's and the state's programs. Although this may appear to add another layer of complexity, the appropriate resolution would depend on the circumstances of each state and political subdivision. In some circumstances, it might be most cost effective to scale a political subdivision's payroll deduction program up to the entire state, whereas it might economically make more sense to maintain a political subdivision's program independent of the state's under different circumstances. As a commenter pointed out, it would be generally more cost effective if payroll deduction savings programs are able to take advantage of economies of scale.[56] To do so, a state may decide to discontinue the program established by a political subdivision and implement its own statewide program. In this case, the Department expects the state and the political subdivision will coordinate the potentially overlapping programs.

Qualified political subdivisions that elect to establish payroll deduction savings programs pursuant to the safe harbor would incur administrative and operating costs, which can be substantial especially in the beginning years until the payroll deduction savings programs become self-sustaining.

Employers may incur costs to update their payroll systems to transmit payroll deductions to the political subdivision or its agent, develop recordkeeping systems to document their collection and remittance of payments under the payroll deduction savings program, and provide information to employees regarding the political subdivision programs. As with political subdivisions' operational and administrative costs, some portion of these employer costs would be indirectly attributable to the rule if more political subdivision payroll deduction savings programs are implemented in the rule's presence than would be in its absence. Because the final rule narrows the number of political subdivisions that are eligible for the safe harbor by the population and demonstrated capacity tests, the aggregate costs imposed on employers would be limited. Moreover, in order to satisfy the safe harbor, most associated costs for employers would be nominal because the roles of employers are limited to ministerial functions, such as withholding the required contribution from employees' wages, remitting contributions to the political subdivision program and providing information about the program to employees. These costs would be incurred disproportionately by small employers and start-up companies, which tend to be least likely to offer pensions. These small employers may incur additional costs to acquire payroll software, use on-line payroll programs, or use external payroll companies to comply with their political subdivisions' programs.[57] However, some small employers may decide to use payroll software, an on-line payroll program, or a payroll service to withhold and remit payroll taxes independent of their political subdivisions' program requirement. Furthermore, compared to manually processing payroll taxes, utilizing payroll software or an on-line payroll program may be more cost effective for small employers in the long run. Therefore, the extent to which these costs can be attributable to political subdivisions' programs could be smaller than what some might estimate. Moreover such costs could be mitigated if political subdivisions exempt the smallest companies from their payroll deduction savings programs as some states do. Supporting this view, a commenter stated that complexity and administrative costs are often cited by small employers as barriers to offer retirement plans for their employees and argued that savings arrangements established by political subdivisions could in fact alleviate small employers' burdens.[58]

Employers, particularly those operating in multiple political subdivisions, may face potentially increased costs to comply with several political subdivision payroll deduction

[56] Comment Letter #6 (American Payroll Association).

[57] According to one survey, about 60 percent of small employers do not use a payroll service. National Small Business Association, April 11, 2013, ''2013 Small Business Taxation Survey.'' This survey says 23% of small employers who handle payroll taxes internally have no employees. Therefore, only about 46%, not 60%, of small employers would be in fact affected by political subdivisions' payroll deduction savings programs, based on this survey. The survey does not include small employers that use payroll software or on-line payroll programs, which provide a cost effective means for such employers to comply with payroll deduction savings programs.

[58] *See* Comment letter #5 (City of Philadelphia Controller).

savings programs, depending on whether and, if so, how, the requirements of those programs differ. This can be more challenging for employers if they operate in states where not all political subdivisions have their own payroll deduction savings programs and/or where some political subdivisions' programs differ in certain ways from others. However, several states have only one qualified political subdivision. Even if states have multiple qualified political subdivisions, the final rule precludes overlapping programs. Thus, the potential burden faced by employers operating in multiple political subdivisions is limited. Moreover, employers operating across several political subdivision borders are likely to have ERISA-covered plans in place for their employees. Thus, there may be no cost burden associated with complying with multiple political subdivision payroll deduction savings programs because employers that sponsor plans typically are exempt from the law enacting such programs. Furthermore, in order to satisfy the final safe harbor rule, the role of employers would be limited to ministerial functions such as timely transmitting payroll deductions, which implies that the increase in cost burden is further likely to be restricted. By limiting eligibility to political subdivisions based on the population, authority, and demonstrated capacity conditions and precluding overlapping political subdivision programs, this final rule further addresses the concerns raised by several commenters by substantially limiting the possibility of conflicting programs among multiple political subdivisions.

The Department believes that well-designed political subdivision-level payroll deduction savings programs have the potential to effectively reduce gaps in retirement security. The political subdivisions that expressed interest in establishing their own payroll deduction savings programs for private-sector workers in the political subdivision seem to be motivated by those workers' significantly lower access rates to employment-based retirement plans compared to the rates for workers nationwide.[59] In order to successfully reduce these significant gaps in retirement savings as intended, there are several factors to consider. Relevant variables such as pension coverage, labor market conditions,[60] population demographics, and elderly poverty, vary widely across the political subdivisions, suggesting a potential opportunity for progress at the political subdivision level. Many workers throughout these political subdivisions currently may save less than would be optimal due to (1) behavioral biases (such as myopia or inertia), (2) labor market conditions that prevent them from accessing plans at work, or (3) their employers' failure to offer retirement plans.[61] Some research suggests that automatic contribution policies are effective in increasing retirement savings and wealth in general by overcoming behavioral biases or inertia.[62] Well-designed political subdivisions' payroll deduction savings programs could help many savers who otherwise might not be saving enough or at all to begin to save earlier than they might have otherwise. Such workers will have traded some consumption today for more in retirement, potentially reaping net gains in overall lifetime well-being. Their additional savings may also reduce fiscal pressure on publicly financed retirement programs and other public assistance programs, such as Supplemental Security Income (SSI), which support low-income Americans, including older Americans.

The Department believes that well-designed political subdivision payroll deduction savings programs can achieve their intended, positive effects of fostering retirement security. However, the potential benefits—primarily increases in retirement savings—might be somewhat limited, because the final safe harbor does not allow employer contributions to political subdivisions' payroll deduction savings programs. Additionally, the initiatives potentially might have some unintended consequences. Those workers least equipped to make good retirement savings decisions arguably stand to benefit most from these programs, but also arguably could be at greater risk of suffering adverse unintended effects. Workers who would not benefit from increased retirement savings could opt out, but some might fail to do so. Such workers might increase their savings too much, unduly sacrificing current economic needs. Consequently, they might be more likely to cash out early and suffer tax losses (unless they receive a non-taxable Roth IRA distribution), and/or to take on more expensive debt to pay necessary bills. Similarly, political subdivisions' payroll deduction savings programs directed at workers who do not currently participate in workplace savings arrangements may be imperfectly targeted to address gaps in retirement security. For example, some college students might be better advised to take less in student loans rather than open an IRA and some young families might do well to save more first for their children's education and later for their own retirement. In general, workers without retirement plan coverage tend to be younger, lower-income or less attached to the workforce, thus these workers may be financially stressed or have other savings goals. Because only large political subdivisions can create and implement programs under the final rule, these demographic characteristics can be more pronounced, assuming large political subdivisions tend to have more diverse workforces. If so, then the benefits of political subdivisions' payroll deduction savings programs could be further limited and in some cases potentially harmful for certain workers. Although these might be valid concerns, political subdivisions are responsible for designing effective programs that minimize these types of harm and maximize benefits to participants.

Commenters have stated another concern—that political subdivision initiatives may ''crowd-out'' ERISA-covered plans. The final rule may inadvertently encourage employers operating in multiple political subdivisions to switch from ERISA-covered plans to political subdivision payroll deduction savings programs in order to reduce costs, especially if they are required to cover employees currently ineligible to participate in ERISA-covered plans under political subdivision programs. This final rule makes clear that political subdivision programs directed toward employers that do not offer other retirement plans fall within this final safe harbor rule.

[59] According to the comment letter submitted by the city of Philadelphia, in May 2016, 54% of employees in Philadelphia do not have access to workplace retirement plans. Similarly, 57% of New York City private-sector workers lack access to a retirement plan at their employment place according to the comment letter submitted by the office of Comptroller of the City of New York. These statistics are significantly higher than the nation-wide average of 34% lacking access to a retirement plan through employment for private-sector workers, according to the National Compensation Study in June of 2016.

[60] *See, e.g.,* U.S. Bureau of Labor Statistics, ''Metropolitan Area Employment and Unemployment—May 2016,'' USDL–16–1291 (June 29, 2016).

[61] According to the National Compensation Survey, March 2016, only 66% of private-sector workers have access to retirement benefits—including defined benefit and defined contribution plans—at work.

[62] *See* Chetty, Friedman, Leth-Petresen, Nielsen & Olsen, ''Active vs. Passive Decisions and Crowd-out in Retirement Savings Accounts: Evidence from Denmark,'' 129 Quarterly Journal of Economics 1141–1219 (2014). *See also* Madrian and Shea, ''The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior,'' 116 Quarterly Journal of Economics 1149–1187 (2001).

However, employers that wish to provide retirement benefits are likely to find that ERISA-covered programs, such as 401(k) plans, have important advantages for them and their employees over participation in political subdivision programs. Potential advantages include significantly higher limits on tax-favored contributions that may be elected by employees ($18,000 in 401(k) plans and $24,000 for those age 50 or older) versus $5,500 in IRAs ($6,500 for those age 50 or older), the opportunity for employers to make tax-favored matching or nonmatching contributions on behalf of employees (allowing a total of up to $54,000 ($60,000 for those age 50 or older) of employee plus employer contributions for an employee in a 401(k) plan versus $5,500 or $6,500 in IRAs), greater flexibility in plan selection and design, ERISA protections, and larger positive recruitment and retention effects.[63] Therefore it seems unlikely that political subdivision initiatives will ''crowd-out'' many ERISA-covered plans, although, if they do, some workers might lose ERISA-covered plans that could have been more generous than political subdivision-based (IRA) benefits.

There is also the possibility that some workers who would otherwise have saved more might reduce their savings to the low, default levels associated with some political subdivision programs. Political subdivisions can address this concern by incorporating into their programs participant education or ''auto-escalation'' features that increase default contribution rates over time and/or as pay increases.

D. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on final and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

In accordance with the requirements of the PRA, the Department solicited comments regarding its determination that the proposed rule is not subject to the requirements of the PRA, because it does not contain a ''collection of information'' as defined in 44 U.S.C. 3502(3). The Department's conclusion was based on the premise that the proposed rule does not require any action by or impose any requirements on employers or the political subdivisions. It merely clarifies that certain political subdivision payroll deduction savings programs that encourage retirement savings would not result in the creation of employee benefit plans covered by Title I of ERISA.

The Department did not receive any comments regarding this assessment. Therefore, the Department has determined that the final rule is not subject to the PRA, because it does not contain a collection of information. The PRA definition of ''burden'' excludes time, effort, and financial resources necessary to comply with a collection of information that would be incurred by respondents in the normal course of their activities. *See* 5 CFR 1320.3(b)(2). The definition of ''burden'' also excludes burdens imposed by a state, local, or tribal government independent of a Federal requirement. *See* 5 CFR 1320.3(b)(3). The final rule imposes no burden on employers, because political subdivisions will customarily include notice and recordkeeping requirements when enacting their payroll deduction savings programs. Thus, employers participating in such programs are responding to political subdivision, not Federal, requirements.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis at the time of the publication of the final rule describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions.

Although several commenters maintained that the proposed rule would impose significant costs on small employers, similar to the proposal, the final rule merely establishes a new safe harbor describing circumstances in which payroll deduction savings programs established and maintained by political subdivisions would not give rise to ERISA-covered employee pension benefit plans. Therefore, the final rule imposes no requirements or costs on small employers, and the Department believes that it will not have a significant economic impact on a substantial number of small employers. Similarly, because the final rule does not impose any requirements or costs on small governments, the Department believes that it will not have a significant economic impact on a substantial number of small government entities, either. Accordingly, pursuant to section 605(b) of the RFA, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

F. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, this final rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or the private sector, which may impose an annual burden of $100 million as adjusted for inflation.

G. Congressional Review Act

The final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review. The final rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

H. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It

[63] These contribution limits are for year 2017. For more details, *see: https://www.irs.gov/retirement-plans/cola-increases-for-dollar-limitations-on-benefits-and-contributions.*

also requires adherence to specific criteria by federal agencies in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final regulation.

In the Department's view, the final rule, by clarifying that payroll deduction savings programs by certain political subdivisions will not result in creation of employee benefit plans under ERISA, would provide more latitude and certainty to political subdivisions and employers regarding the treatment of such arrangements under ERISA. Therefore, the final rule does not contain policies with federalism implications within the meaning of the Order.

Nonetheless, in respect for the fundamental federalism principles set forth in the Order, the Department affirmatively engaged in outreach, including meetings, conference calls, and outreach events, with officials of political subdivisions and other stakeholders regarding the final rule and sought their input on the safe harbor. The Department also received comment letters from local governments and their representatives. Many of the changes in the final rule stem from suggestions contained in the comment letters.

List of Subjects in 29 CFR Part 2510

Accounting, Employee benefit plans, Employee Retirement Income Security Act, Coverage, Pensions, Reporting.

For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2510 as set forth below:

PART 2510—DEFINITION OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3–101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 727 (2012), E.O. 12108, 44 FR 1065 (Jan. 3, 1979) and 29 U.S.C. 1135 note. Sec. 2510.3–38 is also issued under sec. 1, Pub. L. 105–72, 111 Stat. 1457 (1997).

■ 2. In § 2510.3–2, revise paragraph (h) to read as follows:

§ 2510.3–2 Employee pension benefit plan.

* * * * *

(h) *Certain governmental payroll deduction savings programs.* (1) For purposes of title I of the Act and this chapter, the terms ''employee pension benefit plan'' and ''pension plan'' shall not include an individual retirement plan (as defined in 26 U.S.C. 7701(a)(37)) established and maintained pursuant to a payroll deduction savings program of a State or qualified political subdivision of a State, provided that:

(i) The program is specifically established pursuant to State or qualified political subdivision law;

(ii) The program is implemented and administered by the State or qualified political subdivision establishing the program (or by a governmental agency or instrumentality of either), which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose;

(iii) The State or qualified political subdivision (or governmental agency or instrumentality of either) assumes responsibility for the security of payroll deductions and employee savings, including by requiring that amounts withheld from wages by the employer be transmitted to the program promptly and by providing an enforcement mechanism to assure compliance with this requirement;

(iv) The State or qualified political subdivision (or governmental agency or instrumentality of either) adopts measures to ensure that employees are notified of their rights under the program, and creates a mechanism for enforcement of those rights;

(v) Participation in the program is voluntary for employees;

(vi) All rights of the employee, former employee, or beneficiary under the program are enforceable only by the employee, former employee, or beneficiary, an authorized representative of such a person, or by the State or qualified political subdivision (or governmental agency or instrumentality of either);

(vii) The involvement of the employer is limited to the following:

(A) Collecting employee contributions through payroll deductions and remitting them to the program;

(B) Providing notice to the employees and maintaining records regarding the employer's collection and remittance of payments under the program;

(C) Providing information to the State or qualified political subdivision (or governmental agency or instrumentality of either) necessary to facilitate the operation of the program; and

(D) Distributing program information to employees from the State or qualified political subdivision (or governmental agency or instrumentality of either) and permitting the State or qualified political subdivision (or governmental agency or instrumentality of either) to publicize the program to employees;

(viii) The employer contributes no funds to the program and provides no bonus or other monetary incentive to employees to participate in the program;

(ix) The employer's participation in the program is required by State or qualified political subdivision law;

(x) The employer has no discretionary authority, control, or responsibility under the program; and

(xi) The employer receives no direct or indirect consideration in the form of cash or otherwise, other than consideration (including tax incentives and credits) received directly from the State or qualified political subdivision (or governmental agency or instrumentality of either) that does not exceed an amount that reasonably approximates the employer's (or a typical employer's) costs under the program.

(2) A payroll deduction savings program will not fail to satisfy the provisions of paragraph (h)(1) of this section merely because the program—

(i) Is directed toward those employers that do not offer some other workplace savings arrangement;

(ii) Utilizes one or more service or investment providers to operate and administer the program, provided that the State or qualified political subdivision (or the governmental agency or instrumentality of either) retains full responsibility for the operation and administration of the program; or

(iii) Treats employees as having automatically elected payroll deductions in an amount or percentage of compensation, including any automatic increases in such amount or percentage, unless the employee specifically elects not to have such deductions made (or specifically elects to have the deductions made in a different amount or percentage of compensation allowed by the program), provided that the employee is given adequate advance notice of the right to make such elections, and provided, further, that a program may also satisfy this paragraph (h) without requiring or otherwise providing for automatic elections such as those described in this paragraph (h)(2)(iii).

(3) For purposes of this paragraph (h), the term ''State'' shall have the same

meaning as defined in section 3(10) of the Act.

(4) For purposes of this paragraph (h), the term ''qualified political subdivision'' means any governmental unit of a State, including a city, county, or similar governmental body, that—

(i) Has the authority, implicit or explicit, under State law to require employers' participation in the program as described in paragraph (h)(1)(ix) of this section; and

(ii) At the time of the enactment of the political subdivision's payroll deduction savings program:

(A) Has a population equal to or greater than the population of the least populated State (excluding the District of Columbia and territories listed in section 3(10) of the Act);

(B) Has no geographic overlap with any other political subdivision that has enacted a mandatory payroll deduction savings program for private-sector employees and is not located in a State that has enacted such a program statewide; and

(C) Has implemented and administers a plan, fund, or program that provides retirement income to its employees, or results in a deferral of income by its employees for periods extending to the termination of covered employment or beyond.

(5) For purposes of paragraph (h)(1)(iii) of this section, amounts withheld from an employee's wages by the employer are deemed to be transmitted promptly if such amounts are transmitted to the program as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event later than the last day of the month following the month in which such amounts would otherwise have been payable to the employee in cash.

Signed at Washington, DC, this 9th day of December, 2016.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2016–30069 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 89

[Docket ID: DOD–2015–OS–0020]

RIN 0790–AJ33

Interstate Compact on Educational Opportunity for Military Children

AGENCY: Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Final rule.

SUMMARY: DoD is establishing policies to implement the Interstate Compact on Educational Opportunity for Military Children (referred to as the ''Compact'') within the DoD, informed by the sense of Congress, and in furtherance of the operation of DoD schools. The final rule provides components with policies to support the intent of the Compact, which is to aid the transition of school-age children in military families between school districts (to include between Department of Defense Educational Activity (DoDEA) schools and state school districts). Each state joining the Compact agrees to address specific school transition issues in a consistent way and minimize school disruptions for military children transferring from one state school system to another. The Compact consists of general policies in four key areas: Eligibility, enrollment, placement, and graduation. Children of active duty members of the uniformed services, National Guard and Reserve on active duty orders, and members or veterans who are medically discharged or retired for one year are eligible for assistance under the Compact.

DATES: This rule is effective on January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Marcus Beauregard, 571–372–5357.

SUPPLEMENTARY INFORMATION: On March 7, 2016 (81 FR 11698–11706), the Department of Defense published a proposed rule titled Interstate Compact on Educational Opportunity for Military Children for a 60-day public comment period. The public comment period closed on May 6, 2016. Ten public comments were received. The preamble to this final rule addresses the comments. Due to one of the public comments received, the Department has revised the final rule to reflect that the Military Departments will nominate military representatives by position to act as liaisons to State Councils and the Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)) will designate them in this manner.

Edits were made to adjust the process established to designate DoD liaisons to State Councils, so that liaisons are designated by position rather than by individual.

As the result of further internal coordination, administrative edits were made to the regulatory text.

Comment: ''This regulation is very beneficial for the States and as the DoD is to handle the majority of the cost, it has the promise of doing a great deal of good for the children of active duty military without being overly burdensome to the States participating. However, as the participation in the Compact is voluntary, it is possible that the degree of implementation will vary from state to state, perhaps by a large degree. This potential for variation would run against the purpose of the regulation. It is not always desirable to have penalties as part of a regulation, especially one that is voluntary, but without a clear idea of how the regulation would be enforced, the goals of the Compact may not be successful.''

Response: All fifty states and the District of Columbia (DC) have accepted the Compact into their state statutes. Consequently, complying with the provisions of the Compact is based on compliance with state law. Additionally, the Compact (approved by all fifty states and DC) includes the oversight of the Compact by a Commission composed of member states, with rules governing non-compliance and dispute resolution. Also, support for the administration of the Compact and the Commission is funded entirely by the member states without support from the federal government.

Comment: ''This new policy will not only bring awareness to schools, but will open up a need for additional staff to require training and employment in the schools to assist these [military] families. This rule will also open doors for additional policy to be made and other services not being addressed to have priority in legislation in the upcoming years so that the military families can have less strain than they already do with having a parent serve our country.''

Response: The fifty states and DC enacted laws approving the Compact with the understanding that implementation of the Compact would not require additional staffing in schools. Additionally, since enactment of the Compact in the 50 states and DC between 2008 and 2014, there have not been additional policies or services to address educational needs of children in

military families. Instead, states have addressed other concerns, such as licensure and employment of military spouses.

Comment: ''Since most moves occur during the summer months, in between school years, many of the challenges addressed by the proposed rule can be avoided with forethought and planning. For instance, every experienced military spouse knows to contact the gaining school system and/or base to gather as much enrollment information as possible and begin setting up a smooth transition. Required immunizations are dispensed at the base clinic, soccer registration forms and payment are mailed off, copies of IEP and special needs assessment tests are made. But what about things the family cannot control, such as high school prerequisites or differences in the number of required language courses a transferring high school student must take?''

Response: The focus of this rule is the implementation of the Compact provisions by DoDEA and facilitating the DoD liaison function on State Councils. With this said, the Compact provides broad policies to facilitate the transition of children in military families between schools. Forethought and planning can help families during these transitions, but there are elements of the transition process that the Compact addresses without requiring a school district to modify its educational standards.

Comment: ''In the definition for the children of military families, number four should be revised. I believe that children of military members who are severely wounded, ill, injured, or die on active duty or as a result of injuries sustained on active duty need to have this designation for longer than one year. I suggest they keep this designation until June 30th of their normal graduation year. This ensures the child/children will have this support until they graduate.

Similar Comment: Eligibility needs to include recently separated (regardless of despoliation as it is not child's fault for honorable, etc.) and retired/new retirement system??? soldiers (for more than 1 year and beyond ''retire'' as the military is looking to drastically change retirement in the next decade, not sure what those soldiers will be called. . . . thinking ahead here).''

Response: The suggested changes may be very worthwhile; however, the definitions included in this rule are the same as the definitions that have been enacted by the 50 states and DC, which have approved the Compact. Furthermore, the enrollment policies governing DoDEA schools is governed by 20 U.S.C. 921–932 and 10 U.S.C. 2164.

Comment: ''My high school split was awful after my dad retired between my sophomore and junior year. From KY to GA requirements. I was denied Calculus and French 3 due to GA requirements for freshmen PE & sophomore economics to graduate in their state. Guess taking Latin & biology & chemistry right off the bat in KY crowded out these GA requirements. Was such a joke to put a senior into a freshman class for a requirement not needed or looked favorably at for college transcripts. Would have been so much more streamlined if given a waiver and opt out of GA requirements to graduate.''

Response: The Compact allows for military families more flexibility to work with schools to accommodate requirements for the graduation of their children. Section 89.8(b)(4) outlines the provisions of Article VII of the Compact on graduation requirements.

Comment: ''The pact should also provide guidance for both state-side and DoD schools to provide transition tutoring for military children transferring to new schools. States have different standards and teachers teach to different standards per their school districts. There are times when new military children transfer to a different school and they are considered ''behind.'' Not because they have a learning disability, but the part of the curriculum may not have been taught at the old school. If a tutoring program for possibly 90 days or more (if necessary) could be provided at no expense to the parents, this will allow transferring students time to learn any coursework they may not have been taught at their old schools. This will also make the transition less stressful on the kids.''

Response: Adding services, such as tutoring, to the Compact would require the member states and DC to amend their laws that implement the Compact. Since enactment of the Compact in the 50 states and DC between 2008 and 2014, there have not been additional policies or services to address educational needs of children in military families.

Comment: ''Now that the Compact has been adopted by all 50 states and the District of Columbia, the next step must be to ensure each state has a functioning state council. These councils play an important role in raising awareness of the Compact among school districts, as well as answering questions and resolving conflicts. Although DoD cannot compel states to create and maintain state councils, it can and should ensure each council has one or more military representatives. While we commend DoD for its thoughtful approach to identifying military representatives, we have concerns about some of the procedures outlined in the proposed rule. Under the proposed rule, each Service will be assigned several states and will be responsible for selecting the military representative to serve on those states' councils. The military representative must be a military member or DoD civilian who can serve on the state council for two years. Given the transient nature of military life, we believe this places an undue burden on the Services, who will be required to identify a new representative each time an individual serving on a state council is reassigned to a new location. Rather than choosing an individual, we believe it makes more sense to formally attach the military representative role to a given position or billet. An assignment by billet would provide the state councils with the assurance the military representative role will be continuously occupied and reduce the burden on the Services.'' [1]

Response: The Department agrees with the perspective of designating military representatives by position to act as liaisons. The Department has heard informally from others within the Military Interstate Children's Compact Commission (MIC3) that designation by position would be the preferred approach. Consequently, the Department has revised the proposed rule and the DoD Instruction to reflect this change so that the Military Departments will nominate military representatives by position and the DASD(MC&FP) will designate them in this manner. These designations normally will remain in force until a State Commissioner requests a different position (or positions) be designated as the liaison to the State Council.

Executive Summary

I. Purpose of This Rulemaking

This final rule provides components of the DoD with policies to support the intent of the Compact, which is to aid the transition of school-age children in military families between school districts. The intent of the program is to ensure children are enrolled immediately in their new school, placed in the appropriate academic program, and are able to graduate on time.

Each state joining the Compact agrees to address specific school transition issues in a consistent way and minimize

[1] April 14, 2016 letter from the National Military Family Association, submitted as comment on DOD–2015–OS–0020–0001.

school disruptions for military children transferring from one state school system to another. The Compact consists of general policies in four key areas: Eligibility, enrollment, placement, and graduation.

As of August 2014, 50 states and DC have passed legislation to become members of the Compact, including most of those with large numbers of military residents. DoDEA cannot be a member of the Compact, but is complying with its provisions as a matter of policy in both overseas and domestic schools. In return, the Compact member states have agreed to treat students coming from a DoDEA school as though they were transferring from a member state.

The Compact has provisions for member states to facilitate school transition in the following areas:

Education Records and Enrollment

The Compact asks school districts in member states to assist military families with the transfer of education records, additional time for immunization and continuity of enrollment in kindergarten and first grade:

• Education records. When a family leaves a school district in a member state, the parents may receive a set of unofficial records to carry to the new school in another member state. It will include all the information the new school needs to enroll and place the child until it receives the official records. In addition, the Compact requires all sending school districts within member states to send official transcripts within 10 days of a request from the receiving state school district.

• Immunizations. If a child transferring to a member state needs additional immunizations, he or she may enroll and begin school. Parents then have 30 days to see that the child gets the required immunizations. If further immunizations are required, they must be started within 30 calendar days of enrollment. Tuberculosis testing is not covered under the Compact since the TB test is not an immunization but rather a health screening.

• Kindergarten and first grade entrance age. If the entrance age requirement in the new school system is different, transitioning children may continue in the same grade if they have already started kindergarten or first grade where the family was previously stationed. This provision also allows children to move up to first or second grade, regardless of age requirements, if they have completed kindergarten or first grade in another state.

Placement and Attendance

Students from military families often miss appropriate placement in required classes, advanced placement and special-needs programs while awaiting evaluation at the new school. The Compact requires cooperation in the following areas:

• Course and education program placement. A receiving school district in a member state must initially honor placement of a student based on his or her enrollment in the sending state, provided the new school has a similar or equivalent program. The receiving school may evaluate the student after placement to ensure it is appropriate, but the school may not put children into ''holding classes'' while they await assessment. The receiving school may allow the student to attend similar education courses in other schools within the district if the receiving school does not offer such courses.

• Special education services. Students covered by the Individuals with Disabilities Education Act receive the same services (although not necessarily identical programs) identified in the individual education plan from the sending state. This is a parallel requirement under federal law.

• Placement flexibility. School districts are encouraged to determine if course or program prerequisites can be waived for students who have completed similar coursework in the sending school district. This process allows students to take advanced courses rather than repeat similar basic courses.

• Absence related to deployment activities. Students in member states may request additional, excused absences to visit with their parent or legal guardian immediately before, during, and after deployment. Schools have flexibility in approving absences if there are competing circumstances such as state testing or if the student already has excessive absences.

Eligibility for Enrollment

The Compact asks school districts in member states to examine their rules for eligibility to allow children of military parents to have the continuity they need. The Compact requires cooperation in the following areas:

• *Enrollment.* When a child of a deployed parent is staying with a non-custodial parent, a relative or a friend who is officially acting in place of the parents and lives outside of the home school district, the child may continue to attend his or her own school as long as the care provider ensures transportation to school. The Compact also stipulates that a power of attorney for guardianship is sufficient for enrollment and all other actions requiring parental participation or consent.

• *Extracurricular participation.* When children transfer to a new school, their participation in extracurricular activities is facilitated—provided they're eligible—even if application deadlines and tryouts have passed. Schools must make reasonable accommodations, but are not required to hold spaces open for military-related transferees.

Graduation

School transitions can be especially challenging for high school students. The Compact requires school districts to make the following accommodations to facilitate on-time graduation:

• Course waivers. School districts in member states may waive courses required for graduation if similar coursework has been completed in another school. Such waivers are not mandatory under the Compact, but a school district must show reasonable justification to deny a waiver.

• *Exit exams.* Under the Compact, a school district may accept the sending state's exit exams, achievement tests or other tests required for graduation instead of requiring the student to meet the testing requirements of the receiving state. States have flexibility to determine what tests they will accept or require the student to take.

• *Transfers during senior year.* If a student moves during the senior year and the receiving state is unable to make the necessary accommodations for required courses and exit exams, the two school districts must work together to obtain a diploma from the sending school so the student can graduate on time.

The Compact does not address the quality of education or require a state to change any of its standards or education criteria. MIC3 has created a variety of downloadable brochures, webinars, and other resources to help parents and educators learn more about the Compact—See more at: *http://www.mic3.net.*

If a family has a concern about a provision of the Compact as it relates to a child, it's best to contact the school first. Each installation has a school liaison to help work with schools to get questions answered or to provide information on next steps to take if concerns cannot be successfully resolved.

II. Narrative Description of Legal Authorities for This Rule

The legal authorities for this rule clarify the definition of children in military families covered by this rule, cover the protections afforded these children, and provide the authority for establishing the policies included in this rule that describe the implementation of the principles of the Compact within DoD, including DoDEA:

(1) 10 U.S.C. 2164—Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS). This law authorizes DoD to operate a school system within the United States for DoD dependents when it is determined that appropriate educational programs are not available through a local educational agency.

(2) 20 U.S.C.—Education, Chapter 25A—Overseas Defense Dependents' Education. This law authorizes DoD to operate a program to provide a free public education through secondary school for dependents in overseas areas. It is the statutory basis for the DoD Dependent Schools.

III. Summary of the Major Focus Points of This Rulemaking

The major provisions of this regulatory action include designating military representatives as liaisons to State Councils of member states of the Compact, designating the DoD ex-officio member as a liaison to the Compact Commission (*i.e.,* the MIC3), implementing the relevant school transition policies established in the Compact within the DoDEA school system, and establishing a committee within DoDEA to advise on compliance by DoDEA schools.

(1) As required by the Compact, states establish Councils to oversee the implementation of the Compact within the state. The Compact prescribes membership of the State Council, which may include a representative from the military community within the state. Since this individual represents the interests of the military community to the State Council, the military representative can only fulfill a liaison role on the Council and must be designated by DoD. This rule defines the role for the military representative (§ 89.7(a)), along with the process (§ 89.7(b)) for coordinating the requests from State Commissioners and designating these military representatives.

(2) The Compact describes how DoD may send an ex-officio liaison to the Commission meetings, and also describes how the DoD ex-officio member will participate as a liaison on the Executive Committee of the Commission. This rule provides guidelines for the DoD ex-officio member (§ 89.7(d)).

(3) This rule establishes policies for DoDEA governing the transition of school age children in military families (§ 89.8 of this rule), which are equivalent to the following policies included in the Compact: Article IV—records and enrollment, Article V—placement and attendance, Article VI—eligibility for enrollment, and Article VII—graduation.

(4) This rule establishes a committee to advise DoDEA on compliance with provisions in § 89.8. The DoDEA Committee also provides input to the ex-officio member of the Commission on issues arising from DoDEA school interactions with member States of the Compact, and acts as a counterpart to State Councils of member States. Policies for assigning a representative from the Military Departments to this committee are included in § 89.7(c).

IV. Cost and Benefit Analysis

There are no provisions in this final rule that are expected to increase costs for members of the public. Requirements included in this rule may require action to be taken by state education departments and local education agencies as a result of requirements of the state laws.

The costs to the Department are summarized below:

• Military representative attending State Council meetings as a liaison. State Council meetings are generally held at a central location for the state, and are expected to be held at least once per year. The military representative would be required, while on duty and at government expense, to travel to and attend the meeting. A meeting would be expected to demand an average of 1.5 days (travel and meeting time), which would cost an approximate average of $569 [2] in opportunity labor cost. Additionally, intrastate travel and per diem is expected to cost an approximate average of $339.[3] States vary with regards to the number of military representatives they have requested to attend; however, the estimated number of military representatives is 77.[4] Applying the approximate average costs per year provides $43,810 in opportunity labor costs and $26,100 in travel and per diem.

• *Identifying, nominating and designating a position to act as a liaison to a State Council.* DoD estimates approximately 180 hours [5] of administrative time to coordinate nominations for the first year, plus approximately 80 hours [6] to process, review, coordinate, sign and distribute the designation letters. The opportunity labor cost of coordination would be approximately $7,220 [7] and completing the designation letter, with accompanying documents, would be $4,730 [8] for the first year. Subsequent years would be approximately 20 percent of the time and cost associated with the first year (approximately $1,440 for coordination and $950 for completing designation letters).

• *Ex-officio member to the MIC3.* This individual participates as a liaison in the annual conference, executive committee meeting, and other standing committee meetings and would cost DoD approximately $8,610 per year.[9]

Additionally, this final rule will direct DoDEA to transition children under specific policies. These are the same policies that are included in the Compact, Articles IV–VII, which have been shown to be cost-neutral (and perhaps a cost-benefit) when implemented by local education agencies within the states that are

[2] Cost estimated on the salary of a GS–14 step 5 without locality pay or percentage for benefits (average of $47.39 per hour—2016 GS Pay Scale) times approximately 12 hours.

[3] Cost of travel calculated at an average round trip requiring 300 miles times the mileage rate of $0.54 per mile (equals approximately $162), plus per diem costs of $142 per day, plus proportional meals and incidentals for the second day of $35 ($177). Unit rates based on Fiscal Year 2017 standard per diem rate for the Continental United States and 2016 GSA mileage rates.

[4] Estimated number of total military representatives for the 50 member states and the District of Columbia, based on the average of number currently designated in states with military representatives (41 reps in 27 states).

[5] Estimate 3 hours of staff time to receive the request; relay the requirement to the designated Military Department and obtain approval; and provide the name to the Office of Secretary of Defense. Estimate fulfilling requests from 40 states for the first year (designating approximately 60 positions).

[6] Estimate 2 hours of staff time to prepare the letter of designation and accompanying documents and obtain a signature from the Deputy Assistant Secretary of Defense for Military Community and Family Policy. Anticipate processing 40 letters of designation for the first year (some individuals will be included on the same designation letter).

[7] Cost estimated on the salary of a GS–13 step 5, without locality pay or percentage for benefits ($40.10 per hour—2016 GS Pay Scale).

[8] Cost estimated on the salary of a GS–14 step 5 with locality pay for Washington, DC, but no percentage for benefits ($59.13 per hour—2016 GS Pay Scale).

[9] Cost estimated on three trips per year, each involving 3 days, at a location outside of Washington, DC. The labor cost is estimated on the salary of a GS–15 step 5 with locality pay for Washington, DC and no benefits included ($69.56 per hour—2016 GS Pay Scale) times 72 hours ($5,010), plus $3,600 for travel and per diem (based on average cost for 20 similar 3-day temporary duty trips for 2015).

members of the Compact.[10] Essentially, schools are responsible for transitioning children, and the proposed rules, based upon the transition policies included in the Compact, provide a consistent approach that schools apply in member states to the Compact. Hence, there is less variability and uncertainty in the process. Applying these policies within DoDEA is expected to produce similar results, since these policies would apply to all children within the DoDEA school system (therefore applying a consistent policy regardless of the child), and many of these proposed policies represent the existing procedures used in DoDEA schools to transition students. The DoD committee to oversee the implementation of this rule within DoDEA is expected to cost approximately $3,310 per year [11] to administer and conduct meetings.

The benefits derived from DoD's participation in the Compact accrue to Service members and their families, particularly the 676,000 school-age children educated by local education agencies and DoDEA.[12] These benefits have not necessarily been quantified, but can be described in qualitative terms. Military moves are stressful for the entire family, and transitioning to a new school creates stresses because of uncertainty. Military children are confronted with unknown academic and social challenges, and their parents must overcome new administrative requirements to enroll them. The provisions included in the Compact provide relief for some of the administrative requirements faced by parents and the academic issues regularly experienced by military children who generally attend six-to-nine different schools between kindergarten and 12th grade.[13] The goal of the Compact is to replace the widely varying treatment of transitioning military students with a comprehensive approach that provides a uniform policy in every school district in every state that chooses to join. Through more uniform transition policies, military children have an opportunity to assimilate into their classes, extra-curricular activities and new social circles more quickly. Additionally the Compact recognizes the difficulties military children may have with being separated from a parent due to a military deployment, allowing for liberal absences for children to be with the deploying/returning parents.

The Compact Articles IV–VII were developed as a result of input from 17 representative national and state stakeholders who were asked to participate in a working group sponsored by the Council of State Governments, National Center for Interstate Compacts.[14] The majority of their recommendations came from work that had previously been presented in studies, such as the Military Child Education Coalition's *Secondary Education Transition Study,* conducted for the U.S. Army in 2001, and the subsequent Memoranda of Agreement signed by nine school districts which addressed ''the timely transfer of records, systems to ease student transition during the first 2 weeks of enrollment, practices that foster access to extracurricular programs, procedures to lessen the adverse impact of moves of juniors and seniors, [and] variations in school calendars and schedules,'' among other recommendations.[15]

Regulatory Analysis

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. It has been determined that this rule is not a significant regulatory action. The rule does not: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

2 U.S.C. Ch. 25, ''Unfunded Mandates Reform Act''

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Ch. 6)

DoD certifies that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This rule does not impose reporting and record keeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, ''Federalism''

This rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). It has been determined that it does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. This rule has no

[10] Analysis accomplished by states as part of their legislative process showed that the provisions of the Compact supporting the transition of military children were fiscally neutral. Transition occurs regardless of having an organized process, and the provisions of the Compact were considered as providing consistent expectations and administrative procedures capable of reducing the cost of administering transition for military children.

[11] Estimated on two meetings (each two hours in length) per year, attended by 12 people with an average salary of a GS–14 step 5, with Washington, DC locality pay and not including benefits ($59.13 per hour—2016 GS Pay Scale); plus 8 hours of preparation time for the two meetings by a GS–14 step 5, with Washington, DC locality pay.

[12] 2014 Demographic Profile of the Military Community, DMDC Active Duty Military Family File, page 137.

[13] Council of State Governments, ''*Interstate Compact on Educational Opportunity for Military Children Legislative Resource Kit,*'' January 2008, page 1.

[14] Contributing individuals and groups included: National Association of Elementary School Principals; National Military Family Association; Military Child Education Coalition; U.S. Department of Education; National School Boards Association; National PTA; Office of Lt Governor Beverly Purdue, NC; Alabama State Senator; National School Superintendents Association (Local School Superintendent); National Education Association; Military Impacted Schools Association; Maryland Department of Education; Ofc of the Under Secretary of Defense; California Department of Education; Nevada State Senator; and the Florida Department of Education; Education Commission of the States.

[15] Kathleen F. Berg, ''*Easing Transitions of Military Dependents into Hawaii Public Schools: An Invitational Education Link,*'' Journal of Invitational Theory and Practice Volume 14, 2008, page 44.

substantial effect on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local officials. Nothing in this rule preempts any State law or regulation. Therefore, DoD did not consult with State and local officials because it was not necessary.

List of Subjects in 32 CFR Part 89

Children, Education, Interstate Compact.

■ Accordingly 32 CFR part 89 is added to read as follows:

PART 89—INTERSTATE COMPACT ON EDUCATIONAL OPPORTUNITY FOR MILITARY CHILDREN

Sec.
89.1 Purpose.
89.2 Applicability.
89.3 Definitions.
89.4 Policy.
89.5 Responsibilities.
89.6 Procedures.
89.7 Representatives to State Councils, the DoDEA Committee and MIC3.
89.8 Compact provisions.

Authority: 10 U.S.C. 2164, 20 U.S.C. 921–932.

§ 89.1 Purpose.

In accordance with the sense of Congress as set forth in section 539 of Public Law 111–84, this part establishes policy, assigns responsibilities, and provides procedures to implement the Interstate Compact on Educational Opportunity for Military Children (referred to in this part as the ''Compact'') within the DoD.

§ 89.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the DoD, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

§ 89.3 Definitions.

These terms and their definitions are for the purposes of this part.

504 plan. A plan required pursuant to 29 U.S.C. 794 specifying the modifications and accommodations for a child with a disability to meet the individual educational needs of that child as adequately as the needs of children without disabilities are met. The plans can include accommodations such as wheelchair ramps, blood sugar monitoring, an extra set of textbooks, a peanut-free lunch environment, home instruction, or a tape recorder or keyboard for taking notes.

Children of military families. School-aged children who are enrolled in kindergarten through twelfth grade and are in the households of Service members who:

(1) Are on active duty, including members of the National Guard and Reserve on active duty orders pursuant to 10 U.S.C. 1211;

(2) Are active duty or veterans who are severely wounded, ill, or injured; or

(3) Die on active duty or as a result of injuries sustained on active duty;

Children of military members who are severely wounded, ill, or injured retain this designation for 1 year after discharge or retirement. Children of military members who die on active duty or as a result of injuries sustained on active duty, retain this designation for 1 year after death.

Deployment. The period 1 month prior to the military members' departure from their home station on military orders through 6 months after return to their home station.

DoDEA Committee. A DoD committee established pursuant to this part by Director, DoDEA to advise DoDEA on compliance with provisions in § 89.8 by DoDEA schools. The DoDEA Committee also provides input to the ex-officio member of the Commission on issues arising from DoDEA school interactions with member States of the Compact, and acts as a counterpart to State Councils of member States.

Education records. Those official records, files, and data directly related to a child and maintained by the school or local educational agency (LEA) or state educational agency (SEA), including but not limited to, records encompassing all the material kept in the child's cumulative folder such as general identifying data, records of attendance and of academic work completed, records of achievement and results of evaluative tests, health data, disciplinary status, test protocols, and individualized education programs (IEPs).

Ex-officio member of the Commission. Non-voting member of the Commission who may include, but not be limited to, members of the representative organizations of military family advocates, LEA officials, parent and teacher groups, the DoD, the Education Commission of the State, the Interstate Agreement on the Qualification of Educational Personnel, and other interstate compacts affecting the education of children of military members.

Extracurricular activity. A voluntary activity sponsored by the school or LEA or SEA or an organization sanctioned by the LEA or SEA. Extracurricular activities include, but are not limited to, preparation for and involvement in public performances, contests, athletic competitions, demonstrations, displays, and club activities.

IEP. When a child is identified as a child with disabilities in accordance with Individuals With Disabilities Education Act (IDEA), he or she must have a written document that describes the special education supports and services the child will receive. The IEP is developed by a team that includes the child's parents and school staff.

Interstate Compact on Education Opportunity for Military Children (the Compact). An agreement approved through State legislation that requires member States to follow provisions supporting the transition of children of military families between school systems in member States. As part of joining the Compact, States agree to participate in the Commission and pay dues to the Commission to support its oversight of the Compact.

LEA. A public authority legally constituted by the State as an administrative agency to provide control of and direction for kindergarten through twelfth grade public educational institutions. For the purpose of administering the provisions of the Compact in § 89.8 of this part, DoDEA school districts as defined in 20 U.S.C. 932 are equivalent to an LEA.

Member State. A State that has enacted the Compact.

MIC3. The MIC3, also known as the Interstate Commission on Educational Opportunity for Military Children (sometimes referred to as the ''Interstate Commission'' or ''the Commission''), is the governing body of the Compact composed of representatives from each member State, as well as various ex-officio members. The Commission provides general oversight of the agreement, creates and enforces rules governing the Compact, and promotes training and compliance with the Compact. Each member State will be allowed one vote on Compact matters, and the Commission will provide the venue for solving interstate issues and disputes.

Military Family Education Liaison. Individual appointed or designated by State Council of each member state to assist military families and the State in facilitating the implementation of the Compact. Military members and DoD civilian employees cannot perform this function.

Military installation. A base, camp, post, station, yard, center, homeport facility for any ship, or other activity under DoD jurisdiction, including any leased facility. (This term does not

include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.)

Military representative as a liaison to a State Council. Incumbent of a position designated by the DASD(MC&FP), who performs the duties and responsibilities defined in § 89.5 of this part. The military representative is responsible for representing the interest of the DoD in fostering easier transition of children of military families according to their designation (installation representative, Military Department representative or statewide representative). The military representative will be a military member or DoD civilian who can remain in the position for at least 2 years and whose position has a direct interface with the State education system as part of official duties or has supervisory responsibility for those who do.

Military representative to the DoDEA Committee. Individual nominated to represent all four Services by the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs (OASA(M&RA)), the Office of the Assistant Secretary of the Navy for Manpower and Reserve Affairs (OASN(M&RA)), or the Office of the Assistant Secretary of the Air Force for Manpower and Reserve Affairs (OASAF(M&RA)) on a rotational basis and appointed by the DASD(MC&FP) for a 2-year term. Because DoDEA is a DoD Component the military representative may act as a full participant in the DoDEA Committee.

Receiving State. The State to which a child of a military family is sent, brought, or caused to be sent or brought.

SEA. A public authority similar to an LEA, legally constituted by the State as an administrative agency to provide control of and direction for kindergarten through twelfth grade public educational institutions for the entire State.

Sending State. The State from which a child of a military family is sent, brought, or caused to be sent or brought.

State. State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Northern Marianas Islands and any other U.S. territory or possession. For purposes of administering the provisions of the Compact in § 89.8 of this part, DoD is considered a State and DoDEA is considered the equivalent of a State department of education for DoD.

State Council. A body that coordinates among government agencies, LEAs, and military installations concerning the member State's participation in and compliance with the Compact and the Commission activities. A member State may determine the membership of its own Council, but membership must include at least: The State superintendent of education; superintendent of a school district with a high concentration of military children; representative (as a liaison) from a military installation; one representative each from the legislative and executive branches of State government; and other offices and stakeholder groups the State Council deems appropriate.

Transition. The formal and physical process of transferring from school to school; or the period of time in which a child moves from a school in the sending State to a school in the receiving State.

Veteran. A person who served in the military and who was discharged or released from the military under conditions other than dishonorable.

§ 89.4 Policy.

In accordance with the sense of Congress as set forth in section 539 of Public Law 111–84, ''National Defense Authorization Act for Fiscal Year 2010'' and DoD 5500.07–R, ''Joint Ethics Regulations (JER)'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/550007r.pdf*), it is DoD policy to support the intent of the Compact by reducing the difficulty children of military families (referred to in this part as ''children'' or ''the child'') have in transferring between school systems because of frequent moves and deployment of their parents. DoD will support the Compact by:

(a) Designating military liaisons, by position, to State Councils of member States, the DoDEA Committee, and the MIC3.

(b) Implementing the intent of the Compact in the DoDEA to ensure:

(1) Timely enrollment of children in school so they are not penalized due to:

(i) Late or delayed transfers of education records from the previous school district(s); or

(ii) Differences in entrance or age requirements.

(2) Placement of children in educational courses and programs, including special educational services, so they are not penalized due to differences in attendance requirements, scheduling, sequencing, grading, or course content.

(3) Flexible qualification and eligibility of children so they can have an equitable chance at participation in extracurricular, academic, athletic, and social activities.

(4) Graduation within the same timeframe as the children's peers.

(c) Promoting through DoDEA and the Military Departments:

(1) Flexibility and cooperation among SEAs or LEAs, DoDEA, Military Departments, parents, and children to achieve educational success.

(2) Coordination among the various State agencies, LEAs, and military installations regarding the State's participation in the Compact.

§ 89.5 Responsibilities.

(a) Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(M&RA)) oversees the implementation of this part.

(b) Under the authority, direction, and control of the ASD(M&RA), the DASD(MC&FP):

(1) Designates military representatives by position as liaisons to State councils, nominated by the Secretaries of the Military Departments by the procedures outlined in § 89.7 of this part.

(2) Designates the DoD ex-officio member serving as a liaison to MIC3, insofar as DoD is invited to do so by MIC3.

(3) Maintains a roster of designated liaisons to State councils in accordance with 32 CFR part 310.

(4) Monitors issues arising under the Compact:

(i) Affecting children of military families attending and transferring between member State schools; and

(ii) The implementation of § 89.8 of this part, affecting children of military families transferring between member state schools and DoDEA's schools (consisting of the Department of Defense Schools (DoDDS)—Europe, DoDDS—Pacific, and DDESS.

(c) Under the authority, direction, and control of ASD(M&RA), the Director, DoDEA:

(1) To the extent allowable by 10 U.S.C. 2164 and 20 U.S.C. 921–932, adjusts operating policies and procedures issued pursuant to DoD Directive 1342.20, ''Department of Defense Education Activity (DoDEA)'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/134220p.pdf*) to implement the provisions of the Compact described in § 89.8 of this part.

(2) Informs boards and councils, described in DoD Instruction 1342.15, ''Educational Advisory Committees and Councils'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/134215p.pdf*) and DoD Instruction 1342.25, ''School Boards for Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS)'' (available at *http://*

www.dtic.mil/whs/directives/corres/pdf/134225p.pdf), of the Compact provisions in § 89.8 of this part and the DoDEA administration of these provisions.

(3) Addresses disputes over provisions in § 89.8 of this part between member States and DoDEA. When differences cannot be resolved with a member State, works with MIC3 to resolve these disputes.

(4) Establishes the DoDEA Committee to review compliance with the provisions in § 89.8 of this part and to address issues raised by the Secretaries of the Military Departments concerning the implementation of these provisions.

(5) Ensures all personally identifiable information is collected, maintained, disseminated, and used in accordance with 32 CFR part 310.

(6) Ensures that DoDEA schools comply with § 89.8 and that DoDEA school-level officials inform DoDEA students transferring to schools in member States of the benefits extended by receiving States under the Compact.

(d) The Secretaries of the Military Departments:

(1) Nominate military representatives by position, in accordance with the procedures outlined in § 89.7 of this part, for designation as liaisons to State Councils by the DASD(MC&FP) when such DoD liaison is requested.

(2) Establish departmental policies and procedures to inform military communities of:

(i) The provisions of this part as it affects children of military families attending and transferring between member State schools; and

(ii) The provisions in § 89.8 of this part concerning students transferring between DoDEA and member State schools.

(3) Procedures to resolve issues or challenges raised by parents concerning the provisions of § 89.8 of this part.

§ 89.6 Procedures.

DoD implements policy in this part by:

(a) Establishing a committee within DoDEA (referred to in this part as the ''DoDEA Committee'').

(b) Designating military representatives by position to serve as liaisons to the State Councils of the member States and the DoDEA Committee in accordance with procedures in § 89.7.

(c) Designating the ex-officio member to serve as a liaison to MIC3 in accordance with § 89.5 and § 89.7.

(d) Ensuring DoDEA compliance with the selected provisions of the Compact described in § 89.8.

§ 89.7 Representatives to State Councils, the DoDEA Committee and MIC3.

(a) *Military Representatives designated by position as Liaisons to State Councils.* In accordance with section 3–201 of DoD 5500.07–R, incumbents of positions designated as liaisons to State Councils will:

(1) Be a military member or a civilian employee of DoD who has a direct interface with the State education system as part of official duties or has supervisory responsibility for those who do.

(2) Only represent DoD interests (not the interests of the State Council), and consequently may not:

(i) Engage in management or control of the State Council (therefore, may not vote or make decisions on daily administration of council);

(ii) Endorse or allow the appearance of DoD endorsement of the State Council or its events, products, services, or enterprises;

(iii) Represent the State Council to third parties; or

(iv) Represent the State Council to the U.S. Government, as prohibited by federal criminal statues.

(3) Make clear to the State Council that:

(i) The opinions expressed by the representative do not bind DoD or any DoD Component to any action.

(ii) If included on State Council Web sites, all references to the representative by name or title must indicate that they are the ''Military Representative'' as opposed to a council member.

(4) Notify the chain of command of issues requiring policy decisions or actions requested of the military community within the State.

(5) When called upon to act as the spokesperson for one or more than one installation:

(i) Get feedback from the designated points of contact at each military installation within his or her responsibility.

(ii) Coordinate proposed input to the State Council with the appropriate points of contact for each military installation within his or her responsibility.

(iii) Act as a conduit for information between the State Council and each military installation within his or her responsibility.

(iv) Provide feedback through the chain of command to the points of contact for each military installation within his or her responsibility and, as appropriate, to the OASA(M&RA), the OASN(M&RA), or the OASAF(M&RA).

(b) *Nomination Process for Positions Designated as Liaisons to State Councils.* (1) In accordance with DoD 5500.07–R, liaison positions are nominated by the Military Departments and designated by the DASD(MC&FP), not by State officials. Depending on the number of liaison positions required by State policy, designating liaison positions to a State Council will be accomplished according to the processes outlined in Table 1:

TABLE 1—PROCESS FOR DESIGNATING LIAISON POSITIONS TO STATE COUNCILS

If State statute concerning military representatives provides for:	The State Commissioner contacts:	Who requests a selection be made by:	Whereupon the official written designation is made by:
One representative for all military children in the State.	DASD(MC&FP)	OASA(M&RA), OASN(M&RA), or OASAF(M&RA) responsible for providing a representative for the State listed in Table 2.	DASD(MC&FP).
One representative for each Military Service.	DASD(MC&FP)	OASA(M&RA), OASN(M&RA), and OASAF(M&RA).	DASD(MC&FP).
One representative for each military installation in the State.	DASD(MC&FP)	OASA(M&RA), OASN(M&RA) and OASAF(M&RA).	DASD(MC&FP).

(2) When there is more than one military representative to a State Council (*e.g.,* one per installation or one per Military Department represented in the State), the incumbent of the position nominated by the responsible Military Department (Table 2) will serve as the lead military representative when DoD must speak with a single voice.

(3) In circumstances where the State requests an individual by name, the

DASD(MC&FP) will forward the request to the individual's Military Department for consideration of designating the position which the individual encumbers. If that Military Department is different from the one designated in Table 2, the DASD(MC&FP) will first obtain the concurrence of the responsible Military Department.

(4) In accordance with the Compact, State officials appoint or designate the Military Family Education Liaison for the State. Service members and DoD civilians cannot be appointed or designated to fill this position for the State.

TABLE 2—MILITARY DEPARTMENT AREAS OF AUTHORITY FOR SELECTING A SINGLE MILITARY REPRESENTATIVE POSITION TO SERVE AS A LIAISON TO THE STATE COUNCIL

Military department	Areas of Authority
Army	Alabama, Alaska, Colorado, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, South Carolina, Texas, Vermont, Washington, West Virginia, Wisconsin.
Navy	American Samoa, California, Connecticut, District of Columbia, Florida, Guam, Maine, Mississippi, New Hampshire, North Carolina, Northern Marianas, Oregon, Puerto Rico, Rhode Island, Tennessee, Virginia, Virgin Islands.
Air Force	Arizona, Arkansas, Delaware, Idaho, Illinois, Massachusetts, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, South Dakota, Utah, Wyoming.

(c) *Military Representative to the DoDEA Committee.* Membership of the DoDEA Committee will include a representative from one of the Military Services to represent all four Services. OASA(M&RA), OASN(M&RA), or OASAF(M&RA) will nominate a representative on a rotational basis who will be designated for a 2-year term by the DASD(MC&FP).

(d) *Ex-Officio Member Serving as a Liaison to MIC3.* In accordance with section 3–201 of DoD 5500.07–R, the DoD ex-officio member to the Commission, must:

(1) Be a military member or a civilian employee of DoD who can remain in the position for at least 2 years and who has a direct interface with DoDEA and the U.S. public education system as part of official duties or has supervisory responsibility for those who do.

(2) Attend as a liaison meetings of MIC3, its Executive Committee, and other standing committees where requested by the Commission.

(3) Only represent DoD interests (not the interests of MIC3), and consequently may not:

(i) Engage in management or control of MIC3 (therefore, may not vote or make decisions on daily administration of MIC3);

(ii) Endorse or allow the appearance of DoD endorsement of MIC3, or its events, products, services, or enterprises;

(iii) Represent the Commission to third parties; or

(iv) Represent MIC3 to the U.S. Government, as prohibited by criminal statutes.

(4) Make clear to MIC3 that:

(i) The opinions expressed by the incumbent do not bind DoD or any DoD Component to any action.

(ii) If included on MIC3 Web sites, all references to the incumbent by name or title must indicate that they are the ''DoD Ex-Officio Member'' as opposed to a MIC3 member.

(5) Notify the chain of command of issues requiring policy decisions or actions requested of DoD.

§ 89.8 Compact provisions.

(a) *DoDEA Area School Districts Relationship With SEAs or LEAs in Member States.*

(1) For the purposes of DoD's implementation of the Compact in the schools it operates, DoDEA's area offices (DoDDS—Europe, DoDDS—Pacific, and DDESS) and their schools are considered as the equivalent of LEAs and SEAs, respectively.

(2) Each DoDEA area acts as the ''receiving LEA'' and ''sending LEA'' in working with LEAs or SEAs in member States.

(b) *Articles IV Through VII of the Compact.* This section describes the specific duties that DoDEA's LEAs have as ''sending'' or ''receiving'' LEAs. DoDEA's duties under this section will reciprocate the duties assumed by member State LEAs or SEAs to children of military families, as expressed by their respective State's implementation of the Compact Articles IV through VII. DoDEA will implement the provisions described below, which, while retaining the intent of the Compact, have been modified as needed in the DoDEA context.

(1) *Article IV: Education Records and Enrollment*—(i) *Unofficial or ''Hand-Carried'' Education Records.* (A) If official education records cannot be released to the parents for transfer, the DoDEA custodian of the records, as the sending LEA shall provide to the parent a complete set of unofficial education records.

(B) Upon receipt of the unofficial education records, the DoDEA school, as the school in the receiving LEA shall enroll and appropriately place the child as quickly as possible based on the information in the unofficial records, pending validation by the official records.

(ii) *Official education records or transcripts.* (A) The DoDEA school, acting as the receiving LEA shall request the child's official education record from the school in the sending State at the same time as DoDEA school enrolls and conditionally places the child.

(B) Upon receipt of the request for a child's records, the school in DoDEA, acting as the sending LEA will provide the child's official education records to the school in the receiving State, within 10 work days. If there is a designated school staff break, records will be provided as soon as possible; however, the time will not exceed 10 work days after the return of staff. DoDEA will initiate actions to meet these deadlines without violating the disclosure rules of the Privacy Act, 5 U.S.C. 552a.

(iii) *Immunizations.* (A) Parents have 30 days from the date of enrolling their child in a DoDEA school to have their child(ren) immunized in accordance with DoDEA's immunization requirements, as the receiving LEA.

(B) For a series of immunizations, parents must begin initial vaccinations of their child(ren) within 30 days.

(iv) *Entrance age.* (A) At the time of transition and regardless of the age of the child, the DoDEA school, acting as the receiving LEA, shall enroll the transitioning child at the grade level as the child's grade level (*i.e.,* in kindergarten through grade 12) in the sending state's LEA.

(B) A child who has satisfactorily completed the prerequisite grade level in the sending state's LEA will be eligible for enrollment in the next higher grade level in DoDEA school, acting as the receiving LEA, regardless of the child's age.

(C) To be admitted to a school in the receiving State, the parent or guardian of a child transferring from a DoDEA (sending) LEA must provide:

(*1*) Official military orders showing the military member or the member's spouse was assigned to the sending State or commuting area of the State in which the child was previously enrolled. If the child was residing with a guardian other than the military member during the previous enrollment, proof of guardianship (as specified in the Compact) should be provided by the parent or guardian to the receiving LEA or SEA to establish eligibility under the Compact.

(*2*) An official letter or transcript from the sending school authority that shows the student's record of attendance, academic information, and grade placement.

(*3*) Evidence of immunization against communicable diseases.

(*4*) Evidence of date of birth.

(2) *Article V: Placement and Attendance*—(i) *Course placement.* (A) As long as the course is offered by DoDEA, as the receiving LEA, it shall honor placement of a transfer student in courses based on the child's placement or educational assessment in the sending State school.

(B) Course placement includes, but is not limited to, Honors, International Baccalaureate, Advanced Placement, vocational, technical, and career pathways courses.

(C) Continuing the child's academic program from the previous school and promoting placement in academically and career challenging courses shall be a primary consideration when DoDEA considers the placement of a transferring child.

(D) DoDEA, acting as the receiving LEA, may perform subsequent evaluations to ensure the child's appropriate course placement.

(ii) *Educational Program Placement.* (A) As long as the program is offered by DoDEA, acting as a receiving LEA, it will honor placement of the child in educational programs based on current educational assessments and placement in like programs in the sending State. Such programs include, but are not limited to, gifted and talented programs and English language learners.

(B) The receiving State school may perform subsequent evaluations to ensure the child's appropriate educational program placement.

(iii) *Special Education Services.* (A) DoDEA, acting as the receiving LEA, will initially provide comparable services to a child with disabilities based on his or her current IEP in compliance with 20 U.S.C. chapter 33, also known and referred to in this part as the ''Individuals with Disabilities Education Act (IDEA),'' as amended, and the requirements of Executive Order 13160. DoDEA may perform subsequent evaluations to ensure the child's appropriate placement consistent with IDEA.

(B) DoDEA, acting as the receiving LEA, will make reasonable accommodations and modifications to address the needs of incoming children with disabilities, in compliance with the requirements of 29 U.S.C. 794 and Executive Order 13160, and subject to an existing 504 plan to provide the child with equal access to education.

(iv) *Placement Flexibility.* DoDEA's administrative officials must have flexibility in waiving course or program prerequisites or other preconditions for placement in courses or programs offered under the jurisdiction of DoDEA.

(v) *Absences Related to Deployment Activities.* A child whose parent or legal guardian is an active duty Service member and has been called to duty for, is on leave from, or has immediately returned from deployment to a combat zone or combat support posting, will be granted additional excused absences under governing DoDEA rules.

(3) *Article VI: Eligibility for enrollment.* (i) *Eligibility in DoDEA Schools.* Eligibility of dependents of military members is governed by the laws in 10 U.S.C. 2164 and 20 U.S.C. 921 through 932 and their implementing regulations. Only children who are eligible to attend DoDEA schools may do so, regardless of their transition status.

(ii) *Eligibility for extracurricular participation.* DoDEA, acting as the receiving LEA, will facilitate the opportunity for transitioning children's inclusion in extracurricular activities, regardless of application deadlines, to the extent the children are otherwise qualified.

(4) *Article VII: Graduation.* To facilitate the child's on-time graduation, DoDEA will incorporate the following procedures:

(i) *Waiver requirements.* (A) DoDEA administrative officials will waive specific courses required for graduation if similar course work has been satisfactorily completed in another LEA or provide reasonable justification for denial.

(B) If DoDEA, as a receiving LEA, does not grant a waiver to a child who would qualify to graduate from the sending school, DoDEA will provide an alternative means of acquiring required coursework so that graduation may occur on time.

(C) If DoDEA, as the receiving LEA, requires a graduation project, volunteer community service hours, or other DoDEA specific requirement, DoDEA may waive those requirements.

(ii) *Exit exams.* (A) DoDEA, as a receiving LEA, must:

(*1*) Accept exit or end-of-course exams required for graduation from the sending State.

(*2*) Accept national norm-referenced achievement tests.

(*3*) Provide alternative testing in lieu of testing requirements for graduation in the receiving from a DoDEA school.

(B) If the alternatives in paragraph (b)(2)(i) of this section cannot be accommodated by DoDEA as the receiving LEA for a child transferring in his or her senior year, then the provisions of paragraph (b)(1)(iv)(C) of this section will apply.

(iii) *Transfers during senior year.* (A) If a child transferring at the beginning or during his or her senior year is ineligible to graduate from DoDEA, as the receiving LEA, after all alternatives have been considered, DoDEA will request a diploma from the sending LEA or SEA. DoDEA will ensure the receipt of a diploma from the sending LEA or SEA, if the child meets the graduation requirements of the sending LEA or SEA.

(B) If one of the States in question is not a member of this Compact, DoDEA, as a receiving state, will use best efforts to facilitate a transferring child's on-time graduation in accordance with paragraphs (b)(1)(iv)(A) and (b)(1)(iv)(B) of this section.

Dated: December 12, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–30110 Filed 12–19–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–1049]

Drawbridge Operation Regulation; Pearl River, LA/MS

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulations.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the operation of the US 90 highway bridge (East Pearl

River Bridge), a swing span bridge across the Pearl River, mile 8.8, between Slidell, St. Tammany Parish, Louisiana and Pearlington, Hancock County, Mississippi. The deviation is necessary to remove and repair three gear motors to allow for the continued safe operation of the bridge. This deviation allows the bridge to remain in the closed-to-navigation position for a period of 32 days, broken in to one 12-Day Period and two 10-Day periods, as repairs to each motor will be done separately.

DATES: This deviation is effective from 6 a.m. on Thursday January 19, 2017, through 5 p.m. on Tuesday, March 21, 2017.

ADDRESSES: The docket for this deviation, [USCG–2016–1049] is available at *http://www.regulations.gov*. Type the docket number in the ''SEARCH'' box and click ''SEARCH''. Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Donna Gagliano, Bridge Administration Branch, Coast Guard, telephone (504) 671–2128, email *Donna.Gagliano@uscg.mil.*

SUPPLEMENTARY INFORMATION: Boh Bros. Construction Company, on behalf of the Louisiana Department of Transportation and Development, requested a temporary deviation from the operating schedule for the swing span bridge across the Pearl River, mile 8.8, between Slidell, St. Tammany Parish, Louisiana and Pearlington, Hancock County, Mississippi. The deviation was requested to accommodate necessary repairs to the swing span operation due to the complexity of the work requiring rewiring. The draw currently operates under 33 CFR 117.486(b).

For purposes of this deviation, the bridge over the Pearl River will be closed to marine traffic for three extended periods of time from Thursday, January 19, 2017, through Tuesday, March 21, 2017. This deviation allows the bridge to remain closed-to-navigation for the duration of these Phases.

Phase I: A 12-day closure from 6 a.m. on January 19, 2017 through 5 p.m. on January 30, 2017. Phase II: A 10-day closure from 6 a.m. on February 9, 2017 through 5 p.m. on February 18, 2017. Phase III: A 10-day closure from 6 a.m. on March 12, 2017 through 5 p.m. on March 21, 2017. During all Three Phases, the work requires the removal of gear motors #1, #2, and #3, delivery to machine shop to replace bearings and seals, sandblasting and painting, removal of motor armature from input shaft, cutting and broaching of the shafts, and repairing damaged conduit and wiring from the control house to span junction box. Due to the complexity of the work, it will require rewiring of electrical components and conducting testing and troubleshooting of the bridge to safely continue operation of the bridge.

Any vessel with a vertical clearance requirement of less than 10 feet above mean high water in the closed-to-navigation position may pass beneath the bridge at any time. Navigation on the waterway consists of small tugs with and without tows, commercial vessels, and recreational craft, including sailboats.

The bridge will not be able to open for emergencies, and there is no alternate route. LDOTD has coordinated these closing with the Stennis Space Center and other waterway users. The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: December 14, 2016.

David M. Frank,

Bridge Administrator, Eighth Coast Guard District.

[FR Doc. 2016–30572 Filed 12–19–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–1056]

Drawbridge Operation Regulation; Calcasieu River, Westlake, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulations.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Westlake Bridge across the Calcasieu River, mile 36.4, at Westlake, Calcasieu Parish, Louisiana. The deviation is necessary to repair and replace the existing lift rails and actuators on the east end of the bridge. These repairs are essential for the continued safe operation of the bridge. This deviation allows the bridge to remain closed-to-navigation for a total of 36 hours on four different dates in December 2016 and January 2017.

DATES: This temporary deviation is effective from 6 a.m. on Sunday, December 25, 2016 through noon on Monday, January 2, 2017, as discussed in greater detail below.

ADDRESSES: The docket for this deviation, [USCG–2016–1056] is available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH''. Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Giselle MacDonald, Bridge Administration Branch, Coast Guard, telephone (504) 671–2128, email *Giselle.T.MacDonald@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Union Pacific Railroad requested a temporary deviation from the operating schedule of the Westlake Swing-Span Bridge across the Calcasieu River, mile 36.4, at Westlake, Calcasieu Parish, Louisiana.

The vertical clearance of the bridge is 1.07 feet above Mean High Water, elevation 3.56 feet Mean Gulf Level in the closed-to-navigation position and unlimited in the open-to-navigation position. The bridge will not be able to open for emergencies and there are no alternate routes available. Navigation on the waterway consists of tugs with tows, fishing vessels and recreational craft. These closures will not have a significant effect on vessels that use the waterway in the determination and coordination with waterway users.

In accordance with 33 CFR 117.5, the draw shall open on signal for the passage of vessels. This deviation allows the drawbridge to remain in the closed-to-navigation position for 36 hours, from 6 a.m. through 6 p.m. on Sunday, December 25, 2016; from 6 a.m. through noon on Monday, December 26, 2016; from 6 a.m. through 6 p.m. on Sunday, January 1, 2017; and from 6 a.m. through noon on Monday, January 2, 2017.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: December 14, 2016.

David M. Frank,

Bridge Administrator, Eighth Coast Guard District.

[FR Doc. 2016–30576 Filed 12–19–16; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2016–0240; FRL–9956–65–Region 9]

Approval and Limited Approval and Limited Disapproval of Air Quality Implementation Plans; California; Northern Sonoma County Air Pollution Control District; Stationary Source Permits; Correcting Amendment

AGENCY: Environmental Protection Agency.

ACTION: Final rule, correcting amendment.

SUMMARY: On October 6, 2016, the Environmental Protection Agency (EPA) published a final rule in the **Federal Register** approving certain revisions to the Northern Sonoma County Air Pollution Control District (NSCAPCD, or the District) portion of the California State Implementation Plan (SIP), and disapproving others. The EPA indicated in this final action that these revisions would supersede certain older rules in the California SIP but inadvertently included erroneous references in the regulatory text. This document corrects the regulatory text to clarify the replacement of these superseded regulations.

DATES: This action is effective on December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972–3534, *Yannayon.Laura@epa.gov.*

SUPPLEMENTARY INFORMATION: This action corrects inadvertent errors in a rulemaking related to NSCAPCD's rules governing the issuance of permits for stationary sources. On October 6, 2015 (81 FR 69390), the EPA published a rulemaking action finalizing approval of three rules, and a limited approval and limited disapproval of two rules as revisions to the California SIP. This action contained regulatory text amendments to 40 CFR part 52, subpart F. The amendments incorporated material by reference into section 52.220, Identification of plan, paragraphs (c)(461) and (c)(480), and eleven other amendments which indicated the deletion, with or without replacement, of obsolete regulatory language. Those amendments deleting obsolete language with replacement in paragraph (c)(480) erroneously state that they are being replaced by various regulations in paragraph (c)(481). Specifically, the amendments at paragraphs (c)(124)(ix)(D), (c)(156)(vi)(B), (c)(162)(i)(B), (c)(164)(i)(B)(*5*), and (c)(385)(i)(B)(*2*) include incorrect references to (481), when they should be referring to (480). This action adds regulatory text to correct these references.

The EPA has determined that this action falls under the ''good cause'' exemption in section 553(b)(3)(B) of the Administrative Procedures Act (APA) which, upon finding ''good cause,'' authorizes agencies to dispense with public participation where public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest. Public notice and comment for this action is unnecessary because this action correcting inadvertent regulatory text errors included in the EPA's October 6, 2016 final rule is consistent with the substantive revision to the California SIP as described in the preamble of said action concerning regulations governing the issuance of permits in NSCAPCD. In addition, the EPA can identify no particular reason why the public would be interested in having the opportunity to comment on the correction prior to this action being finalized, since this correction action does not change the EPA's analysis or overall action related to the approval of NSCAPCD's revisions to their rules in the California SIP.

The EPA also finds that there is good cause under APA section 553(d)(3) for this correction to become effective on the date of publication of this action. Section 553(d)(3) of the APA allows an effective date of less than 30 days after publication ''as otherwise provided by the agency for good cause find and published with the rule.'' 5 U.S.C. 553(d)(3). The purpose of the 30-day waiting period prescribed in APA section 553(d)(3) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. This rule does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. This action merely corrects inadvertent errors for the regulatory text of the EPA's prior rulemaking for the California SIP. For these reasons, the EPA finds good cause under APA section 553(d)(3) for this correction to become effective on the date of publication of this action.

Need for Correction

As published, the final regulations incorrectly referenced 40 CFR 52.220(c)(481) in 5 instances, when they should have referenced 40 CFR 52.220(c)(480).

Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), or require prior consultation with state officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

Because this action is not subject to notice-and-comment requirements under the APA or any other statute, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, the EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of this rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Carbon monoxide, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds, Reporting and recordkeeping requirements.

Dated: December 1, 2016.

Alexis Strauss,

Acting Regional Administrator, Region IX.

Accordingly, 40 CFR part 52 is corrected by making the following correcting amendments:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by revising paragraphs (c)(124)(ix)(D), (c)(156)(vi)(B), (c)(162)(i)(B), (c)(164)(i)(B)(*5*), and (c)(385)(i)(B)(*2*) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(124) * * *

(ix) * * *

(D) Previously approved on July 31, 1985 in paragraph (c)(124)(ix)(B) of this section and now deleted without replacement, Rule 130 (introductory text, b.1, n1, p5, and s2), and now deleted with replacement in paragraphs (c)(480)(i)(A)(*3*) and (*4*), Rules 220(c) and 230.

* * * * *

(156) * * *

(vi) * * *

(B) Previously approved on July 31, 1985 in paragraph (c)(156)(vi)(A) of this section and now deleted without replacement, Rule 130 (b2, m1, p3, p3a, and s7), and now deleted with replacement in Paragraph (c)(480)(i)(A)(*3*) of this section, Chapter II, 220(B).

* * * * *

(162) * * *

(i) * * *

(B) Previously approved on July 31, 1985 in paragraph (c)(162)(i)(A) of this section and now deleted with replacement in Paragraph (c)(480)(i)(A)(*3*) of this section, Chapter II, 220(A).

* * * * *

(164) * * *

(i) * * *

(B) * * *

(*5*) Previously approved on April 17, 1987 in paragraph (c)(164)(i)(B)(1) of this section and now deleted without replacement, Rule 130 (d1 and s5), and now deleted with replacement in paragraph (c)(480)(i)(A)(*2*) of this section, rule 200(a).

* * * * *

(385) * * *

(i) * * *

(B) * * *

(*2*) Previously approved on May 6, 2011 in paragraph (c)(385)(i)(B)(1) of this section and now deleted with replacement in paragraph (c)(480)(i)(A)(*1*) of this section, Rule 130, ''Definitions,'' amended December 14, 2010.

* * * * *

[FR Doc. 2016–30186 Filed 12–19–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 141

[EPA–HQ–OW–2015–0218; FRL–9956–71–OW]

RIN 2040–AF49

Revisions to the Unregulated Contaminant Monitoring Rule (UCMR 4) for Public Water Systems and Announcement of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of public meeting.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is finalizing a Safe Drinking Water Act (SDWA) rule that requires public water systems to collect occurrence data for contaminants that may be present in drinking water but are not yet subject to EPA's drinking water standards set under the SDWA. This rule identifies eleven analytical methods to support water system monitoring for a total of 30 chemical contaminants, consisting of nine cyanotoxins and one cyanotoxin group; two metals; eight pesticides plus one pesticide manufacturing byproduct (hereinafter collectively referred to as ''pesticides''); three brominated haloacetic acid disinfection byproduct groups; three alcohols; and three semivolatile organic chemicals. EPA is also announcing a public meeting and webinar to discuss the implementation of the fourth Unregulated Contaminant Monitoring Rule.

DATES: This final rule is effective on January 19, 2017, 30 days after publication in the **Federal Register**. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 19, 2017.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2015–0218. All documents in the docket are listed on the *https://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda D. Parris, Standards and Risk Management Division (SRMD), Office of Ground Water and Drinking Water (OGWDW) (MS 140), Environmental Protection Agency, 26 West Martin Luther King Drive, Cincinnati, OH 45268; telephone number: (513) 569–7961; or email address: *parris.brenda@epa.gov;* or Melissa Simic, SRMD, OGWDW (MS 140), Environmental Protection Agency, 26 West Martin Luther King Drive, Cincinnati, Ohio 45268; telephone number: (513) 569–7864; or email address: *simic.melissa@epa.gov.* For general information, contact the Safe Drinking Water Hotline. Callers within the United States can reach the Hotline at (800) 426–4791. The Hotline is open Monday through Friday, excluding federal holidays, from 10:00 a.m. to 4:00 p.m., eastern time. The Safe Drinking Water Hotline can also be found on the Internet at: *https://www.epa.gov/ground-water-and-drinking-water/safe-drinking-water-hotline.*

SUPPLEMENTARY INFORMATION:

Table of Contents

Abbreviations and Acronyms

µg/L Microgram per liter
Adda (2*S*,3*S*,8*S*,9*S*,4*E*,6*E*)-3-amino-9-methoxy-2,6,8-trimethyl-10-phenyl-4,6-decadienoic acid
ASDWA Association of State Drinking Water Administrators
ASTM ASTM International
CAS Chemical Abstract Service
CBI Confidential Business Information
CCC Continuing Calibration Check
CCL Contaminant Candidate List
CFR Code of Federal Regulations
CRA Congressional Review Act
CWS Community Water System
D/DBPRs Disinfectants and Disinfection Byproducts Rules (including Stage 1 and Stage 2 D/DBPRs)
ELISA Enzyme-linked Immunosorbent Assay
EPA United States Environmental Protection Agency
EPTDS Entry Point to the Distribution System
ESI Electrospray Ionization
FR Federal Register
GC Gas Chromatography
GC/ECD Gas Chromatography/Electron Capture Detection
GC/MS Gas Chromatography/Mass Spectrometry
GW Ground Water
GWUDI Ground Water Under the Direct Influence of Surface Water
HAAs Haloacetic Acids
HAA5 Dibromoacetic Acid, Dichloroacetic Acid, Monobromoacetic Acid, Monochloroacetic Acid, Trichloroacetic Acid
HAA6Br Bromochloroacetic Acid, Bromodichloroacetic Acid, Dibromoacetic Acid, Dibromochloroacetic Acid, Monobromoacetic Acid, Tribromoacetic Acid
HAA9 Bromochloroacetic Acid, Bromodichloroacetic Acid, Chlorodibromoacetic Acid, Dibromoacetic Acid, Dichloroacetic Acid, Monobromoacetic Acid, Monochloroacetic Acid, Tribromoacetic Acid, Trichloroacetic Acid
IC Ion Chromatography
IC–MS/MS Ion Chromatography-Tandem Mass Spectrometry
IC/ESI–MS/MS Ion Chromatography/Electrospray Ionization/Tandem Mass Spectrometry
ICP–MS Inductively Coupled Plasma-Mass Spectrometry
ICR Information Collection Request
IDC Initial Demonstration of Capability
IS Internal Standard
LFB Laboratory Fortified Blank
LRB Laboratory Reagent Blank
LC/ESI–MS/MS Liquid Chromatography/Electrospray Ionization/Tandem Mass Spectrometry
LC–MS/MS Liquid Chromatography/Tandem Mass Spectrometry
LT2 Long Term 2 Enhanced Surface Water Treatment Rule
M Million
MAC Mycobacterium Avium Complex
MRL Minimum Reporting Level
NAICS North American Industry Classification System
NARA National Archives and Records Administration
NCOD National Contaminant Occurrence Database
NPDWRs National Primary Drinking Water Regulations
NTNCWS Non-transient Non-community Water System
OGWDW Office of Ground Water and Drinking Water
OMB Office of Management and Budget
PA Partnership Agreement
PRA Paperwork Reduction Act
PT Proficiency Testing
PWS Public Water System
PWSID Public Water System Identification
QC Quality Control
QCS Quality Control Sample
QHS Quality HAA Sample
RFA Regulatory Flexibility Act
SBA Small Business Administration
SDWA Safe Drinking Water Act
SDWARS Safe Drinking Water Accession and Review System
SDWIS/Fed Federal Safe Drinking Water Information System
SM Standard Methods for the Examination of Water and Wastewater
SMP State Monitoring Plan
SOP Standard Operating Procedure
SPE Solid Phase Extraction
SR Source Water
SRF Drinking Water State Revolving Fund
SRMD Standards and Risk Management Division
SUR Surrogate Standard
SVOCs Semivolatile Organic Chemicals
SW Surface Water
TNCWS Transient Non-community Water System
TOC Total Organic Carbon
UCMR Unregulated Contaminant Monitoring Rule
UMRA Unfunded Mandates Reform Act of 1995
USEPA United States Environmental Protection Agency

I. General Information

A. Does this action apply to me?

The fourth Unregulated Contaminant Monitoring Rule (UCMR 4) applies to public water systems (PWSs). PWSs are systems that provide water for human consumption through pipes, or other constructed conveyances, to at least 15 service connections or that regularly serve an average of at least 25 individuals daily at least 60 days out of the year. This rule applies to all large community and non-transient non-community water systems (NTNCWSs) serving more than 10,000 people. A community water system (CWS) is a PWS that has at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents. A NTNCWS is a PWS that is not a CWS and that regularly serves at least 25 of the same people over six months per year. Some examples of NTNCWS are schools, factories, office buildings and hospitals, which have their own water systems. EPA selects the nationally representative sample of small CWSs and NTNCWSs serving 10,000 or fewer people that are required to monitor (see

''Statistical Design and Sample Selection for the Unregulated Contaminant Monitoring Regulation'' (USEPA, 2001a) for a description of the statistical approach for the nationally representative sample). This rule does not apply to transient non-community water systems (TNCWSs) (*i.e.,* non-community water systems that do not regularly serve at least 25 of the same people over six months per year). A TNCWSs provides water in a place such as a gas station or campground, where people do not remain for long periods of time.

States, territories and tribes with primary enforcement responsibility (primacy) to administer the regulatory program for PWSs under the SDWA can participate in the implementation of UCMR 4 through Partnership Agreements (PAs). Primacy agencies with PAs can choose to be involved in various aspects of the UCMR 4 monitoring for the PWSs they oversee; however, the PWS remains responsible for compliance with the rule requirements. Examples of potentially regulated categories and entities are identified in the following table.

Category	Examples of potentially regulated entities	NAICS [a]
State, local & tribal governments	States, local and tribal governments that analyze water samples on behalf of PWSs required to conduct such analysis; states, local and tribal governments that directly operate CWSs and NTNCWSs required to monitor.	924110
Industry	Private operators of CWSs and NTNCWSs required to monitor	221310
Municipalities	Municipal operators of CWSs and NTNCWSs required to monitor	924110

[a] NAICS = North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table summarizes the types of entities that EPA is aware could potentially be regulated by this action. If you are uncertain whether your entity is regulated by this action, carefully examine the definition of a PWS found in §§ 141.2 and 141.3, and the applicability criteria found in § 141.40(a)(1) and (2) of Title 40 in the Code of Federal Regulations (CFR). If you have questions, please consult the contacts listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the Agency taking and why?

This final rule requires PWSs to analyze drinking water samples for 29 unregulated contaminants that do not have health based standards set under the SDWA, as well as one group of regulated contaminants (described in section I.C), and to report their results to EPA. This is the fourth national monitoring effort under the UCMR program, and builds upon the framework established under the prior three UCMR actions (see section II.A). The monitoring provides data to inform future regulatory actions to protect public health.

The public benefits from the information about whether or not unregulated contaminants are present in their drinking water. If contaminants are not found, consumer confidence in their drinking water will improve. If contaminants are found, illnesses may be avoided when subsequent actions, such as regulations, reduce or eliminate those contaminants.

C. What is the Agency's authority for taking this action?

As part of its responsibilities under the SDWA, EPA implements section 1445(a)(2), ''Monitoring Program for Unregulated Contaminants.'' This section, as amended in 1996, requires that once every five years, beginning in August 1999, EPA issue a list of no more than 30 unregulated contaminants to be monitored by PWSs. The list can include contaminants included in previous UCMR cycles but will generally focus on contaminants not yet monitored under UCMR. SDWA section 1445(g)(7) requires that EPA enter the monitoring data into the Agency's publicly-available National Contaminant Occurrence Database (NCOD). The SDWA also requires that EPA ensures that systems serving a population larger than 10,000 people, as well as a nationally representative sample of PWSs serving 10,000 or fewer people, monitor for the unregulated contaminants. EPA must vary the frequency and schedule for monitoring based on the number of persons served, the source of supply, and the contaminants likely to be found. EPA is using this authority as the basis for monitoring 29 of the 30 contaminants.

Section 1445(a)(1)(A) of the SDWA, as amended in 1996, requires that every person who is subject to any SDWA requirement establish and maintain such records, make such reports, conduct such monitoring and provide such information as the Administrator may reasonably require by regulation to assist the Administrator in establishing SDWA regulations. Pursuant to this provision, EPA can also require the monitoring of contaminants already subject to EPA's drinking water standards. EPA is using this authority as the basis for monitoring one of the chemical groups (Haloacetic Acids 5 (HAA5)) under this rule. Sample collection and analysis for HAA5 can be done concurrently with the unregulated HAA monitoring (for HAA6Br and HAA9) described in section III.B.3 (resulting in no significant additional burden since all three HAA groups can be measured by a single method) and will allow EPA to better understand co-occurrence between regulated and unregulated disinfection byproducts.

Hereinafter, all 30 chemicals/groups are collectively referred to as ''contaminants.''

D. What is the estimated cost of this action?

EPA estimates the total average national cost of this action will be $24.3 million per year from 2017–2021. EPA has documented the assumptions and data sources used in the preparation of this estimate in the Information Collection Request (ICR) (USEPA, 2016a). EPA identified eleven analytical methods (nine EPA-developed analytical methods and two alternate, equivalent, consensus organization-developed methods) to analyze samples for 30 UCMR 4 contaminants. EPA's estimate of the analytical cost for the UCMR 4 contaminants and related indicators is $2,500 per sample set. EPA calculated these costs by summing the laboratory unit cost of each method.

Small PWSs selected for UCMR 4 monitoring sample an average of 6.7 times per PWS (*i.e.,* number of responses per PWS) across the three-year ICR period. The estimated labor burden per response for small PWSs is 2.8 hours. Large PWSs and very large PWSs sample and report an average of 11.4 and 14.1 times per PWS, respectively, across the three-year ICR period. The estimated labor burden per

response for large and very large PWSs is 6.1 and 9.9 hours, respectively.

Exhibit 1 presents a breakdown of estimated annual average national costs. Estimated PWS (*i.e.,* large and very large) and EPA costs reflect the analytical cost (*i.e.,* non-labor) for all UCMR 4 methods as well as labor-related cost. EPA pays for the analytical costs for all systems serving a population of 10,000 or fewer people. Laboratory analysis and sample shipping account for approximately 79% of the total national cost for UCMR 4 implementation. EPA estimated laboratory unit costs based on consultations with multiple commercial drinking water laboratories. The cost of the laboratory methods includes shipping the sample from the facility to the laboratory as part of the cost for the analysis.

EPA expects that states will incur labor costs associated with voluntary assistance with UCMR 4 implementation. EPA estimated state costs using the relevant assumptions from the State Resource Model, which was developed by the Association of State Drinking Water Administrators (ASDWA) (ASDWA, 2013) to help states forecast resource needs. Model estimates were adjusted to account for actual levels of state participation under UCMR 3. State participation is voluntary; thus, the level of effort is expected to vary among states and will depend on their individual agreements with EPA.

Additional details regarding EPA's cost assumptions and estimates can be found in the ''Information Collection Request for the Unregulated Contaminant Monitoring Rule (UCMR 4)'' (USEPA, 2016a) EPA ICR Number 2192.08, which presents estimated cost and burden for the 2017–2019 period, consistent with the 3-year timeframe for ICRs. Estimates of costs over the entire 5-year UCMR 4 period of 2017–2021 are attached as an appendix to the ICR. Specifically, most of the burden is incurred in the second, third and fourth year (*i.e.,* monitoring and sample analysis) of the UCMR 4 monitoring period. The first year (the planning year) involves a lesser burden, and the final fifth year involves the least burden since the program is concluding. The next ICR period will overlap with the last two years of the 5-year UCMR 4 period, and therefore will have substantially lower figures.

Copies of the ICR and its appendix are available in the EPA public docket for this final rule, under Docket ID No. EPA–HQ–OW–2015–0218. The total estimated annual costs (labor and non-labor) are as follows:

EXHIBIT 1—ESTIMATED AVERAGE ANNUAL COSTS OF UCMR 4

Respondent	Avg. annual cost all respondents (2017–2021) [1]
Small Systems (25–10,000), including labor [2] only (non-labor costs [3] paid for by EPA)	$0.2 M
Large Systems (10,001–100,000), including labor and non-labor costs	15.0 M
Very Large Systems (100,001 and greater), including labor and non-labor costs	4.1 M
States, including labor costs related to implementation coordination	0.5 M
EPA, including labor for implementation and non-labor for small system testing	4.5 M
Average Annual National Total	24.3 M

[1] Totals may not equal the sum of components due to rounding.
[2] Labor costs pertain to systems, states and EPA. Costs include activities such as reading the rule, notifying systems selected to participate, sample collection, data review, reporting and record keeping.
[3] Non-labor costs will be incurred primarily by EPA and by very large and large PWSs. They include the cost of shipping samples to laboratories for testing and the cost of the laboratory analyses.

E. What is the applicability date?

The determination of whether a PWS is required to monitor under UCMR 4 is based on the type of system (*e.g.,* CWS, NTNCWS, etc.) and its retail population served, as indicated by the Federal Safe Drinking Water Information System (SDWIS/Fed) inventory on December 31, 2015. SDWIS/Fed can be accessed at *https://www.epa.gov/ground-water-and-drinking-water/safe-drinking-water-information-system-sdwis-federal-reporting.* If a PWS believes its retail population served in SDWIS/Fed is inaccurate, the system should contact its state to verify its population as of the applicability date and request a correction, if necessary. The 5-year UCMR 4 program will take place from January 2017 through December 2021, with sample collection occurring between January 1, 2018, and December 31, 2020.

II. Background

A. How has EPA implemented the Unregulated Contaminant Monitoring program?

EPA published the list of contaminants for the first UCMR (UCMR 1) in the **Federal Register** (FR) on September 17, 1999 (64 FR 50556, (USEPA, 1999)), the second UCMR (UCMR 2) on January 4, 2007 (72 FR 368, (USEPA, 2007)) and the third UCMR (UCMR 3) on May 2, 2012 (77 FR 26072, (USEPA, 2012a)). EPA established a three-tiered approach for monitoring contaminants under the UCMR program. Assessment Monitoring for ''List 1'' contaminants typically relies on analytical methods, techniques or technologies that are in common use by drinking water laboratories. Screening Survey monitoring for ''List 2'' contaminants typically relies on newer techniques or technologies that are not as commonly used, such that laboratory capacity to perform List 2 analyses may be limited. Finally, Pre-Screen Testing for ''List 3'' contaminants is often associated with techniques or technologies that are very recently developed and/or are particularly complex. In addition to method cost and complexity and laboratory capacity, EPA considers sampling frequency and the relevant universe of PWSs when deciding which of the three tiers is appropriate for the monitoring of a contaminant.

EPA designed the Assessment Monitoring sampling approach (USEPA, 2001a) to ensure that sample results would yield a high level of confidence and a low margin of error. The design for a nationally representative sample of small systems called for the sample set to be stratified by water source type (ground water (GW) or surface water (SW)), service size category and state (where each state is allocated a

minimum of two systems in its state monitoring plan (SMP)).

This final action identifies 30 List 1 contaminants to be measured during Assessment Monitoring from 2018–2020, with pre-monitoring activity in 2017 and post-monitoring activity in 2021. EPA developed this rule after considering input from public comments. For more information on EPA's response to public comments, please see section III.

B. How are the Contaminant Candidate List, the UCMR program, the Regulatory Determination process and the NCOD interrelated?

Under the 1996 amendments to the SDWA, Congress established a stepwise, risk-based approach for determining which contaminants would become subject to drinking water standards. Under the first step, EPA is required to publish, every five years, a list of contaminants that are not yet regulated but which are known or anticipated to occur in PWSs; this is known as the Contaminant Candidate List (CCL). Under the second step, EPA must require, every five years, monitoring of up to 30 unregulated contaminants (many of which have been selected from the CCL for the UCMR monitoring to-date) to determine their occurrence in drinking water systems; this is known as the UCMR program. Under the third step, EPA is required to determine, every five years, whether or not to begin the process of developing a national primary drinking water regulation for at least five CCL contaminants; this is known as a Regulatory Determination and involves evaluating the following questions:

(1) May the contaminant have an adverse effect on human health?

(2) Is the contaminant known to occur or substantially likely to occur in PWSs with a frequency and at levels of public health concern?

(3) In the sole judgement of the Administrator, does regulation of such contaminants present a meaningful opportunity for risk reduction for people served by PWSs?

Finally, the SDWA requires EPA to issue national primary drinking water regulations (NPDWRs) for contaminants the Agency determines should be regulated.

The CCL process identifies contaminants that may require regulation, while the UCMR program helps provide the data necessary for the Regulatory Determination process previously outlined. The data collected through the UCMR program are stored in the drinking water NCOD to facilitate analysis and review of contaminant occurrence, and support the Administrator's determination on whether regulation of a contaminant is in the public health interest, as required under SDWA section 1412(b)(1). UCMR results can be viewed by the public at: *https://www.epa.gov/dwucmr*. PWSs are also responsible for addressing UCMR results in their annual Consumer Confidence Reports, consistent with prior UCMR cycles and as required by § 141.153.

III. What are the key requirements of the rule, including notable changes between UCMR 3, the proposed UCMR 4 and the final UCMR 4?

EPA published ''Revisions to the Unregulated Contaminant Monitoring Rule (UCMR 4) for Public Water Systems and Announcement of a Public Meeting;'' Proposed Rule, on December 11, 2015 (80 FR 76897, (USEPA, 2015a)). The UCMR 4 proposal identified eleven new analytical methods to support water system monitoring for a total of 30 new contaminants, and detailed other potential changes relative to UCMR 3. Among the other changes reflected in the UCMR 4 proposal were identification of water systems subject to UCMR 4 and provisions for sampling locations, timeframe and frequency, as well as updated data elements.

EPA received input on the UCMR 4 proposal from 34 public commenters, including state and local government, utilities and utility stakeholder organizations, laboratories, academia, non-governmental organizations and other interested stakeholders . After considering the comments, EPA made the changes described in Exhibit 2 to develop the final UCMR 4 action. Sections III A–C summarize key aspects of this final rule and the associated notable and recurring comments received in response to the proposed rule. EPA has compiled all public comments and EPA's responses in the ''Response to Comments Document for the Unregulated Contaminant Monitoring Rule (UCMR 4),'' (USEPA, 2016b), which can be found in the electronic docket listed in the **ADDRESSES** section of this notice.

EXHIBIT 2—NOTABLE CHANGES TO UCMR 4 BETWEEN PROPOSED AND FINAL RULE

CFR rule section		Description of change	Corresponding preamble section
No.	Title/description		
§ 141.40(a)(3)	Related specifications for the analytes to be monitored.	Revises Table 1 to include EPA Method 546 Enzyme-linked Immunosorbent Assay (ELISA) and removes source water as a sample location for cyanotoxins.	III.A. & III.B.
§ 141.40(a)(3) and § 141.40(a)(4).	Sampling design requirements—frequency.	Revises Table 1 to update the monitoring dates to January 2018 through December 2020 for the 20 additional contaminants, and also updates Table 2 to reflect the traditional sample collection timeframe (consecutive 12-month period) for the 20 additional contaminants. Additionally, updates Table 2 to reflect the traditional sample collection frequency (four consecutive quarters for SW and ground water under the direct influence of surface water (GWUDI) water systems, and twice, 5–7 months apart, for GW systems) for those 20 contaminants.	III.B. & I.E.
§ 141.40(a)(3) and § 141.40(a)(4).	Phased sample analysis for microcystins.	Removes source water samples from the phased sample analysis for microcystins.	III.B.2
§ 141.40(a)(3)	Applicability of HAA monitoring requirements.	Removes UCMR 4 HAA requirement for water systems that are not subject to HAA5 monitoring under the Disinfectants and Disinfection Byproduct Rules (D/DBPRs).	III.B.3

EXHIBIT 2—NOTABLE CHANGES TO UCMR 4 BETWEEN PROPOSED AND FINAL RULE—Continued

CFR rule section		Description of change	Corresponding preamble section
No.	Title/description		
§ 141.35(e)	Reporting requirements—Data elements.	Updates and clarifies data elements to address disinfecting and treatment types, and adds data elements to account for the metadata collected for the cyanotoxins.	III.C.

A. What contaminants are in UCMR 4?

1. This Rule

EPA is maintaining the proposed list of unregulated contaminants and the methods associated with analyzing those contaminants, with the exception of updating the ELISA method for ''total microcystins'' (see Exhibit 3). Further information on the prioritization process, as well as contaminant-specific information (source, use, production, release, persistence, mobility, health effects and occurrence) that EPA used to select the contaminants is contained in ''UCMR 4 Contaminants—Information Compendium for Final Rule'' (USEPA, 2016c). This Information Compendium can be found in the electronic docket listed in the **ADDRESSES** section of this notice.

2. Summary of Major Comments and EPA Responses

Commenters who expressed an opinion about the proposed UCMR 4 analytes were generally supportive. Some commenters suggested alternative ways to collect the HAA information. Suggestions included collecting results for all nine HAAs individually; only collecting results for HAA9; or doing targeted research studies of HAAs independent of UCMR. EPA has concluded that monitoring for the three HAA groups (HAA5, HAA6Br and HAA9) will provide the information of interest on the relative occurrence between regulated and unregulated HAAs as well as brominated versus chlorinated HAAs. Though the targeted research proposed by some commenters is beyond the scope of today's action, EPA will take the recommendation under advisement and consider how such research may complement the UCMR data.

Some commenters supported EPA's proposal to not include *Legionella pneumophila* and *Mycobacterium avium* Complex (MAC) in UCMR 4; others encouraged EPA to add Legionella, and in some cases MAC. The latter commenters identified several candidate methods, suggested that Legionella is not exclusively a premise plumbing issue, and pointed to concerns with health effects. While EPA recognizes the Legionella concern, the Agency has concluded that this national survey will not be able to adequately address many of the variables, complexities and uncertainties discussed by commenters. More research is needed to identify the optimal sampling location, frequency of sampling events and proper sampling population, and address biofilms and associated indicators. Further research is also needed on the dose-response ecology of Legionella in the distribution system to identify the correct method needed to monitor at a level that would be instructive and cost effective.

Multiple commenters expressed concerns with the ELISA methodology and some of the specific elements of the ELISA Standard Operating Procedure (SOP) (Ohio EPA, 2015) identified in the proposal for cyanotoxins. In 2016, EPA finalized EPA Method 546: ''Determination of Total Microcystins and Nodularins in Drinking Water and Ambient Water by Adda Enzyme-Linked Immunosorbent Assay'' as the prescribed method for total microcystins (USEPA, 2016e). The fundamentals of Method 546 are quite similar to those of the Ohio EPA methodology, and Method 546 addresses concerns expressed about minimum reporting levels (MRLs), holding times and quality control.

EXHIBIT 3—30 UCMR 4 ANALYTES

List 1 Analytes	
One Cyanotoxin Group using EPA Method 546 (Adda ELISA): [1]	
''total microcystins''.	
Seven Cyanotoxins using EPA Method 544 (SPE LC–MS/MS): [2]	
microcystin-LA.	microcystin-RR.
microcystin-LF.	microcystin-YR.
microcystin-LR.	nodularin.
microcystin-LY.	
Two Cyanotoxins using EPA Method 545 (LC/ESI–MS/MS): [3]	
anatoxin-a.	cylindrospermopsin.
Two Metals using EPA Method 200.8 (ICP–MS) [4] **or alternate SM** [5] **or ASTM:** [6]	
germanium.	manganese.
Nine Pesticides using EPA Method 525.3 (SPE GC/MS): [7]	
alpha-hexachlorocyclohexane.	profenofos.
chlorpyrifos.	tebuconazole.
dimethipin.	total permethrin (cis- & trans-).
ethoprop.	tribufos.

EXHIBIT 3—30 UCMR 4 ANALYTES—Continued

oxyfluorfen.	
Three Brominated HAA Groups using EPA Method 552.3 (GC/ECD) or 557 (IC/ESI–MS/MS): [8 9 10]	
HAA5. HAA6Br.	HAA9.
Three Alcohols using EPA Method 541 (GC/MS): [11]	
1-butanol. 2-methoxyethanol.	2-propen-1-ol.
Three Semivolatile Organic Chemicals (SVOCs) using EPA Method 530 (GC/MS): [12]	
butylated hydroxyanisole. o-toluidine.	quinolone.

[1] EPA Method 546 Adda Enzyme-Linked Immunosorbent Assay (ELISA) (USEPA, 2016e).
[2] EPA Method 544 (Solid phase extraction (SPE) liquid chromatography/tandem mass spectrometry (LC–MS/MS)) (USEPA, 2015b). This method will only be used if analyses by ELISA (for ''total microcystins'') yield results above reporting limits.
[3] EPA Method 545 (Liquid chromatography/electrospray ionization/tandem mass spectrometry (LC/ESI–MS/MS)) (USEPA, 2015c).
[4] EPA Method 200.8 (Inductively coupled plasma mass spectrometry (ICP–MS)) (USEPA, 1994).
[5] Standard Methods (SM) 3125 (SM, 2005a) or SM 3125–09 (SM Online, 2009).
[6] ASTM International (ASTM) D5673–10 (ASTM, 2010).
[7] EPA Method 525.3 (SPE Gas chromatography/mass spectrometry (GC/MS)) (USEPA, 2012b).
[8] EPA Method 552.3 (Gas chromatography/electron capture detection (GC/ECD)) (USEPA, 2003) and EPA Method 557 (Ion chromatography-electrospray ionization-tandem mass spectrometry (IC–ESI–MS/MS)) (USEPA, 2009a). HAA5 includes: Dibromoacetic acid, dichloroacetic acid, monobromoacetic acid, monochloroacetic acid, trichloroacetic acid. HAA6Br includes: Bromochloroacetic acid, bromodichloroacetic acid, dibromoacetic acid, chlorodibromoacetic acid, monobromoacetic acid, tribromoacetic acid. HAA9 includes: Bromochloroacetic acid, bromodichloroacetic acid, chlorodibromoacetic acid, dibromoacetic acid, dichloroacetic acid, monobromoacetic acid, monochloroacetic acid, tribromoacetic acid, trichloroacetic acid.
[9] Regulated HAAs (HAA5) are included in the monitoring program to gain a better understanding of co-occurrence with currently unregulated disinfection byproducts.
[10] Brominated HAA monitoring also includes sampling for indicators total organic carbon (TOC) and bromide using methods approved for compliance monitoring. TOC methods include: SM 5310B, SM 5310C, SM 5310D (SM, 2005b, 2005c, 2005d), or SM 5310B–00, SM 5310C–00, SM 5310D–00 (SM Online, 2000a, 2000b, 2000c), EPA Method 415.3 (Rev. 1.1 or 1.2) (USEPA, 2005, 2009b). Bromide methods include: EPA Methods 300.0 (Rev. 2.1), 300.1 (Rev. 1.0), 317.0 (Rev. 2.0), 326.0 (Rev. 1.0) (USEPA, 1993, 1997, 2001b, 2002) or ASTM D 6581–12 (ASTM, 2012).
[11] EPA Method 541 (GC/MS) (USEPA, 2015d).
[12] EPA Method 530 (GC/MS) (USEPA, 2015e).

B. What are the UCMR 4 sampling design and timeline of activities?

EPA is maintaining the 2018 to 2020 monitoring timeframe identified in the proposal. Preparations prior to 2018 will include coordinating laboratory approval, selecting representative small systems (USEPA, 2001a), developing SMPs and establishing monitoring schedules. Exhibit 4 illustrates the major activities that will take place in preparation for and during the implementation of UCMR 4.

Exhibit 4: Timeline of UCMR 4 Activities

2017	2018	2019	2020	2021
After final rule publication: EPA/state primacy authorities (1) develop SMPs (including the nationally representative sample); (2) inform PWSs/ establish monitoring plans; and (3) continuation of laboratory approval	← **Assessment Monitoring** → List 1 Contaminants *All large systems serving more than 10,000 people;* *800 small systems serving 10,000 or fewer people for cyanotoxins;* *800 small systems serving 10,000 or fewer people for the 20 additional contaminants.* Reporting and analysis of data			Complete reporting and analysis of data

To minimize the impact of the rule on small systems (those serving 10,000 or fewer people), EPA pays for the sample kit preparation, sample shipping fees and analysis costs for these systems. In addition, no small system will be required to monitor for both cyanotoxins and the 20 additional UCMR contaminants. Consistent with prior UCMRs, large systems (those serving more than 10,000 people) pay for all costs associated with their monitoring. A summary of the estimated number of systems subject to monitoring is shown in Exhibit 5.

EXHIBIT 5—SYSTEMS TO PARTICIPATE IN UCMR 4 MONITORING

System size (number of people served)	National sample: Assessment monitoring design		Total number of systems per size category
	10 List 1 cyanotoxins	20 Additional list 1 contaminants [3]	
Small Systems [1] (25–10,000).	800 randomly selected SW or GWUDI systems	800 randomly selected SW, GWUDI and GW systems.	1,600
Large Systems [2] (10,001 and over).	All SW or GWUDI systems (2,725)	All SW, GWUDI and GW systems (4,292)	4,292
Total	3,525	5,092	5,892

[1] Total for small systems is additive because these systems will only be selected for one component of UCMR 4 sampling (10 cyanotoxins or 20 additional contaminants). EPA will pay for all analytical costs associated with monitoring at small systems.

[2] Large system counts are approximate. The number of large systems is not additive. All SW and GWUDI systems will monitor for cyanotoxins; those same systems will also monitor for the 20 additional List 1 contaminants, as will the large GW systems.

[3] Water systems that are not subject to HAA5 monitoring under the D/DBPRs (§ 141.Subparts L and V) are not required to monitor for the UCMR 4 HAAs or associated indicators (TOC and bromide).

1. Sampling Frequency, Timing

a. This Rule

Today's rule maintains the proposed increased sampling frequency and narrower monitoring timeframe for total microcystins and the nine cyanotoxins. Sampling will take place twice a month for four consecutive months (total of eight sampling events) for SW and GWUDI systems. These water systems will collect samples during the monitoring timeframe of March through November (excluding December, January and February). GW systems are excluded from cyanotoxin monitoring.

Monitoring for the 20 additional UCMR 4 contaminants will be based on the traditional UCMR sampling frequency and timeframe. For SW and GWUDI systems, sampling will take place for four consecutive quarters over the course of 12 months (total of four sampling events). Sampling events will occur three months apart. For example, if the first sample is taken in January, the second will then occur anytime in April, the third will occur anytime in July and the fourth will occur anytime in October. For GW systems, sampling will take place twice over the course of 12 months (total of two sampling events). Sampling events will occur five to seven months apart. For example, if the first sample is taken in April, the second sample will then occur anytime in September, October or November.

EPA, in conjunction with the states, will initially determine schedules (year and months of monitoring) for large water systems. These PWSs will then have an opportunity to modify their schedule for planning purposes or other reasons (*e.g.,* to conduct monitoring during the months the system or the state believes are most vulnerable, spread costs over multiple years, address a situation where the sampling location will be closed during the scheduled month of monitoring, etc.). PWSs are not permitted to reschedule monitoring specifically to avoid sample collection during a suspected vulnerable period for the cyanotoxins. EPA will schedule and coordinate small system monitoring by working closely with partnering states. SMPs provide an opportunity for states to review and revise the initial sampling schedules that EPA proposes.

b. Summary of Major Comments and EPA Responses

Commenters generally supported the narrower timeframe for cyanotoxin sampling but disfavored the narrower March through November timeframe for the 20 additional contaminants. For the latter group of contaminants, EPA received multiple comments that recommended using the traditional sampling frequency and timing of previous UCMR cycles. Commenters cited the potential for cost savings by allowing the UCMR 4 HAAs to be sampled on the same schedule as compliance monitoring, and they also suggested that traditional 12-month monitoring would be appropriate for assessing lifetime exposure. EPA agrees with these points and today's rule includes the traditional monitoring schedule for the 20 additional contaminants. EPA's response is detailed more fully in the ''Response to Comments Document for the Unregulated Contaminant Monitoring Rule (UCMR 4),'' (USEPA, 2016b), which can be found in the electronic docket listed in the **ADDRESSES** section of this notice.

Several commenters recommended that the Agency reduce the number of sample events for GW systems to one instead of the traditional two. Commenters provided an assessment of data on UCMR 3 contaminants in GW systems, and suggested that there is no significant statistical difference between the results for the two sample events for many of the contaminants. EPA acknowledges that based on the UCMR 3 data, the correlation between sample event 1 and sample event 2 for GW systems can be high, and the distributions of measured values can be very similar. However, when making regulatory determinations, EPA evaluates the number of systems (and populations) with means or single measured values above health levels of concern, as both values provide important information on the occurrence of UCMR contaminants in PWSs. The approach suggested by commenters would yield less accurate data for several reasons. First, the analysis provided by the commenters shows that the counts or percentage of systems above a concentration of interest can vary between sample events, and that there are individual cases where the contaminant is not detected in one sample event but occurs at significant levels in the second event. In addition, the analysis by commenters did not find a strong correlation between the two GW sampling events for chlorate, a disinfectant byproduct, likely due to the temporal variability in disinfection practices. This strongly suggests that having a single sample

event may not be appropriate for temporally variable contaminants like pesticides and other anthropogenic contaminants. EPA did consider making exceptions for certain classes of contaminants (*e.g.,* those contaminants that are not as temporally variable), however, the UCMR design must address all types of contaminants on a national scale, often without advance knowledge about the degree to which the contaminant occurrence may vary over time. Making exceptions would increase the complexity of the sample design. In addition, statistical means based on two measurements have considerably less error than a single measurement per system and provide a more robust dataset for future regulatory decisions. EPA also notes that the analysis provided by commenters only addressed a limited set of contaminants (*i.e.,* those from UCMR 3) and did not examine the results from other UCMR cycles; if EPA were to consider reducing sampling frequency as suggested, the Agency would need more robust information. EPA will re-evaluate this issue in future UCMR cycles if new information becomes available.

Finally, it is worth noting that the Agency does allow systems the opportunity to reduce monitoring by using approved GW representative entry points and, in the case of water systems that purchase water from the same source, by using representative connections.

2. Phased Sample Analysis for Microcystins

a. This Rule

Today's rule utilizes a phased sample analysis approach for the microcystins to reduce analytical costs (*i.e.,* PWSs will collect all required samples for each sampling event but not all samples may need to be analyzed). However, that phased approach has been simplified relative to the proposed approach and will begin with sample collection at the entry point to the distribution system (EPTDS). Three samples will be collected at the EPTDS for cyanotoxins. One sample will be collected for EPA Method 546 (Adda ELISA), another for potential analysis by EPA Method 544, and another for analysis by EPA Method 545. Adda ELISA is a widely used screening assay that allows for the aggregate detection of numerous microcystin congeners; it does not allow for measurement of the individual congeners (USEPA, 2015f; Fischer et al., 2001; McElhiney and Lawton, 2005; Zeck et al., 2001). If the EPTDS ELISA result is less than 0.3 micrograms per liter (µg/L) (*i.e.,* the reporting limit for total microcystins), then the sample collected for Method 544 will not be analyzed for that sample event and only the Adda ELISA result will be reported to EPA. If the ELISA result is greater than or equal to 0.3 µg/L, the result will be reported to EPA and the EPA Method 544 sample will then be analyzed to identify and quantify nodularin and the six specific microcystin congeners identified in Exhibit 3. Cylindrospermopsin and anatoxin-a will only be monitored at the EPTDS, with analysis by EPA Method 545.

In lieu of the proposed source-water ELISA monitoring, this final rule requires PWSs to answer four simple ''metadata'' questions (identifying the appropriate responses from the options provided) to help EPA understand the source water quality at the time their EPTDS samples are collected. These questions are identified in the Data Elements section III.C.1.

b. Summary of Major Comments and EPA Responses

EPA received multiple comments on the proposed phased approach to microcystins and the utility of measuring pH and temperature in the source water. Some commenters recommended omitting source water sampling for microcystins, suggesting that a correlation cannot be drawn between source water and finished water using the proposed approach. Commenters also suggested the following: Targeted studies should collect treatment plant metadata to support future analyses; the phased approach could potentially miss an increase in cyanotoxins released as a result of treatment (*e.g.,* cell rupture during treatment); the inclusion of both source water data and drinking water data in NCOD and other outreach materials would confuse consumers; and more appropriate candidate indicators could be considered. EPA has considered these concerns and is not requiring source water microcystin monitoring in the final rule, nor is the Agency requiring pH and temperature data collection. UCMR 4 focuses instead on finished water cyanotoxin data collection and a more qualitative characterization of source water. EPA estimates that the final rule approach, relying on the collection of source water metadata in lieu of source water sampling, reduces $1.8 million in costs from the proposed regulation over the five-year period of the UCMR 4. The collection of source water metadata can easily be incorporated into the data reporting system and will complement the quantitative analytical drinking water data used to support future regulatory determinations.

EPA also received comments reflecting confusion about the interpretation of results from the Adda ELISA microcystin method and Method 544 (microcystins by LC–MS/MS). EPA notes that the two methods provide different measures of microcystin occurrence and risk, and one result cannot practically be used to confirm the other. The Adda ELISA allows for an aggregate quantification of a wide spectrum of microcystin congeners based on the ability of the antibodies used in the assay to recognize microcystins, while Method 544 focuses on quantifying six specific microcystin congeners. The microcystins addressed in Method 544 may or may not be the dominant congeners in particular source waters.

3. Applicability of HAA Monitoring Requirements

a. This Rule

If a water system is not subject to HAA5 monitoring under the D/DBPRs (see § 141.622 for D/DBPR monitoring requirements), the water systems is not required to collect and analyze UCMR 4 HAA samples.

b. Summary of Major Comments and EPA Responses

One commenter suggested that EPA remove the UCMR 4 requirement for water systems to monitor for HAAs if the system is not subject to HAA5 monitoring under the D/DBPRs. The logic is that non-disinfecting GW systems would not be expected to have measureable HAAs as DBPs. EPA agrees with the comment and has removed the requirement. This change reduces the UCMR 4 cost by $826,000 from the proposed rule's cost over the 5-year UCMR 4 period.

4. Representative Sampling

a. This Rule

Consistent with previous UCMRs and as described in § 141.35(c)(3), UCMR 4 maintains the option for large GW systems that have multiple EPTDSs to sample, with prior approval, at representative sampling locations rather than at each EPTDS. Representative sampling plans approved under prior UCMRs will be recognized as valid for UCMR 4. Systems must submit a copy of documentation from their state or EPA representing the prior approval of their alternative sampling plan. Any *new* GW representative monitoring plans must be submitted to EPA for review (by the state or EPA) within 120 days from publication of this final rule.

Once approved, these representative EPTDS locations, along with previously approved EPTDS locations from prior UCMRs, must be loaded into the Safe Drinking Water Accession and Review System (SDWARS) by the water system by December 31, 2017.

Consistent with previous UCMRs and as described in § 141.40, Table 1, systems that purchase water with multiple connections from the same wholesaler may select one representative connection from that wholesaler. This EPTDS sampling location must be representative of the highest annual volume connections. If the connection selected as the representative EPTDS is not available for sampling, an alternate highest volume representative connection must be sampled. Water provided by multiple wholesalers will be considered different sources and will each need a representative connection.

b. Summary of Major Comments and EPA Responses

EPA received multiple comments about representative wholesale connections from consecutive systems. Commenters were concerned that this approach to reduce monitoring would be eliminated in UCMR 4. The proposed rule preamble explicitly highlighted the flexibility for *representative ground water sampling,* but did not highlight the option for *representative wholesale connections* (*i.e.,* for consecutive systems). In this preamble, EPA is affirming the opportunity for water systems that purchase water (with multiple connections from the same wholesaler) to reduce monitoring; this option will continue in UCMR 4. EPA will likewise address this in future meetings, webinars and outreach materials.

5. Sampling Locations

a. This Rule

Sample collection for the UCMR 4 contaminants will take place at the EPTDS for all contaminant groups except for the HAAs, which will take place in the distribution system. Sampling for the HAA indicators, TOC and bromide, will take place at a single source water influent for each treatment plant.

If the system's treatment plant/water source is subject to the D/DBPR's HAA5 monitoring requirements under § 141.622, the water system will collect samples for the UCMR 4 HAAs at the D/DBPR sampling location(s). UCMR 4 HAA samples and D/DBPR HAA5 compliance monitoring samples may be collected by the PWS at the same time. However, EPA notes that PWSs are required to arrange for UCMR 4 HAA samples to be analyzed by a UCMR 4 approved laboratory using EPA Method 552.3 or 557 (both of which are compliance methods also approved for analysis of D/DBPR samples).

For those systems subject to UCMR 4 HAA monitoring, sampling for the HAA indicators (TOC and bromide) will take place at the source water influent for each treatment plant (concurrent with UCMR 4 HAA sampling in the distribution system). This indicator-monitoring requirement does not pertain to consecutive systems (*i.e.,* those purchasing water from other systems). For purposes of TOC and bromide sampling, EPA defines source water influent under UCMR as untreated water entering the water treatment plant (*i.e.,* at a location prior to any treatment).

SW and GWUDI systems subject to TOC monitoring under the D/DBPRs will use their TOC source water sampling site(s) defined at § 141.132 for UCMR 4 TOC and bromide samples. If a SW or GWUDI system is not subject to the D/DBPR TOC monitoring, it will use its Long Term 2 Enhance Surface Water Treatment Rule (LT2) source water sampling site(s) (§ 141.703) to collect UCMR 4 samples for TOC and bromide. GW systems that are subject to the D/DBPRs will take TOC and bromide samples at their influents entering their treatment train.

b. Summary of Major Comments and EPA Responses

With the exception of microcystin monitoring, commenters generally agreed with the sampling location approach described in the proposal. Changes made to address the microcystin comments are addressed in section III.B.2.

C. What are the reporting requirements for UCMR 4?

1. Data Elements

a. This Rule

Today's final rule maintains the 26 data elements described in the proposed rule and updates some of the definitions for clarity and consistency in the reporting requirements. Additionally, EPA has included four data elements to address collection of the source water metadata discussed in section III.B.2.

The four new metadata elements are all yes or no questions, with a corresponding drop down menu of options if yes is selected:

(1) Bloom Occurrence—preceding the finished water sample collection, did you observe an algal bloom in your source waters near the intake?

(2) Cyanotoxin Occurrence—preceding the finished water sample collection, were cyanotoxins ever detected in your source waters, near the intake and prior to any treatment (based on sampling by you or another party)?

(3) Indicator of Possible Bloom—Treatment—preceding the finished water sample collection, did you notice any changes in your treatment system operation and/or treated water quality that may indicate a bloom in the source water?

(4) Indicator of Possible Bloom—Source Water Quality Parameters—preceding the finished water sample collection, did you observe any notable changes in source water quality parameters (if measured)?

Please see Table 1 of § 141.35(e) for the complete list of data elements, definitions and drop down options that will be provided in the data reporting system.

b. Summary of Major Comments and EPA Responses

EPA received many comments on the proposed data elements, particularly regarding the complexity and utility of collecting the new quality control (QC) parameters; concerns with how the data will be gathered and processed; and questions about how the database will function.

EPA will collect all 30 data elements in SDWARS 4, an updated version of the data reporting system used in previous UCMR actions. More than half of these data elements (*e.g.,* inventory and analytical results) were used in prior UCMR cycles and were included in the previous SDWARS system. The new QC data elements are already generated by the laboratory and do not constitute new analytical requirements.

SDWARS 4 will include improvements in the user interface and new QC checks will be built into the system to review the data in real-time. Consistent with prior UCMR cycles, states and EPA will have access to data once posted by the laboratory and reviewed by the PWS (or 60 days after the laboratory posting, whichever comes first). EPA will offer two database training sessions in 2017 to help users become familiar with the new system. One training session will be for the water systems and the other training session will be for the laboratories. A future **Federal Register** announcement will provide more details on these training sessions.

Other comments regarding the data elements included the following specific points: a request for a simpler

classification of treatment ''bins''; a recommendation that the final rule collect the primary and secondary disinfectant practice in place at the time of HAA sampling; an observation that the UCMR 4 data are more informative when there is information describing the associated treatment; a recommendation that EPA simplify the data elements and data definitions; and a recommendation that the rule not collect metadata about oxidant addition, oxidant order of application, oxidant dose and oxidant contact time.

The final rule simplifies and clarifies the treatment options available for the PWS to select as metadata; includes the collection of all disinfectant practices and information describing the treatment in place; simplifies the data elements and data definitions; and does not include the collection of metadata about oxidant order of application, dose or contact time. EPA's response is detailed more fully in the ''Response to Comments Document for the Unregulated Contaminant Monitoring Rule (UCMR 4),'' (USEPA, 2016b), which can be found in the electronic docket listed in the **ADDRESSES** section of this notice.

IV. How are laboratories approved for UCMR 4 monitoring?

Consistent with the proposal, and with past practice, the final rule requires EPA approval of all laboratories conducting analyses for UCMR 4. EPA will follow the traditional Agency approach, outlined in the proposal, to approving UCMR laboratories, which requires laboratories seeking approval to: (1) Provide EPA with data that demonstrates a successful completion of an initial demonstration of capability (IDC) as outlined in each method; (2) verify successful analytical performance at or below the MRLs as specified in this action; (3) provide information about laboratory operating procedures; and (4) successfully participate in an EPA proficiency testing (PT) program for the analytes of interest. Audits of laboratories may be conducted by EPA prior to and/or following approval. The ''UCMR 4 Laboratory Approval Requirements and Information Document'' (USEPA, 2016d) provides guidance on the EPA laboratory approval program and the specific method acceptance criteria.

EPA may supply analytical reference standards for select analytes to participating/approved laboratories when reliable standards are not readily available through commercial sources.

This final rule's structure for the laboratory approval program is the same as that proposed for UCMR 4 and employed in previous UCMRs, and provides an assessment of the laboratories' ability to perform analyses using the methods listed in § 141.40(a)(3), Table 1. The UCMR 4 laboratory approval process is designed to assess whether laboratories possess the required equipment and analyst skills and can meet the laboratory-performance and data-reporting criteria described in this action. Laboratory participation in the UCMR laboratory approval program is voluntary. However, as in previous UCMRs and as proposed for UCMR 4, EPA will require PWSs to exclusively use laboratories that have been approved under the program to analyze UCMR 4 samples. EPA expects to post a list of approved UCMR 4 laboratories to *https://www.epa.gov/dwucmr.* Laboratories are encouraged to apply for UCMR 4 approval as early as possible, as EPA anticipates that large PWSs scheduled for monitoring in the first year will be making arrangements for sample analyses soon after the final rule is published. The steps and requirements for the laboratory approval process are listed in sections A through F below.

A. Request To Participate

Laboratories interested in the UCMR 4 laboratory approval program can request registration materials by emailing EPA at *UCMR_Sampling_Coordinator@epa.gov* to request registration materials.

B. Registration

Laboratory applicants will provide registration information that includes: Laboratory name, mailing address, shipping address, contact name, phone number, email address and a list of the UCMR 4 methods for which the laboratory is seeking approval. This registration step provides EPA with the necessary contact information, and ensures that each laboratory receives a customized application package. Laboratories must complete and submit the necessary registration information by February 21, 2017.

C. Application Package

Laboratories wishing to participate will complete and return a customized application package that includes the following: IDC data, including precision, accuracy and results of MRL studies; information regarding analytical equipment and other materials; proof of current drinking water laboratory certification (for select compliance monitoring methods); and example chromatograms for each method under review. Laboratories must complete and submit the necessary application materials by April 19, 2017.

As a condition of receiving and maintaining approval, the laboratory is expected to confirm that it will post UCMR 4 monitoring results and quality control data that meet method criteria (on behalf of its PWS clients) to EPA's UCMR electronic data reporting system, SDWARS.

D. EPA's Review of Application Packages

EPA will review the application packages and, if necessary, request follow-up information. Laboratories that successfully complete the application process become eligible to participate in the UCMR 4 PT program.

E. Proficiency Testing

A PT sample is a synthetic sample containing a concentration of an analyte or mixture of analytes that is known to EPA, but unknown to the laboratory. To be approved, a laboratory is expected to meet specific acceptance criteria for the analysis of a UCMR 4 PT sample(s) for each analyte in each method, for which the laboratory is seeking approval. EPA intends to offer at least two opportunities for a laboratory to successfully analyze UCMR 4 PT samples after publication of the final rule. A laboratory is expected to pass one of the PT studies for each analytical method for which it is requesting approval, and will not be required to pass a PT study for a method it has already passed in a previous UCMR 4 PT study. EPA does not expect to conduct additional PT studies after the start of system monitoring; however, laboratory audits will likely be ongoing throughout UCMR 4 implementation. Initial laboratory approval is expected to be contingent on successful completion of a PT study. Continued laboratory approval is contingent on successful completion of the audit process and satisfactorily meeting all the other stated conditions.

F. Written EPA Approval

For laboratories that have already successfully completed the preceding steps (A through E), EPA will have sent the applicant a letter listing the methods for which approval is pending (*i.e.,* pending promulgation of this rule). Because no changes have been made to the final rule that impact the laboratory approval program, laboratories that received pending approval letters will be granted approval without further action on their part. Additional approval actions (*i.e.,* for those laboratories that apply and have not already proceeded to the point of being in ''approval pending'' status) will be based on laboratory completion of Steps

A through E. In both cases, EPA will document its final decision in writing.

EPA did not receive any adverse comments on the laboratory approval process or criteria that it proposed.

V. What is the past and future stakeholder involvement in the regulation process?

A. What is the states' role in the UCMR program?

UCMR is a direct implementation rule (*i.e.,* EPA has primary responsibility for its implementation) and state participation is voluntary. Under previous UCMRs, specific activities that individual states, tribes and territories agreed to carry out or assist with were identified and established exclusively through PAs. Through PAs, states, tribes and territories can help EPA implement the UCMR program and help ensure that the UCMR data are of the highest quality possible to best support Agency decision making. Under UCMR 4, EPA will continue to use the PA process to determine and document the following: the process for review and revision of the SMPs; replacing and updating system information; review and approval of proposed GW representative monitoring plans; notification and instructions for systems; and compliance assistance. EPA recognizes that states/primacy agencies often have the best information about PWSs in their state and encourages states to partner.

SMPs include tabular listings of the systems that EPA selected and the proposed schedule for their monitoring. Initial SMPs also typically include instructions to states for revising and/or correcting system information in the SMPs, including modifying the sampling schedules for small systems. EPA will incorporate revisions from states, resolve any outstanding questions and return the final SMPs to each state.

B. What stakeholder meetings have been held in preparation for UCMR 4?

EPA incorporates stakeholder involvement into each UCMR cycle. Specific to the development of UCMR 4, EPA held three public stakeholder meetings and is announcing a fourth in today's preamble (see section V.C). EPA held a meeting focused on drinking water methods for CCL contaminants on May 15, 2013, in Cincinnati, Ohio. Participants included representatives of state agencies, laboratories, PWSs, environmental organizations and drinking water associations. Meeting topics included an overview of the regulatory process (CCL, UCMR and Regulatory Determination) and drinking water methods under development, primarily for CCL contaminants (see USEPA, 2013 for presentation materials). EPA held a second stakeholder meeting on June 25, 2014, in Washington, DC. Attendees representing state agencies, tribes, laboratories, PWSs, environmental organizations and drinking water associations participated in the meeting via webinar and in person. Meeting topics included a status update on UCMR 3; UCMR 4 potential sampling design changes relative to UCMR 3; UCMR 4 candidate analytes and rationale; and the laboratory approval process (see USEPA, 2014 for meeting materials). The third stakeholder meeting was held on January 13, 2016, via a webinar, during the public comment period for the proposed rule. Attendees representing state agencies, laboratories, PWSs, environmental organizations and drinking water associations participated. Meeting topics included the proposed UCMR 4 monitoring requirements, analyte selection and rationale, analytical methods, the laboratory approval process and GW representative monitoring plans (see USEPA, 2016f for meeting materials).

C. How do I participate in the upcoming stakeholder meeting?

EPA will hold the fourth UCMR 4 public stakeholder meeting in Washington, DC, on April 12, 2017. Attendees can participate in person or via webinar. Topics will include the final UCMR 4 requirements for monitoring, sampling and reporting, analytical methods, the laboratory approval process, GW representative monitoring plans and consecutive system monitoring plans.

1. Meeting Participation

Those who wish to participate in the public meeting, whether in person or via webinar, need to register in advance no later than 5:00 p.m., eastern time on April 7, 2017, by going to *https://www.eventbrite.com/e/ucmr-4-public-stakeholder-meeting-registration-28264984329.* To ensure adequate time for questions, individuals or organizations with specific questions should identify any upfront questions when they register. Additional questions from attendees will be taken during the meeting and answered as time permits. The number of webinar connections available for the meeting is limited and will be available on a first-come, first-served basis. Further details about registration and participation can be found on EPA's Unregulated Contaminant Monitoring Program ''Meetings and Materials'' Web site at *https://www.epa.gov/dwucmr.*

2. Meeting Materials

Materials are expected to be sent by email to all registered attendees prior to the meeting. EPA will post the materials on the Agency's Web site for persons who are unable to participate.

D. How did EPA consider Children's Environmental Health?

Executive Order 13045 does not apply to UCMR 4, however, EPA's Policy on Evaluating Health Risks to Children is applicable (See VII.G. Executive Order 13045). By monitoring for unregulated contaminants that may pose health risks via drinking water, UCMR furthers the protection of public health for all citizens, including children. EPA considered children's health risks during the development of UCMR 4. This includes considering public comments about candidate contaminant priorities.

The objective of UCMR 4 is to collect nationally representative drinking water data on a set of unregulated contaminants. EPA generally collects occurrence data for contaminants at the lowest levels that are feasible for the national network of approved drinking water laboratories to quantify accurately. By setting reporting levels as low as is feasible, the Agency positions itself to better address contaminant risk information in the future, including that associated with unique risks to children.

E. How did EPA address Environmental Justice?

The EPA has concluded that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard (see VII.J. Executive Order 12898). This regulatory action provides EPA and other interested parties with scientifically valid data on the national occurrence of selected contaminants in drinking water. By seeking to identify unregulated contaminants that may pose health risks via drinking water from all PWSs, UCMR furthers the protection of public health for all citizens. EPA recognizes that unregulated contaminants in drinking water are of interest to all populations and structured the rulemaking process and implementation of the UCMR 4 rule to allow for meaningful involvement and transparency. EPA organized public meetings and webinars to share information regarding the development of UCMR 4; coordinated with tribal governments; and convened a

workgroup that included representatives from several states.

EPA will continue to collect U.S. Postal Service Zip Codes for each PWS's service area, as collected under UCMR 3, to support assessment in future regulatory evaluations of whether or not minority, low-income and/or indigenous-population communities are uniquely impacted by particular drinking water contaminants.

VI. What documents are being incorporated by reference?

The following methods are incorporated by reference into this section for UCMR 4 monitoring. All approved material is available for inspection electronically at *https://www.regulations.gov* (Docket ID No. EPA–HQ–OW–2015–0218), or from the sources listed for each method. EPA has worked to make these methods and documents reasonably available to interested parties. The EPA and non-EPA methods that support monitoring under this rule are as follows:

A. Methods From the U.S. Environmental Protection Agency

The following methods are from the U.S. Environmental Protection Agency, Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004.

1. Method 200.8 ''Determination of Trace Elements in Waters and Wastes by Inductively Coupled Plasma—Mass Spectrometry,'' Revision 5.4, EMMC Version, 1994. Available on the Internet at *https://www.nemi.gov.* This is an EPA method for the analysis of elements in water by ICP–MS and will measure germanium and manganese during UCMR 4.

2. Method 300.0 ''Determination of Inorganic Anions by Ion Chromatography Samples,'' Revision 2.1, August 1993. Available on the Internet at *https://www.nemi.gov.* This is an EPA method for the analysis of inorganic anions in water samples using ion chromatography (IC) with conductivity detection. It will be used for the measurement of bromide, an indicator for the HAAs.

3. Method 300.1 ''Determination of Inorganic Anions in Drinking Water by Ion Chromatography,'' Revision 1.0, 1997. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.* This is an EPA method for the analysis of inorganic anions in water samples using IC with conductivity detection. It will be used for the measurement of TOC, an indicator for the HAAs.

4. Method 317.0 ''Determination of Inorganic Oxyhalide Disinfection By-Products in Drinking Water Using Ion Chromatography with the Addition of a Postcolumn Reagent for Trace Bromate Analysis,'' Revision 2.0, July 2001, EPA 815–B–01–001. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.* This is an EPA method for the analysis of inorganic anions in water samples using IC with conductivity detection. It will be used for the measurement of bromide, an indicator for the HAAs.

5. Method 326.0 ''Determination of Inorganic Oxyhalide Disinfection By-Products in Drinking Water Using Ion Chromatography Incorporating the Addition of a Suppressor Acidified Postcolumn Reagent for Trace Bromate Analysis,'' Revision 1.0, June 2002, EPA 815–R–03–007. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.* This is an EPA method for the analysis of inorganic anions in water samples using IC with conductivity detection. It will be used for the measurement of bromide, an indicator for the HAAs.

6. Method 415.3 ''Determination of Total Organic Carbon and Specific UV Absorbance at 254 nm in Source Water and Drinking Water,'' Revision 1.1, February 2005, EPA/600/R–05/055. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.* This is an EPA method for the analysis of TOC in water samples using a conductivity detector or a nondispersive infrared detector.

7. Method 415.3 ''Determination of Total Organic Carbon and Specific UV Absorbance at 254 nm in Source Water and Drinking Water,'' Revision 1.2, September 2009, EPA/600/R–09/122. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.* This is an EPA method for the analysis of TOC in water samples using a conductivity detector or a nondispersive infrared detector.

8. Method 525.3 ''Determination of Semivolatile Organic Chemicals in Drinking Water by Solid Phase Extraction and Capillary Column Gas Chromatography/Mass Spectrometry (GC/MS),'' Version 1.0, February 2012, EPA/600/R–12/010. Available on the Internet *https://www.epa.gov/water-research/epa-drinking-water-research-methods.* This is an EPA method for the analysis of semivolatile organic chemicals in drinking water using SPE and GC/MS and will measure the nine UCMR 4 pesticides (alpha-hexachlorocyclohexane, chlorpyrifos, dimethipin, ethoprop, oxyfluorfen, profenofos, tebuconazole, total cis- and trans- permethrin and tribufos).

9. Method 530 ''Determination of Select Semivolatile Organic Chemicals in Drinking Water by Solid Phase Extraction and Gas Chromatography/Mass Spectrometry (GC/MS),'' Version 1.0, January 2015, EPA/600/R–14/442. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.* This is an EPA method for the analysis of semivolatile organic chemicals in drinking water using SPE and GC/MS and will measure butylated hydroxyanisole, o-toluidine and quinoline.

10. EPA Method 541: ''Determination of 1-Butanol, 1,4-Dioxane, 2-Methoxyethanol and 2-Propen-1-ol in Drinking Water by Solid Phase Extraction and Gas Chromatography/Mass Spectrometry,'' November 2015, EPA 815–R–15–011. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.* This is an EPA method for the analysis of selected alcohols and 1,4-dioxane in drinking water using SPE and GC/MS and will measure 1-butanol, 2-methoxyethanol and 2-propen-1-ol.

11. Method 544 ''Determination of Microcystins and Nodularin in Drinking Water by Solid Phase Extraction and Liquid Chromatography/Tandem Mass Spectrometry (LC/MS/MS),'' Version 1.0, February 2015, EPA 600–R–14/474. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.* This is an EPA method for the analysis of selected cyanotoxins in drinking water using SPE and LC–MS/MS with electrospray ionization (ESI) and will measure six microcystins (microcystin-LA, microcystin-LF, microcystin-LR, microcystin-LY, microcystin-RR and microcystin-YR) and nodularin.

12. EPA Method 545: ''Determination of Cylindrospermopsin and Anatoxin-a in Drinking Water by Liquid Chromatography Electrospray Ionization Tandem Mass Spectrometry (LC/ESI–MS/MS),'' April 2015, EPA 815–R–15–009. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.* This is an EPA method for the analysis of selected cyanotoxins in drinking water using LC–MS/MS with ESI and will measure cylindrospermopsin and anatoxin-a.

13. EPA Method 546: ''Determination of Total Microcystins and Nodularins in Drinking Water and Ambient Water by Adda Enzyme-Linked Immunosorbent Assay,'' August 2016, EPA–815–B–16–011. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.* This is an EPA method for the analysis of total microcystins and nodularins in drinking water using ELISA.

14. Method 552.3 ''Determination of Haloacetic Acids and Dalapon in Drinking Water by Liquid-Liquid Microextraction, Derivatization, and Gas Chromatography with Electron Capture Detection,'' Revision 1.0, July 2003, EPA 815–B–03–002. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.* This is an EPA method for the analysis of haloacetic acids and dalapon in drinking water using liquid-liquid microextraction, derivatization, and GC with ECD, and will measure the three UCMR 4 HAA groups (HAA5, HAA6Br and HAA9).

15. EPA Method 557: ''Determination of Haloacetic Acids, Bromate, and Dalapon in Drinking Water by Ion Chromatography Electrospray Ionization Tandem Mass Spectrometry (IC–ESI–MS/MS),'' Version 1.0, September 2009, EPA 815–B–09–012. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.* This is an EPA method for the analysis of haloacetic acids, bromate, and dalapon in drinking water using IC–MS/MS with ESI, and will measure the three UCMR 4 HAA groups (HAA5, HAA6Br and HAA9).

B. Methods From American Public Health Association—Standard Methods (SM)

The following methods are from American Public Health Association—Standard Methods (SM), 800 I Street NW., Washington, DC 20001–3710

1. ''Standard Methods for the Examination of Water & Wastewater,'' 21st edition (2005).

a. SM 3125 ''Metals by Inductively Coupled Plasma/Mass Spectrometry.'' This is a Standard Method for the analysis of metals and metalloids in water by ICP–MS and is used for the analysis of germanium and manganese.

b. SM 5310B ''Total Organic Carbon (TOC): High-Temperature Combustion Method.'' This is a Standard Method for the analysis of TOC in water samples using a conductivity detector or a nondispersive infrared detector.

c. SM 5310C ''Total Organic Carbon (TOC): Persulfate-UV or Heated-Persulfate Oxidation Method.'' This is a Standard Method for the analysis of TOC in water samples using conductivity detector or a nondispersive infrared detector.

d. SM 5310D ''Total Organic Carbon (TOC): Wet-Oxidation Method.'' This is a Standard Method for the analysis of TOC in water samples using a conductivity detector or a nondispersive infrared detector.

2. ''Standard Methods Online.,'' approved 2000 (unless noted). Available for purchase on the Internet at *http://www.standardmethods.org.*

a. SM 3125 ''Metals by Inductively Coupled Plasma/Mass Spectrometry'' Editorial revisions, 2011 (SM 3125–09). This is a Standard Method for the analysis of metals and metalloids in water by ICP–MS and is used to measure germanium and manganese.

b. SM 5310B ''Total Organic Carbon: High-Temperature Combustion Method,'' (5310B–00). This is a Standard Method for the analysis of TOC in water samples using a conductivity detector or a nondispersive infrared detector.

c. SM 5310C ''Total Organic Carbon: Persulfate-UV or Heated-Persulfate Oxidation Method,'' (5310C–00). This is a Standard Method for the analysis of TOC in water samples using a conductivity detector or a nondispersive infrared detector.

d. SM 5310D ''Total Organic Carbon: Wet-Oxidation Method,'' (5310D–00). This is a Standard Method for the analysis of TOC in water samples using a conductivity detector or a nondispersive infrared detector.

C. Methods From ASTM International

The following methods are from ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428–2959.

1. ASTM D5673–10 ''Standard Test Method for Elements in Water by Inductively Coupled Plasma-Mass Spectrometry,'' approved August 1, 2010. Available for purchase on the Internet at *http://www.astm.org/Standards/D5673.htm.* This is an ASTM method for the analysis of elements in water by ICP–MS and is used to measure germanium and manganese.

2. ASTM D6581–12 ''Standard Test Methods for Bromate, Bromide, Chlorate, and Chlorite in Drinking Water by Suppressed Ion Chromatography,'' approved March 1, 2012. Available for purchase on the Internet at *http://www.astm.org/Standards/D6581.htm.* This is an ASTM method for the analysis of inorganic anions in water samples using IC with conductivity detection. It will be used for the measurement of bromide, an indicator for the HAAs.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket, ''Documentation of OMB Review Under Executive Order 12866: Revisions to the Unregulated Contaminant Monitoring Regulation (UCMR 4) for Public Water Systems.'' The EPA prepared an analysis of the potential costs associated with this action, and this is also available in the docket, ''Information Collection Request for the Unregulated Contaminant Monitoring Rule (UCMR 4).''

B. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted for approval to OMB under the PRA. The ICR document that the EPA prepared has been assigned EPA ICR number 2192.08. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The ICR requirements are not enforceable until OMB approves them.

The information that EPA will collect under this rule fulfills the statutory requirements of section 1445(a)(2) of the SDWA, as amended in 1996. EPA will collect information that describes the source of the water, location and test results for samples taken from PWSs as described in 40 CFR 141.35(e). The information collected will support Agency decisions as to whether or not to regulate particular contaminants under the SDWA. Reporting is mandatory. The data are not subject to confidentiality protection.

EPA received a number of comments regarding cost and burden of the proposed rule. Those comments recommended the following: Omit source water monitoring for microcystins; omit UCMR 4 HAA monitoring for PWSs that do not conduct HAA compliance monitoring; allow monitoring over a 12-month period for contaminants other than cyanotoxins; and provide more accurate cost estimates. Based on these public comments, the following changes were made to the final rule. EPA's response is detailed more fully in the ''Response to Comments Document for the Unregulated Contaminant Monitoring Rule (UCMR 4),'' (USEPA, 2016b), which can be found in the electronic docket listed in the **ADDRESSES** section of this notice.

1. Removed the proposed source water monitoring requirement for microcystins, temperature and pH.

2. Limited UCMR 4 HAA monitoring to only those PWSs that are subject to the D/DBPRs.

3. Restored the traditional 12-month monitoring schedule for the 20 additional (non-cyanotoxin) contaminants. This will support PWSs

that wish to do concurrent HAA compliance monitoring and UCMR 4 sampling.

4. Increased the wage estimates to 2016 rates using the Employment Cost Index for waters and salaries in trade, transport and utilities.

5. Updated the analytical costs of each method with new cost estimates from more laboratories.

The annual burden and cost estimates described in this section are based on the implementation assumptions described in section III. In general, burden hours were calculated by:

1. Determining the activities that PWSs and states would complete to comply with the UCMR activity;

2. Estimating the number of hours per activity;

3. Estimating the number of respondents per activity; and

4. Multiplying the hours per activity by the number of respondents for that activity.

Respondents to UCMR 4 include 1,600 small PWSs (800 for cyanotoxin monitoring and a different set of 800 for monitoring the additional 20 contaminants), the ~4,292 large PWSs and the 56 states and primacy agencies (~5,948 total respondents). The frequency of response varies across respondents and years. System costs (particularly laboratory analytical costs) vary depending on the number of sampling locations. For cost estimates, EPA assumed that systems will conduct sampling evenly from January 2018 through December 2020, excluding December, January and February of each year for cyanotoxins (*i.e.,* one-third of the systems in each year of monitoring). Because the applicable ICR period is 2017–2019, one year of monitoring activity (*i.e.,* 2020) is not captured in the ICR estimates; this will be addressed in a subsequent ICR renewal for UCMR 4.

Small PWSs that are selected for UCMR 4 monitoring will sample an average of 6.7 times per PWS (*i.e.,* number of responses per PWS) across the 3-year ICR period. The average burden per response for small PWSs is estimated to be 2.8 hours. Large PWSs (those serving 10,001 to 100,000 people) and very large PWSs (those serving more than 100,000 people) will sample and report an average of 11.4 and 14.1 times per PWS, respectively, across the 3-year ICR period. The average burden per response for large and very large PWSs is estimated at 6.1 and 9.9 hours, respectively. States are assumed to have an annual average burden of 244.3 hours related to coordination with EPA and PWSs. In the aggregate, during the ICR period, the average response (*e.g.,* responses from PWSs and states) is associated with a burden of 6.9 hours, with a labor plus non-labor cost of $1,636 per response.

The annual average per-respondent burden hours and costs for the ICR period are: Small PWSs—6.1 hours, or $169, for labor; large PWSs—23.3 hours, or $684, for labor and $5,756 for analytical costs; very large PWSs—46.4 hours, or $1,253, for labor and $15,680 for analytical costs; and states—244.3 hours, or $11,789, for labor. Annual average burden and cost per respondent (including both systems and states) is estimated to be 23.3 hours, with a labor plus non-labor cost of $3,718 per respondent. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's rules in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

For purposes of assessing the impacts of this rule on small entities, EPA considered small entities to be PWSs serving 10,000 or fewer people, because this is the system size specified in the SDWA as requiring special consideration with respect to small system flexibility. As required by the RFA, EPA proposed using this alternative definition in the FR, (63 FR 7606, February 13, 1998 (USEPA, 1998a)), sought public comment, consulted with the Small Business Administration (SBA) and finalized the alternative definition in the Consumer Confidence Reports rulemaking, (63 FR 44512, August 19, 1998 (USEPA, 1998b)). As stated in that Final Rule, the alternative definition will be applied to future drinking water rules, including this rule.

An agency certifies that a rule will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. The evaluation of the overall impact on small systems, summarized in the preceding discussion, is further described as follows. EPA analyzed the impacts for privately-owned and publicly-owned water systems separately, due to the different economic characteristics of these ownership types, such as different rate structures and profit goals. However, for both publicly- and privately-owned systems, EPA used the ''revenue test,'' which compares annual system costs attributed to the rule to the system's annual revenues. EPA used median revenue data from the 2006 CWS Survey for public and private water systems (USEPA, 2009c). The revenue figures were updated to 2016 dollars, and increased by three percent to account for inflation. EPA assumes that the distribution of the sample of participating small systems will reflect the proportions of publicly- and privately-owned systems in the national inventory. The estimated distribution of the representative sample, categorized by ownership type, source water and system size, is presented in Exhibit 6.

EXHIBIT 6—NUMBER OF PUBLICLY- AND PRIVATELY-OWNED SMALL SYSTEMS SUBJECT TO UCMR 4

System size (# of people served)	Publicly-owned	Privately-owned	Total [1]
Ground Water			
500 and under	21	64	85
501 to 3,300	161	62	223
3,301 to 10,000	179	41	220
Subtotal GW	*361*	*167*	*528*

EXHIBIT 6—NUMBER OF PUBLICLY- AND PRIVATELY-OWNED SMALL SYSTEMS SUBJECT TO UCMR 4—Continued

System size (# of people served)	Publicly-owned	Privately-owned	Total [1]
Surface Water (and GWUDI)			
500 and under	18	21	39
501 to 3,300	241	86	327
3,301 to 10,000	548	158	706
Subtotal SW	*807*	*265*	*1,072*
Total of Small Water Systems	*1,168*	*432*	*1,600*

[1] PWS counts were adjusted to display as whole numbers in each size category.

The basis for the UCMR 4 RFA certification is as follows: For the 1,600 small water systems that will be affected, the average annual cost for complying with this rule represents no more than 0.7% of system revenues (the highest estimated percentage is for GW systems serving 500 or fewer people, at 0.7% of its median revenue). Exhibit 7 presents the yearly cost to small systems and to EPA for the small system sampling program, along with an illustration of system participation for each year of UCMR 4.

EXHIBIT 7—IMPLEMENTATION OF UCMR 4 AT SMALL SYSTEMS

Cost description	2017	2018	2019	2020	2021	Total [1]
Costs to EPA for Small System Program (Assessment Monitoring)						
	$0	$5,635,113	$5,635,113	$5,635,113	$0	$16,905,340
Costs to Small Systems (Assessment Monitoring)						
	0	270,848	270,848	270,848	0	812,545
Total Costs to EPA and Small Systems for UCMR 4						
	0	5,905,962	5,905,962	5,905,962	0	17,717,886
System Monitoring Activity Timeline [2]						
Assessment Monitoring: Cyanotoxins	.....	1/3 PWSs Sample	1/3 PWSs Sample	1/3 PWSs Sample	.....	800
Assessment Monitoring: 20 Additional Contaminants	.....	1/3 PWSs Sample	1/3 PWSs Sample	1/3 PWSs Sample	.....	800

[1] Totals may not equal the sum of components due to rounding.
[2] Total number of systems is 1,600. No small system conducts Assessment Monitoring for both cyanotoxins and the 20 additional contaminants.

PWS costs are attributed to the labor required for reading about UCMR 4 requirements, monitoring, reporting and record keeping. The estimated average annual burden across the 5-year UCMR 4 implementation period of 2017–2021 is 2.8 hours at $102 per small system. Average annual cost, in all cases, is less than 0.7% of system revenues. By assuming all costs for laboratory analyses, shipping and quality control for small entities, EPA incurs the entirety of the non-labor costs associated with UCMR 4 small system monitoring, or 95% of total small system testing costs. Exhibit 8 and Exhibit 9 present the estimated economic impacts in the form of a revenue test for publicly- and privately-owned systems.

EXHIBIT 8—UCMR 4 RELATIVE COST ANALYSIS FOR SMALL PUBLICLY-OWNED SYSTEMS (2017–2021)

System size (# of people served)	Annual number of systems impacted [1]	Average annual hours per system (2017–2021)	Average annual cost per system (2017–2021)	Revenue test [2] (%)
Ground Water Systems				
500 and under	4	1.5	$55	0.14
501 to 3,300	32	1.6	59	0.04
3,301 to 10,000	36	1.7	63	0.01
Surface Water (and GWUDI) Systems				
500 and under	4	3.3	119	0.16
501 to 3,300	48	3.3	119	0.04
3,301 to 10,000	110	3.4	124	0.01

[1] PWS counts were adjusted to display as whole numbers in each size category.
[2] The Revenue Test was used to evaluate the economic impact of an information collection on small government entities (*e.g.,* publicly-owned systems); costs are presented as a percentage of median annual revenue in each size category (EPA, 2009c).

EXHIBIT 9—UCMR 4 RELATIVE COST ANALYSIS FOR SMALL PRIVATELY-OWNED SYSTEMS (2017–2021)

System size (# of people served)	Annual number of systems impacted [1]	Average annual hours per system (2017–2021)	Average annual cost per system (2017–2021)	Revenue test [2] (%)
Ground Water Systems				
500 and under	13	1.5	$55	0.74
501 to 3,300	12	1.6	59	0.04
3,301 to 10,000	8	1.7	63	0.01
Surface Water (and GWUDI) Systems				
500 and under	4	3.3	119	0.28
501 to 3,300	17	3.3	119	0.04
3,301 to 10,000	32	3.4	124	0.01

[1] PWS counts were adjusted to display as whole numbers in each size category.
[2] The Revenue Test was used to evaluate the economic impact of an information collection on small government entities (*e.g.,* privately-owned systems); costs are presented as a percentage of median annual revenue in each size category (EPA, 2009c).

The Agency has determined that 1,600 small PWSs (for Assessment Monitoring), or approximately 4.2% of all small systems, will experience an impact of no more than 0.7% of revenues; the remainder of small systems will not be impacted.

Although this rule will not have a significant economic impact on a substantial number of small entities, EPA has attempted to reduce this impact by assuming all costs for analyses of the samples and for shipping the samples from small systems to laboratories contracted by EPA to analyze UCMR 4 samples (the cost of shipping is now included in the cost of each analytical method). EPA has set aside $2.0 million each year from the Drinking Water State Revolving Fund (SRF), with its authority to use SRF monies for the purposes of implementing this provision of the SDWA. Thus, the costs to these small systems will be limited to the labor associated with collecting a sample and preparing it for shipping.

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. The Agency therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an annual unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action implements mandate(s) specifically and explicitly set forth in the SDWA without the exercise of any policy discretion by the EPA.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. As described previously, this rule requires monitoring by all large PWSs. Information in the SDWIS/Fed water system inventory indicates there are 17 large tribal PWSs (ranging in size from 10,001 to 40,000 customers). EPA estimates the average annual cost to each of these large PWSs, over the 5-year rule period, to be $3,864. This cost is based on a labor component (associated with the collection of samples), and a non-labor component (associated with shipping and laboratory fees), and represents 1.1% of average revenue/sales for large PWSs. UCMR also requires monitoring by a nationally representative sample of small PWSs. EPA estimates that approximately 1.5% of small tribal systems will be selected as a nationally representative sample for Assessment Monitoring. EPA estimates the average annual cost to small tribal systems over the 5-year rule period to be $102. Such cost is based on the labor associated with collecting a sample and preparing it for shipping and represents less than 0.7% of average revenue/sales for small PWSs. All other small PWS expenses (associated with shipping and laboratory fees) are paid by EPA.

EPA consulted with tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this rule to permit them to have meaningful and timely input into its development. A summary of that consultation is provided in the electronic docket listed in the **ADDRESSES** section of this notice.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because EPA does not think the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are addressed in section V.D of the preamble.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This is a national drinking water occurrence study that was submitted to OMB for review.

I. National Technology Transfer and Advancement Act and 1 CFR Part 51

This action involves technical standards. This rule uses methods developed by the Agency and two major voluntary consensus method organizations to support UCMR 4 monitoring. The voluntary consensus method organizations are Standard Methods and ASTM International. EPA

identified acceptable consensus method organization standards for the analysis of manganese and germanium. In addition, there are several consensus standards that are approved for compliance monitoring that will be available for use in the analysis of TOC and bromide. A summary of each method along with how the method specifically applies to UCMR 4 can be found in section VI of the preamble.

All of these standards are reasonably available for public use. The Agency methods are free for download on EPA's Web site. The methods in the Standard Method 21st edition are consensus standards, available for purchase from the publisher, and are commonly used by the drinking water community. The methods in the Standard Method Online are consensus standards, available for purchase from the publisher's Web site, and are commonly used by the drinking water community. The methods from ASTM International are consensus standards, are available for purchase from the publisher's Web site, and are commonly used by the drinking water community.

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

The EPA concludes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. Background information regarding EPA's consideration of Executive Order 12898 in the development of this final rule is provided in section V.E of this preamble, and an additional supporting document has been placed in the electronic docket listed in the **ADDRESSES** section of this notice.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

VIII. References

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List of Subjects in 40 CFR Part 141

Environmental protection, Chemicals, Incorporation by reference, Indian-lands, Intergovernmental relations, Radiation protection, Reporting and recordkeeping requirements, Water supply.

Dated: December 8, 2016.

Gina McCarthy,

Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR part 141 as follows:

PART 141—NATIONAL PRIMARY DRINKING WATER REGULATIONS

■ 1. The authority citation for part 141 continues to read as follows:

Authority: 42 U.S.C. 300f, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–4, 300j–9, and 300j–11.

Subpart D—Reporting and Recordkeeping

■ 2. In § 141.35:

■ a. Revise the third sentence in paragraph (b)(1).

■ b. Revise the second and third sentences in paragraph (b)(2).

■ c. Remove ''October 1, 2012,'' and add in its place ''December 31, 2017,'' in paragraph (c)(1).

■ d. Revise the second and third sentences in paragraph (c)(2).

■ e. Revise the last sentence in paragraph (c)(3)(i).

■ f. Revise the fifth sentence in paragraph (c)(3)(ii).

■ g. Remove ''October 1, 2012,'' and add in its place April 19, 2017, in paragraph (c)(4).

■ h. Revise paragraphs (c)(5)(i), (c)(6) introductory text, (d)(2), and (e).

The revisions and additions read as follows:

§ 141.35 Reporting for unregulated contaminant monitoring results.

* * * * *

(b) * * *

(1) * * * Information that must be submitted using EPA's electronic data reporting system must be submitted through: *https://www.epa.gov/dwucmr.* * * *

(2) * * * If you have received a letter from EPA or your State concerning your required monitoring and your system does not meet the applicability criteria for UCMR established in § 141.40(a)(1) or (2), or if a change occurs at your system that may affect your requirements under UCMR as defined in § 141.40(a)(3) through (5), you must mail or email a letter to EPA, as specified in paragraph (b)(1) of this section. The letter must be from your PWS Official and must include your PWS Identification (PWSID) Code along with an explanation as to why the UCMR requirements are not applicable to your PWS, or have changed for your PWS, along with the appropriate contact information.* * *

(c) * * *

(2) * * * You must provide your sampling location(s) and inventory information by December 31, 2017, using EPA's electronic data reporting system. You must submit, verify or update the following information for each sampling location, or for each approved representative sampling location (as specified in paragraph (c)(3) of this section regarding representative sampling locations): PWSID Code; PWS Name; PWS Facility Identification Code; PWS Facility Name; PWS Facility Type; Water Source Type; Sampling Point Identification Code; Sampling Point Name; and Sampling Point Type Code; (as defined in Table 1 of paragraph (e) of this section).

(3) * * *

(i) * * * You must submit a copy of the existing alternate EPTDS sampling

plan or your representative well proposal, as appropriate, April 19, 2017, as specified in paragraph (b)(1) of this section.

(ii) * * * You must submit the following information for each proposed representative sampling location: PWSID Code; PWS Name; PWS Facility Identification Code; PWS Facility Name; PWS Facility Type; Sampling Point Identification Code; and Sampling Point Name (as defined in Table 1, paragraph (e) of this section). * * *

* * * * *

(5) * * *

(i) *General rescheduling notification requirements.* Large systems may change their monitoring schedules up to December 31, 2017, using EPA's electronic data reporting system, as specified in paragraph (b)(1) of this section. After this date has passed, if your PWS cannot sample according to your assigned sampling schedule (*e.g.,* because of budget constraints, or if a sampling location will be closed during the scheduled month of monitoring), you must mail or email a letter to EPA, as specified in paragraph (b)(1) of this section, prior to the scheduled sampling date. You must include an explanation of why the samples cannot be taken according to the assigned schedule, and you must provide the alternative schedule you are requesting. You must not reschedule monitoring specifically to avoid sample collection during a suspected vulnerable period. You are subject to your assigned UCMR sampling schedule or the schedule that you revised on or before December 31, 2017, unless and until you receive a letter from EPA specifying a new schedule.

* * * * *

(6) *Reporting monitoring results.* For UCMR samples, you must report all data elements specified in Table 1 of paragraph (e) of this section, using EPA's electronic data reporting system. You also must report any changes, relative to what is currently posted, made to data elements 1 through 9 to EPA in writing, explaining the nature and purpose of the proposed change, as specified in paragraph (b)(1) of this section.

* * * * *

(d) * * *

(2) *Reporting sampling information.* You must provide your sampling location(s) by December 31, 2017, using EPA's electronic data reporting system, as specified in paragraph (b)(1) of this section. If this information changes, you must report updates, including new sources and sampling locations that are put in use before or during the PWS' UCMR sampling period, to EPA's electronic data reporting system within 30 days of the change, as specified in paragraph (b)(1) of this section. You must record all data elements listed in Table 1 of paragraph (e) of this section on each sample form and sample bottle, as appropriate, provided to you by the UCMR Sampling Coordinator. You must send this information as specified in the instructions of your sampling kit, which will include the due date and return address. You must report any changes made in data elements 1 through 9 by emailing an explanation of the nature and purpose of the proposed change to EPA, as specified in paragraph (b)(1) of this section.

(e) *Data elements.* Table 1 defines the data elements that must be provided for UCMR monitoring.

TABLE 1—UNREGULATED CONTAMINANT MONITORING REPORTING REQUIREMENTS

Data element	Definition
1. Public Water System Identification (PWSID) Code.	The code used to identify each PWS. The code begins with the standard 2-character postal State abbreviation or Region code; the remaining 7 numbers are unique to each PWS in the State. The same identification code must be used to represent the PWS identification for all current and future UCMR monitoring.
2. Public Water System Name	Unique name, assigned once by the PWS.
3. Public Water System Facility Identification Code.	An identification code established by the State or, at the State's discretion, by the PWS, following the format of a 5-digit number unique within each PWS for each applicable facility (*i.e.,* for each source of water, treatment plant, distribution system, or any other facility associated with water treatment or delivery). The same identification code must be used to represent the facility for all current and future UCMR monitoring.
4. Public Water System Facility Name.	Unique name, assigned once by the PWS, for every facility ID (*e.g.,* Treatment Plant).
5. Public Water System Facility Type.	That code that identifies that type of facility as either: CC = consecutive connection. DS = distribution system. IN = source water influent. SS = sampling station. TP = treatment plant. OT = other.
6. Water Source Type	The type of source water that supplies a water system facility. Systems must report one of the following codes for each sampling location: SW = surface water (to be reported for water facilities that are served entirely by a surface water source during the twelve-month period). GW = ground water (to be reported for water facilities that are served entirely by a ground water source during the twelve-month period). GU = ground water under the direct influence of surface water (to be reported for water facilities that are served all or in part by ground water under the direct influence of surface water at any time during the twelve-month sampling period), and are not served at all by surface water during this period. MX = mixed water (to be reported for water facilities that are served by a mix of surface water, ground water and/or ground water under the direct influence of surface water during the twelve-month period).
7. Sampling Point Identification Code.	An identification code established by the State, or at the State's discretion, by the PWS, that uniquely identifies each sampling point. Each sampling code must be unique within each applicable facility, for each applicable sampling location (*i.e.,* entry point to the distribution system, source water influent or distribution system sample at maximum residence time). The same identification code must be used to represent the sampling location for all current and future UCMR monitoring.
8. Sampling Point Name	Unique sample point name, assigned once by the PWS, for every sample point ID (*e.g.,* Entry Point).

TABLE 1—UNREGULATED CONTAMINANT MONITORING REPORTING REQUIREMENTS—Continued

Data element	Definition
9. Sampling Point Type Code	A code that identifies the location of the sampling point as either: SR = source water taken from plant influent; untreated water entering the water treatment plant (*i.e.,* a location prior to any treatment). EP = entry point to the distribution system. DS = distribution system sample.
10. Disinfectant Type	All of the disinfectants/oxidants that have been added prior to the entry point to the distribution system. Please select all that apply: PEMB = Permanganate. HPXB = Hydrogen peroxide. CLGA = Gaseous chlorine. CLOF = Offsite Generated Hypochlorite (stored as a liquid form). CLON = Onsite Generated Hypochlorite. CAGC = Chloramine (formed with gaseous chlorine). CAOF = Chloramine (formed with offsite hypochlorite). CAON = Chloramine (formed with onsite hypochlorite). CLDB = Chlorine dioxide. OZON = Ozone. ULVL = Ultraviolet light. OTHD = All other types of disinfectant/oxidant. NODU = No disinfectant/oxidant used.
11. Treatment Information	Treatment information associated with the sample point. Please select all that apply: CON = Conventional (non-softening, consisting of at least coagulation/sedimentation basins and filtration). SFN = Softening. RBF = River bank filtration. PSD = Pre-sedimentation. INF = In-line filtration. DFL = Direct filtration. SSF = Slow sand filtration. BIO = Biological filtration (operated with an intention of maintaining biological activity within filter). UTR = Unfiltered treatment for surface water source. GWD = Groundwater system with disinfection only. PAC = Application of powder activated carbon. GAC = Granular activated carbon adsorption (not part of filters in CON, SCO, INF, DFL, or SSF). AIR = Air stripping (packed towers, diffused gas contactors). POB = Pre-oxidation with chlorine (applied before coagulation for CON or SFN plants or before filtration for other filtration plants). MFL = Membrane filtration. IEX = Ionic exchange. DAF = Dissolved air floatation. CWL = Clear well/finished water storage without aeration. CWA = Clear well/finished water storage with aeration. ADS = Aeration in distribution system (localized treatment). OTH = All other types of treatment. NTU = No treatment used. DKN = Do not know.
12. Disinfectant Residual Type	Disinfectant residual type in the distribution system for each HAA sample. CL2 = Chlorine (*i.e.,* originating from addition of free chlorine only). CLO2 = chlorine dioxide. CLM = Chloramines (originating from with addition of chlorine and ammonia or pre-formed chloramines). CAC = Chlorine and chloramines (if being mixed from chlorinated and chloroaminated water). NOD = No disinfectant residual.
13. Sample Collection Date	The date the sample is collected, reported as 4-digit year, 2-digit month, and 2-digit day (YYYY/MM/DD).
14. Sample Identification Code	An alphanumeric value up to 30 characters assigned by the laboratory to uniquely identify containers, or groups of containers, containing water samples collected at the same sampling location for the same sampling date.
15. Contaminant	The unregulated contaminant for which the sample is being analyzed.
16. Analytical Method Code	The identification code of the analytical method used.
17. Extraction Batch Identification Code.	Laboratory assigned extraction batch ID. Must be unique for each extraction batch within the laboratory for each method. For CCC samples report the Analysis Batch Identification Code as the value for this field. For methods without an extraction batch, leave this field null.
18. Extraction Date	Date for the start of the extraction batch (YYYY/MM/DD). For methods without an extraction batch, leave this field null.
19. Analysis Batch Identification Code.	Laboratory assigned analysis batch ID. Must be unique for each analysis batch within the laboratory for each method.
20. Analysis Date	Date for the start of the analysis batch (YYYY/MM/DD).
21. Sample Analysis Type	The type of sample collected and/or prepared, as well as the fortification level. Permitted values include: CF = concentration fortified; the concentration of a known contaminant added to a field sample reported with sample analysis types LFSM, LFSMD, LFB, CCC and QCS. CCC = continuing calibration check; a calibration standard containing the contaminant, the internal standard, and surrogate analyzed to verify the existing calibration for those contaminants. FS = field sample; sample collected and submitted for analysis under this rule. IS = internal standard; a standard that measures the relative response of contaminants.

TABLE 1—UNREGULATED CONTAMINANT MONITORING REPORTING REQUIREMENTS—Continued

Data element	Definition
	LFB = laboratory fortified blank; an aliquot of reagent water fortified with known quantities of the contaminants and all preservation compounds. LRB = laboratory reagent blank; an aliquot of reagent water treated exactly as a field sample, including the addition of preservatives, internal standards, and surrogates to determine if interferences are present in the laboratory, reagents, or other equipment. LFSM = laboratory fortified sample matrix; a UCMR field sample with a known amount of the contaminant of interest and all preservation compounds added. LFSMD = laboratory fortified sample matrix duplicate; duplicate of the laboratory fortified sample matrix. QCS = quality control sample; a sample prepared with a source external to the one used for initial calibration and CCC. The QCS is used to check calibration standard integrity. QHS = quality HAA sample; HAA sample collected and submitted for quality control purposes. SUR = surrogate standard; a standard that assesses method performance for each extraction.
22. Analytical Results—Sign	A value indicating whether the sample analysis result was: (<) ''less than'' means the contaminant was not detected, or was detected at a level below the Minimum Reporting Level. (=) ''equal to'' means the contaminant was detected at the level reported in ''Analytical Result— Measured Value.''
23. Analytical Result—Measured Value.	The actual numeric value of the analytical results for: Field samples; laboratory fortified matrix samples; laboratory fortified sample matrix duplicates; and concentration fortified.
24. Additional Value	Represents the true value or the fortified concentration for spiked samples for QC Sample Analysis Types (CCC, EQC, LFB, LFSM and LFSMD). For Sample Analysis Type FS and LRB and for IS and surrogate QC Contaminants, leave this field null.
25. Laboratory Identification Code	The code, assigned by EPA, used to identify each laboratory. The code begins with the standard two-character State postal abbreviation; the remaining five numbers are unique to each laboratory in the State.
26. Sample Event Code	A code assigned by the PWS for each sample event. This will associate samples with the PWS monitoring plan to allow EPA to track compliance and completeness. Systems must assign the following codes: SEC1, SEC2, SEC3, SEC4, SEC5, SEC6, SEC7 and SEC8—represent samples collected to meet UCMR Assessment Monitoring requirements for cyanotoxins; where ''SEC1'' represents the first sampling period, ''SEC2'' the second period and so forth, for all eight sampling events. SEA1, SEA2, SEA3 and SEA4—represent samples collected to meet UCMR Assessment Monitoring requirements for the additional contaminants; where ''SEA1'' and ''SEA2'' represent the first and second sampling period for all water types; and ''SEA3'' and ''SEA4'' represent the third and fourth sampling period for SW and GU sources only.
27. Bloom Occurrence	A yes or no answer provided by the PWS for each cyanotoxin sample event. *Question:* Preceding the finished water sample collection, did you observe an algal bloom in your source waters near the intake? YES = if yes, select all the YESs that apply: YD = yes, on the day the UCMR cyanotoxin sample was collected. YW = yes, between the day the sample was taken and the past week. YM = yes, between the past week and past month. YY = yes, between the past month and past year. YP = yes, prior to the past year. NO = have never seen a bloom.
28. Cyanotoxin Occurrence	A yes or no answer provided by the PWS for each cyanotoxin sample event. *Question:* Preceding the finished water sample collection, were cyanotoxins ever detected in your source waters near the intake and prior to any treatment (based on sampling by you or another party)? YES = if yes, select all the YESs that apply: YD = yes, on the day the UCMR cyanotoxin sample was collected. YW = yes, between the day the sample was taken and the past week. YM = yes, between the past week and past month. YY = yes, between the past month and past year. YP = yes, prior to the past year. NO = have never detected cyanotoxins in source water. NS = unaware of any source water cyanotoxin sampling. Select all that apply (*i.e.,* all that were detected) if you answered YES to detecting cyanotoxins in source water: MIC = Microcystins. CYL = Cylindrospermopsin. ANA = Anatoxin-A. SAX = Saxitoxins. OTH = Other. DK = do not know.
29. Indicator of Possible Bloom—Treatment.	A yes or no answer provided by the PWS for each cyanotoxin sample event. *Question:* Preceding the finished water sample collection, did you notice any changes in your treatment system operation and/or treated water quality that may indicate a bloom in the source water? YES = if yes, select all that apply: DFR = Decrease in filter runtimes. ITF = Increase in turbidity in filtered water. ICD = Need for increased coagulant dose. TOI = Increase in taste and odor issues in finished water. IOD = Need for increase in oxidant/disinfectant dose. IDB = Increase in TTHM/HAA5 in finished water.

TABLE 1—UNREGULATED CONTAMINANT MONITORING REPORTING REQUIREMENTS—Continued

Data element	Definition
30. Indicator of Possible Bloom—Source Water Quality Parameters.	OTH = Describe other changes. NO = no changes. A yes or no answer provided by the PWS for each cyanotoxin sample event. *Question:* Preceding the finished water sample collection, did you observe any notable changes in source water quality parameters (if measured)? YES = if yes, select all that apply to the source water: ITP = Increase in water temperature. ITU = Increase in turbidity. IAL = Increase in alkalinity. ITO = Increase in total organic carbon. ICD = Increase in chlorine demand. IPH = Increase in pH. ICA = Increase in chlorophyll a. IPY = Increase in phycocyanin. INU = Increase in nutrients (example: nitrogen or phosphorus). OTH = Describe other changes. NO = no changes observed.

Subpart E—Special Regulations, Including Monitoring Regulations and Prohibition on Lead Use

■ 3. In § 141.40:
■ a. Remove ''December 31, 2010'' and add in its place ''December 31, 2015'' in paragraph (a) introductory text.
■ b. Revise paragraphs (a)(1), (a)(2)(i)(A), (a)(2)(ii)(A) and (C), (a)(3), and (a)(4)(i)(B) and (C).
■ c. Remove ''October 1, 2012.'' and add in its place ''December 31, 2017.'' in paragraph (a)(4)(i).
■ d. Revise paragraph (a)(4)(ii) introductory text.
■ e. Remove and reserve paragraph (a)(4)(ii)(F).
■ f. Add paragraph (a)(4)(iii).
■ g. Remove ''August 1, 2012.'' and add in its place ''February 21, 2017, and necessary application material April 19, 2017.'' in paragraph (a)(5)(ii).
■ h. Revise paragraph (a)(5)(v), the second sentence in paragraph (a)(5)(vi), and paragraph (c).

The revisions and addition read as follows:

§ 141.40 Monitoring requirements for unregulated contaminants.

(a) * * *

(1) *Applicability to transient non-community systems.* If you own or operate a transient non-community water system, you are not subject to monitoring requirements in this section.

(2) * * *

(i) * * *

(A) *Assessment monitoring.* You must monitor for the contaminants on List 1, per Table 1, UCMR Contaminant List, in paragraph (a)(3) of this section. If you serve a retail population of more than 10,000 people, you are required to perform this monitoring regardless of whether you have been notified by the State or EPA.

* * * * *

(ii) * * *

(A) *Assessment monitoring.* You must monitor for the contaminants on List 1 per Table 1, in paragraph (a)(3) of this section, if you are notified by your State or EPA that you are part of the State Monitoring Plan for Assessment Monitoring.

* * * * *

(C) *Pre-screen testing.* You must monitor for the contaminants on List 3 of Table 1, in paragraph (a)(3) of this section if you are notified by your State or EPA that you are part of the State Monitoring Plan for Pre-Screen Testing.

(3) *Analytes to be monitored.* Lists 1, 2, and 3 contaminants are provided in the following table:

TABLE 1—UCMR CONTAMINANT LIST

1—Contaminant	2—CAS Registry No.	3—Analytical methods [a]	4—Minimum reporting level [b]	5—Sampling location [c]	6—Period during which monitoring to be completed
List 1: Assessment Monitoring Cyanotoxin Chemical Contaminants					
"total microcystin"	N/A	EPA 546	0.3 µg/L	EPTDS	3/1/2018–11/30/2020.
anatoxin-a	64285–06–9	EPA 545	0.03 µg/L	EPTDS	3/1/2018–11/30/2020.
cylindrospermopsin	143545–90–8	EPA 545	0.09 µg/L	EPTDS	3/1/2018–11/30/2020.
microcystin-LA	96180–79–9	EPA 544	0.008 µg/L	EPTDS	3/1/2018–11/30/2020.
microcystin-LF	154037–70–4	EPA 544	0.006 µg/L	EPTDS	3/1/2018–11/30/2020.
microcystin-LR	101043–37–2	EPA 544	0.02 µg/L	EPTDS	3/1/2018–11/30/2020.
microcystin-LY	123304–10–9	EPA 544	0.009 µg/L	EPTDS	3/1/2018–11/30/2020.
microcystin-RR	111755–37–4	EPA 544	0.006 µg/L	EPTDS	3/1/2018–11/30/2020.
microcystin-YR	101064–48–6	EPA 544	0.02 µg/L	EPTDS	3/1/2018–11/30/2020.
nodularin	118399–22–7	EPA 544	0.005 µg/L	EPTDS	3/1/2018–11/30/2020.
List 1: Assessment Monitoring Additional Chemical Contaminants					
Metals					
germanium	7440–56–4	EPA 200.8, ASTM D5673–10, SM 3125.	0.3 µg/L	EPTDS	1/1/2018–12/31/2020.

TABLE 1—UCMR CONTAMINANT LIST—Continued

1—Contaminant	2—CAS Registry No.	3—Analytical methods [a]	4—Minimum reporting level [b]	5—Sampling location [c]	6—Period during which monitoring to be completed
manganese	7439–96–5	EPA 200.8, ASTM D5673–10, SM 3125.	0.4 µg/L	EPTDS	1/1/2018–12/31/2020.
Pesticides and a Pesticide Manufacturing Byproduct					
alpha-hexachlorocyclohexane.	319–84–6	EPA 525.3	0.01 µg/L	EPTDS	1/1/2018–12/31/2020.
chlorpyrifos	2921–88–2	EPA 525.3	0.03 µg/L	EPTDS	1/1/2018–12/31/2020.
dimethipin	55290–64–7	EPA 525.3	0.2 µg/L	EPTDS	1/1/2018–12/31/2020.
ethoprop	13194–48–4	EPA 525.3	0.03 µg/L	EPTDS	1/1/2018–12/31/2020.
oxyfluorfen	42874–03–3	EPA 525.3	0.05 µg/L	EPTDS	1/1/2018–12/31/2020.
profenofos	41198–08–7	EPA 525.3	0.3 µg/L	EPTDS	1/1/2018–12/31/2020.
tebuconazole	107534–96–3	EPA 525.3	0.2 µg/L	EPTDS	1/1/2018–12/31/2020.
total permethrin (cis- & trans-).	52645–53–1	EPA 525.3	0.04 µg/L	EPTDS	1/1/2018–12/31/2020.
tribufos	78–48–8	EPA 525.3	0.07 µg/L	EPTDS	1/1/2018–12/31/2020.
Brominated Haloacetic Acid (HAA) Groups [d e]					
HAA5	N/A	EPA 552.3 or EPA 557	N/A	D/DBPR HAA location.	1/1/2018–12/31/2020.
HAA6Br	N/A	EPA 552.3 or EPA 557	N/A	D/DBPR HAA location.	1/1/2018–12/31/2020.
HAA9	N/A	EPA 552.3 or EPA 557	N/A	D/DBPR HAA location.	1/1/2018–12/31/2020.
Alcohols					
1-butanol	71–36–3	EPA 541	2.0 µg/L	EPTDS	1/1/2018–12/31/2020.
2-methoxyethanol	109–86–4	EPA 541	0.4 µg/L	EPTDS	1/1/2018–12/31/2020.
2-propen-1-ol	107–18–6	EPA 541	0.5 µg/L	EPTDS	1/1/2018–12/31/2020.
Other Semivolatile Chemicals					
butylated hydroxanisole	25013–16–5	EPA 530	0.03 µg/L	EPTDS	1/1/2018–12/31/2020.
o-toluidine	95–53–4	EPA 530	0.007 µg/L	EPTDS	1/1/2018–12/31/2020.
quinoline	91–22–5	EPA 530	0.02 µg/L	EPTDS	1/1/2018–12/31/2020.
List 2: Screening Survey					
Reserved	Reserved	Reserved	Reserved	Reserved	Reserved.
List 3: Pre-Screen Testing					
Reserved	Reserved	Reserved	Reserved	Reserved	Reserved.

Column headings are:

1—Contaminant: The name of the contaminant to be analyzed.

2—CAS (Chemical Abstract Service) Registry Number or Identification Number: A unique number identifying the chemical contaminants.

3—Analytical Methods: Method numbers identifying the methods that must be used to test the contaminants.

4—Minimum Reporting Level (MRL): The value and unit of measure at or above which the concentration of the contaminant must be measured using the approved analytical methods. If EPA determines, after the first six months of monitoring that the specified MRLs result in excessive resampling, EPA will establish alternate MRLs and will notify affected PWSs and laboratories of the new MRLs. N/A is defined as non-applicable.

5—Sampling Location: The locations within a PWS at which samples must be collected.

6—Period During Which Monitoring to be Completed: The time period during which the sampling and testing will occur for the indicated contaminant.

[a] The analytical procedures shall be performed in accordance with the documents associated with each method, see paragraph (c) of this section.

[b] The MRL is the minimum concentration of each analyte that must be reported to EPA.

[c] With the exception of HAA monitoring, sampling must occur at entry points to the distribution system (EPTDSs), after treatment is applied, that represent each non-emergency water source in routine use over the 12-month period of monitoring. Systems that purchase water with multiple connections from the same wholesaler may select one representative connection from that wholesaler. This EPTDS sampling location must be representative of the highest annual volume connections. If the connection selected as the representative EPTDS is not available for sampling, an alternate highest volume representative connection must be sampled. See 40 CFR 141.35(c)(3) for an explanation of the requirements related to the use of representative GW EPTDSs. Sampling for UCMR 4 HAA groups must be conducted at the Disinfectants and Disinfection Byproduct Rule (D/DBPR) sampling locations (40 CFR 141.622).

[d] UCMR 4 HAA monitoring applies only to those PWSs that are subject to D/DBPR HAA5 monitoring requirements.

[e] PWSs that purchase 100 percent of their water (''consecutive systems'') are not required to collect UCMR 4 source water samples for TOC or bromide analyses. Sampling for TOC and bromide must otherwise occur at source water influent locations representing untreated water entering the water treatment plant (*i.e.,* a location prior to any treatment). SW and GWUDI systems subject to the D/DBPR TOC monitoring must use their D/DBPR TOC source water sampling site(s) from 40 CFR 141.132 for UCMR 4 TOC and bromide samples. SW and GWUDI systems that are not subject to D/DBPR TOC monitoring will use their Long Term 2 Enhance Surface Water Treatment Rule (LT2) source water sampling site(s) (40 CFR 141.703) for UCMR 4 TOC and bromide samples. Ground water systems that are subject to the D/DBPRs, and therefore subject to UCMR 4 HAA monitoring, will take TOC and bromide samples at their influents entering their treatment train. TOC and bromide must be collected at the same time as HAA samples. These indicator samples must be collected at a single source water influent using methods already approved for compliance monitoring. TOC methods include: SM 5310 B, SM 5310 C, SM 5310 D (21st edition), or SM 5310 B–00, SM 5310 C–00, SM 5310 D–00 (SM Online), EPA Method 415.3 (Rev. 1.1 or 1.2). Bromide methods include: EPA Methods 300.0 (Rev. 2.1), 300.1 (Rev. 1.0), 317.0 (Rev. 2.0), 326.0 (Rev. 1.0) or ASTM D 6581–12. The MRLs for the individual HAAs are discussed in paragraph (a)(5)(v) of this section.

(4) * * *

(i) * * *

(B) *Frequency.* You must collect the samples within the timeframe and according to the frequency specified by contaminant type and water source type for each sampling location, as specified in Table 2, in this paragraph. For the second or subsequent round of sampling, if a sample location is non-operational for more than one month before and one month after the scheduled sampling month (*i.e.,* it is not possible for you to sample within the window specified in Table 2, in this paragraph), you must notify EPA as specified in § 141.35(c)(5) to reschedule your sampling.

TABLE 2—MONITORING FREQUENCY BY CONTAMINANT AND WATER SOURCE TYPES

Contaminant type	Water source type	Timeframe	Frequency [1]
List 1 Cyanotoxins Chemicals.	Surface water or Ground water under the direct influence of surface water (GWUDI).	March–November.	You must monitor twice a month for four consecutive months (total of eight sampling events). Sample events must occur two weeks apart.
List 1 Contaminants—Additional Chemicals.	Surface water or GWUDI	12 months	You must monitor for four consecutive quarters. Sample events must occur three months apart. (Example: If first monitoring is in January, the second monitoring must occur any time in April, the third any time in July and the fourth any time in October).
	Ground water	12 months	You must monitor twice in a consecutive 12-month period. Sample events must occur 5–7 months apart. (Example: If the first monitoring event is in April, the second monitoring event must occur any time in September, October or November).

[1] Systems must assign a sample event code for each contaminant listed in Table 1. Sample event codes must be assigned by the PWS for each sample event. For more information on sample event codes see § 141.35(e) Table 1.

(C) *Location.* You must collect samples for each List 1 Assessment Monitoring contaminant, and, if applicable, for each List 2 Screening Survey, or List 3 Pre-Screen Testing contaminant, as specified in Table 1, in paragraph (a)(3) of this section. Samples must be collected at each sample point that is specified in column 5 and footnote c of Table 1, in paragraph (a)(3) of this section. PWSs conducting List 1 monitoring for the brominated HAA groups must collect TOC and bromide samples as specified in footnote d of Table 1, in paragraph (a)(3) of this section. If you are a GW system with multiple EPTDSs, and you request and receive approval from EPA or the State for sampling at representative EPTDS(s), as specified in § 141.35(c)(3), you must collect your samples from the approved representative sampling location(s).

* * * * *

(ii) *Small systems.* If you serve 10,000 or fewer people and are notified that you are part of the State Monitoring Plan for Assessment Monitoring, Screening Survey or Pre-Screen monitoring, you must comply with the requirements specified in paragraphs (a)(4)(ii)(A) through (H) of this section. If EPA or the State informs you that they will be collecting your UCMR samples, you must assist them in identifying the appropriate sampling locations and in collecting the samples.

* * * * *

(iii) *Phased sample analysis for microcystins.* You must collect the three required samples (one each for EPA Methods 544, 545 and 546 (ELISA) at the EPTDS) for each sampling event, but not all samples may need to be analyzed. If the Method 546 ELISA result is less than 0.3 µg/L, report that result and do not analyze the EPA Method 544 sample for that sample event. If the Method 546 ELISA result is greater than or equal to 0.3 µg/L, report the value and analyze the other microcystin sample using EPA Method 544. You must analyze the EPA Method 545 sample for each sample event for Cylindrospermopsin and anatoxin-a only.

* * * * *

(5) * * *

(v) *Method defined quality control.* You must ensure that your laboratory analyzes Laboratory Fortified Blanks and conducts Laboratory Performance Checks, as appropriate to the method's requirements, for those methods listed in Table 1, column 3, in paragraph (a)(3) of this section. Each method specifies acceptance criteria for these QC checks. The following HAA results must be reported using EPA's electronic data reporting system for quality control purposes.

TABLE 4—HAA QC RESULTS

1—Contaminant	2—CAS Registry No.	3—Analytical methods [a]	4—Minimum reporting level [b]	5—HAA6Br Group	6—HAA9 Group	7—HAA5 Group
Brominated Haloacetic Acid (HAA) Groups						
Bromochloroacetic acid (BCAA)	5589–96–8	EPA 552.3 or EPA 557	0.3 µg/L.			
Bromodichloroacetic acid (BDCAA)	71133–14–7	EPA 552.3 or EPA 557	0.5 µg/L.			

TABLE 4—HAA QC RESULTS—Continued

1—Contaminant	2—CAS Registry No.	3—Analytical methods [a]	4—Minimum reporting level [b]	5—HAA6Br Group	6—HAA9 Group	7—HAA5 Group
Chlorodibromoacetic acid (CDBAA)	5278–95–5	EPA 552.3 or EPA 557	0.3 µg/L	HAA6Br		
Tribromoacetic acid (TBAA)	75–96–7	EPA 552.3 or EPA 557	2.0 µg/L.			
Monobromoacetic acid (MBAA)	79–08–3	EPA 552.3 or EPA 557	0.3 µg/L.			
Dibromoacetic acid (DBAA)	631–64–1	EPA 552.3 or EPA 557	0.3 µg/L		HAA9	
Dichloroacetic acid (DCAA)	79–43–6	EPA 552.3 or EPA 557	0.2 µg/L.			
Monochloroacetic acid (MCAA)	79–11–8	EPA 552.3 or EPA 557	2.0 µg/L			HAA5
Trichloroacetic acid (TCAA)	76–03–9	EPA 552.3 or EPA 557	0.5 µg/L.			

Column headings are:
1—Contaminant: The name of the contaminant to be analyzed.
2—CAS (Chemical Abstract Service) Registry Number or Identification Number: A unique number identifying the chemical contaminants.
3—Analytical Methods: Method numbers identifying the methods that must be used to test the contaminants.
4—Minimum Reporting Level (MRL): The value and unit of measure at or above which the concentration of the contaminant must be measured using the approved analytical methods. If EPA determines, after the first six months of monitoring that the specified MRLs result in excessive resampling, EPA will establish alternate MRLs and will notify affected PWSs and laboratories of the new MRLs.
5–7—HAA groups identified in paragraph (a)(3) of this section to be monitored as UCMR contaminants.
[a] The analytical procedures shall be performed in accordance with the documents associated with each method, see paragraph (c) of this section, and must meet all quality control requirements outlined paragraph (a)(5) of this section.
[b] The MRL is the minimum concentration of each analyte that must be reported to EPA.

(vi) * * * You must require your laboratory to submit these data electronically to the State and EPA using EPA's electronic data reporting system, accessible at *https://www.epa.gov/dwucmr,* within 120 days from the sample collection date. * * * * * * * * *

(c) *Incorporation by reference.* These standards are incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection either electronically at *http://www.regulations.gov,* in hard copy at the Water Docket, EPA/DC, and from the sources as follows. The Public Reading Room (EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC) is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for this Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426. The material is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030 or go to *http://www.archives.gov/federal-register/cfr/about.html.*

(1) U.S. Environmental Protection Agency, Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004.

(i) Method 200.8 ''Determination of Trace Elements in Waters and Wastes by Inductively Coupled Plasma—Mass Spectrometry,'' Revision 5.4, EMMC Version, 1994. Available on the Internet at *https://www.nemi.gov.*

(ii) Method 300.0 ''Determination of Inorganic Anions by Ion Chromatography Samples,'' Revision 2.1, August 1993. Available on the Internet at *https://www.nemi.gov.*

(iii) Method 300.1 ''Determination of Inorganic Anions in Drinking Water by Ion Chromatography,'' Revision 1.0, 1997. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.*

(iv) Method 317.0 ''Determination of Inorganic Oxyhalide Disinfection By-Products in Drinking Water Using Ion Chromatography with the Addition of a Postcolumn Reagent for Trace Bromate Analysis,'' Revision 2.0, July 2001, EPA 815–B–01–001. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.*

(v) Method 326.0 ''Determination of Inorganic Oxyhalide Disinfection By-Products in Drinking Water Using Ion Chromatography Incorporating the Addition of a Suppressor Acidified Postcolumn Reagent for Trace Bromate Analysis,'' Revision 1.0, June 2002, EPA 815–R–03–007. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.*

(vi) Method 415.3 ''Determination of Total Organic Carbon and Specific UV Absorbance at 254 nm in Source Water and Drinking Water,'' Revision 1.1, February 2005, EPA/600/R–05/055. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.*

(vii) Method 415.3 ''Determination of Total Organic Carbon and Specific UV Absorbance at 254 nm in Source Water and Drinking Water,'' Revision 1.2, September 2009, EPA/600/R–09/122. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.*

(viii) Method 525.3 ''Determination of Semivolatile Organic Chemicals in Drinking Water by Solid Phase Extraction and Capillary Column Gas Chromatography/Mass Spectrometry (GC/MS),'' Version 1.0, February 2012, EPA/600/R–12/010. Available on the Internet *https://www.epa.gov/water-research/epa-drinking-water-research-methods.*

(ix) Method 530 ''Determination of Select Semivolatile Organic Chemicals in Drinking Water by Solid Phase Extraction and Gas Chromatography/Mass Spectrometry (GC/MS),'' Version 1.0, January 2015, EPA/600/R–14/442. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.*

(x) EPA Method 541: ''Determination of 1-Butanol, 1,4-Dioxane, 2-Methoxyethanol and 2-Propen-1-ol in Drinking Water by Solid Phase Extraction and Gas Chromatography/Mass Spectrometry,'' November 2015, EPA 815–R–15–011. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.*

(xi) Method 544 ''Determination of Microcystins and Nodularin in Drinking Water by Solid Phase Extraction and Liquid Chromatography/Tandem Mass Spectrometry (LC/MS/MS),'' Version 1.0, February 2015, EPA 600–R–14/474. Available on the Internet at *https://www.epa.gov/water-research/epa-drinking-water-research-methods.*

(xii) EPA Method 545: ''Determination of Cylindrospermopsin and Anatoxin-a in Drinking Water by Liquid Chromatography Electrospray Ionization Tandem Mass Spectrometry (LC/ESI–

MS/MS),'' April 2015, EPA 815–R–15–009. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.*

(xiii) EPA Method 546: ''Determination of Total Microcystins and Nodularins in Drinking Water and Ambient Water by Adda Enzyme-Linked Immunosorbent Assay,'' August 2016, EPA–815–B–16–011. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.*

(xiv) Method 552.3 ''Determination of Haloacetic Acids and Dalapon in Drinking Water by Liquid-Liquid Microextraction, Derivatization, and Gas Chromatography with Electron Capture Detection,'' Revision 1.0, July 2003, EPA 815–B–03–002. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.*

(xv) EPA Method 557: ''Determination of Haloacetic Acids, Bromate, and Dalapon in Drinking Water by Ion Chromatography Electrospray Ionization Tandem Mass Spectrometry (IC–ESI–MS/MS),'' Version 1.0, September 2009, EPA 815–B–09–012. Available on the Internet at *https://www.epa.gov/dwanalyticalmethods.*

(2) American Public Health Association—Standard Test Method for Elements in Water by Inductively Coupled Plasma-Mass Spectrometry,'' approved August 1, 2010. Available for purchase on the Internet at *http://www.astm.org/Standards/D5673.htm.*

(i) ''Standard Methods for the Examination of Water & Wastewater,'' 21st edition (2005).

(A) SM 3125 ''Metals by Inductively Coupled Plasma/Mass Spectrometry.''

(B) SM 5310B ''Total Organic Carbon (TOC): High-Temperature Combustion Method.''

(C) SM 5310C ''Total Organic Carbon (TOC): Persulfate-UV or Heated-Persulfate Oxidation Method.''

(D) SM 5310D ''Total Organic Carbon (TOC): Wet-Oxidation Method.''

(ii) The following methods are from ''Standard Methods Online.,'' approved 2000 (unless noted). Available for purchase on the Internet at *http://www.standardmethods.org.*

(A) SM 3125 ''Metals by Inductively Coupled Plasma/Mass Spectrometry'' Editorial revisions, 2011 (SM 3125–09).

(B) SM 5310B ''Total Organic Carbon: High-Temperature Combustion Method,'' (5310B–00).

(C) SM 5310C ''Total Organic Carbon: Persulfate-UV or Heated-Persulfate Oxidation Method,'' (5310C–00).

(D) SM 5310D ''Total Organic Carbon: Wet-Oxidation Method,'' (5310D–00).

(3) ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428–2959.

(i) ASTM D5673–10 ''Standard Test Method for Elements in Water by Inductively Coupled Plasma-Mass Spectrometry,'' approved August 1, 2010. Available for purchase on the Internet at *http://www.astm.org/Standards/D5673.htm.*

(ii) ASTM D6581–12 ''Standard Test Methods for Bromate, Bromide, Chlorate, and Chlorite in Drinking Water by Suppressed Ion Chromatography,'' approved March 1, 2012. Available for purchase on the Internet at *http://www.astm.org/Standards/D6581.htm.*

[FR Doc. 2016–30469 Filed 12–19–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

[No. DOI–2016–0006; 17XD4523WS DS10200000 DWSN00000.000000 WBS DP10202]

RIN 1093–AA21

Freedom of Information Act Regulations

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: This rule revises the regulations that the Department of the Interior (Department) follows in processing records under the Freedom of Information Act in part to comply with the FOIA Improvement Act of 2016. The revisions clarify and update procedures for requesting information from the Department and procedures that the Department follows in responding to requests from the public.

DATES: This rule is effective on January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Cindy Cafaro, Office of Executive Secretariat and Regulatory Affairs, 202–208–5342.

SUPPLEMENTARY INFORMATION:

I. Why We're Publishing This Rule and What It Does

A. Introduction

In late 2012, the Department published a final rule updating and replacing the Department's previous Freedom of Information Act (FOIA) regulations. In early 2016, the Department updated that final rule, primarily to authorize the Office of Inspector General to process their own FOIA appeals. On June 30, 2016, the FOIA Improvement Act of 2016, Public Law 114–185, 130 Stat. 538 (the Act) was enacted. The Act specifically requires all agencies to review and update their FOIA regulations in accordance with its provisions. In addition, the Department has received feedback from its FOIA practitioners and requesters and identified areas where it would be possible to further update, clarify, and streamline the language of some procedural provisions.

On September 20, 2016, the Department published a proposed rule in the **Federal Register** (81 FR 64401) to implement the Act and address the feedback received. We requested comments on the proposed rule over a 60-day period ending on November 21, 2016, and we considered all comments received in drafting this final rule. Accordingly, the Department is making the following changes to 43 CFR part 2:

- Section 2.4(e) is amended to provide additional guidance on how bureaus handle misdirected requests.
- Section 2.15 is amended to bring attention to the Department's existing FOIA Request Tracking Tool (*https://foia.doi.gov/requeststatus*).
- Section 2.19 is amended to bring further attention to the services provided by the Office of Government Information Services (OGIS), in accordance with the provisions of the Act.
- Section 2.21 is amended to reflect that the OGIS would be defined earlier in the regulations than it previously had been and to reference bureaus' FOIA Public Liaisons, in addition to the OGIS.
- Section 2.24 is amended to require a foreseeable harm analysis, in accordance with the provisions of the Act, and to require bureaus to provide an explanation to the requester when an estimate of the volume of any records withheld in full or in part is not provided.
- Section 2.37(f) is amended to reflect the provisions of the Act.
- Section 2.39 is amended to remove what will be superfluous language, after the changes to section 2.37(f).
- Section 2.58 is amended to provide more time for requesters to appeal, in accordance with the provisions of the Act.
- Section 2.66(d) is amended to reflect an updated Web site link.

B. Discussion of Comments

Six commenters responded to the invitation for comments, including two commenters from subcomponents of Federal agencies and four commenters from non-Federal sources. Two of these commenters offered substantive suggestions on specific existing provisions of the rule that are not being amended; these suggestions are outside the scope of this rulemaking and are not

addressed below. The commenters generally supported the proposed changes, with the exception of one commenter who stated the Act makes it harder to collect fees in FOIA requests that require submitter notifications (a comment that, because it concerns the Act itself, is not within the scope of this rulemaking). However, one commenter suggested that § 2.21 should require certain bureau responses to requesters inform the requesters of their right to seek assistance from FOIA Public Liaisons, in accordance with the Act. We agree and have modified our edits to this section accordingly.

C. Technical and Procedural Comments

In the interests of clarity and consistency, the Department made very minor clarifications and added, moved, and deleted phrases in § 2.37(f)(2)(i) and (ii). The Department also updated a Web site link in § 2.66(d).

II. Compliance With Laws and Executive Orders

1. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rulemaking is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

3. Small Business Regulatory Enforcement Fairness Act

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. This rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

6. Federalism (E.O. 13132)

In accordance with Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It would not substantially and directly affect the relationship between the Federal and state governments. A federalism summary impact statement is not required.

7. Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

8. Consultation With Indian Tribes (E.O. 13175)

Under the criteria in Executive Order 13175, we have evaluated this rule and determined that it has no potential effects on federally recognized Indian tribes. This rule does not have tribal implications that impose substantial direct compliance costs on Indian Tribal governments.

9. Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act is not required.

10. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), is not required. Pursuant to 43 CFR 46.205(b) and 43 CFR 46.210(i), the Department of the Interior NEPA implementing procedures exclude from preparation of an environmental assessment or impact statement ''[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature. . . .'' None of the extraordinary circumstances listed in 43 CFR 46.215 exists for this rule. Accordingly, this rule is categorically excluded from environmental analysis under 43 CFR 46.210(i).

11. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required. This rule will not have a significant effect on the nation's energy supply, distribution, or use.

12. Clarity of This Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

List of Subjects in 43 CFR Part 2

Freedom of information.

Elizabeth Klein,

Principal Deputy Assistant Secretary for Policy, Management and Budget.

For the reasons stated in the preamble, the Department of the Interior amends part 2 of title 43 of the Code of Federal Regulations as follows:

PART 2—FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461.

Subpart B—How to Make a Request

■ 2. In § 2.4, revise paragraph (e) to read as follows:

§ 2.4 Does where you send your request affect its processing?

* * * * *

(e) If your request is received by a bureau that believes it is not the appropriate bureau to process your request, the bureau that received your request will attempt to contact you (if possible, via telephone or email) to confirm that you deliberately sent your request to that bureau for processing. If you do not confirm this, the bureau will deem your request misdirected and route the misdirected request to the appropriate bureau to respond under the basic time limit outlined in § 2.17.

* * * * *

Subpart D—Timing of Responses to Requests

■ 3. In § 2.15, add paragraph (g) to read as follows:

§ 2.15 What is multitrack processing and how does it affect your request?

* * * * *

(g) You may track the status of your request, including its estimated processing completion date, at *https://foia.doi.gov/requeststatus/.*

§ 2.19 [Amended]

■ 4. In § 2.19(b)(2), add the words ‘‘, and notify you of your right to seek dispute resolution from the Office of Government Information Services (OGIS)’’ after the words ‘‘you and the bureau’’.

Subpart E—Responses to Requests

■ 5. Amend § 2.21(a) by removing the second sentence and adding two sentences in its place to read as follows:

§ 2.21 How will the bureau respond to requests?

(a) * * * The bureau's written response will include a statement about the services offered by its FOIA Public Liaison. The bureau's written response will also include a statement about the services offered by OGIS, using standard language that can be found at: *https://www.doi.gov/foia/news/guidance.*’’

* * * * *

§ 2.24 [Amended]

■ 6. Amend § 2.24 by:

■ a. In paragraph (b)(3), adding the words ‘‘, along with a statement that the bureau reasonably foresees that disclosure would harm an interest protected by the applied exemption(s) or disclosure is prohibited by law’’ after the words ‘‘or in part’’; and

■ b. In paragraph (b)(4), adding the word ‘‘including’’ after the word ‘‘unless’’ and adding the words ‘‘and the bureau explains this harm to you’’ after the words ‘‘withhold the records’’.

Subpart G—Fees

■ 7. In § 2.37, revise paragraph (f) to read as follows:

§ 2.37 What general principles govern fees?

* * * * *

(f) If the bureau does not comply with any time limit in the FOIA:

(1) Except as provided in paragraph (f)(2) of this section, the bureau cannot assess any search fees (or, if you are in the fee category of a representative of the news media or an educational and noncommercial scientific institution, duplication fees).

(2)(i) If the bureau has determined that unusual circumstances apply (as the term is defined in § 2.70) and the bureau provided you a timely written notice to extend the basic time limit in accordance with § 2.19, the noncompliance is excused for an additional 10 workdays.

(ii) If the bureau has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the noncompliance is excused if the bureau has provided you a timely written notice in accordance with § 2.19 and has discussed with you via written mail, email, or telephone (or made not less than 3 good-faith attempts to do so) how you could effectively limit the scope of the request.

(iii) If a court has determined that exceptional circumstances exist (as that term is defined in § 2.70), the noncompliance is excused for the length of time provided by the court order.

* * * * *

§ 2.39 [Amended]

■ 8. In § 2.39, remove the paragraph (a) designation and remove paragraph (b).

Subpart H—Administrative Appeals

§ 2.58 [Amended]

■ 9. In § 2.58(a) and (b), remove the number ‘‘30’’ and add in its place the number ‘‘90’’.

Subpart I—General Information

§ 2.66 [Amended]

■ 10. In § 2.66(d), remove the Web site address ‘‘*http://www.doi.gov/foia/servicecenters.cfm*’’ and add in its place the Web site address ‘‘*https://www.doi.gov/foia/servicecenters*’’.

[FR Doc. 2016–30601 Filed 12–19–16; 8:45 am]

BILLING CODE 4334–63–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2016–0002; Internal Agency Docket No. FEMA–8461]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at *https://www.fema.gov/national-flood-insurance-program-community-status-book.*

DATES: The effective date of each community's scheduled suspension is the third date (‘‘Susp.’’) listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact Patricia Suber, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 400 C Street SW., Washington, DC 20472, (202) 646–4149.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. A notice withdrawing the suspension of such communities will be published in the **Federal Register.**

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. FEMA has determined that the community suspension(s) included in this rule is a non-discretionary action and therefore the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) does not apply.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

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

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

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region VI				
Texas:				
Baytown, City of, Chambers and Harris Counties.	485456	July 17, 1970, Emerg; July 1, 1974, Reg; January 6, 2017, Susp.	January 6, 2017	January 6, 2017.
Deer Park, City of, Harris County	480291	February 22, 1974, Emerg; August 15, 1980, Reg; January 6, 2017, Susp.	*.....do	Do.
El Lago, City of, Harris County	485466	August 14, 1970, Emerg; July 2, 1971, Reg; January 6, 2017, Susp.	.....do	Do.
Galena Park, City of, Harris County ..	480293	November 29, 1974, Emerg; November 2, 1982, Reg; January 6, 2017, Susp.	.....do	Do.
Harris County, Unincorporated Areas	480287	May 14, 1970, Emerg; May 26, 1970, Reg; January 6, 2017, Susp.	.....do	Do.
Houston, City of, Fort Bend, Harris and Montgomery Counties.	480296	September 14, 1973, Emerg; December 11, 1979, Reg; January 6, 2017, Susp.	.....do	Do.
Jacinto City, City of, Harris County ...	480299	September 4, 1975, Emerg; September 2, 1981, Reg; January 6, 2017, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
La Porte, City of, Harris County	485487	August 28, 1970, Emerg; February 12, 1971, Reg; January 6, 2017, Susp.	.....do	Do.
Morgans Point, City of, Harris County	480305	July 7, 1975, Emerg; December 1, 1983, Reg; January 6, 2017, Susp.	.....do	Do.
Nassau Bay, City of, Harris County ...	485491	July 24, 1970, Emerg; November 13, 1970, Reg; January 6, 2017, Susp.	.....do	Do.
Pasadena, City of, Harris County	480307	July 2, 1971, Emerg; May 26, 1970, Reg; January 6, 2017, Susp.	.....do	Do.
Pearland, City of, Brazoria, Fort Bend and Harris Counties.	480077	December 19, 1973, Emerg; July 5, 1984, Reg; January 6, 2017, Susp.	.....do	Do.
Seabrook, City of, Galveston and Harris Counties.	485507	May 29, 1970, Emerg; April 23, 1971, Reg; January 6, 2017, Susp.	.....do	Do.
Shoreacres, City of, Harris County	485510	September 11, 1970, Emerg; November 20, 1970, Reg; January 6, 2017, Susp.	.....do	Do.
South Houston, City of, Harris County	480311	April 17, 1975, Emerg; March 18, 1987, Reg; January 6, 2017, Susp.	.....do	Do.
Taylor Lake Village, City of, Harris County.	485513	August 28, 1970, Emerg; November 13, 1970, Reg; January 6, 2017, Susp.	.....do	Do.
Webster, City of, Harris County	485516	October 30, 1970, Emerg; May 19, 1972, Reg; January 6, 2017, Susp.	.....do	Do.

*.....do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: December 12, 2016.

Michael M. Grimm,

Assistant Administrator for Mitigation, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2016–30533 Filed 12–19–16; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

45 CFR Part 1324

RIN 0985–AA08

State Long-Term Care Ombudsman Programs

AGENCY: Administration on Aging, Administration for Community Living, HHS.

ACTION: Final rule; correction and correcting amendments.

SUMMARY: In the February 11, 2015 **Federal Register**, we published a final rule in order to implement provisions of the Older Americans Act (the Act) regarding States' Long-Term Care Ombudsman programs (Ombudsman programs). The effective date was July 1, 2016. This correcting amendment corrects a limited number of technical and typographical errors identified in the February 11, 2015 final rule.

DATES: This correcting document is effective December 19, 2016.

FOR FURTHER INFORMATION CONTACT: Becky Kurtz, Director, Office of Long-Term Care Ombudsman Programs, Administration for Community Living, Administration on Aging, Atlanta Federal Center, 61 Forsyth Street SW., Suite 5M69, Atlanta, Georgia 30303–8909, 404–562–7592.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2015–01914 of February 11, 2015 (80 FR 7704), the final rule entitled ''State Long-Term Care Ombudsman Programs,'' there were a number of technical and typographical errors that are identified and corrected in this correcting amendment. On July 1, 2016, those provisions of the final rule which had been originally codified as 45 CFR part 1327 were re-numbered as 45 CFR parts 1324 in FR Doc. 2016–13138 (81 FR 35644). The remaining provisions (originally codified as amendments to 45 CFR part 1321) remain unchanged. All of the provisions below refer to errors found in 45 CFR part 1324.

II. Summary of Changes

A. Summary of Changes in the Regulations Text

1. On page 7765, in the regulations text for § 1324.19(b)(5), we erroneously used the word ''paragraph'' instead of ''through.'' To correct this error, we have removed the word ''paragraph'' and replaced it with the word ''through.''

2. On page 7765, in the regulations text for § 1324.19(b)(7)(i), we erroneously included the term ''has no resident representative.'' Since this situation (regarding the authority for the Ombudsman program to make a referral when a resident has ''no resident representative'') is not needed in this paragraph and already provided for in § 1324.19(b)(6)(ii), the redundancy of this provision was in error. We believe elimination of this language will not change the requirements of this provision and will lessen confusion regarding its implementation.

The corrections to the errors summarized in this section appear in the regulations text of this correcting amendment.

III. Waiver of Notice and Comment Procedure and Delay in Effective Date

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the **Federal Register** before the provisions of a rule take effect. However, under section 553(b)(B) of the APA, an agency may dispense with normal rule-making requirements for good cause if the agency makes a finding that the notice and comment process is impracticable, unnecessary, or contrary to the public interest. We find that there is good cause to waive such requirements. We find that notice and comment is unnecessary because we are not altering our policies; rather, we are simply implementing correctly the policies that

we previously proposed, received comment on, and subsequently finalized.

In addition, section 553(d) of the APA mandates a 30-day delay in the effective date after issuance or publication of a rule. The section, however, creates an exception at section 553(d)(3) that allows the agency to avoid the 30-day delay in effective date when it has good cause and publishes it with the rule. We have found good cause to avoid the 30-day delay. As discussed above, this rule is merely a technical correction and makes no substantive changes to the rule. We believe the public is best served by having the final rule reflect these corrections as soon as possible.

List of Subjects for 45 CFR Part 1324

Administrative practice and procedure, Aged, Long-term care.

Accordingly, 45 CFR chapter XIII, subchapter C, is corrected by making the following correcting amendments to part 1324:

PART 1324—STATE LONG-TERM CARE OMBUDSMAN PROGRAMS

■ 1. The authority citation for part 1324 continues to read as follows:

Authority: 42 U.S.C. 3001 *et seq.;* the Older Americans Act, as amended.

§ 1324.19 [Amended]

■ 2. Section 1324.19 is amended as follows:

■ a. In paragraph (b)(5) by removing the word ''paragraph'' and adding in its place ''through''; and

■ b. In paragraph (b)(7)(i) by removing the words ''has no resident representative, or''.

Dated: December 13, 2016.

Madhura C. Valverde,

Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2016–30455 Filed 12–19–16; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

[Docket No. 160617541–6999–02]

RIN 0648–BG15

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Program

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement Amendment 47 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (Crab FMP) and to make minor clarifications to regulations implementing the Crab FMP. This final rule addresses how individual processing quota (IPQ) use caps apply to the Bering Sea *Chionoecetes bairdi* Tanner crab fisheries: the eastern *C. bairdi* Tanner (EBT) and the western *C. bairdi* Tanner (WBT). This regulation exempts EBT and WBT IPQ crab that is custom processed at a facility through contractual arrangements with the processing facility owners from being applied against the IPQ use cap of the processing facility owners, thereby allowing a facility to process more crab without triggering the IPQ use cap. This exemption is necessary to allow all of the EBT and WBT Class A individual fishing quota crab to be processed at the facilities currently processing EBT and WBT crab, and will have significant positive economic effects on the fishermen, processors, and communities that participate in the EBT and WBT fisheries. This final rule is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Crab FMP, and other applicable law.

DATES: Effective January 19, 2017.

ADDRESSES: Electronic copies of Amendment 47 to the Crab FMP, the Regulatory Impact Review (RIR), Initial Regulatory Flexibility Analysis (IRFA), and the Categorical Exclusion prepared for this action are available from *http://www.regulations.gov* or from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.*

The Environmental Impact Statement (Program EIS), RIR (Program RIR), Final Regulatory Flexibility Analysis (Program FRFA), and Social Impact Assessment prepared for the Crab Rationalization Program (Program) are available from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Keeley Kent, 907–586–7228.

SUPPLEMENTARY INFORMATION: This final rule implements Amendment 47 to the Crab FMP and regulatory amendments to the Program. NMFS published a notice of availability for Amendment 47 in the **Federal Register** on September 13, 2016 (81 FR 62850). Comment on Amendment 47 was invited through November 14, 2016. The Secretary approved Amendment 47 on December 6, 2016, after accounting for information from the public, and determining that Amendment 47 is consistent with the Crab FMP, the Magnuson-Stevens Act, and other applicable law. NMFS published the proposed rule to implement Amendment 47 on September 23, 2016 (81 FR 65615). The comment period on the proposed rule ended on October 24, 2016. NMFS received four comments. A summary of these comments and NMFS' responses are provided in the Comments and Responses section of this preamble.

This final rule modifies regulations that specify how IPQ use caps apply to IPQ issued for EBT and WBT crab fisheries. The following sections describe: (1) The Bering Sea and Aleutian Islands (BSAI) crab fisheries under the Program, (2) IPQ use caps and custom processing arrangements, and (3) this final rule.

The BSAI Crab Fisheries Under the Program

This section and the following section of the preamble provide a brief description of the Program, and the elements of the Program, that apply to Amendment 47 and this final rule. For a more detailed description of the Program as it relates to this final rule, please see Sections 2.5 and 2.6 of the RIR (see **ADDRESSES**) and the preamble of the proposed rule (81 FR 65615; September 23, 2016).

The Program was implemented on March 2, 2005 (70 FR 10174). The Program established a limited access privilege program for nine crab fisheries in the BSAI, including the EBT and WBT crab fisheries, and assigned quota share (QS) to persons based on their historic participation in one or more of those nine BSAI crab fisheries during a specific period. Under the Program, NMFS issued four types of QS: catcher vessel owner (CVO) QS was assigned to holders of License Limitation Program (LLP) licenses who delivered their catch to shoreside crab processors or to stationary floating crab processors; catcher/processor vessel owner QS was assigned to LLP license holders who harvested and processed their catch at sea; catcher/processor crew QS was issued to captains and crew on board catcher/processor vessels; and catcher vessel crew QS was issued to captains and crew on board catcher vessels. Each year, a person who holds QS may receive an exclusive harvest privilege for a portion of the annual total allowable catch, called individual fishing quota (IFQ).

NMFS also issued processor quota share (PQS) under the Program. Each year, PQS yields an exclusive privilege to process a portion of the IFQ in each of the nine BSAI crab fisheries. This annual exclusive processing privilege is called individual processor quota (IPQ). Only a portion of the QS issued yields IFQ that is required to be delivered to a processor with IPQ. QS derived from deliveries made by catcher vessel owners (*i.e.,* CVO QS) is subject to designation as either Class A IFQ or Class B IFQ. Ninety percent of the IFQ derived from CVO QS is designated as Class A IFQ, and the remaining 10 percent is designated as Class B IFQ. Class A IFQ must be matched and delivered to a processor with IPQ. Class B IFQ is not required to be delivered to a processor holding IPQ for that fishery. Each year there is a one-to-one match of the total pounds of Class A IFQ with the total pounds of IPQ issued in each crab fishery.

NMFS issued QS and PQS for the EBT and WBT crab fisheries. Unlike the QS and PQS issued for most other Program fisheries, the QS and PQS issued for the EBT and WBT crab fisheries are not subject to regional delivery and processing requirements, commonly known as regionalization. Therefore, the Class A IFQ that results from EBT and WBT QS, and the IPQ that results from EBT and WBT PQS, can be delivered to, and processed at, any otherwise eligible processing facility. In addition, the PQS and resulting IPQ issued for the EBT and WBT crab fisheries are not subject to right-of-first-refusal (ROFR) provisions included in the Program. The ROFR provisions provide certain communities with an option to purchase PQS or IPQ that would otherwise be used outside of the community holding the ROFR.

Because the EBT and WBT crab fisheries are not subject to regionalization or ROFR provisions, crab harvested under a Class A IFQ permit in these fisheries can be delivered to processors in a broad geographic area more easily than crab harvested under Class A IFQ permits in Program fisheries subject to regionalization and ROFR provisions. The rationale for exempting the EBT and WBT crab fisheries from regionalization and ROFR provisions is described in the Program EIS (see **ADDRESSES**), and in the final rule implementing the Program (70 FR 10174, March 2, 2005).

IPQ Use Caps and Custom Processing Arrangements

The Program limits the amount of QS that a person can hold (*i.e.,* own), the amount of IFQ that a person can use, and the amount of IFQ that can be used on board a vessel. Similarly, the Program limits the amount of PQS that a person can hold, the amount of IPQ that a person can use, and the amount of IPQ that can be processed at a given facility. These limits are commonly referred to as use caps.

In most of the nine BSAI crab fisheries under the Program, including the Tanner crab fisheries, a person is limited to holding no more than 30 percent of the PQS initially issued in the fishery, and to using no more than the amount of IPQ resulting from 30 percent of the initially issued PQS in a given fishery, with a limited exemption for persons receiving more than 30 percent of the initially issued PQS. No person in the EBT or WBT crab fisheries received in excess of 30 percent of the initially issued PQS (see Section 2.5.2 of the RIR). Therefore, no person may use an amount of EBT or WBT IPQ greater than an amount resulting from 30 percent of the initially issued EBT or WBT PQS. The rationale for the IPQ use caps is described in the Program EIS and the final rule implementing the Program (70 FR 10174, March 2, 2005).

Section 680.7(a)(7) provides that IPQ use by a person is calculated by summing the total amount of IPQ that is held by that person and IPQ held by other persons who are affiliated with that person. The term ''affiliation'' is defined in § 680.2 as a relationship between two or more entities where one entity directly or indirectly owns or controls 10 percent or more of the other entity. Additional terms used in the definition of ''affiliation'' are described in § 680.2.

Under § 680.7(a)(7), any IPQ crab that is ''custom processed'' at a facility an IPQ holder owns will be applied against the IPQ use cap of the facility owner, unless specifically exempted by § 680.42(b)(7). A custom processing arrangement exists when an IPQ holder has a contract with the owners of a processing facility to have his or her crab processed at that facility, and the IPQ holder does not have an ownership interest in that processing facility or is not otherwise affiliated with the owners of that processing facility. In custom processing arrangements, the IPQ holder contracts with a facility operator to have the IPQ crab processed according to that IPQ holder's specifications. Custom processing arrangements typically occur when an IPQ holder does not own a shoreside processing facility or cannot economically operate a stationary floating crab processor.

This Final Rule

Below is a brief description of this final rule. For a more detailed description of the rationale for this final rule, please see Sections 1 and 2.9.2 of the RIR (see **ADDRESSES**) and the preamble of the proposed rule (81 FR 65615; September 23, 2016).

This final rule modifies § 680.42(b)(7)(ii)(A) by adding EBT and WBT IPQ crab to the list of BSAI crab fisheries already receiving a custom processing arrangement exemption. This final rule will allow EBT and WBT IPQ crab received for custom processing by the three processors currently operating in these fisheries to qualify for a custom processing arrangement exemption and not apply against the IPQ use caps for these processors. With this final rule, all EBT and WBT IPQ crab received under custom processing arrangements at the facilities owned by the three existing EBT and WBT processors (Maruha-Nichiro Corporation, Trident Seafoods, or Unisea Seafoods) will not be counted against the IPQ use cap of the facility or the facility owners. The custom processing arrangement exemption allows these processors to custom process crab for unaffiliated IPQ holders who have custom processing arrangements with the processors, thereby allowing harvesters to fully harvest and deliver their EBT and WBT Class A IFQ crab to IPQ holders with a custom processing arrangement at facilities operating in these fisheries.

At its June 2016 meeting, the North Pacific Fishery Management Council (Council) voted to recommend Amendment 47, which creates a custom processing arrangement exemption for EBT and WBT crab. The Council recognized that consolidation within the Tanner crab processing sector has constrained the ability of the processing sector to process all of the EBT and WBT Class A IFQ crab without exceeding the IPQ use caps. The Council determined that the likelihood of additional unique and unaffiliated processing facilities entering the Tanner crab processing sector for the 2016/2017 crab fishing year or the near future is low, creating a significant risk that the portion of the Tanner crab allocation in excess of the caps will not be processed. Without the ability to have all EBT and WBT Class A IFQ processed, that portion of the Tanner crab allocation in excess of the caps will likely go unharvested because sufficient processing facilities do not currently exist in the Bering Sea region.

The anticipated effects of this final rule include allowing the full processing of all EBT and WBT Class A IFQ crab

and the associated economic and social benefits of that processing activity for harvesters, the existing Tanner crab processors, and the communities where processing facilities are located. These communities include Akutan, Dutch Harbor/Unalaska, King Cove, and Saint Paul, AK. This final rule will allow all of the Tanner crab Class A IFQ to be harvested and processed by existing processors and will thus avoid the adverse economic and social impacts created by the lack of adequate processing capacity that would otherwise result if the EBT and WBT crab fisheries could not be fully processed. Without this rule, only 90 percent of the EBT and WBT Class A IFQ could be processed by the existing processors. The remaining ten percent of the EBT and WBT Class A IFQ crab represents approximately $3.4 million in ex-vessel value and $4.95 million in first wholesale value based on estimated ex-vessel and first wholesale values of EBT and WBT crab in the 2015/2016 crab fishing year, the most recent crab fishing year for which EBT and WBT total allowable catches (TACs) have been specified (see Section 2.9 of the RIR for additional detail).

The Council and NMFS considered whether this final rule could result in further consolidation of Tanner crab processing to fewer facilities than currently operating. Since EBT and WBT crab are not subject to regionalization or ROFR, there would be no regulatory limitations preventing all of the EBT and WBT IPQ crab from being processed by one company at one facility. The Council and NMFS determined that operational factors make it unlikely that additional consolidation will occur. First, the extent to which the exemption allows further consolidation depends on whether processors choose to enter custom processing arrangements with IPQ holders. The choice to enter those arrangements depends largely on the benefit to the IPQ holder arising from using the IPQ at the holder's own facility or custom processing the IPQ at a plant unaffiliated with the IPQ holder. Collectively, the three companies and their facilities that process Tanner crab have substantial holdings of IPQ (see Table 2–3 of the RIR). It is likely more economical for these companies to process the IPQ they hold at their facilities rather than to negotiate a custom processing agreement with another processor, which reduces the likelihood of further consolidation.

Second, the extent of further consolidation depends on the business decisions that participants make regarding their participation in other crab fisheries, such as Bristol Bay red king crab and Bering Sea *C. opilio* crab. None of the current Tanner crab processors only process Tanner crab; all companies and facilities that process Tanner crab also process Bristol Bay red king crab and Bering Sea *C. opilio.* Crab processing tends to be labor intensive, requiring relatively large crews. The cost of transporting, housing, and provisioning crews to run crab processing lines at a plant can be high. Processors that are active in other BSAI crab fisheries may be more likely to continue processing in the Tanner crab fisheries to help maintain a consistent amount of crab available for processing at the facility (see Section 2.9.2 of the RIR for more information).

Third, processors are likely to maintain processing facilities near the fishing grounds. Proximity to the fishing grounds may help prevent or reduce deadloss—dead crab landed at the dock, which is associated with increased transit time between the fishing grounds and offload. Additionally, proximity to the fishing grounds can help harvesters maximize their efficiency and prevent the need to spend significant time transiting to and from processing facilities for offload. Given these factors, the Council and NMFS concluded that additional consolidation of processing activity in the EBT and WBT fisheries is unlikely under current and projected operations.

This final rule will provide a benefit to processors willing to custom process Class A IFQ for EBT and WBT crab, and those IPQ holders who do not own processing facilities and must have their crab custom processed. The custom processing arrangement exemption for EBT and WBT IPQ crab avoids the adverse economic impacts created by the 30-percent IPQ use cap for Tanner crab fisheries to IPQ holders who own and operate processing facilities. This final rule will also benefit those IPQ holders who do not have processing facilities since their IPQ could be custom processed by an existing facility and their custom processing arrangement will not count against the 30-percent IPQ use cap (see Section 2.9.2 of the RIR for further information).

This final rule will benefit harvesters who hold Class A IFQ for EBT and WBT crab. Without this rule, harvesters with EBT or WBT Class A IFQ likely will be unable to fully harvest allocations provided to them due to IPQ use cap limitations imposed on IPQ holders and the three existing processors that receive EBT and WBT crab. This rule allows Class A IFQ holders in the EBT and WBT crab fisheries to fully harvest their IFQ allocations, because those Class A IFQ holders who match with IPQ holders who do not own processing facilities will be able to deliver their IFQ to a processing facility that has a custom processing arrangement with that IPQ holder.

The effects of this final rule on communities and community sustainability are expected to be beneficial relative to no action. This final rule continues the delivery of EBT and WBT Class A IFQ crab to processors at facilities owned by the Maruha-Nichiro Corporation, Trident Seafoods, or UniSea Seafoods in BSAI communities. This final rule is expected to maintain the amount of income generated and the amount of tax revenues in communities where existing processing facilities are located.

Although this final rule provides a benefit to the existing three processors with processing facilities, this final rule does not preclude the ability for new, unaffiliated processing companies to enter the EBT and WBT fisheries, establish custom processing arrangements with IPQ holders, and process EBT and WBT crab. Section 2.9.2 of the RIR provides more detail on the potential for new unaffiliated processing companies to enter the EBT and WBT crab fisheries.

Regulation To Make a Minor Clarification

This final rule also modifies § 680.42(b)(7)(ii)(B) to clarify the meaning of the phrase ''on the effective date of this rule'' that occurs in § 680.42(b)(7)(ii)(B). The phrase ''on the effective date of this rule'' in § 680.42(b)(7)(ii)(B) refers to the effective date of the regulations that implemented Amendment 27 to the Crab FMP and that added § 680.42(b)(7)(ii)(B) to the regulations (74 FR 25449, May 28, 2009). Regulations implementing Amendment 27 to the Crab FMP were published on May 28, 2009, and became effective on June 29, 2009. The phrase ''on the effective date of this rule'' was inadvertently left in the regulatory text and not replaced with the actual effective date of the rule. This final rule revises the phrase ''on the effective date of this rule'' to read ''on June 29, 2009'' to reduce any confusion about the applicable date for the requirements in § 680.42(b)(7)(ii)(B). This minor correction does not substantively change the intent or effect of § 680.42(b)(7)(ii)(B).

Comments and Responses

Comment 1: The commenter states that NOAA should reduce the ''quota'' (TACs) of the EBT and WBT fisheries by

50 percent. The commenter also states that existing fishery management regulations are causing biological harm, ''poaching'' (unreported harvest) is occurring, and additional law enforcement effort is required.

Response: This final rule does not modify the process for determining the total amount of EBT or WBT crab available for harvest each year. The EBT and WBT fisheries are not overfished, not subject to overfishing, and the TACs for these fisheries have not been exceeded in any year these fisheries have been open for fishing since the implementation of the Program. The commenter's recommendation to reduce the TACs is not supported by available information and is outside the scope of the rule.

The commenter does not provide any data to support the assertion that unreported harvest is occurring. NMFS does not have any data that indicates that unreported harvest is occurring. The NOAA Office of Law Enforcement allocates law enforcement resources as it deems necessary and appropriate to ensure adequate enforcement.

Comment 2: Two commenters express support for the proposed rule and concur with the rationale for the rule as laid out in the preamble to the proposed rule. The commenters urge NMFS to adopt this rule.

Response: NMFS acknowledges this comment.

Comment 3: The commenter states that most stakeholders have accepted the necessity of Amendment 47 and the proposed rule with the understanding that the Council will undertake a more comprehensive review of processor use caps in the EBT and WBT fisheries. The commenter cites to several sections of the RIR that state that large processors are the primary beneficiaries of custom processing cap exemptions for the EBT and WBT fisheries, and that smaller processors that participate in the fisheries could be disadvantaged by the exemption. The commenter also cites to sections in the RIR stating that processor consolidation could curtail product development in that some processors may wish to develop new products which might not be possible (or as advantageous) under custom processing arrangements. According to the commenter, the lack of new product forms has been a quantifiable result of processor consolidation which should be analyzed and addressed through a well-crafted amendment to the FMP.

Response: As described in the preamble to the proposed rule, this final rule, and Section 2.9.2 of the RIR, the Council and NMFS considered the potential impact of Amendment 47 and this final rule on existing and potential processing operations. Based on the information available and the analyses prepared for this action, the Council and NMFS determined for reasons provided in the preambles of the proposed rule and this final rule that Amendment 47 and this final rule are not likely to cause adverse impacts on fishermen, processors, or communities participating in the EBT and WBT crab fisheries.

The decision to enter into a custom processing arrangement is a voluntary decision made by each processor. The commenter incorrectly stated that the RIR concluded that processor consolidation would impede the development of new products. Section 2.9.2 of the RIR states that the theoretical interest of processor 'A' in the development of new products but the disinterest of other processors in new product forms may be a reason why processor 'A' would not engage in custom processing arrangements with other processors, thereby inhibiting further consolidation in the sector. Although the commenter states that there has been a ''quantifiable'' lack of new product forms due to processor consolidation, NMFS does not have data to determine the range of product forms provided by crab processors, and cannot determine if consolidation in the number of processors in the fishery has resulted in fewer new product forms. Although the commenter's suggestion to initiate a new analysis and FMP amendment to assess this issue is outside of the scope of this final rule, when the Council adopted Amendment 47 it also requested Council staff to prepare a discussion paper that will review various approaches to processor consolidation within the EBT and WBT crab fisheries, such as raising the Tanner crab IPQ use cap to 40%; converting Class A IFQ to Class B IFQ; and applying a custom processing arrangement exemption only in years when processing capacity is not sufficient (*i.e.,* when there are less than four processors).

Comment 4: The commenter requests expedited implementation of this rule so that the regulations are effective by January 13, 2017. The commenter states that actions taken by the Alaska Board of Fisheries (Board of Fisheries) in January 2017 could result in changes to State of Alaska (State) harvest policy regulations for the EBT and WBT fisheries. The current State harvest policy regulations do not provide for an EBT or WBT fishery for the 2016/2017 crab fishing year. However, if the Board of Fisheries modifies the EBT and WBT harvest policy regulations at its January 2017 meeting, this could result in changes that would provide an opportunity for the State to issue TACs for the EBT and WBT fisheries for the 2016/2017 crab fishing year. The commenter expresses concern that if issued, 10 percent of the EBT and WBT Class A IFQ could be stranded if this final rule is not effective by the start of the Board of Fisheries meeting on January 13, 2017.

Response: NMFS acknowledges this request and anticipates that this final rule will be published in the **Federal Register** prior to January 13, 2017, or shortly thereafter, and that the regulations will be effective well in advance of the end of the EBT and WBT fishing seasons on March 31, 2017. However, NMFS has determined that implementation (*i.e.,* publication and effectiveness) of this final rule is not required prior to January 13, 2017, in order for the Board of Fisheries to modify its harvest policy regulations, for the State to issue TACs for the EBT and WBT fisheries, for NMFS to issue IFQ or IPQ, or to prevent stranding of EBT and WBT Class A IFQ. By State regulation (5 AAC 35.510), the EBT and WBT crab fishing seasons end on March 31 of each year. If the Board of Fisheries were to modify its harvest policy regulations and the State issued TACs for the EBT and WBT fisheries, harvesting and processing in the EBT and WBT fisheries could begin because existing Federal regulations allow each of the three processors operating in the EBT and WBT fisheries to receive and process up to 30 percent of the EBT or WBT Class A IFQ (a total of 90 percent of the EBT or WBT Class A IFQ) before being constrained. NMFS anticipates that this final rule will be effective with sufficient time to allow for the complete harvesting and processing of the EBT and WBT fisheries before the end of the fishing seasons on March 31, 2017, should the State modify its harvest policy regulations so that IFQ and IPQ is issued for the 2016/2017 crab fishing year. NMFS is not waiving the 30-day delay in effectiveness requirement of the Administrative Procedure Act for this final rule based on this comment.

Classification

The Administrator, Alaska Region, NMFS, has determined that Amendment 47 to the Crab FMP and this final rule are necessary for the conservation and management of the EBT and WBT fisheries and are consistent with the Magnuson-Stevens Act and other applicable law.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. The preamble to the proposed rule (81 FR 65615, September 23, 2016) and the preamble to this final rule serve as the small entity compliance guide for this action.

Final Regulatory Flexibility Analysis

Section 604 of the Regulatory Flexibility Act (RFA) requires an agency to prepare a final regulatory flexibility analysis (FRFA) after being required by that section or any other law to publish a general notice of proposed rulemaking and when an agency promulgates a final rule under section 553 of Title 5 of the U.S. Code. The following paragraphs constitute the FRFA for this action.

This FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA), a summary of the significant issues raised by the public comments, NMFS' responses to those comments, and a summary of the analyses completed to support the action. Analytical requirements for the FRFA are described in the RFA, section 604(a)(1) through (6). The FRFA must contain:

1. A statement of the need for, and objectives of, the rule;

2. A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

4. A description and an estimate of the number of small entities to which the rule will apply, or an explanation of why no such estimate is available;

5. A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

The ''universe'' of entities to be considered in a FRFA generally includes only those small entities that can reasonably be expected to be directly regulated by the action. If the effects of the rule fall primarily on a distinct segment of the industry, or portion thereof (*e.g.,* user group, gear type, geographic area), that segment will be considered the universe for purposes of this analysis.

In preparing a FRFA, an agency may provide either a quantifiable or numerical description of the effects of a rule (and alternatives to the rule), or more general descriptive statements, if quantification is not practicable or reliable.

Need for and Objectives of This Final Rule

C. bairdi crab processing facilities have consolidated to the extent that the IPQ use caps are constraining the ability of the remaining processing sector to process the entire allocation of Tanner crab under the caps. Without the entry of additional unique and unaffiliated processors into the Tanner crab processing sector, which appears unlikely in the near future, the portion of the *C. bairdi* Tanner crab allocation in excess of the caps (*i.e.,* 10 percent) will not be harvested because insufficient processing capacity, relative to the use caps, is currently available. In the 2015/2016 Tanner crab season, the gross ex-vessel value for 10 percent of the Class A IFQ for EBT and WBT crab was estimated at $3.4 million. Without relief from the use cap restriction, harvesters, processors, and communities are expected to lose the potential benefits from the foregone portion of this crab catch. Management objectives include providing relief from the processing use caps, so that the full *C. bairdi* crab allocation can be harvested, processed, and delivered to consumer markets, worldwide.

Summary of Significant Issues Raised During Public Comment

NMFS published the proposed rule to implement Amendment 47 on September 23, 2016 (81 FR 65615). An IRFA was prepared and summarized in the Classification section of the preamble to the proposed rule. The comment period on the proposed rule ended on October 24, 2016. NMFS received 4 comments on Amendment 47 and the proposed rule. None of these comments raise issues in response to the IRFA. The Chief Counsel for Advocacy of the SBA did not file any comments on the IRFA or the proposed rule. The public comments received for Amendment 47 were mostly supportive of the action. One comment requested further analysis of how the development of new products by some processors may not be possible or advantageous under custom processing arrangements. However, under this final rule, custom processing arrangements are not required, but rather remain a voluntary business arrangement that a processor may choose to enter. No changes were made to this rule or the RFA analysis as a result of public comments.

Number and Description of Directly Regulated Small Entities

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide.

The SBA has established size criteria for all other major industry sectors in the United States, including fish processing businesses. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

The entities directly regulated by this action are those entities that process EBT and WBT crab. It does not include entities that harvest Class A IFQ EBT and WBT crab. From 2012 through

2014, the most recent period for which NMFS has data on processors, there are no processors considered small entities that will be directly regulated by this action.

This action will also directly regulate registered crab receivers (RCRs) as all Program crab must be received by an RCR. Some RCRs are the same entities that process Tanner crab, and others are those that have their Tanner crab custom processed. In 2015/2016, there were 10 RCRs that received Tanner crab, seven of which are considered large entities due to their affiliations with large seafood processing companies. The remaining three are considered small entities because they are affiliated with not-for-profit organizations.

Recordkeeping, Reporting, and Other Compliance Requirements

This action does not require any new recordkeeping and reporting requirements, or any modification of existing requirements.

Description of Significant Alternatives to This Final Rule That Minimize Economic Impacts on Small Entities

The Council and NMFS did not identify any alternatives to the action alternative that would minimize the impact on small entities better than the action alternative and still meet the objectives for this final rule. The impacts on small entities are defined in the IRFA for this action and are not repeated here. The action alternative will allow the full harvest and processing of the Tanner crab total allowable catch. This action is not expected to have negative economic impacts on the small entities directly impacted by this action.

The Council considered a limited duration option that would have created a temporary rule to provide a fix for the near term, but would require the Council to take further action if it intended to create a more long-term revision. The Council did not select this option as it already has the ability to examine processing activity in the Tanner crab fishery at any time and take future action on this subject. This option would not have had less economic impact on small entities than the action alternative, as the action alternative is not expected to have negative impacts.

List of Subjects in 50 CFR Part 680

Alaska, Reporting and recordkeeping requirements.

Dated: December 9, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 680 is amended as follows:

PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 680 continues to read as follows:

Authority: 16 U.S.C. 1862; Pub. L. 109–241; Pub. L. 109–479.

■ 2. In § 680.42, revise paragraph (b)(7)(ii) introductory text, and paragraphs (b)(7)(ii)(A) and (B) to read as follows:

§ 680.42 Limitations on use of QS, PQS, IFQ, and IPQ.

* * * * *

(b) * * *

(7) * * *

(ii) The IPQ crab meets the conditions in paragraphs (b)(7)(ii)(A) and (B) of this section or the IPQ crab meets the conditions in paragraph (b)(7)(ii)(C) of this section:

(A) The IPQ crab is:

(*1*) BSS IPQ crab with a North region designation;

(*2*) EAG IPQ crab;

(*3*) EBT IPQ crab;

(*4*) PIK IPQ crab;

(*5*) SMB IPQ crab;

(*6*) WAG IPQ crab provided that IPQ crab is processed west of 174 degrees west longitude;

(*7*) WAI IPQ crab; or

(*8*) WBT IPQ crab.

(B) That IPQ crab is processed at:

(*1*) Any shoreside crab processor located within the boundaries of a home rule, first class, or second class city in the State of Alaska in existence on June 29, 2009; or

(*2*) Any stationary floating crab processor that is:

(*i*) Located within the boundaries of a home rule, first class, or second class city in the State of Alaska in existence on June 29, 2009;

(*ii*) Moored at a dock, docking facility, or at a permanent mooring buoy, unless that stationary floating crab processor is located within the boundaries of the city of Atka in which case that stationary floating crab processor is not required to be moored at a dock, docking facility, or at a permanent mooring buoy; and

(*iii*) Located within a harbor, unless that stationary floating crab processor is located within the boundaries of the city of Atka on June 29, 2009, in which case that stationary floating crab processor is not required to be located within a harbor.

* * * * *

[FR Doc. 2016–30068 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 81, No. 244
Tuesday, December 20, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AB27

Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA), Packers and Stockyards Program (P&SP) is proposing to amend the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act). The proposed amendments will clarify the conduct or action by packers, swine contractors, or live poultry dealers that GIPSA considers unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act. The proposed amendments will also identify criteria that the Secretary will consider in determining whether conduct or action by packers, swine contractors, or live poultry dealers constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the P&S Act.

This proposed rule identifies the conduct or action that is a per se violation of section 202(a) of the P&S Act, includes an illustrative list of conduct or action, absent demonstration of a legitimate business justification, GIPSA believes is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of harm to competition, and clarifies that any conduct or action that harms or is likely to harm competition is a violation of section 202(a) of the P&S Act. The proposed rule also includes criteria the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the P&S Act.

DATES: We will consider comments we receive by February 21, 2017.

ADDRESSES: We invite you to submit comments on this proposed rule. You may submit comments by any of the following methods:

- *Mail:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Hand Delivery or Courier:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Internet: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

Instructions: All comments should make reference to the date and page number of this issue of the **Federal Register**. Regulatory analyses and other documents relating to this rulemaking will be available for public inspection in Room 2542A–S, 1400 Independence Avenue SW., Washington, DC 20250–3613 during regular business hours. All comments received will be included in the public docket without change, including any personal information provided. All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)). Please call the Management and Budget Services staff of GIPSA at (202) 720–8479 to arrange a public inspection of comments or other documents related to this rulemaking.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Litigation and Economic Analysis Division, P&SP, GIPSA, 1400 Independence Ave. SW., Washington, DC 20250, (202) 720–7051, *s.brett.offutt@usda.gov*.

SUPPLEMENTARY INFORMATION:

Background on Prior Proposed Rule

In June 2010, GIPSA proposed a new regulation designated as § 201.210. Paragraph (a) in that regulation introduced a list of examples of conduct that GIPSA considered unfair, unjustly discriminatory, or deceptive under section 202(a) of the P&S Act. GIPSA intended the first seven examples in the list to exemplify conduct that would violate section 202(a) regardless of proof of harm or likely harm to competition. The seven (7) examples proposed were as follows: (1) An unjustified material breach of a contractual duty or an action or omission that a reasonable person would consider unscrupulous, deceitful, or in bad faith in connection with any transaction in or contract involving the production, maintenance, marketing or sale of livestock or poultry; (2) a retaliatory action or omission, such as coercion, intimidation, or disadvantage, by a packer, swine contractor, or live poultry dealer in response to the lawful expression, association, or action of a poultry grower, livestock producer, or swine production contract grower; (3) a refusal to provide to a poultry grower or swine production contract grower statistical information and data (*e.g.,* feed conversion rates, feed analysis, and origin and breeder history) used to determine compensation paid under a production contract; (4) an action or attempt to limit by contract a poultry grower, swine production contract grower, or livestock producer's legal rights and remedies afforded by law; (5) paying premiums or applying discounts on a swine production contract grower's payment or the purchase price received by the livestock producer from the sale of livestock without documenting the reason and substantiating the revenue and cost justification associated with the premium or discount; (6) terminating a poultry growing arrangement or a swine production contract based only on allegations that the poultry grower or swine production contract grower failed to comply with an applicable law, rule or regulation; and (7) a representation, omission or practice that is fraudulent or likely to mislead a reasonable poultry grower, swine production contract grower, or livestock producer regarding a material condition or term in a contract or business transaction. These seven (7) examples of conduct were followed by one last example, number eight (8), that read, ''Any act that causes competitive injury or creates a likelihood of competitive injury.''

Comments in opposition to proposed § 201.210 argued that the regulation was unclear, vague, and ambiguous. Some questioned whether the lack of clarity would make it impossible to determine whether a company was behaving in compliance with § 201.210. Other comments questioned whether it allowed for a balancing of interests. As

a result of the comments, GIPSA has restructured and revised proposed § 201.210.

Summary of Changes From the 2010 Proposed Rule

In this new proposed rule, GIPSA restructured § 201.210 into three paragraphs designated by letters (a) through (c). Paragraph (a) addresses ''per se'' violations of section 202(a), which are those behaviors specifically identified with the P&S Act as unfair, unjustly discriminatory, or deceptive practices or devices. A delay in payment or attempt to delay payment for livestock purchases by a market agency, dealer, or packer is specifically identified as an ''unfair practice'' in Section 409(c) of the P&S Act. When a packer violates section 409(c) of the P&S Act (7 U.S.C. 228b), the conduct is also a ''per se'' violation of section 202(a) of the P&S Act. Likewise, delays in payment or attempts to delay payment by a live poultry dealer are ''per se'' violations because such conduct is identified as an ''unfair practice'' in section 410(b) of the P&S Act (7 U.S.C. 228b–1). Paragraph (b) provides a list of examples of conduct or action that absent demonstration of a legitimate business justification, GIPSA considers as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act whether or not the conduct harms or is likely to harm competition. Paragraph (c) states that any conduct or action that harms or is likely to harm competition is unfair, unjustly discriminatory, or deceptive and is a violation of section 202(a).

Proposed § 201.210 is consistent with USDA's long held position that a showing of harm or likely harm to competition is not required for all violations of section 202(a) of the P&S Act and with the scope of section 202(a) as set forth in the aforementioned interim final rule, § 201.3(a), which also appears in this edition of the **Federal Register**.

GIPSA is proposing § 201.210(a) to affirmatively assert that any conduct or action by a packer, swine contractor, or live poultry dealer that the P&S Act explicitly deems to be unfair, unjustly discriminatory, or deceptive is a violation of section 202(a) without a showing of harm or likely harm to competition. Examples of such conduct or action that would fall under this section are in sections 409(c) and 410(b) of the P&S Act, which state that a packer and live poultry dealer, respectively, have engaged in an ''unfair practice'' when they fail to pay timely for livestock or poultry.

GIPSA is proposing § 201.210(b) as a non-exhaustive list of the types of conduct or action that GIPSA believes is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of whether the conduct harms or is likely to harm competition. Neither the P&S Act nor the regulations have ever specifically defined the terms ''unfair,'' ''unjustly discriminatory,'' or ''deceptive.'' This list is intended to reduce confusion regarding conduct that is unfair, unjustly discriminatory, or deceptive, without harming or the likelihood of harming competition. This list provides a sufficient number of examples to convey an understanding of this category of conduct and is not intended to list all conduct that would fit this category. These examples are violations if there is no legitimate business justification for the conduct. Legitimate business justifications would allow certain conduct that otherwise would be deemed a violation of section 202(a).

Proposed § 201.210(b)(1) identifies retaliatory action or threat of retaliatory action by a packer, swine contractor or live poultry dealer as violations of section 202(a) when done in response to lawful communication, association, or assertion of rights by a livestock producer, swine production contract grower, or poultry grower. The threat of terminating a contract in retaliation for some action may be sufficient unfair conduct to violate the P&S Act. These retaliatory acts or threats of retaliatory action may be directed toward a single grower or small group of growers, causing them harm, but not having significant effects on competition. For this reason, we propose to include both ''retaliatory action'' and the ''threat of retaliatory action'' in proposed § 201.210(b)(1), as an example of conduct or action that is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of whether the conduct harms or is likely to harm competition.

Proposed § 201.210(b)(2) identifies conduct or action that attempts to contractually limit the legal rights or remedies afforded by law to a livestock producer, swine production contract grower, or poultry grower as unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act. This proposed paragraph only contains an illustrative list of examples of such conduct or action limiting the legal contractual rights and remedies afforded to livestock producers, swine production contract growers, or poultry growers. This list is intended to provide a sufficient number of examples of the types of legal rights and remedies intended to be protected under this section. It is an illustrative list and is not intended to list all applicable legal rights and remedies.

Under proposed § 201.210(b)(2)(i), GIPSA considers conduct or action that contractually limits a livestock producer, swine production contract grower, or poultry grower's right to a trial by jury as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act. Proposed § 201.210(b)(2)(i) provides for an exception when the livestock producer, swine production contract grower, or poultry grower has agreed to be bound by arbitration provisions in a contract that complies with § 201.218(a) and that provides a meaningful opportunity to participate fully in the arbitration process after applying the criteria outlined in § 201.218(b).

The 2008 Farm Bill added section 209, *Choice of Law and Venue,* to the P&S Act. Section 209(a) provides that the forum to resolve any dispute among the parties to a poultry growing arrangement or swine production or marketing contract that arises out of that arrangement or contact must be located in the Federal judicial district where the principal part of the performance took place. GIPSA is proposing to add § 201.210(b)(2)(ii), which makes clear that requiring a trial, arbitration, or other means of dispute resolution to be held in a location other than the Federal judicial district where a grower or producer performs their contractual obligations is unfair and a violation of § 202(a) of the P&S Act. Due to differences in resources between the live poultry dealer, swine contractor or packer and the poultry grower, swine production contract grower or livestock producer, the growers and producers are at a disadvantage if required to travel great distances to resolve disputes. This conduct has the potential to impact a single grower or producer or a small group of growers or producers without harming competition. This proposed regulation interprets and implements a statutory requirement that does not include a harm to competition component.

Under proposed §§ 201.210(b)(2)(iii) and (iv), GIPSA considers any conduct or action that contractually limits a livestock producer's, swine production contract grower's, or poultry grower's right to pursue all damages available under applicable law, or right to seek an award of attorney fees, if such an award is available, under applicable law, respectively, as unfair, unjustly discriminatory, or deceptive in violation

of section 202(a) of the P&S Act. Livestock producers, swine production contract growers, and poultry growers commonly have little or no opportunity to negotiate the terms of their contracts with packers, swine contractors, and live poultry dealers. The livestock producers, swine production contract growers, and poultry growers are offered a contract and are typically expected to accept the terms as offered. If the livestock producer, swine production contract grower, or poultry grower has assumed considerable debt to finance their farming operation, the producer or grower may feel they have no choice but to accept the terms as offered. GIPSA believes that it is unfair, unjustly discriminatory or deceptive to limit a producer or grower from recovering damages that would otherwise be available, but for the limitations in the contract.

Proposed §§ 201.210(b)(3) through (7) identify the failure to act in compliance or in accordance with other specified regulations as conduct or action that is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act. Section 201.210(b)(3) clarifies that failing to comply with the requirements of § 201.100 is unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act. Regulation § 201.100 specifies certain information and notices that must be provided to poultry growers. The live poultry dealer has control over most, if not all, of the information relevant to the grower's operations. This information is critical to the grower in operating his or her business and places the grower at a great disadvantage without this information. The 2008 Farm Bill directed GIPSA to, among other things, promulgate regulations establishing criteria the Secretary will consider in determining: (1) Whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement; (2) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act; (3) whether a live poultry dealer or swine production contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of their arrangement or contract that could lead to the termination of the poultry growing arrangement or swine production contact; and (4) whether the arbitration process provided in a contract provides a grower or producer a meaningful opportunity to participate fully in the arbitration process. As directed by the 2008 Farm Bill, GIPSA published the regulations establishing the criteria in a final rule on December 9, 2011 [76 FR 76874]. The regulations are codified in 9 CFR part 201 as 9 CFR 201.215,[1] 201.216, 201.217 and 201.218, respectively. These criteria, when applied, allow the Secretary to determine whether certain conduct has occurred, specifically whether reasonable notice of suspension of delivery of birds has been given (201.215), whether requiring additional capital investments violates the Act (201.216), whether a reasonable period of time has been given to remedy a breach of contract (201.217), and whether the grower or producer is given the option to decline arbitration and provided a meaningful opportunity to participate in the arbitration process if they so choose (201.218). After applying the criteria in each of these four (4) regulations, the Secretary could determine that a violation of the P&S Act has occurred. This proposed regulation makes clear that such violations are considered unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act.

Existing regulations under the P&S Act govern the weighing of livestock, poultry, and feed (§§ 201.55, 201.71, 201.72, 201.73, 201.73–1, 201.76, 201.82, 201.99, 201.108–1). The regulations at § 201.71 also address the proper use of carcass merit evaluation systems and devices. Packers, swine contractors, and live poultry dealers use sophisticated scales and electronic devices to determine weight and quality characteristics of live animals and carcasses. The weights and quality measurements are used in formulas that determine payment to livestock producers and poultry growers. Failure to properly use these devices can affect producer and grower payment. GIPSA has always considered inaccurate weighing and the use of inaccurate scales to be unfair conduct. This proposed rule sets forth GIPSA's position on these practices as unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act.

The regulations regarding the weighing of livestock, poultry, and feed require that packers, swine contractors, and live poultry dealers properly install, maintain, inspect, and operate scales to ensure livestock producers, swine production contract growers, and poultry growers are paid on accurate weights. Inaccurate weighing and inaccurate scales can have a significant impact on a poultry grower or livestock producer. Even slight inaccuracies can result in large financial losses when applied over an entire flock or large number of livestock. GIPSA considers, and now proposes for clarification, the failure to accurately weigh poultry and livestock to be a violation of section 202(a) of the P&S Act.

In 2014, GIPSA incorporated by reference applicable requirements of the 2013 edition of the National Institute of Standards and Technology (NIST) Handbook 44. The referenced requirements include standards for livestock, meat, and poultry evaluation systems and/or devices. These standards reference specifications established by the American Society for Testing Materials (ASTM) International. By incorporating the standards in Handbook 44, GIPSA requires regulated entities to comply with the standards. Misuse of these systems and devices or use of inaccurate devices can cause significant harm to a single producer or group of producers without necessarily harming competition. GIPSA considers such harm to producers unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act. GIPSA is therefore proposing to add, as a final example of an unfair practice that violates section 202(a) of the P&S Act that does not require a showing of harm or likely harm to competition, a failure to ensure accurate evaluation systems or devices at § 201.210(b)(9).

The specific conduct listed in this proposed rule violates section 202(a) of the P&S Act regardless of whether the conduct or action harms or is likely to harm competition. This list does not imply that conduct that harms competition or is likely to harm competition would not also violate the P&S Act. To make this clear, GIPSA is proposing to add § 201.210(c), which clarifies that, absent demonstration of a legitimate business justification, any conduct or action that harms or is likely to harm competition is an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a) of the P&S Act. However, nothing in this provision would apply to mergers and acquisitions by packers, swine contractors, or live poultry dealers.

Section 11006(1) of the 2008 Farm Bill directed GIPSA to amend the

[1] The criteria regarding suspension of delivery of birds § 201.215 included ''(a) Whether a live poultry dealer provides a grower written notice at least 90 days prior to the date it intends to suspend the delivery of birds under a poultry growing arrangement''. This criterion was rescinded effective February 5, 2015 [80 FR 6430].

regulations under the P&S Act to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the P&S Act. In June 2010, GIPSA published a proposed rule, which included a new regulation addressing this Congressional mandate, § 201.211.

Throughout the history of the P&S Act, an ''undue or unreasonable preference or advantage'' has been determined according to the facts of each case within the purposes of the P&S Act. In proposed § 201.211, GIPSA proposed the following three (3) criteria the Secretary could consider to determine if an undue or unreasonable preference or advantage, or an undue or unreasonable prejudice or disadvantage, had occurred in violation of the P&S Act: (1) Whether contract terms based on number, volume or other condition, or contracts with price determined in whole or in part by the volume of livestock sold are made available to all poultry growers, livestock producers or swine production contract growers who individually or collectively meet the conditions set by the contract; (2) whether price premiums based on standards for product quality, time of delivery and production methods are offered in a manner that does not discriminate against a producer or group of producers that can meet the same standards; and (3) whether information regarding acquiring, handling, processing, and quality of livestock is disclosed to all producers when it is disclosed to one or more producers.

Many commenters supported proposed § 201.211 and specifically the criterion related to contract terms based on number, volume or other conditions. These commenters saw this section as a way to address potential disadvantages to small and medium-scale producers.

GIPSA received several comments expressing concerns regarding the practicality of the proposed criteria on contract distribution by the packer, swine contractor, or live poultry dealer to all livestock producers, swine production contract growers, or live poultry dealers. Some commenters also expressed a concern with the ambiguity and lack of clarity in certain criteria.

Many commenters expressed concerns that the proposed criterion related to price premiums and related types of contracts would have the unintended consequence of either directly or indirectly eliminating alternative marketing arrangements (AMA) Livestock producers use AMAs to market their livestock to a packer at least 14 days prior to slaughter under a verbal or written agreement. Many commenters opined that the proposed regulations would increase the potential for litigation thereby jeopardizing the continued use of these arrangements. The rapid growth of value-added segments of the livestock industry (*e.g.,* breed certifications, source verification, and production method certification) has benefitted many producers and supported consumer demand. GIPSA did not intend to limit the use of AMAs. Commenters also expressed concern about privacy issues in disclosing information regarding acquiring, handling, processing, and quality of livestock to all producers as discussed in proposed § 201.211(c). In response to the comments, GIPSA has revised proposed § 201.211. We do not intend for the current proposed provisions to affect value-added production and premiums, but commenters are encouraged to explain any concerns about how the proposed text will affect value-added production and how we might alter our rule to correct that.

In this new proposed rule, GIPSA would add new § 201.211, ''*Undue or unreasonable preferences or advantages,*'' which is consistent with Congress' instruction to the Secretary in the 2008 Farm Bill. The proposed regulation identifies five criteria the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the P&S Act. This list is not exhaustive and other criteria may be considered depending on the circumstances of a particular situation.

In response to concerns raised in comments received in 2010 about ambiguity and clarity, GIPSA deleted the criterion regarding contract terms based on number, volume, or other conditions. The originally proposed criteria related to price premiums and disclosing information have also been deleted. Additionally, we propose to add criteria addressing types of conduct considered to be favorable toward some producers and growers as compared to others.

Under proposed § 201.211(a), the Secretary will consider whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to others similarly situated who have engaged in lawful communication, association, or assertion of their rights. Producers and growers are entitled to exercise their rights of speech and association, such as forming or joining a contract growers' union, without fear of experiencing disparate treatment. Packers, swine contractors or live poultry dealers who treat some producers and growers more favorably than producers or growers who choose to exercise their rights are giving an undue preference or advantage to a group of producers or growers to the detriment of others. GIPSA believes this conduct violates section 202(b) of the P&S Act and is proposing this regulation to clarify its position.

Under proposed § 201.211(b), the Secretary will consider whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to others similarly situated who the packer, swine contractor, or live poultry dealer contend have taken an action or engaged in conduct that violates any applicable law, rule or regulation related to the livestock or poultry operation without a reasonable basis to determine that the livestock producer, swine production contract grower, or poultry grower committed the violation. GIPSA has become aware of situations in which a packer, swine contractor, or live poultry dealer has terminated a contract with a producer or grower based on an allegation that some law or regulation was violated. For example, a live poultry dealer might terminate a poultry grower's contract on the basis that the live poultry dealer believes the poultry grower violated some aspect of the Clean Water Act. Unless there is some reasonable basis for such a determination, such as a finding by a government agency charged with enforcing the Clean Water Act, GIPSA believes treating growers differently under these circumstances would violate the prohibition of section 202(b) against giving undue preferences or advantages to some producers and growers as compared to other producers and growers.

Under proposed § 201.211(c), the Secretary will consider whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to others similarly situated for an arbitrary reason unrelated to the livestock or poultry operation. This is necessary to prevent disparate treatment for any reason unrelated to the sale or production of livestock or poultry. If the packer, swine contractor, or live poultry dealer demonstrates a legitimate business reason for the action, the action would not violate section 202(b) of the P&S Act.

Under proposed § 201.211(d), the Secretary will consider whether a packer, swine contractor, or live poultry

dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to others similarly situated on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status. Disparate treatment due to any of these bases could constitute a violation of one or more person's civil rights. GIPSA considers conduct that treats some producers or growers more favorably than others or to the detriment of a producer or grower because of the producer's or grower's status as a member of a class to be prohibited conduct in violation of section 202(b) of the P&S Act.

Finally under proposed § 201.211(e), the Secretary will consider whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise constitute an undue or unreasonable preference or advantage. A packer, swine contractor, or live poultry dealer may have a legitimate business reason for treating some livestock producers, swine production contract growers, or poultry growers more favorably. In evaluating the criteria proposed above, the Secretary will also consider the proffered justification for the conduct in determining whether the packer swine contractor, or live poultry dealer has violated section 202(b) of the P&S Act.

Required Impact Analyses

Executive Order 12866 and Regulatory Flexibility Act

This rulemaking has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. GIPSA is proposing to make two changes to the regulations. The first will help to clarify the types of conduct considered unfair, unjustly discriminatory, or deceptive in violation of § 202(a) of the P&S Act. The second provides criteria, in response to requirements of the 2008 Farm Bill, to consider in determining whether a packer, swine contractor, or live poultry dealer has engaged in conduct resulting in an undue preference or advantage to one or more livestock producers or poultry growers in violation of § 202(b) of the P&S Act. As a required part of the regulatory process, GIPSA prepared an economic analysis of proposed §§ 201.210 and 201.211. The first section of the analysis is an introduction and a discussion of the prevalence of contracting in the cattle, hog, and poultry industries as well as a discussion of potential market failures. Next, GIPSA discusses three regulatory alternatives it considered and presents a summary cost-benefit analysis of each alternative. GIPSA then discusses the impact on small businesses.

Introduction

GIPSA issued a proposed rule on June 22, 2010, which included §§ 201.3, 201.210, and 201.211. GIPSA has revised the 2010 versions of §§ 201.210 and 201.211 and is now proposing new §§ 201.210 and 201.211 and issuing § 201.3(a) as an interim final rule. Section 201.3(a) states that certain conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition. Section 201.3(a) formalizes GIPSA's longstanding position that, in some cases, violations of sections 202(a) and 202(b) can be proven without demonstrating harm or likely harm to competition. Section 201.210, among other things, provides clarity to the industry regarding the conduct or action, absent demonstration of a legitimate business justification, that constitutes an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) regardless of harm to competition. Section 201.211 provides clarity to the industry regarding the conduct or action that constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) by establishing criteria that the Secretary will consider in making such a determination. GIPSA believes the proposed regulations will serve to strengthen the protection afforded the nation's livestock producers and growers while promoting fairness and equity among industry segments.

Proposed § 201.210(a) specifies that any conduct or action by a packer, swine contractor, or live poultry dealer that is explicitly deemed to be an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device by the P&S Act is a per se violation of section 202(a). Section 201.210(b) provides examples of conduct or action that, absent demonstration of a legitimate business justification, are ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.210(c) specifies that any conduct or action that harms or is likely to harm competition is an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a). Many of the examples provided in § 201.210(b) relate to conduct or action that limits, by contract, the legal rights and remedies afforded by law to poultry growers, swine production contract growers, and livestock producers. Other examples include conduct or action that could be violations of section 202(a) of the P&S Act upon application and consideration of criteria contained within other specified regulations.

As required by the 2008 Farm Bill, proposed § 201.211 specifies criteria the Secretary will consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b). The first four (4) criteria require the Secretary to consider whether one or more livestock producers, swine production contract growers, or poultry growers is treated more favorably as compared to other similarly situated livestock producers, swine contract growers, or poultry growers. The fifth criterion in § 201.211 requires the Secretary to consider whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise be an undue or unreasonable preference or advantage.

Sections 201.210 and 201.211 focus heavily on contracts between livestock producers and packers, swine production contract growers and swine contractors, and poultry growers and live poultry dealers. A discussion of contracting in these industries is, therefore, useful in explaining the need for these additional regulations.

Prevalence of Contracting in Cattle, Hog, and Poultry Industries

Contracting is an important and prevalent feature in the production and marketing of livestock and poultry. Several provisions in §§ 201.210 and 201.211 affect livestock and poultry grown or marketed under contract. For example, under § 201.210(b)(2), absent demonstration of a legitimate business justification, GIPSA considers conduct or action by packers, swine contractors, or live poultry dealers that limit or attempt to limit, by contract, the legal rights and remedies of livestock producers, swine production contract growers, or poultry growers as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.211 establishes criteria the Secretary will consider in determining whether conduct or action by a packer, swine contractor, or live poultry dealer

constitutes an undue or unreasonable preference or advantage and a violation of section 202(b).

The type of contracting varies among cattle, hogs, and poultry. Broilers, the largest segment of poultry, are almost exclusively grown under production contracts, in which the live poultry dealers own the birds and provide poultry growers with feed and medication to raise and care for the birds until they reach the desired market size. Poultry growers provide the housing, labor, water, electricity, fuel, and provide for waste removal. Cattle production contracts are not subject to the jurisdiction of the P&S Act. Hog production falls between these two extremes. As shown in Table 1 below, over 96 percent of all broilers and over 40 percent of all hogs are grown under contractual arrangements. Similarly, swine contractors typically own the slaughter hogs and sell the finished hogs to pork packers. The swine contractors typically provide feed and medication to the swine production contract growers who own the growing facilities and provide growing services. With the exception of turkey production, the use of contract growing arrangements has remained relatively stable over the last years that the Census of Agriculture has published data on commodities raised and delivered under production contracts as Table 1 shows.

TABLE 1—PERCENTAGE OF POULTRY AND HOG RAISED AND DELIVERED UNDER PRODUCTION CONTRACTS [2]

Species	2002	2007	2012
Broilers	98.0	96.5	96.4
Turkeys	41.7	67.7	68.5
Hogs	42.9	43.3	43.5

Another contract category is marketing contracts, where livestock producers market their livestock to a packer for slaughter under a verbal or written agreement. These are commonly referred to as Alternative Marketing Arrangements (AMA). Pricing mechanisms vary across AMAs. Some AMAs rely on a spot market for at least one aspect of its price, while others involve complicated pricing formulas with premiums and discounts based on carcass merits. The livestock producer and packer agree on a pricing mechanism under AMAs, but usually not on a specific price.

USDA's Agricultural Marketing Service (AMS) reports the number of cattle sold to packers under formula, forward contract, and negotiated pricing mechanisms. The following table illustrates the prevalence of contracting in the marketing of fed cattle. Formula pricing methods and forward contracts are two forms of AMA contracts. Thus, the first two columns in Table 2 are cattle marketed under contract and the third column represents the spot market for fed cattle. The data in Table 2 show that the contracting of cattle has increased since 2005. Approximately 35 percent of fed cattle were marketed under contracts in 2005. By 2015, the percentage of fed cattle marketed to packers under contracts had increased to almost 75 percent.

TABLE 2—PERCENTAGE OF FED CATTLE SOLD BY TYPE OF PURCHASE [3]

Year	Formula	Forward contract	Negotiated
2005	30.4	5.0	64.6
2006	31.5	6.8	61.7
2007	33.2	8.3	58.5
2008	37.4	9.9	52.7
2009	43.7	7.0	49.3
2010	44.9	9.5	45.6
2011	48.4	10.9	40.7
2012	54.7	11.4	33.8
2013	60.0	10.2	29.8
2014	58.1	14.2	27.6
2015	58.2	16.5	25.3

As previously discussed and illustrated in Table 1 above, over 40 percent of hogs are grown under production contracts. These hogs are then sold by swine contractors to packers under marketing contracts. The prevalence of marketing contracts in the sale of finished hogs, which includes production contract and non-production contract hogs, to packers is even more prevalent as shown in the table below.

TABLE 3—PERCENTAGE OF HOGS SOLD BY TYPE OF PURCHASE [4]

Year	Other marketing arrangements [5]	Formula [6]	Negotiated
2005	39.3	49.7	11.0

[2] Agricultural Census, 2007 and 2012. *https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/* and *https://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/*.

[3] USDA's Agricultural Marketing Service. *https://mpr.datamart.ams.usda.gov/menu.do?path=Products/Cattle/Weekly*. Accessed on September 9, 2016.

[4] USDA's Agricultural Marketing Service.

[5] Includes Packer Owned and Packer Sold, and Other Purchase Arrangements.

[6] Includes Swine Pork Market Formula, and Other Market Formula.

TABLE 3—PERCENTAGE OF HOGS SOLD BY TYPE OF PURCHASE [4]—Continued

Year	Other marketing arrangements [5]	Formula [6]	Negotiated
2006	44.0	46.4	9.6
2007	44.8	46.5	8.7
2008	43.9	47.6	8.5
2009	42.8	50.4	6.8
2010	45.4	49.4	5.2
2011	47.6	48.2	4.2
2012	47.7	48.6	3.6
2013	48.3	48.4	3.2
2014	45.9	51.4	2.7
2015	46.0	51.4	2.6

Similar to cattle, the percentage of hogs sold under marketing contracts has increased since 2005 to over 97 percent in 2015. The spot market for hogs has declined to 2.6 percent in 2015. As these data demonstrate, almost all hogs are marketed under some type of marketing contract.

Benefits of Contracting in Cattle, Hog, and Poultry Industries

Contracts have many benefits. They help farmers and livestock producers manage price and production risks, elicit the production of products with specific quality attributes by tying prices to those attributes, and facilitate the smooth the flow of commodities to processing plants encouraging more efficient use of farm and processing capacities. Agricultural contracts can also lead to improvements in efficiency throughout the supply chain for products by providing farmers with incentives to deliver products consumers desire and produce products in ways that reduce processing costs and, ultimately, retail prices.

In 2007, RTI International conducted a comprehensive study of marketing practices in the livestock and red meat industries from farmers to retailers (the RTI Study).[7] The RTI Study analyzed the extent of use, price relationships, and costs and benefits of contracting, including AMAs. The RTI Study found that AMAs increased the economic efficiency of the cattle and hog markets and yielded economic benefits to consumers, livestock producers and packers.

The RTI Study found that increased economic efficiencies came from less volatility in volume and more intensive use of production and processing facilities, meaning less capital, labor, and feed per pound of meat produced. Increased economic efficiencies also came from reduced transaction costs and from sending price signals to better match the meat attributes to consumer demand. Consumers benefit from lower meat prices and from getting meat with desired attributes. In turn, the consumer benefits increase livestock demand, which provides benefits to livestock producers.

Structural Issues in the Cattle, Hog, and Poultry Industries

As the above discussion highlights, there are important benefits associated with the use of agriculture contracts in the cattle, hog, and poultry industries. However, if there are large disparities in the bargaining power among contracting parties resulting from size differences between contracting parties or the use of market power by one of the contracting parties, the contracts may have detrimental effects on one of the contracting parties and may result in inefficiencies in the marketplace.

For example, a contract that ties a grower to a single purchaser of a specialized commodity, even if the contract provides for fair compensation to the grower, still leaves the grower subject to default risks should the contractor fail. Another example is a contract that covers a shorter term than the life of the capital (a poultry house, for example). The grower may face the hold-up risk that the contractor may require additional capital investments or may impose lower returns at the time of contract renewal. Hold-up risk is a potential market failure and is discussed in detail in the next section. These risks may be heightened when there are no alternative buyers for the grower to switch to, or when the capital investment is specific to the original buyer.[8] Some growers make substantial long-term capital investments as part of livestock or poultry production contracts, including land, poultry or hog houses, and equipment. Those investments may tie the grower to a single contractor or integrator. Costs associated with default risks and hold-up risks are important to many growers in the industry. The table below shows the number of integrators that broiler growers have in their local areas by percent of total farms and by total production.

TABLE 4—INTEGRATOR CHOICE FOR BROILER GROWERS [9]

Integrators in grower's area [10] (number)	Farms (% of total)	Birds (% of total)	Production (% of total)	Can change to another integrator (% of farms)
1	21.7	23.4	24.5	7

[7] RTI International, 2007, GIPSA Livestock and Meat Marketing Study, Prepared for GIPSA.

[8] See Vukina and Leegomonchai, *Oligopsony Power, Asset Specificity, and Hold-Up: Evidence From The Broiler Industry, American Journal of Agricultural Economics,* 88(3): 589–605 (August 2006).

[9] MacDonald, James M. Technology, Organization, and Financial Performance in U.S. Broiler Production. USDA, Economic Research Service, June 2014.

[10] Percentages were determined from the USDA Agricultural Resource Management Survey (ARMS), 2011. ''Respondents were asked the number of integrators in their area. They were also asked if they could change to another integrator if they stopped raising broilers for their current integrator.'' Ibid. p. 30.

TABLE 4—INTEGRATOR CHOICE FOR BROILER GROWERS [9]—Continued

Integrators in grower's area [10] (number)	Farms (% of total)	Birds (% of total)	Production (% of total)	Can change to another integrator (% of farms)
2	30.2	31.9	31.7	52
3	20.4	20.4	19.7	62
4	16.1	14.9	14.8	71
>4	7.8	6.7	6.6	77
No Response	3.8	2.7	2.7	Na

The data in the table show that 52 percent of broiler growers, accounting for 56 percent of total production, report having only one or two integrators in their local areas. This limited integrator choice may accentuate the contract risks. A 2006 survey indicated that growers facing a single integrator received 7 to 8 percent less compensation, on average, than farmers located in areas with 4 or more integrators.[11] If live poultry dealers already possess some market power to force down prices for poultry growing services, some contracts can extend that power by raising the costs of entry for new competitors, or allowing for price discrimination.[12]

Many beef, pork, and poultry processing markets face barriers to entry including; (1) Economies of scale; (2) high asset-specific capital costs with few alternative uses of the capital; (3) brand loyalty of consumers, customer loyalty to the incumbent processors, and high customer switching costs; and (4) governmental food safety, bio-hazard, and environmental regulations. Consistent with these barriers, there has been limited new entry.

However, an area where entry has been successful is in developing and niche markets, such as organic meat and free-range chicken. Developing and niche markets have a relatively small consumer market that is willing to pay higher prices, which supports smaller plant sizes. Niche processors are generally small, however, and do not offer opportunities to many producers or growers.

Economies of scale have resulted in large processing plants in the beef, pork, and poultry processing industries. The barriers to entry discussed above may have limited the entry of new processors, which limits the expansion of choice of processors to which livestock producers market their livestock. Barriers to entry also limit the expansion of choice for poultry growers who have only one or two integrators in their local areas with no potential entrants on the horizon. The limited expansion of choice of processors by livestock producers, swine production contract growers, and poultry growers may limit contract choices and the bargaining power of producers and growers in negotiating contracts.

One indication of potential market power is industry concentration.[13] The following table shows the level of concentration in the livestock and poultry slaughtering industries for 2005–2015.

TABLE 5—FOUR-FIRM CONCENTRATION IN LIVESTOCK AND POULTRY SLAUGHTER [14]

Year	Steers & heifers (%)	Hogs (%)	Broilers (%)	Turkeys (%)
2005	80	64	n.a.	n.a.
2006	81	61	n.a.	n.a.
2007	80	65	57	52
2008	79	65	57	51
2009	86	63	53	58
2010	85	65	51	56
2011	85	64	52	55
2012	85	64	51	53
2013	85	64	54	53
2014	83	62	51	58
2015	85	66	51	57

The table above shows the concentration of the four largest steer and heifer slaughterers has remained relatively stable between 79 and 86 percent since 2005. Hog and broiler slaughter concentration has also remained relatively steady at over 60 percent and 50 percent, respectively.

The data in Table 5 are estimates of national concentration and the size differences discussed below are also at the national level, but the economic markets for livestock and poultry may be regional or local, and concentration in regional or local areas may be higher than national measures. For example, while poultry markets may appear to be the least concentrated in terms of the four-firm concentration ratios presented above, economic markets for poultry growing services are more localized than markets for fed cattle or hogs, and local concentration in poultry markets is greater than in hog and other livestock

[11] MacDonald, J. and N. Key. ''Market Power in Poultry Production Contracting? Evidence from a Farm Survey.'' *Journal of Agricultural and Applied Economics.* 44(4) (November 2012): 477–490.

[12] See, for example, Williamson, Oliver E. *Markets and Hierarchies: Analysis and Antitrust Implications,* New York: The Free Press (1975); Edlin, Aaron S. & Stefan Reichelstein (1996) ''Holdups, Standard Breach Remedies, and Optimal Investment,'' *The American Economic Review* 86(3): 478–501 (June 1996).

[13] For additional discussion see MacDonald, J.M. 2016 ''Concentration, contracting, and competition policy in U.S. agribusiness,'' *Competition Law Review,* No. 1–2016: 3–8.

[14] The data on cattle and hogs were compiled from USDA's NASS data of federally inspected slaughter plants. Data on broilers and turkeys were compiled from Packers and Stockyards industry annual reports. Both data sources are proprietary.

markets.[15] The data presented earlier in Table 4 highlight this issue by showing the limited ability a poultry grower has to switch to a different integrator. As a result, national concentration may not demonstrate accurately the options poultry growers in a particular region actually face.

Empirical evidence does not show a strong or simple relationship between increases in concentration and increases in market power. Other factors matter, including the ease of entry by new producers into a concentrated industry and the ease with which retail food buyers or agricultural commodity sellers can change their buying or marketing strategies in response to attempts to exploit market power.

For example, in 2009, the Government Accountability Office (GAO) reviewed 33 studies published since 1990 that were relevant for assessing the effect of concentration on commodity or food prices in the beef, pork, or dairy sectors.[16] Most of the studies found no evidence of market power, or found that the efficiency gains from concentration were larger than the market power effects. Efficiency gains would be larger if increased concentration led to reduced processing costs (likely to occur if there are scale economies [17] in processing), and if the reduced costs led to a larger effect on prices than the opposing impact of fewer firms. For example, with respect to beef processing, the GAO report concluded that concentration in the beef processing sector has been, overall, beneficial because the efficiency effects dominated the market power effects, thereby reducing farm-to-wholesale beef margins.

Several studies reviewed by the GAO did find evidence of market power in the retail sector, in that food prices exceeded competitive levels or that commodity prices fell below competitive levels. However, the GAO study also concluded that it was not clear whether market power was caused by concentration or some other factor. In interviews with experts, the GAO report concluded that increases in concentration may raise greater concerns in the future about the potential for market power and the manipulation of commodity or food prices.

Another factor GIPSA considered in proposing §§ 201.210 and 201.211 is the contrast in size and scale between livestock producers, swine production contract growers, and poultry growers and the packers, swine contractors, and live poultry dealers they supply. The disparity in size between large oligopsonistic buyers and atomistic sellers may lead to market power and asymmetric information. The 2012 Census of Agriculture reported 740,978 cattle and calf farms with 69.76 million head of cattle for an average of 94 head per operation. Ninety-one percent of these were family or individually-owned operations.[18] The largest one percent of cattle farms sold about 51 percent of the cattle sold by all cattle farms.

There were 33,880 cattle feeding operations in 2012 that sold 25.47 million head of fed cattle for an average of 752 head per feedlot. The 607 largest feedlots sold about 75 percent of the fed cattle, and averaged 32,111 head sold. About 80 percent of feedlots were family or individually owned.[19] As Table 5 shows, the four largest cattle packers processed about 85 percent, 25.47 million head, for an average of 5.41 million head per cattle packer. This means the average top four cattle packers had 57,574 times the volume of the average cattle farm, and 1,054 times the volume of the largest one percent of cattle farms. It also means the average top four cattle packers had 7,197 times the volume of the average feedlot, and 169 times the volume of the very largest feedlots.

The USDA, National Agricultural Statistics Service 2012 livestock slaughter summary reported that in 2012, 113.16 million head of hogs were commercially slaughtered in the United States.[20] Table 5 shows that the top four hog packers processed about 64 percent of those hogs, which comes to an average of about 18.1 million head of hogs per top four packer. The 2012 Census of Agriculture reported 55,882 farms with hog and pig sales.[21] About 83 percent of the farms were family or individually owned. Of the 55,882 farms with hog and pig sales, 47,336 farms were independent growers raising hogs and pigs for themselves (sold an average of 1,931 head), 8,031 were swine production contract growers raising hogs and pigs for someone else (an average of 10,970 head per swine production contract grower), and 515 were swine contractors (sold an average of 38,058 head per swine contractor).[22]

The National Chicken Council states that in 2016, approximately 35 companies were involved in the business of raising, processing, and marketing chicken on a vertically integrated basis, while about 25,000 family farmers had production contracts with those companies.[23] That comes to about 714 family-growers per company. Collectively, the family-growers produced about 95 percent of the nearly 9 billion broilers produced in the United States in 2015. The other 5 percent were grown on company-owned farms. That means the average family-grower produced about 342,000 broilers. As Table 5 shows, the four largest poultry companies in the United States accounted for 51 percent of the broilers processed. That means the average volume processed by the four largest poultry companies was about 1.15 billion head, which was 3,357 times the average family grower's volume.

As the above discussion highlights, there are large size differences between livestock producers and meat packers. There are also large size differences between poultry growers and the live poultry dealers which they supply. These size differences may contribute to unequal bargaining power due to monopsony market power or oligopsony market power, or asymmetric information. The result is that the contracts bargained between the parties may have detrimental effects on livestock producers, swine production contract growers, and poultry growers due to the structural issues discussed above and may result in inefficiencies in the marketplace.

Hold-Up as a Potential Market Failure

Integrators demand investment in fixed assets from the growers. One example is specific types of poultry houses and equipment the integrator may require the grower to utilize in their growing operations. These investments may improve efficiency by more than the cost of installation. Typically, the improved efficiency would accrue to both the integrator and the grower. The integrator has lower feed costs, and the grower performs better relative to other poultry growers in a settlement group. If the grower bears the entire cost of installation, then the grower should be further compensated for the feed conversion gains that accrue to the integrator. The

[15] MacDonald and Key (2012) Op. Cit. and Vukina and Leegomonchai (2006) Op. Cit.

[16] United States Government Accountability Office. Concentration in Agriculture. GAO–09–746R. Enclosure II: Potential Effects of Concentration on Agricultural Commodity and Retail Food Prices.

[17] Scale economies are present when average production costs decrease as output increases.

[18] Census of Agriculture, 2012.

[19] Ibid.

[20] Ibid.

[21] A pig is a generic term for a young hog.

[22] Agricultural Census, 2012.

[23] *http://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/.*

risk is that after the assets are installed, the cost to the grower is ''sunk.'' This means that if the integrator reneges on paying compensation for the additional capital investments, and insists on maintaining the lower price, the grower will accept that lower price rather than receive nothing. This allows the integrator to get the benefit of efficiency gains, at no expense to them, with the grower bearing all of the cost. This reneging is termed ''hold-up'' in the economic literature.[24]

Hold-up can have two consequences that result in a misallocation of resources. If the growers do not anticipate hold-up, then growers will spend too much on investments because the integrator who demands them is not incurring any cost. That is inefficient. If the grower does anticipate hold-up, they will act as if the integrator were going to renege even when they were not, resulting in too little investment and loss of potential efficiency gains.

Hold-up can be resolved with increased competition. If an integrator developed a reputation for reneging, and growers could go elsewhere, the initial integrator would be punished and disincentivized from reneging in the future. Unfortunately, in practice, many growers do not have the option of going elsewhere.

Data shown above in Table 4 indicate that there are few integrators in these markets, and that growers have limited choice. Table 5, above, indicates the level of concentration in the livestock and poultry slaughtering industries and shows that integrators and livestock packers operate in concentrated markets.

This rule would allow growers to file complaints against integrators that renege, giving some of the incentive benefit of competition, without compromising the efficiency of having a few large processors.

Contracting, Industry Structure, and Market Failure: Summary of the Need for Regulation

There are benefits of contracting in the livestock and poultry industries, as well as structural issues that may result in unequal bargaining power and market failures. These structural issues and market failures will be mitigated by relieving plaintiffs from the requirement to demonstrate competitive injury. Because proving competitive injury is difficult and costly, removing that burden will facilitate the use of litigation by producers and growers to address violations of the Packers and Stockyards Act. If growers are able to seek legal remedies, then their contracts are easier to enforce. This will incentivize packers, swine contractors, and integrators to avoid exploitation of market power and asymmetric information, as well as behaviors that result in the market failure of hold-up. The result will be improved efficiency in the livestock and poultry markets.

GIPSA has a clear role to ensure that market failures are mitigated so that livestock and poultry markets remain fair and competitive. Moreover, even assuming that the market organization is efficient from a societal perspective, the disparity in bargaining power between the regulated entities and the producers from whom they purchase may lead to individual cases of unfair, unjustly discriminatory, deceptive, or undue or unreasonable prejudice or disadvantage that result in harm to individual producers but not harm to competition at a market level. Sections 201.210 and 201.211 promote fairness and equity for livestock producers, swine production contract growers, and poultry growers regardless of whether or not harm rises to the level of harm to competition.

Costs of the Regulations Proposed on June 22, 2010

GIPSA issued a proposed rule on June 22, 2010, which included §§ 201.3, 201.210, and 201.211. GIPSA considered thousands of comments before proposing the current versions of §§ 201.210 and 201.211. Many of the provisions that contributed to the costs estimated by the Informa Study and the Elam Study are not in the current proposed regulations. The following provisions were in the 2010 rule, but are not in the currently proposed regulations.

- Requirement that packers, live poultry dealers, and swine contractors maintain records justifying differences in prices (§ 201.210(a)(5)).
- Provision prohibiting packers from purchasing livestock from other packers (§ 201.212(c)).
- Requirement that packers offer the same terms to groups of small producers as offered to large producers when the group can collectively meet the same quantity commitments (§ 201.211(a)).
- Requirement that packers refrain from entering into exclusive agreements with livestock dealers (§ 201.212(b)).
- Requirements that packers and live poultry dealers submit sample contracts to GIPSA for posting to the public (§ 201.213).

Additionally, GIPSA adjusted the rule proposed in 2010 to give live poultry dealers more flexibility in suspending the delivery of birds and requiring capital improvements and those adjustments are reflected in current §§ 201.215 and 201.216, respectively, which were finalized in 2011 and modified in 2015. Although many thousands of the comments submitted contained general qualitative assessments of either the costs or benefits of the proposed rule, only two comments systematically described quantitative costs across the rule provisions. Comments from the National Meat Association (NMA) included cost estimates by Informa Economics (the Informa Study). The Informa Study projected costs of $880 million, $401 million, and $362 million for U.S. cattle and beef, hogs and pork, and poultry industries respectively.[25] However, these cost estimates were for all of the 2010 proposed changes, many of which do not apply. The Informa Study estimated $133.4 million to be one-time direct costs resulting from rewriting contracts, additional record keeping, etc.[26] In the study, the majority of the costs would be indirect costs. The Informa Study estimated $880.9 million in costs due to efficiency losses and $459.9 million in costs due to reduced demand caused by a reduction in meat quality resulting from fewer AMAs.

Comments from the National Chicken Council included cost estimates prepared by Dr. Thomas E. Elam, President, FarmEcon LLC (the Elam Study).[27] The Elam Study estimated that the entire 2010 rule would cost the chicken industry $84 million in the first year increasing to $337 million in the fifth year, with a total cost of $1.03 billion over the first five years.[28] The Elam Study identified $6 million as one-time administrative costs. The study states that most of the costs would be indirect costs resulting from efficiency losses,[29] while more than half of the costs estimated would be due to a reduced rate of improvement in feed efficiency. Again, these cost estimates were for all of the 2010 proposed changes, many of which do not apply.

Estimates of the costs in the Informa Study and the Elam Study were largely due to projections that packers, swine contractors, and live poultry dealers would alter business practices in

[24] See for example, Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, ''Vertical Integration, Appropriable Rents, and the Competitive Contracting Process,'' *The Journal of Law and Economics* 21, no 2 (Oct., 1978): 297–326.

[25] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Tables 7 to 9, Pages 51 to 53.

[26] Ibid. Page 53

[27] See Elam, Dr. Thomas E. ''Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact.'' FarmEcon LLC, 2010.

[28] Ibid. Page 24

[29] Ibid. Page 24

reaction to the proposed rule. For example, the Informa Study projected that packers would reduce the number and types of AMAs to avoid potential litigation,[30] and the Elam Study expected live poultry dealers to evaluate each load of feed delivered to growers to avoid litigation.[31]

The studies relied on interviews that queried the willingness of packers, swine contractors, or live poultry dealers to alter their business practices. The estimates, based on interviews, may overstate costs because the packers, swine contractors, live poultry dealers, and other stakeholders would face adjustment costs from the rule proposed in 2010 and had incentives to respond that they would discontinue current practices.

There also may have been some confusion concerning GIPSA's administrative enforcement authority. The Informa Study indicated that 75 percent of the costs of the rule proposed in 2010, were directly related to proposed § 201.3(c) enabling a finding of a violation of sections 202(a) or (b) of the P&S Act without a finding of harm or likely harm to competition.[32] However, with respect to packers buying livestock for the purpose of slaughter, proposed § 201.3(c) would not cause a change with respect to GIPSA's enforcement activities. For several decades, GIPSA has brought administrative enforcement actions against packers for violations of the regulations under the P&S Act without demonstrating harm or likely harm to competition. It is only in the poultry industry that, with the exception of timely payment to growers (section 410), GIPSA does not have the authority to bring administrative enforcement actions. Though GIPSA has administratively enforced section 202(a) and/or 202(b) violations in the livestock industry without demonstrating harm or likely harm to competition, some federal courts have held that it is necessary to demonstrate harm or likely harm to competition in some livestock cases and in many poultry cases.

Given the changes made in response to comments, GIPSA does not expect that either new proposed § 201.210 or new proposed § 201.211 will cause packers to reduce their use of AMAs.

Cost-Benefit Analysis of Proposed §§ 201.210 and 201.211

Regulatory Alternatives Considered

Executive Order 12866 requires an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation and an explanation of why the planned regulatory action is preferable to the identified potential alternatives.[33] GIPSA considered three regulatory alternatives. The first alternative that GIPSA considered was to maintain the status quo and not propose the regulations. The second alternative that GIPSA considered was revising the versions of §§ 201.210 and 201.211 that were published in 2010 and proposing new versions. This is GIPSA's preferred alternative as will be explained below. The third alternative that GIPSA considered was proposing new versions of §§ 201.210 and 201.211, but instituting a phased implementation of the proposed regulations. Under this alternative, proposed §§ 201.210 and 201.211 would only take effect when a written or verbal livestock marketing, swine growing, or poultry growing contract expires, is replaced, or is modified. The costs and benefits of these alternatives are discussed in order below.

Regulatory Alternative 1: Status Quo

If §§ 201.210 and 201.211 are never finalized, there are no marginal costs and marginal benefits as industry participants will not alter their conduct. This alternative would not address the 2008 Farm Bill requirement to promulgate regulations establishing criteria the Secretary would consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the P&S Act, nor would it connect the criteria established in 2011 to a violation of the P&S Act. From a cost standpoint, this alternative costs the least as compared to the other two alternatives. This alternative also has no marginal benefits. Since there are no changes from the status quo under this regulatory alternative, it will serve as the baseline against which to measure the other two alternatives.

Regulatory Alternative 2: The Preferred Alternative

A. Cost Estimation of the Preferred Alternative

GIPSA believes that the costs of §§ 201.210 and 201.211 will mostly consist of the costs of reviewing and re-writing marketing and production contracts to ensure that packers, swine contractors, and live poultry dealers are not engaging in conduct or action that is unfair, unjustly discriminatory, or deceptive or that in any way gives an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower or subjects any livestock producer, swine production contract grower, or poultry grower to an undue or unreasonable prejudice or disadvantage.

Sections 201.210 and 201.211 do not impose any new requirements and mainly serve as guidance for compliance with sections 202(a) and 202(b). GIPSA does not expect the proposed regulations will result in a decrease in the use of AMAs or other incentive payment systems, or decreased efficiencies in the cattle, hog, and poultry industries. The only indirect costs that GIPSA anticipates are the effects of the increase in administrative costs on supply and demand and the resulting quantity and price impacts on the retail markets for beef, pork, and chicken and the related input markets for cattle, hogs, and broilers.

To estimate costs, GIPSA divided costs into two major categories, direct and indirect costs. GIPSA expects the direct costs to be comprised of administrative costs. Administrative costs for regulated entities include items such as review of marketing and production contracts, additional record keeping, and all other associated administrative office work to demonstrate that they are not engaging in conduct or action that is unfair, unjustly discriminatory, or deceptive or that in any way gives an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower or subjects any livestock producer, swine production contract grower, or poultry grower to an undue or unreasonable prejudice or disadvantage.

Indirect costs include costs caused by changes in supply and/or demand in the markets for beef, pork, and chicken and the related input markets for cattle, hogs, and poultry resulting from the proposed rule.

1. Direct Costs—Administrative Costs of the Preferred Alternative

To estimate administrative costs of the proposed rule, GIPSA relied on its experience reviewing contracts and other business records commonly maintained in the livestock and poultry industries for compliance with the P&S Act and regulations. GIPSA has data on the number of production contracts between swine production contract growers and swine contractors and poultry growers and live poultry dealers. GIPSA estimated the number of

[30] Informa, page 30.

[31] Elam, page 18.

[32] Informa, page 71.

[33] See section 6(a)(3)(C) of Executive Order 12866.

marketing contracts between producers and packers based on the number of feedlots and the percentage of livestock procured under AMAs. GIPSA then multiplied the hourly estimates of the administrative functions of reviewing and revising contracts by the average annual wages to arrive at the total estimated administrative costs for implementation of §§ 201.210 and 201.211. Since packers, swine contractors, and live poultry dealers have to review their contracts to ensure that they are not engaging in conduct or action that is unfair, unjustly discriminatory, or deceptive or that in any way gives an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower or subjects any livestock producer, swine production contract grower, or poultry grower to an undue or unreasonable prejudice or disadvantage, GIPSA estimates that the regulated entities will only review the contract once and split the contract review time between the two regulations.

Based on GIPSA's experience, it developed time estimates for the number of hours for attorneys and company managers to review and revise marketing and production contracts and for staff to make changes, copy, and obtain signed copies of the contracts. For poultry contracts, GIPSA estimates that each unique contract type would require 12 hours of attorney time to review and rewrite a contract, 20 hours of company management time, and for each individual contract, 4 hours of administrative time, and 6.5 hours of additional record keeping time. GIPSA estimates that each of the 133 live poultry dealers who report to GIPSA rely on 10 unique contract types on average. For cattle marketing contracts, GIPSA estimates that each contract would require 4 hours of attorney time to review and rewrite a contract, 4 hours of company management time, 2 hours of administrative time, and 8 hours of additional record keeping time. For hog production and marketing contracts, GIPSA estimates that each contract would require 2 hours of attorney time to review and rewrite a contract, 2 hours of company management time, 1 hour of administrative time, and 6.5 hours of additional record keeping time.

GIPSA multiplied estimated hours to conduct these administrative tasks by the average hourly wages for managers at $58/hour, attorneys at $83/hour, and administrative assistants at $34/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for regulated entities.[34]

GIPSA recognizes that contract review costs will also be borne by livestock producers, swine production contract growers, and poultry growers. GIPSA estimates that each livestock producer, swine production contract grower, and poultry grower will spend two hours of time reviewing a contract and will spend two hours of their attorney's time to review the contract. GIPSA multiplied two hours of livestock producer, swine production contract grower, and poultry grower time and two hours of attorney time to conduct the marketing and production contract review by the average hourly wages for attorneys at $83/hour and managers at $58/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for livestock producers, swine contract growers, and poultry growers. GIPSA then applied this cost to the estimated 2,355 cattle marketing contracts, 1,290 hog marketing contracts, 8,031 hog production contracts, and 21,925 poultry growing contracts that have been reported to GIPSA.

After determining the administrative costs to both the regulated entities and those they contract with, GIPSA then added the administrative costs of the regulated entities and the livestock producers, swine production contract growers, and poultry growers together and subsequently split them in half to arrive at the first-year total estimated administrative costs attributable to each of the two regulations. A summary of the first-year total estimated administrative costs for implementation of §§ 201.210 and 201.211 appear in the following table:

TABLE 6—FIRST-YEAR ADMINISTRATIVE COSTS OF §§ 201.210 AND 201.211

[Indirect costs include costs caused by:]

Regulation	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
201.210	1.39	3.81	8.40	13.60
201.211	1.39	3.81	8.40	13.60
Total	2.79	7.61	16.79	27.19

The first-year total administrative costs are $27.19 million and are the same for §§ 201.210 and 201.211 for cattle, hogs, and poultry because packers, swine contractors, live poultry dealers, livestock producers, swine production contract growers, and poultry growers must conduct the same administrative functions of contract review and record keeping in response to both regulations. The administrative costs are the highest for poultry, followed by hogs and cattle. This is due to the greater prevalence of contract growing arrangements in the poultry industry.

2. Direct Costs—Litigation Costs of the Preferred Alternative

Interim final regulation 201.3(a) will be in effect when §§ 201.210 and 201.211 become effective. GIPSA expects that § 201.3(a) will result in additional litigation as this rule states that certain conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without harm or likely harm to competition in all cases. Section 201.3(a) formalizes GIPSA's longstanding position that, in some cases, violations of sections 202(a) and 202(b) can be proven without demonstrating harm or likely harm to competition in all cases. Section 201.210 provides clarity to the industry regarding the conduct or action, absent demonstration of a legitimate business justification that constitutes an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) regardless of harm to competition. Section 201.211 provides

[34] All salary costs are based on mean annual 2015 salary adjusted for benefit costs, set to an hourly basis. *http://www.bls.gov/oes/*. Accessed on August 26, 2016.

clarity to the industry regarding the conduct or action that constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) by establishing criteria that the Secretary will consider in making such a determination.

Regulation 201.3(a) is broad in nature. Sections 201.210 and 201.211 provide additional clarity. Thus, GIPSA considers the additional litigation under § 201.3(a) to be the baseline litigation costs for §§ 201.210 and 201.211 and that the litigation costs for § 201.3(a) already include the litigation costs of §§ 201.210 and 201.211. Since those litigation costs have already been counted under § 201.3(a), GIPSA does not allocate any additional litigation costs to §§ 201.210 and 201.211. For the purposes of this RIA, the marginal litigation costs of §§ 201.210 and 201.210 are zero.

3. Total Direct Costs of the Preferred Alternative

The total first-year direct costs of §§ 201.210 and 201.211 are the sum of administrative and litigation costs from above and are summarized in the following table.

TABLE 7—DIRECT COSTS OF §§ 201.210 AND 201.211

Cost Type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
Admin Costs	2.79	7.61	16.79	27.19
Litigation Costs	0.00	0.00	0.00	0.00
Total Direct Costs	2.79	7.61	16.79	27.19

GIPSA estimates that the total direct costs of proposed §§ 201.210 and 201.211 to be $27.19 million. As the above table shows, the costs are highest for the poultry industry, followed by hogs and cattle. The primary reason is the high utilization of growing contracts and the estimated higher administrative costs in the poultry industry.

4. Indirect Costs of the Preferred Option

As previously discussed, GIPSA does not expect that proposed §§ 201.210 and 201.211 will result in a decreased use of AMAs, use of grower ranking systems or other incentive pay, reduced capital formation, or decreased efficiencies in the meat and poultry industries because the regulations simply clarify conduct and action that are unfair, unjustly discriminatory, and deceptive and a violation of section 202(a) and clarify the conduct or action that constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) by establishing criteria the Secretary will consider in making such a determination. The only indirect costs that GIPSA expects are the effects of the increase in total industry costs from the administrative costs on supply and demand, and the resulting quantity and price impacts of the retail markets for beef, pork, and poultry, and the related input markets for cattle, hogs, and poultry.

GIPSA modeled the impact of the increase in total industry costs resulting from the direct costs of implementing §§ 201.210 and 201.211 in a Marketing Margins Model (MMM) framework.[35] The MMM allows for the estimation of changes in consumer and producer surplus and the quantification of deadweight loss or gain caused by changes in supply and demand in the retail markets for beef, pork, and poultry and the input markets for cattle, hogs, and poultry.

GIPSA modeled the increases in industry costs resulting from higher direct costs as an inward (or upward) shift in the supply curves for beef, pork, and poultry. This has the effect of increasing the equilibrium prices and reducing the equilibrium quantity traded. This also has the effect of reducing the derived demand for cattle, hogs, and poultry, which causes a reduction in the equilibrium prices and quantity traded. Economic theory suggests that these shifts in the supply curves and derived demand curves and the resulting price and quantity impacts will result in a reduction in social welfare through a deadweight loss.

To estimate the output and input supply and demand curves for the MMM, GIPSA constructed linear supply and demand curves around equilibrium price and quantity points using price elasticities of supply and demand from the GIPSA Livestock Meat and Marketing Study and from USDA's Economic Research Service.[36]

GIPSA then shifted the supply curves for beef, pork, and chicken up by the amount of the increase in total cost for each industry and calculated the new equilibrium prices and quantities. GIPSA calculated the new equilibrium prices and quantities in the input markets resulting from the decreases in derived demand. GIPSA also calculated the resulting social welfare changes in the input and output markets for each industry.

The calculation of the price impacts from the increases in industry costs from §§ 201.210 and 201.211 resulted in price increases of approximately one-hundredth of a cent or less in retail prices for beef, pork, and poultry. This is because the increase in total industry costs is very small in relation to overall industry costs.[37] The result is that the resulting deadweight losses from the increases in total industry costs are indistinguishable from zero and, therefore, GIPSA concludes that the indirect costs of §§ 201.210 and 201.211 for each industry are zero.

5. Total Costs of the Preferred Alternative

GIPSA added all direct costs to the indirect costs (equal to zero), to arrive at the estimated total first-year costs of §§ 201.210 and 201.211. The total first-year costs are summarized in the following table.

[35] The framework is explained in detail in Tomek, W.G. and K.L. Robinson ''*Agricultural Product Prices,*'' third edition, 1990, Cornell University Press.

[36] RTI International ''GIPSA Livestock Meat and Marketing Study'' prepared for Grain Inspection, Packers and Stockyards Administration, 2007.

ERS Price Elasticities: *http://www.ers.usda.gov/data-products/commodity-and-food-elasticities/demand-elasticities-from-literature.aspx*.

[37] The $27.19 million increase in total industry costs from §§ 201.210 and 201.211 is only 0.02 percent of total industry costs of approximately $178 billion for the beef, pork, and poultry industries.

TABLE 8—TOTAL COSTS OF §§ 201.210 AND 201.211

Cost type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
Admin Costs	2.79	7.61	16.79	27.19
Litigation Costs	0.00	0.00	0.00	0.00
Total Direct Costs	2.79	7.61	16.79	27.19
Total Indirect Costs	0.00	0.00	0.00	0.00
Total Costs	2.79	7.61	16.79	27.19

GIPSA estimates that the total costs of §§ 201.210 and 201.211 will be $27.19 million in the first year of implementation.

6. Ten-Year Total Costs of the Preferred Option

To arrive at the estimated ten-year costs of §§ 201.210 and 201.211, GIPSA expects the costs of the regulations to be constant for the first five years while courts are setting precedents for the interpretation of the regulations. GIPSA expects that case law with respect to the regulations will be settled after five years and by then, industry participants will know how GIPSA will enforce the regulations and how courts will interpret the regulations. Once courts establish precedents in case law, GIPSA expects the direct administrative costs of reviewing and revising contracts to decrease rapidly as contracts will already contain any language modifications necessitated by implementation of the regulations.

To arrive at the estimated ten-year costs of §§ 201.210 and 201.211, GIPSA estimates that in the first five years, 20 percent of all contracts will either expire and need to be renewed each year or new marketing and production contracts will be put in place each year. As discussed above, GIPSA expects the costs of reviewing and revising contracts will remain constant in the first five years. However, the overall costs will be lower because the direct administrative costs of reviewing and revising contracts will only apply to the 20 percent of expiring contracts or new contracts. GIPSA estimates that in the second five years, the direct administrative costs of reviewing and revising contracts will decrease by 50 percent per year as the courts establish precedents and contracts already contain any language modifications necessitated by implementation of the regulations.

The total ten-year costs of the regulations appear in the table below.

TABLE 9—TEN-YEAR TOTAL COSTS OF §§ 201.210 AND 201.211

Year	Total direct ($ millions)
2018[38]	27.19
2019	5.44
2020	5.44
2021	5.44
2022	5.44
2023	2.72
2024	1.36
2025	0.68
2026	0.34
2027	0.17
Totals	54.21

Based on the analysis, GIPSA expects the ten-year total costs of §§ 201.210 and 201.211 will be $54.21 million.

7. Net Present Value of Ten-Year Total Costs of the Preferred Alternative

The total costs of §§ 201.210 and 201.211 in the table above show that the costs are highest in the first year, decline to a constant lower level over the next four years, and then gradually decrease again over the subsequent five years. Costs to be incurred in the future are less expensive than the same costs to be incurred today. This is because the money that will be used to pay the costs in the future can be invested today and earn interest until the time period in which the cost is incurred.

To account for the time value of money, the costs of the regulations to be incurred in the future are discounted back to today's dollars using a discount rate. The sum of all costs discounted back to the present is called the net present value (NPV) of total costs. GIPSA relied on both a three percent and seven percent discount rate as discussed in Circular A–4.[39] GIPSA measured all costs using constant dollars.

GIPSA calculated the NPV of the ten-year total costs of the regulations using both a three percent and seven percent discount rate and the NPVs appear in the following table.

TABLE 10—NPV OF TEN-YEAR TOTAL COSTS OF §§ 201.210 AND 201.211

Discount rate	($ millions)
3 Percent	50.33
7 Percent	45.95

GIPSA expects the NPV of the ten-year total costs of §§ 201.210 and 201.211 will be $50.33 million at a three percent discount rate and $45.95 million at a seven percent discount rate.

8. Annualized Costs of the Preferred Alternative

GIPSA then annualized the NPV of the ten-year total costs (referred to as annualized costs) of §§ 201.210 and 201.211 using both a three percent and seven percent discount rate as required by Circular A–4 and the results appear in the following table.[40]

TABLE 11—ANNUALIZED COSTS OF §§ 201.210 AND 201.211

Discount rate	($ millions)
3 Percent	5.90
7 Percent	6.54

GIPSA expects the annualized costs of §§ 201.210 and 201.211 will be $5.90 million at a three percent discount rate and $6.54 million at a seven percent discount rate.

B. Impacts on Costs of Interim Final § 201.3(a)

Concurrent with proposing §§ 201.210 and 201.211, GIPSA is issuing an interim final version of § 201.3(a). Section 201.3(a) states that conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition. As a stand-alone regulation, § 201.3(a) formalizes GIPSA's longstanding position that, in some cases, violations of sections 202(a) and 202(b) can be proven without

[38] GIPSA uses 2018 as the date for the proposed rule to be in effect for analytical purposes only. The date the proposed rule becomes final is not known.

[39] *https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.*

[40] Ibid.

demonstrating harm or likely harm to competition.

In its Regulatory Impact Analysis, GIPSA estimated the annualized costs of § 201.3(a) to range from $6.87 million to $96.01 million at a three percent discount rate and from $7.12 million to $98.60 million at a seven percent discount rate. The range of potential costs is broad and GIPSA relied on its expertise to arrive at a point estimate of expected annualized costs. GIPSA expects the cattle, hog, and poultry industries to primarily take a ''wait and see'' approach to how courts will interpret § 201.3(a) and only slightly adjust its use of AMAs, and incentive or performance-based payment systems. GIPSA estimates that the annualized costs of § 201.3(a) at the point estimate will be $51.44 million at a three percent discount rate and $52.86 million at a seven percent discount rate based on an anticipated ''wait and see'' approach by the cattle, hog, and poultry industries.

GIPSA recognizes that courts, after the implementation of § 201.3(a), may opt to continue to apply earlier precedents of requiring the showing of harm or potential harm to competition in section 202(a) and 202(b) cases. This has the potential to affect the costs of §§ 201.210 and 201.211 should they become finalized. GIPSA expects that even if courts continue to require showing of harm or potential harm to competition in section 202(a) and 202(b) cases, that firms will likely still incur costs of complying with §§ 201.210 and 201.211. Even if regulated entities expect that courts will require showing of a harm to competition for §§ 201.210 and 201.211 violations, the regulated entities may still expect litigation as private parties test the courts application of § 201.3 as it relates to §§ 201.210 and 201.211 violations. To reduce this threat of litigation, regulated entities may still incur the administrative costs detailed above. Should §§ 201.210 and 201.211 become finalized and courts still require a showing of harm or potential harm to competition, regulated entities may still voluntarily undertake the adjustment costs detailed above.

GIPSA expects proposed §§ 201.210 and 201.211 to reduce the costs of implementing § 201.3 by providing more clarity in the appropriate application of sections 202(a) and (b) of the P&S Act. Section 201.210 provides illustrative examples of conduct or action, absent demonstration of a legitimate business justification, that GIPSA considers as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.211 provides criteria the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of section 202(b).

C. Benefits of the Preferred Alternative

GIPSA was unable to quantify the benefits of §§ 201.210 and 201.211. However, there are qualitative benefits of §§ 201.210 and 201.211 coupled with § 201.3(a) that merit discussion.

An important qualitative benefit of § 201.210 coupled with § 201.3(a) is the increased ability for the enforcement of the P&S Act for violations of 202(a) that do not result in harm or likely harm to competition. An illustrative example is the inaccurate weighing of live poultry grown to a target slaughter weight by a poultry grower under contract for a live poultry dealer. The weight of poultry is used as one factor to determine the payment to growers under most contract growing arrangements. The poultry grower is harmed if the true weight is more than the inaccurate weight used to compensate the poultry grower. The harm to the poultry grower is very small when compared to the entire industry and there is no discernible or provable harm to competition from this one instance. Because there is no discernible or provable harm or likely harm to competition, courts have been reluctant to find a violation of section 202(a) of the P&S Act in such a situation, despite the harm suffered by the individual poultry grower. However, if similar, though unrelated, harm is experienced by a large number of poultry growers, the cumulative effect does result in significant harm to competition. The individual harm is inconsequential to the industry, but the sum total of all individual harm has the potential to be quite significant when compared to the poultry industry. Under proposed § 201.210(b)(8), failing to ensure accurate weights of live poultry, absent a legitimate business justification, will constitute unfair, unjustly discriminatory, or deceptive practices or devices and a violation of section 202(a) of the P&S Act. Whether or not the conduct harms or is likely to harm competition becomes irrelevant.

The sum of all individual harm is likely to increase total industry costs of producing beef, pork, and chicken due to inefficiencies through the production and marketing complex due to an inefficient allocation of resources. The costs of all unfair, unjustly discriminatory, or deceptive practices or devices are reflected in higher costs of producing cattle, hogs, and poultry at the producer/grower level of the industry and of producing beef, pork, and chicken in the packing/wholesale level of the industry, with some portion of these costs passed along to consumers in the form of higher prices.

GIPSA expects proposed §§ 201.210 and 201.211 coupled with interim final § 201.3(a) to increase enforcement actions against packers, swine contractors, and live poultry dealers for violations of sections 202(a) and/or 202(b) when the conduct or action does not harm or is not likely to harm competition. Several appellate courts have disagreed with USDA's interpretation of the P&S Act that harm or likely harm to competition is not necessary in all cases to prove a violation of sections 202(a) or 202(b). In some cases in which the United States was not a party, these courts have concluded that plaintiffs could not prove their claims under sections 202(a) and/or 202(b) without proving harm to competition or likely harm to competition. One reason the courts gave for declining to defer to USDA's interpretation of the statute is that USDA had not previously formalized its interpretation in a regulation. Section 201.3(a) addresses that issue and §§ 201.210 and 201.211 provide further clarity.

GIPSA expects the successful litigation of enforcement actions brought under proposed §§ 201.210 or 201.211 combined with interim final 201.3(a) to deter violations of sections 202(a) and (b). Successful deterrence will result in lower overall costs throughout the entire production and marketing complex of all livestock, poultry, and meat.

Sections 201.210 and 201.211 also contain several provisions that GIPSA expects will improve efficiencies in the regulated markets for cattle, hogs, and poultry and reduce market failures. For regulations to improve efficiencies for market participants and generate benefits for consumers and producers, they must increase the amount of relevant information to market participants, protect private property rights, and foster competition.

Section 201.210(b) will increase the amount of relevant information to market participants by providing notice to all market participants of specific examples of conduct or action that, absent demonstration of a legitimate business justification, are unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of whether the conduct or action harms or is likely to harm competition. Market participants will all know, for example, that absent demonstration of a legitimate business justification, retaliatory conduct and the

limiting, by contract, the legal rights and remedies afforded by law to livestock producers, swine production contract growers, or poultry growers is a violation of § 201.210 and section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Additionally, market participants will all know that absent demonstration of a legitimate business justification, failure to ensure accurate scales and weights, and failing to ensure the accuracy of electronic evaluation systems and devices is a violation of § 201.210 and section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Ensuring the accuracy of weighing and grading devices serves to increase economic efficiency. Inaccurate weighing and grading reduces economic efficiency by effectively distorting per-unit prices and harms livestock producers, swine production contract growers, and poultry growers, even though the resulting harm may not have an overall effect on competition if the conduct is directed at only one livestock producer, swine production contract grower, or poultry grower.

Similarly, § 201.211 increases the amount of relevant information to market participants and offsets any potential abuse of market power by clearly stating to all contracting parties the criteria that the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of 202(b) of the P&S Act.

Both regulations may also serve to reduce the risk of violating sections 202(a) and 202(b) because they provide clarification to the livestock and poultry industries as to the conduct or action that, absent demonstration of a legitimate business justification, is unfair, unjustly discriminatory, or deceptive and violates section 202(a) of the Act regardless of whether the conduct or action harms or is likely to harm competition and the criteria that the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the P&S Act. Less risk through the clarification provided in the regulations will likely foster competitiveness and fairness in contracting and provide protections for livestock producers, swine production contract growers, and poultry growers against unfair, unjustly discriminatory, and deceptive practices and devices and undue or unreasonable preferences or advantages.

Benefits to the livestock and poultry industries and the cattle, hog, and poultry markets also arise from establishing parity of negotiating power between packers, swine contractors, and live poultry dealers and livestock producers, swine production contract growers, and poultry growers by reducing the ability to use market power with the resulting deadweight losses.[41] Establishing parity of negotiating power in contracts promotes fairness and equity and is consistent with GIPSA's mission [t]o protect fair trade practices, financial integrity, and competitive markets for livestock, meats, and poultry.''[42]

D. Cost-Benefit Summary of the Preferred Alternative

GIPSA expects the annualized costs of §§ 201.210 and 201.211 will be $5.90 million at a three percent discount rate and $6.54 million at a seven percent discount rate. GIPSA expects the costs to be highest for the poultry industry due to its extensive use of poultry growing contracts, followed by the hog industry and the cattle industry, respectively.

GIPSA was unable to quantify the benefits of the regulations, but explained numerous qualitative benefits that will protect livestock producers, swine production contract growers, and poultry growers from retaliation, promote fairness and equity in contracting, increase economic efficiencies, and reduce the negative effects of market failures throughout the entire livestock and poultry value chain. The primary benefit of § 201.210 and § 201.211 is the increased ability for the enforcement of the P&S Act for violations of sections 202(a) and (b) that do not result in harm or likely harm to competition. This, in turn, will reduce instances of unfair, unjustly discriminatory, or deceptive practices or devices, unfair advantages and increased efficiencies in the marketplace. This benefit of additional enforcement of the P&S Act will accrue to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers.

Regulatory Alternative 3: Contract Duration—Phased Implementation

GIPSA considered a third regulatory alternative of phased implementation. Under this third alternative, §§ 201.210 and 201.211 would only apply to marketing and production contracts when they expire, are altered, or new contracts are put in place. Consider for example, a poultry growing contract with three years remaining in the contract when the regulations become effective. The provisions of the regulations that apply to contracts would not be applicable to this contract until the contract expires after three years and is either renewed or replaced.

A. Cost Estimation of Phased Implementation

GIPSA estimated the costs of phased implementation by multiplying the costs of §§ 201.210 and 201.211 for the preferred alternative (Table 8) for each year of the first 10 years the regulations would be effective starting in 2018 by the percentage of contracts expiring or altered in the same year. USDA's Economic Research Service Agricultural Resource Management Surveys conducted in 2003 and 2011 provided data about the length of hog and broiler production contracts. GIPSA relied on its knowledge of hog and cattle marketing contracts based on regular reviews of packer procurement practices to estimate contract lengths for hog and cattle marketing contracts. The data on contract length appear in the following table:

TABLE 12—PRODUCTION AND MARKETING CONTRACT DURATIONS

Contract duration	Broilers production[43] (percent)	Hogs production[44] (percent)	Hogs marketing (percent)	Cattle marketing (percent)
Short Term <= 12 months	65.20	40.50	100.00	100.00

[41] Nigel Key and Jim M. MacDonald discuss evidence for the effect of concentration on grower compensation in ''Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey'' selected paper American Agri. Economics Assn. meeting Orlando, Florida, July 27–29, 2008.

[42] See additional discussion in Steven Y. Wu and James MacDonald (2015) ''Economics of Agricultural Contract Grower Protection Legislation,'' *Choices* 30(3): 1–6.

[43] USDA's Economic Research Service Agricultural Resource Management Survey (ARMS) 2011.

[44] USDA's Economic Research Service Agricultural Resource Management Survey (ARMS) 2003.

TABLE 12—PRODUCTION AND MARKETING CONTRACT DURATIONS—Continued

Contract duration	Broilers production [43] (percent)	Hogs production [44] (percent)	Hogs marketing (percent)	Cattle marketing (percent)
Medium Term 13–60 months	19.20	3.50	0.00	0.00
Long Term > 60 months	15.60	56.00	0.00	0.00

The data in the table show that 65.2 percent of broiler production contracts have a duration of 12 months or less. GIPSA estimates that 100 percent of all hog and cattle marketing contracts expire or are altered every 12 months or less. Even if the contracts do not expire, GIPSA expects changes every year to the base prices, premiums and discounts, lean percentages, etc. of hog and cattle marketing contracts and GIPSA would consider a change to any one of these items in the contract as an alteration to the contract, which would trigger the application of the new regulations.

For the first year of the regulations, GIPSA multiplied the poultry costs of the regulations by 65.20 percent, the percentage of the hog costs attributable to hog production contracts by 40.5 percent, the percentage of the hog costs attributable to hog marketing contracts by 100 percent, and the cattle costs by 100 percent. For years two through five, GIPSA followed the same procedure, but adjusted poultry and hog production costs by the number of contracts that are five years or less. For broilers, 84.4 percent are five years or less in duration and 44 percent of all hog production contracts are five years or less years in duration. For years six through ten, GIPSA applied 100 percent of the preferred alternative costs to reflect full implementation costs.

The following table shows the ten-year total costs for each year of the phased implementation alternative. The ten-year total costs for each year of the preferred alternative (Table 9) are also shown for convenience.

TABLE 13—PHASED IMPLEMENTATION TOTAL COSTS OF §§ 201.210 AND 201.211

Year	Preferred option ($ millions)	Phased implementation ($ millions)
2018	27.19	17.45
2019	5.44	4.18
2020	5.44	4.18
2021	5.44	4.18
2022	5.44	4.18
2023	2.72	2.72
2024	1.36	1.36
2025	0.68	0.68
2026	0.34	0.34
2027	0.17	0.17

TABLE 13—PHASED IMPLEMENTATION TOTAL COSTS OF §§ 201.210 AND 201.211—Continued

Year	Preferred option ($ millions)	Phased implementation ($ millions)
Totals	54.21	39.43

GIPSA estimates that the first-year total costs of §§ 201.210 and 201.211 under the phased implementation alternative will be $17.45 million and the ten-year total costs will be $39.43 million. As the table shows, the costs in the first five years are lower under the phased implementation alternative than under the preferred alternative because the regulations apply to fewer contracts until the time period in which all contracts are phased in.

B. NPV of Ten-Year Total Costs of Phased Implementation

GIPSA calculated the NPV of the ten-year total costs of §§ 201.210 and 201.211 under phased implementation using both a three percent and seven percent discount rate and the NPVs are shown in the following table.

TABLE 14—NPVS OF TEN-YEAR TOTAL COSTS OF §§ 201.210 AND 201.211—PHASED IMPLEMENTATION

Discount rate	($ Millions)
3 Percent	36.33
7 Percent	32.86

GIPSA expects the NPV of the ten-year total costs of §§ 201.210 and 201.211 under the phased implementation option to be $36.33 million at a three percent discount rate and $32.86 million at a seven percent discount rate.

C. Annualized Costs of Phased Implementation

GIPSA then annualized the costs of §§ 201.210 and 201.211 using both a three percent and seven percent discount rate as required by Circular A–4 and the results appear in the following table.

TABLE 15—ANNUALIZED COSTS OF REGULATIONS—PHASED IMPLEMENTATION

Discount rate	($ millions)
3 Percent	4.26
7 Percent	4.68

GIPSA expects the annualized costs of §§ 201.210 and 201.211 under phased implementation will be $4.26 million at a three percent discount rate and $4.68 million at a seven percent discount rate.

D. Benefits of the Phased Implementation Alternative

The benefits of phased implementation are identical to the benefits of the preferred alternative with the exception of when the benefits will be received and the amount of the benefits. Like the costs, the benefits will be received only when contracts expire, are altered, or new contracts are put in place. Moreover, benefits to be received in the future are worth less than benefits received today. The benefits will be received in the same proportion of the total costs and are based on contract durations. The benefits of the phased implementation alternative are less than under the preferred alternative, because the full benefits will not be received until all contracts have expired, been altered, or replaced by new contracts. The full benefits of phased implementation will be received beginning in year six.

E. Cost-Benefit Summary of Phased Implementation

GIPSA expects the annualized costs of §§ 201.210 and 201.211 under phased implementation will be $4.26 million at a three percent discount rate and $4.68 million at a seven percent discount rate. The benefits will be received in the same proportion as total costs and are based on contract durations. The benefits of the phased implementation alternative are less than under the preferred alternative because the full benefits will not be received until all contracts have expired, been altered, or replaced by new contracts.

Cost-Benefit Comparison of Regulatory Alternatives

The status quo alternative has zero marginal costs and benefits as GIPSA does not expect any changes in the livestock and poultry industries. GIPSA compared the annualized costs of the preferred alternative to the annualized costs of the phased implementation alternative by subtracting the annualized costs of the phased implementation alternative from the preferred alternative and the results appear in the following table.

TABLE 16—DIFFERENCE IN ANNUALIZED COSTS OF §§ 201.210 AND 201.211 BETWEEN PREFERRED ALTERNATIVE AND PHASED IMPLEMENTATION ALTERNATIVE

Discount rate	($ millions)
3 Percent	1.64
7 Percent	1.86

The annualized costs of the phased implementation alternative is $1.64 million less expensive using a three percent discount rate and $1.86 million less expensive using a seven percent discount rate. As is the case with costs, the benefits will be highest for the preferred alternative because the full benefits will be received immediately and not when contracts have expired, been altered, or replaced by new contracts as is the case under the phased implementation alternative.

Though the phased implementation alternative would save between $1.64 million and $1.86 million on an annualized basis, this alternative would deny the benefits offered by §§ 201.210 and 201.211 to a substantial percentage of poultry growers and swine production contract growers for five or more years based on the length of their production contracts. As the data in Table 12 show, 15.6 percent of poultry growers and 56 percent of swine production contract growers have contracts with durations exceeding five years. Under the phased implementation alternative, these poultry growers and swine production contract growers would continue to be exposed to the potential market failures discussed above in the section on *Contracting, Industry Structure, and Market Failure: Summary of the Need for Regulation* until an alteration to an existing contract or the entering of a new contract triggered application of §§ 201.210 and 201.211. GIPSA considered all three regulatory alternatives and believes that the preferred alternative is the best alternative as the benefits of the regulations will be captured immediately by all livestock producers, swine production contract growers, and poultry growers, regardless of the length of their production or marketing contracts.

Regulatory Flexibility Analysis of the Preferred Option

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).[45] SBA considers broiler and turkey producers and swine contractors, NAICS codes 112320, 112330, and 112210 respectively, to be small businesses if sales are less than $750,000 per year. Live poultry dealers, NAICS 311615, are considered small businesses if they have fewer than 1,250 employees. Cattle and hog packers, NAICS 311611, are defined as small businesses if they have fewer than 1,000 employees.

The Census of Agriculture (Census) indicates there were 558 farms that sold their own hogs and pigs in 2012 and that identified themselves as contractors or integrators. The Census provides the number of head sold from their own operations by size classes for swine contractors, but not the value of sales nor number of head sold from the farms of the contracted production. Thus, to estimate the entity size and average per-entity revenue by the SBA classification, the average value per head for sales of all swine operations is multiplied by production values for firms in the Census size classes for swine contractors. The estimates reveal that although about 65 percent of swine contractors had sales of less than $750,000 in 2012 and would have been classified as small businesses, these small businesses accounted for only 2.8 percent of the hogs produced under production contracts. Additionally, there were 8,031 swine producers in 2012 with swine contracts and about half of these producers would have been classified as small businesses.

GIPSA maintains data on live poultry dealers from the annual reports these firms file with GIPSA. Currently, there are 133 live poultry dealers that would be subject to the proposed regulations. According to U.S. Census data on County Business Patterns, there were 74 poultry slaughter firms that had more than 1,250 employees in 2013. The difference yields approximately 59 poultry slaughterers that have fewer than 1,250 employees and would be considered as small businesses that would be subject to the proposed regulations.

Another factor that is important in determining the economic effect of the regulations is the number of contracts held by a firm. GIPSA records for 2014 indicated there were 21,925 poultry production contracts in effect, of which 13,370, or 61 percent, were held by the largest six poultry slaughterers and 90 percent (19,673) were held by the largest 25 firms. These 25 firms are all in the large business SBA category, whereas the 21,925 poultry growers holding the other end of the contracts are almost all small businesses by SBA's definitions.

Live poultry dealers classified as large businesses are responsible for about 89.7 percent of the poultry contracts. Assuming that small businesses will bear 10.3 percent of the costs, in the first year the regulations are effective, $1.7 [46] million would fall on live poultry dealers classified as small businesses. This amounts to average estimated costs for each small live poultry dealer of $29,200.

As of June 2016, GIPSA records identified 359 beef and pork packers actively purchasing cattle or hogs for slaughter. Many firms slaughtered more than one species of livestock. Of the 359 beef and pork packers, 161 processed both cattle and hogs, 132 processed cattle but not hogs, and 66 processed hogs but not cattle.

GIPSA estimates that small businesses accounted for 19.3 percent of the cattle and 17.8 percent of the hogs slaughtered in 2015. If the costs of implementing §§ 201.210 and 201.211 are proportional to the number of head processed, then in 2018, the first year the regulations would be effective, GIPSA estimates that $538,000 [47] in additional costs would fall on beef packers classified as small businesses. This amounts to estimated costs of $1,900 for each small beef packer.

On average, $188,000 [48] in additional first-year costs would be expected to fall on pork packers classified as small businesses, and $184,000 [49] would fall on swine contractors classified as small businesses. This amounts to average

[45] See: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[46] Estimated cost to live poultry dealers of $16.79 million × 10.27 percent of firms that are small businesses = $1.7 million.

[47] Estimated cost to beef packers of $2.79 million × 19.3 percent of firms that are small businesses = $538 thousand.

[48] Estimated cost to hogs and pork of $7.61 million × 17.8 percent of slaughter in small businesses × 13.8 percent of costs attributed to packers = $188 thousand.

[49] Estimated cost to hogs and pork of $7.61 million × 2.8 percent of contracted hogs produced by swine contractors that are small businesses × 86.2 percent of costs attributed to contractors = $184 thousand.

estimated costs for each small pork packer of $860, and average estimated costs for each small swine contractor of $506 in the first year the regulations would be effective. To the extent that smaller beef and pork packers rely on AMA purchases less than large packers, the estimates might tend to overstate costs.

Annualized costs discounted at a three percent interest rate would be $117,000 for the cattle industry, $80,500 for the hog industry, and $374,000 for the poultry industry. This amounts to annualized costs of $410 for each beef packer, $190 for each pork packer, $110 for each swine contractor, and $6,300 for each live poultry dealer that is a small business. The total annualized costs for small businesses would be $571,500.

Annualized costs at a seven percent discount rate would be $129,400 for the cattle industry, $89,300 for the hog industry, and $415,000 for the poultry industry. This amounts to annualized costs of $450 for each beef packer, $206 for each pork packer, $122 for each swine contractor, and $7,000 for each live poultry dealer that is a small business. The total annualized costs for small businesses would be $633,800.

The table below lists the estimated additional costs associated with the proposed regulations in the first year. It also lists annualized costs discounted at three percent and seven percent discount rates.

TABLE 17—ESTIMATED COSTS TO SMALL BUSINESSES FROM §§ 201.210 AND 201.211

Estimate type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
First-Year Costs	0.538	0.371	1.725	2.634
10 years Annualized at 3 Percent	0.117	0.081	0.374	0.572
10 years Annualized at 7 Percent	0.129	0.089	0.415	0.634

In considering the impact on small businesses, GIPSA considered the average costs and revenues of each small business impacted by §§ 201.210 and 201.211. The number of small businesses impacted by §§ 201.210 and 201.211, by NAICS code, as well as the per entity, first-year and annualized costs at both the three percent and seven percent discount rates appear in the following table.

TABLE 18—PER ENTITY COSTS TO SMALL BUSINESSES OF §§ 201.210 AND 201.211

NAICS	Number of small business	First year ($)	Annualized Costs—3% ($)	Annualized Costs—7% ($)
112210—Swine Contractor	363	506	110	122
311615—Poultry	59	29,236	6,344	7,035
311611—Cattle	287	1,874	407	451
311611—Hogs	219	856	186	206

The following table compares the average per entity first-year and annualized costs of §§ 201.210 and 201.211 to the average revenue per establishment for all firms in the same NAICS code. The annualized costs are slightly higher at the seven percent rate than at the three percent rate, so only the seven percent rate is shown as it is the higher annualized cost.

TABLE 19—COMPARISON OF PER ENTITY COST TO SMALL BUSINESSES OF §§ 201.210 AND 201.211 TO REVENUES

NAICS	Number of small business	Average first-year cost per entity ($)	Average annualized cost per entity ($)	Average revenue per establishment ($)	First-year cost as percent of revenue	Annualized cost as percent of revenue
112210—Swine Contractor	363	506	122	485,860	0.10	0.03
311615—Poultry	59	29,236	7,035	13,842,548	0.21	0.05
311611—Cattle	287	1,874	451	6,882,205	0.03	0.01
311611—Hogs	219	856	206	6,882,205	0.01	0.00

The revenue figures in the above table come from Census data for live poultry dealers and cattle and hog slaughterers, NAICS codes 311615 and 311611, respectively.[50] As discussed above, the Census provides the number of head sold by size classes for farms that sold their own hogs and pigs in 2012 and that that identified themselves as contractors or integrators, but not the value of sales nor the number of head sold from the farms of the contracted production. Thus, to estimate average revenue per establishment, GIPSA used the estimated average value per head for sales of all swine operations and the production values for firms in the Census size classes for swine contractors.

As the results in Table 19 demonstrate, the costs of §§ 201.210 and 201.211 as a percent of revenue are small as they are less than one percent, with the exception of the upper boundary for swine contractors.[51]

[50] Source: *http://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html.* Accessed on November 29, 2016.

[51] There are significant differences in average revenues between swine contractors and cattle, hog, and poultry processors, resulting from the difference in SBA thresholds.

Annualized cost savings of exempting small businesses would be about $570,000 using a three percent discount rate and about $634,000 using a seven percent discount rate.

One purpose of § 201.3(a) is to mitigate the risks of potential market failures or unequal bargaining power to all livestock producers, swine production contract growers, and poultry growers, not just the livestock producers, swine production contract growers, and poultry growers selling or growing livestock and poultry for large packers, swine contractors, and poultry dealers. Exempting small businesses would continue to subject the livestock producers, swine production contract growers, and poultry growers with contractual arrangements with small packers, swine contractors, and live poultry dealers to the contracting risks and potential market failures discussed above. GIPSA believes that the benefits of §§ 201.210 and 201.211 should be captured by all livestock producers, swine production contract growers, and poultry growers.

Based on the above analyses regarding §§ 201.210 and § 201.211, GIPSA certifies that this rule is not expected to have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). While confident in this certification, GIPSA acknowledges that individual businesses may have relevant data to supplement our analysis. We would encourage small stakeholders to submit any relevant data during the comment period.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect, although in some instances they merely reiterate GIPSA's previous interpretation of the P&S Act. This proposed rule will not pre-empt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this proposed rule. Nothing in this proposed rule is intended to interfere with a person's right to enforce liability against any person subject to the P&S Act under authority granted in section 308 of the P&S Act.

Executive Order 13175

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

GIPSA has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under EO 13175. If a tribe requests consultation, GIPSA will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

Paperwork Reduction Act

This proposed rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the federal government.

E-Government Act Compliance

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

List of Subjects in 9 CFR Part 201

Contracts, Poultry, Livestock, Trade Practices.

For the reasons set forth in the preamble, we propose to amend 9 CFR part 201 as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for Part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. Section 201.210 is added to read as follows:

§ 201.210 Unfair, unjustly discriminatory, or deceptive practices or devices by packers, swine contractors, or live poultry dealers.

Any packer, swine contractor, or live poultry dealer is prohibited from engaging in conduct or action that constitutes an unfair, unjustly discriminatory, or deceptive practice or device in violation of section 202(a) of the Act. Such conduct or action includes, but is not limited to:

(a) *Per se violation of section 202(a).* Any conduct or action explicitly deemed to be an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device by the Act is a violation of section 202(a) of the Act.

(b) *Violation of section 202(a) regardless of harm to competition.* Absent demonstration of a legitimate business justification, the following is an illustrative list of conduct or action that constitutes an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a) of the Act regardless of whether the conduct or action harms or is likely to harm competition:

(1) A retaliatory action or the threat of retaliatory action in response to lawful communication, association, or assertion of rights by a livestock producer, swine production contract grower, or poultry grower. A retaliatory action or the threat of retaliatory action against any livestock producer, swine production contract grower, or poultry grower includes, but is not limited to, coercion, intimidation, or unjust discrimination;

(2) Conduct or action that limits or attempts to limit by contract the legal rights and remedies afforded by law of a livestock producer, swine production contract grower, or poultry grower:

(i) The right to a trial by jury except when the livestock producer, swine production contract grower, or poultry grower has agreed to be bound by arbitration provisions in a contract that complies with § 201.218(a) and that provides a meaningful opportunity to participate fully in the arbitration process after applying the criteria in § 201.218(b);

(ii) The right, pursuant to section 209(a) of the Act, to resolve any dispute among the parties to a poultry growing arrangement, or swine production or marketing contract, in the Federal judicial district in which the principal part of the performance took place under the arrangement or contract;

(iii) The right to pursue all damages available under applicable law; or

(iv) The right to seek an award of attorney fees available under applicable law;

(3) Failing to comply with the requirements of § 201.100;

(4) Failing to provide reasonable notice to a poultry grower before suspending the delivery of birds after applying the criteria in § 201.215;

(5) Requiring unreasonable additional capital investments from a poultry grower or swine production contract grower after applying the criteria in § 201.216;

(6) Failing to provide a reasonable period of time to remedy a breach of contract before termination of the contract after applying the criteria in § 201.217;

(7) Failing to provide a meaningful opportunity to participate fully in the arbitration process after applying the criteria in § 201.218;

(8) Failing to ensure accurate scales and weighing of livestock, livestock carcasses, live poultry, or feed for the purposes of purchase, sale, acquisition, payment, or settlement as required by the regulations under the Act; or

(9) Failing to ensure the accuracy of livestock, meat, and poultry electronic evaluation systems and devices for the purposes of purchase, sale, acquisition, payment, or settlement as required by the regulations under the Act.

(c) *Conduct or action that harms competition.* Absent demonstration of a legitimate business justification, any conduct or action that harms or is likely to harm competition is an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a) of the Act.

■ 3. Section 201.211 is added to read as follows:

§ 201.211 Undue or unreasonable preferences or advantages.

The Secretary will consider the following criteria when determining whether a packer, swine contractor, or live poultry dealer has engaged in conduct or action that constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the Act. These criteria include, but are not limited to:

(a) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers who have engaged in lawful communication, association, or assertion of their rights;

(b) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers who the packer, swine contractor, or live poultry dealer contends have taken an action or engaged in conduct that violates any applicable law, rule, or regulation related to the livestock or poultry operation without a reasonable basis to determine that the livestock producer, swine production contract grower, or poultry grower committed the violation;

(c) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers for an arbitrary reason unrelated to the livestock or poultry operation;

(d) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status;

(e) Whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise constitute an undue or unreasonable preference or advantage; and

(f) Whether the conduct or action by a packer, swine contractor, or live poultry dealer harms or is likely to harm competition.

Larry Mitchell,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2016–30430 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AB26

Poultry Grower Ranking Systems

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA), Packers and Stockyards Program (P&SP) is proposing to amend the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act). The proposed amendments will identify criteria that the Secretary may consider when determining whether a live poultry dealer's use of a poultry grower ranking system for ranking poultry growers for settlement purposes is unfair, unjustly discriminatory, or deceptive or gives an undue or unreasonable preference, advantage, prejudice, or disadvantage. The proposed amendments will also clarify that absent demonstration of a legitimate business justification, failing to use a poultry grower ranking system in a fair manner after applying the identified criteria is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of whether it harms or is likely to harm competition.

DATES: We will consider comments we receive by February 21, 2017.

ADDRESSES: We invite you to submit comments on this proposed rule. You may submit comments by any of the following methods:

- *Mail:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Hand Delivery or Courier:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Internet: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

Instructions: All comments should make reference to the date and page number of this issue of the **Federal Register**. Regulatory analyses and other documents relating to this rulemaking will be available for public inspection in Room 2542A–S, 1400 Independence Avenue SW., Washington, DC 20250–3613 during regular business hours. All comments received will be included in the public docket without change, including any personal information provided. All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)). Please call the Management and Budget Services staff of GIPSA at (202) 720–8479 to arrange a public inspection of comments or other documents related to this rulemaking.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Litigation and Economic Analysis Division, P&SP, GIPSA, 1400 Independence Ave. SW., Washington, DC 20250–3601, (202) 720–7051, *s.brett.offutt@usda.gov*.

SUPPLEMENTARY INFORMATION:

Background on Prior Rulemaking

GIPSA previously published a notice of proposed rulemaking on June 22, 2010, which included requirements regarding a live poultry dealer's use of a poultry grower ranking system when determining payment for grower services. That proposed rule would have required live poultry dealers paying growers on a tournament system to pay growers raising the same type and kind of poultry the same base pay and further required that growers be settled in groups with other growers with like house types. Upon review of public comments received both in writing and through public meetings held during the comment period in 2010, we have elected not to publish this rule as a final rule, but rather have modified proposed § 201.214 and are publishing it as a proposed rule and requesting further public comment.

Background on Current Rulemaking

The P&S Act (7 U.S.C. 181 *et seq.*) sets forth broad prohibitions on the conduct of entities operating subject to its jurisdiction. For example, section 202(a) of the P&S Act prohibits packers, swine contractors, and live poultry dealers from engaging in any unfair, unjustly discriminatory, or deceptive practices. 7 U.S.C. 192(a). Section 202(b) of the P&S Act prohibits packers, swine contractors, and live poultry dealers from making or giving any undue or unreasonable preference or advantage to any particular person, or subjecting any particular person to any undue or unreasonable prejudice or disadvantage. 7 U.S.C. 192(b). These broad provisions, which have not previously been interpreted in regulations, make enforcement difficult and create uncertainty among industry participants regarding compliance.

GIPSA is proposing these regulations to clarify when certain conduct in the poultry industry related to poultry grower ranking systems violates sections 202(a) or 202(b) of the P&S Act. A poultry grower ranking system, sometimes called a ''tournament,'' is the process used by live poultry dealers to determine final payment to poultry growers upon settlement of each flock. Under a poultry grower ranking system, growers whose flocks are slaughtered during the same settlement week are paid according to a structure that compares growers' feed efficiency and live weight of the grown birds delivered to the plant. Growers with better performance according to a live poultry dealer's standards are ranked higher than growers with lower performance and, therefore, receive more compensation.

Poultry grower ranking systems are widely used by live poultry dealers operating as vertically integrated companies. The vertically integrated company is responsible for every step of the poultry production process except the raising and caring of the live birds meant for slaughter. Independent farmers, acting as contractors and referred to as ''poultry growers,'' perform this function. The vertically integrated live poultry dealer provides the chicks,[1] feed, and medication to poultry growers who house and feed the birds under a contract. The poultry grower grows the birds to market size (preferred weight for slaughter) and then, after slaughter, receives a settlement check for that flock. The payment received depends on how efficiently the poultry grower converted feed to meat as compared to the other poultry growers in the settlement group.

GIPSA has received complaints from poultry growers alleging unfair treatment in poultry grower ranking systems. Many of the underlying factors in these complaints were shared with GIPSA in the comments to the 2010 proposed rule. The 2010 proposed rule (§ 201.214) would have required live poultry dealers paying growers on a tournament system to pay growers raising the same type and kind of poultry the same base pay and further required that growers be settled in groups with other growers with like house types. Comments in favor of the proposed rule most often cited the imbalance in power and control between the poultry companies and the growers. Most common among the reasons for supporting the proposed rule was the control the poultry company has over inputs. Growers have no control over numerous inputs that ultimately determine pay. In particular, the poultry companies control the following inputs and production variables: Chick health, number of chicks placed, feed quality, medications, growout time, breed and type of bird, weighing of the birds, and weighing of the feed. Commenters complained that the poultry grower ranking system is a poor indicator of the grower's abilities and performance in growing chickens. One commenter pointed out that bird age can vary as much as 9 days in a group. Due to the relatively short growing period for poultry, there can be significant differences in bird size, and as a result, grower pay, in birds just a few days apart in age. Comments also expressed concern that company employees who are also poultry growers get preferential treatment and may get better birds or get to keep flocks longer.

Comments opposed to the proposed rule overwhelmingly cited the loss of the incentive for growers to perform. For example, commenters complained that ''there will be no incentive available for above-average growers,'' ''the pay system rewards the ones who strive to do best,'' it ''will take money from the most progressive growers,'' and ''is grossly unfair to the most productive and successful growers, only benefits the least productive and least successful.'' Those opposed to the proposed rule commented that everyone should not be paid the same, that competition is good for the industry, and that those that spend money and expend effort should be rewarded. Some commenters stated there will not be enough like houses to group together for ranking purposes.

A few commenters offered recommendations. Specifically, they suggested ''same type and kind'' of poultry should be defined as same breed, age range, sex, and target weight. Also, they suggested that the base pay rate should reflect grower's cost of production plus a reasonable rate of return. Other commenters suggested that GIPSA should clarify that incentive pay would still be allowed under the proposed rule. In GIPSA's experience reviewing live poultry dealer records, some poultry companies use the base pay as the minimum pay rate, so implementing the provision regarding base pay would not be difficult. Several comments said that ''like house type'' was poorly defined. Depending on the interpretation, there could be many different categories of like house types in which case, there could be very few growers in a given settlement group.

Commenters critical of the poultry grower ranking system focused on the live poultry dealer's control over the inputs. Inputs and other factors influencing performance and pay are not equal among growers. Commenters noted that variations in chicks, feed, and medications have a significant influence on the poultry grower's performance, but the grower has no control or influence over the quality of those inputs. As an example, one comment stated that male chickens have higher average weight gain than female chickens. Therefore, if one grower gets a higher percentage of male chickens than other growers, that grower could

[1] Poultry grower ranking systems are used extensively in broiler production. The ranking systems are also used in turkey production. References in this document to chicks, chickens, or broilers are also relevant to the use of grower ranking systems in turkey production.

have an advantage in the ranking system over growers who receive all or a higher percentage of female chickens. The breed of the poultry is also a factor. Growers who receive a breed that does not perform as well, due to the characteristics of that breed, are disadvantaged compared to growers who receive a better-performing breed. Another factor noted by commenters was the age of the breeder flock and that chicks from breeder hens that are very young or very old are known to be inferior to chicks from hens that are of prime egg-laying age. Commenters stated that poultry growers who get all or a higher percentage of chicks from very old or very young breeder hens are at a disadvantage compared to growers who receive chicks from hens in the prime weeks of laying good eggs. Citing these examples, commenters pointed out the ways live poultry dealers could give preferential treatment to some growers by delivering superior chicks to their farms.

Other comments focused on the quantity and quality of feed. One poultry grower commented about the effect on rankings when the live poultry dealer assumes that the grower receives more feed than the live poultry dealer actually delivered. The grower explained that a 200 pound under-delivery of feed in a system where production costs are averaged to ten-thousandths of a cent, would affect the rankings and cause the grower to be paid less than other growers in the settlement group. Another grower commented that he had received a delivery of bad feed that made the chickens sick. Although the live poultry dealer replaced the bad or spoiled feed, the damage had been done and the grower's flock ranked at the bottom of the poultry grower ranking for that settlement group. These commenters were expressing their frustration with the poultry grower ranking system that relied on inputs over which they had no control.

Recognizing that not all inputs are the same, in proposed new § 201.214, GIPSA is not proposing that all poultry growers receive the same quality inputs, or that growers only be ranked in settlement groups where all growers receive the same quality inputs. In each settlement group, it is very likely that the live poultry dealer will place chicks on some farms that are inferior to other chicks simply due to the variation in the birds. Likewise, feed quality or the delivery quantity may vary.

Unlike the proposed rule published in 2010 regarding poultry grower ranking systems, this proposed rule would not prohibit or prescribe certain conduct, nor would it prescribe specific payment to be made to growers. Instead, after consideration of the comments received, we are proposing a rule that encourages better sharing of information with growers and fairness in areas under a live poultry dealer's control. Proposed new § 201.214 sets forth criteria that the Secretary may consider to determine whether live poultry dealers have used the poultry grower ranking system in a manner that violates sections 202(a) or (b) of the P&S Act.

Proposed new § 201.214, ''Poultry Grower Ranking Systems'' would establish a non-exhaustive list of criteria the Secretary may consider when determining whether a live poultry dealer has violated the P&S Act with respect to the use of a poultry grower ranking system. Under proposed § 201.214(a), the Secretary may consider whether the grower is provided enough information to make informed decisions regarding the grower's poultry production operation. Such information would include the anticipated number of flocks per year and the average gross income from each flock. Because most growers borrow substantial sums of money to build and upgrade houses to meet the live poultry dealer's specifications, a grower would want a contract of sufficient length and with sufficient poultry production to repay the loan. For that reason, it is important for the poultry grower to know the anticipated average gross income from each flock in order to plan accordingly for future earnings and investments. Live poultry dealers should disclose information necessary to enable the grower to make informed decisions.

Under proposed § 201.214(b), the Secretary may consider whether a live poultry dealer supplies inputs (*e.g.,* birds, feed, and medication) of comparable quality and quantity to all poultry growers in the ranking group. When considering the inputs provided by the live poultry dealer to the poultry grower and the growout specifications established for the poultry grower, GIPSA does not require uniformity, but rather fairness among the growers in a settlement group. Growers are not paid based solely on their individual performance, but as compared to other growers in a settlement group. When a grower received inputs of either superior or inferior quality as compared to the inputs provided to other growers, that grower may be at either an advantage or disadvantage when flocks are settled depending on the quality of the inputs received. Under proposed § 201.214(b), the Secretary may also consider whether there is a pattern of supplying inferior inputs (*e.g.,* birds, feed, and medication) to one or more poultry growers in the ranking group. With regards to supplying inferior birds, as discussed above, lower quality chicks may result from very young or very old breeder hens, from a poultry breed that does not perform as well as other breeds in the growout, or for other reasons. If a poultry grower consistently receives lower quality or inferior chicks, the grower will experience higher mortality rates and lower efficiency. The grower will rank lower in the settlement group and receive less compensation as compared to the other growers in the settlement group. Similarly, if a poultry grower receives lower quality feed, or if the grower receives less feed than the quantity used to calculate payment, the grower's performance will suffer as compared to other growers in the settlement group. Also, if a grower's flock needs medication, but the live poultry dealer fails to provide the medication, or if one flock is placed on a different treatment schedule, the flock performance may suffer as compared to other flocks in the settlement group. Under proposed § 201.214(c), the Secretary may consider additional company-controlled factors that could affect a grower's performance in a settlement group.

Proposed § 201.214(d) provides that the Secretary may consider whether the live poultry dealer has demonstrated a legitimate business justification for conduct that may otherwise be unfair, unjustly discriminatory, or deceptive, or that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage. A legitimate business justification for certain conduct may be sufficient to find that the conduct does not violate the P&S Act. We request comment on the types of conduct that might be considered for a legitimate business justification, in order to give further context to this provision in the final rule.

Concurrent with the publication of this proposed rule, GIPSA is also proposing another rule in this issue of the **Federal Register** that, among other things, would clarify the conduct or action by packers, swine contractors, or live poultry dealers that GIPSA considers unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act. Specifically, this proposed rule includes § 201.210, ''Unfair, unjustly discriminatory, or deceptive practices or devices by packers, swine contractors, or live poultry dealers,'' which includes in paragraph (b) a non-exhaustive list of conduct or action that, absent

demonstration of a legitimate business justification, GIPSA believes is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act, regardless of whether the conduct harms or is likely to harm competition. Currently, proposed § 201.210(b) contains nine examples. In this rule, GIPSA is proposing to add to proposed § 201.210(b) a tenth example, § 201.210(b)(10) GIPSA also considers a live poultry dealer's failure to use a poultry grower ranking system in a fair manner after applying the criteria in § 201.214 to be an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) of the P&S Act regardless of whether it harms or is likely to harm competition.

IV. Required Impact Analyses

Executive Order 12866 and Regulatory Flexibility Act

This rulemaking has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. As a required part of the regulatory process, GIPSA prepared an economic analysis of proposed § 201.214. The first section of the analysis is an introduction and discussion of the prevalence of contracting in the poultry industry as well as a discussion of potential market failures. Next, GIPSA discusses three regulatory alternatives it considered and presents a summary cost-benefit analysis of each alternative. GIPSA then discusses the impact on small businesses.

Introduction

GIPSA issued a proposed rule on June 22, 2010, which included § 201.214. GIPSA has revised the 2010 version of § 201.214 and is now proposing a new § 201.214. The rule GIPSA proposed on June 22, 2010, included several requirements regarding live poultry dealers' use of tournament systems. That section of the proposed rule would have required live poultry dealers paying growers on a tournament system to pay growers raising the same type and kind of poultry the same base compensation and further required that growers be settled in groups with other growers with like house types. The rule also prohibited live poultry dealers from offering poultry growing arrangements containing provisions that decrease or reduce grower compensation below the base compensation amount.

Upon review of public comments received both in writing and through public meetings held during the comment period in 2010, GIPSA elected not to publish this rule as a final rule and has removed the requirements and prohibitions in the rule proposed on June 22, 2010.

GIPSA has re-written § 201.214 and is proposing this regulation to establish criteria the Secretary may consider in determining whether a live poultry dealer has used a poultry grower ranking system to compensate poultry growers in an unfair, unjustly discriminatory, or deceptive manner, or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.[2] Coupled with § 201.3(a), which is being published as an interim final rule concurrently in this edition of the **Federal Register** and proposed § 201.210(b)(10), which is discussed below, the criteria clarify whether a live poultry dealer's use of a poultry grower ranking system violates sections 202(a) and/or 202(b) of the P&S Act.

Interim Final § 201.3(a) states that certain conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition in all cases. Proposed § 201.210(b)(10) would add to proposed § 201.210(b), which is published as part of a separate proposed rule in this edition of the **Federal Register**, another example of conduct or action by a live poultry dealer that absent demonstration of a legitimate business justification, GIPSA considers an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) of the P&S Act regardless of whether the conduct or action harms or is likely to harm competition. Specifically, proposed § 201.210(b)(10) would clarify that absent demonstration of a legitimate business justification, GIPSA considers the failure to use a poultry grower ranking system in a fair manner after applying the criteria in proposed § 201.214 to be an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) of the P&S Act regardless of whether it harms or is likely to harm competition. Since § 201.210(b)(10) relies on the criteria in § 201.214, the estimated costs and benefits of § 201.210(b)(10) are included in the estimated costs and benefits of § 201.214.

The criteria in proposed § 201.214 would include whether a live poultry dealer has provided sufficient information to enable a poultry grower to make informed business decisions. The criteria would also address whether the inputs, including birds, feed, and medication, provided by live poultry dealers to poultry growers are of consistent quality and quantity. The criteria would recognize the non-uniformity of inputs provided by live poultry dealers to growers and discourage the live poultry dealer from consistently providing superior or inferior inputs to growers in a manner that consistently affects grower compensation. The criteria also would consider whether live poultry dealers have provided poultry growers with dissimilar production variables such as the density at which the live poultry dealer places birds, target bird sizes, and age of birds at slaughter that affects the performance and grower ranking. Finally, the criteria would consider whether a live poultry dealer has demonstrated a legitimate business justification for conduct that may otherwise be unfair, unjustly discriminatory, or deceptive or gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.

Prevalence of Poultry Contracts and Poultry Grower Ranking Systems

The production of poultry is highly vertically integrated with live poultry dealers owning or controlling most segments of the value chain. Live poultry dealers typically own the breeding stock, the hatcheries, the feedmills, the live birds, and they own and operate the slaughter operations. Live poultry dealers typically contract out the growing operations for their live birds to independent poultry growers. Live poultry dealers who own or control most segments of the value chain and contract out the growing operations of live birds are commonly referred to as integrators.[3]

Broilers are almost exclusively grown under production contracts. In 2012, 96.4% of broilers were grown under contract, while 68.5% of turkeys were grown under production contracts. Under a production contract, the live poultry dealer provides the poultry grower with many inputs including the live chicks, feed, and medications. The poultry grower in turn provides the housing, labor, water, electricity, fuel,

[2] A tournament system is a type of poultry grower ranking system.

[3] For the purposes of this Regulatory Impact Analysis, the terms live poultry dealer and integrator are used interchangeably. P&SP has jurisdiction over live poultry dealers, most of which are also integrators. The only time the Regulatory Impact Analysis will refer to integrators is when another author uses the term integrator as in Table 2.

and provides for waste removal. At the end of the grow-out period, the live poultry dealer typically picks up the birds for slaughter. The payment to the poultry grower for the growing services is often determined by a poultry grower ranking system outlined in the production contract.

Under a typical poultry grower ranking system, all growers who grew birds that were shipped to the same plant in the same week are grouped together for payment purposes. Their cost per pound of live weight is averaged using standard costs for chicks and feed. Live poultry dealers then rank the growers based on cost. Live poultry dealers typically reward growers with lower costs by providing higher compensation for their growing services. Live poultry dealers typically provide less compensation to growers with higher costs.

Contracting is an important and prevalent feature in the production of poultry. The following table shows the share of poultry, by type, produced under contract over the years that the Census of Agriculture has published data on commodities raised and delivered under production contracts.

TABLE 1—PERCENTAGE OF POULTRY RAISED AND DELIVERED UNDER PRODUCTION CONTRACTS [4]

Poultry	2002	2007	2012
Broilers (%)	98.0	96.5	96.4
Turkeys (%)	41.7	67.7	68.5

Benefits of Contracting in Agricultural Production and the Poultry Industry

Agricultural production contracts have many benefits. They help farmers and livestock producers manage price and production risks, elicit the production of products with specific quality attributes by tying prices to those attributes, and facilitate the smooth flow of commodities to processing plants encouraging more efficient use of farm and processing capacities. Agricultural production contracts can also lead to improvements in efficiency throughout the supply chain for products by providing farmers with incentives to deliver products consumers desire and produce products in ways that reduce processing costs and, ultimately, retail prices. Poultry production contracts are a specific type of agricultural production contract that are widely used due to the benefits of growing poultry under production contract arrangements.

There are benefits to both live poultry dealers and poultry growers from entering into agricultural production contracts, referred to as contract poultry growing arrangements [5] in the poultry industry. Contract poultry growing arrangements allow for a sharing of risk between the live poultry dealer and the poultry grower. Contract poultry growing arrangements have provided poultry growers with predictable income and access to financing to invest in more efficient types of houses. More efficient housing may lead to higher compensation under poultry grower ranking systems. Contract poultry growing arrangements have benefited live poultry dealers by shifting the capital expenses of growing poultry to the poultry growers.

The pervasive use of contract poultry growing arrangements has benefited the poultry industry and consumers by increasing the rate of adoption of new technology, increasing feed conversion, and increasing the ability of the industry to respond to changes in consumer demand.[6] The prevalence of contract poultry growing arrangements in the poultry industry is evidence of the benefits to growers, live poultry dealers, and consumers.

Structural Issues in the Poultry Industry

As the above discussion highlights, there are important benefits associated with the use of agriculture contracts in the poultry industry. However, if there are large disparities in the bargaining power among contracting parties resulting from size differences between contracting parties or the use of market power by one of the contracting parties, the contracts may have detrimental effects on one of the contracting parties and may result in inefficiencies in the marketplace.

For example, a contract that ties a grower to a single purchaser of a specialized commodity, even if the contract provides for fair compensation to the grower, still leaves the grower subject to default risks should the contractor fail. Another example is a contract that covers a shorter term than the life of the capital (a poultry house, for example). The grower may face the hold-up risk that the contractor (live poultry dealer) may require additional capital investments or may impose lower returns at the time of contract renewal. Hold-up risk is a potential market failure and is discussed in detail in the next section. These risks may be heightened when there are no alternative buyers for the grower to switch to, or when the capital investment is specific to the original buyer.[7] Some growers make substantial long-term capital investments as part of poultry production contracts, including land, poultry houses, and equipment. Those investments may tie the grower to a single integrator. Costs associated with default risks and hold-up risks are important to many growers in the industry. The table below shows the number of integrators that broiler growers have in their local areas by percent of total farms and by total production.

[4] Agricultural Census, 2007 and 2012. *https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/* and *https://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/*.

[5] Under section 2(a)(9) of the P&S Act, a ''poultry growing arrangement'' is defined as ''any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry for delivery, in accord with another's instructions, for slaughter.''

[6] Vukina, Tomislav, ''Vertical Integration and Contracting in the U.S. Poultry Sector,'' *Journal of Food Distribution Research,* July 2001.

[7] See Vukina and Leegomonchai, *Oligopsony Power, Asset Specificity, and Hold-Up: Evidence From The Broiler Industry, American Journal of Agricultural Economics,* 88(3): 589–605 (August 2006).

TABLE 4—INTEGRATOR CHOICE FOR BROILER GROWERS [8]

Integrators in grower's area [9]	Farms	Birds	Production	Can change to another integrator
Number	Percent of total			Percent of farms
1	21.7	23.4	24.5	7
2	30.2	31.9	31.7	52
3	20.4	20.4	19.7	62
4	16.1	14.9	14.8	71
>4	7.8	6.7	6.6	77
No Response	3.8	2.7	2.7	Na

The data in the table show that 52 percent of broiler growers, accounting for 56 percent of total production, report having only one or two integrators in their local areas. This limited integrator choice may accentuate the contract risks. A 2006 survey indicated that growers facing a single integrator received 7 to 8 percent less compensation, on average, than farmers located in areas with 4 or more integrators.[10] If live poultry dealers already possess some market power to force down prices for poultry growing services, some contracts can extend that power by raising the costs of entry for new competitors, or allowing for price discrimination.[11]

Many poultry processing markets face barriers to entry, including: (1) Economies of scale; (2) high asset-specific capital costs with few alternative uses of the capital; (3) brand loyalty of consumers, customer loyalty to the incumbent processors, and high customer switching costs; and (4) governmental food safety, bio-hazard, and environmental regulations. Consistent with these barriers, there has been limited new entry.

However, an area where entry has been successful is in developing and niche markets, such as organic meat and free-range chicken. Developing and niche markets have a relatively small consumer market that is willing to pay higher prices, which supports smaller plant sizes. Niche processors are generally small, however, and do not offer opportunities to many producers or growers.

Economies of scale have resulted in large processing plants in the poultry processing industry. Barriers to entry limit the expansion of choice for poultry growers who have only one or two integrators in their local areas with no potential entrants on the horizon. The limited expansion of choice of processors by poultry growers may limit contract choices and the bargaining power of growers in negotiating contracts.

One indication of potential market power is industry concentration.[12] The following table shows the level of concentration in the poultry slaughtering industry for 2007–2015.

TABLE 5—FOUR-FIRM CONCENTRATION IN POULTRY SLAUGHTER [13]

Year	Broilers (%)	Turkeys (%)
2007	57	52
2008	57	51
2009	53	58
2010	51	56
2011	52	55
2012	51	53
2013	54	53
2014	51	58
2015	51	57

The table above shows the concentration of the four largest broiler and turkey processors has remained relatively steady at between 50 and 60 percent.

The data in Table 5 are estimates of national concentration and the size differences discussed below are also at the national level, but the economic markets for poultry may be regional or local, and concentration in regional or local areas may be higher than national measures.[14] The data presented earlier in Table 4 highlight this issue by showing the limited ability a poultry grower has to switch to a different integrator. As a result, national concentration may not demonstrate accurately the options poultry growers in a particular region actually face.

Another factor GIPSA considered in proposing § 201.214 is the contrast in size and scale between poultry growers and the live poultry dealers they supply. The disparity in size between large oligopsonistic buyers and atomistic sellers may lead to market power. The National Chicken Council states that in 2016, approximately 35 companies were involved in the business of raising, processing, and marketing chicken on a vertically integrated basis, while about 25,000 family farmers had production contracts with those companies.[15] That comes to about 714 family-growers per company. Collectively, the family-growers produced about 95 percent of the nearly 9 billion broilers produced in the United States in 2015. The other 5 percent were grown on company-owned farms. That means the average family-grower produced about 342,000 broilers. As Table 5 shows, the four largest poultry companies in the United States accounted for 51 percent of the broilers processed. That means the average volume processed by the four largest poultry companies was about 1.15 billion head, which was 3,357 times the average family grower's volume.

As the above discussion highlights, there are large size differences between poultry growers and the live poultry dealers which they supply. These size differences may contribute to unequal

[8] MacDonald, James M. Technology, Organization, and Financial Performance in U.S. Broiler Production. USDA, Economic Research Service, June 2014.

[9] Percentages were determined from the USDA Agricultural Resource Management Survey (ARMS), 2011. ''Respondents were asked the number of integrators in their area. They were also asked if they could change to another integrator if they stopped raising broilers for their current integrator.'' Ibid. p. 30.

[10] MacDonald, J. and N. Key. ''Market Power in Poultry Production Contracting? Evidence from a Farm Survey.'' *Journal of Agricultural and Applied Economics.* 44(4) (November 2012): 477–490.

[11] See, for example, Williamson, Oliver E. *Markets and Hierarchies: Analysis and Antitrust Implications,* New York: The Free Press (1975); Edlin, Aaron S. & Stefan Reichelstein (1996) ''Holdups, Standard Breach Remedies, and Optimal Investment,'' *The American Economic Review* 86(3): 478–501 (June 1996).

[12] For additional discussion see MacDonald, J.M. 2016 ''Concentration, contracting, and competition policy in U.S. agribusiness,'' *Competition Law Review,* No. 1–2016: 3–8.

[13] These data were compiled from Packers and Stockyards industry annual reports, a proprietary data source.

[14] MacDonald and Key (2012) Op. Cit. and Vukina and Leegomonchai (2006) Op. Cit.

[15] *http://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/.*

bargaining power due to monopsony market power or oligopsony market power, or asymmetric information. The result is that the contracts bargained between the parties may have detrimental effects on poultry growers due to the structural issues discussed above and may result in inefficiencies in the marketplace.

Hold-Up as a Potential Market Failure

Integrators demand investment in fixed assets from the growers. One example is specific types of poultry houses and equipment the integrator may require the grower to utilize in their growing operations. These investments may improve efficiency by more than the cost of installation. Typically, the improved efficiency would accrue to both the integrator and the grower. The integrator has lower feed costs, and the grower performs better relative to other poultry growers in a settlement group. If the grower bears the entire cost of installation, then the grower should be further compensated for the feed conversion gains that accrue to the integrator. The risk is that after the assets are installed, the cost to the grower is ''sunk.'' This means that if the integrator reneges on paying compensation for the additional capital investments, and insists on maintaining the lower price, the grower will accept that lower price rather than receive nothing. This allows the integrator to get the benefit of efficiency gains, at no expense to them, with the grower bearing all of the cost. This reneging is termed ''hold-up'' in the economic literature.[16]

Hold-up can have two consequences that result in market failures. If the growers do not anticipate hold-up, then growers will spend too much on investments because the integrator who demands them is not incurring any cost. That is inefficient. If the grower does anticipate hold-up, they will act as if the integrator was going to renege even when it was not, resulting in too little investment and loss of potential efficiency gains.

Hold-up can be resolved with increased competition. If an integrator developed a reputation for reneging, and growers could go elsewhere, the initial integrator would be punished and disincentivized from reneging in the future. Unfortunately, in practice, many growers do not have the option of going elsewhere.

[16] See for example, Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, ''Vertical Integration, Appropriable Rents, and the Competitive Contracting Process,'' *The Journal of Law and Economics* 21, no 2 (Oct., 1978): 297–326.

Data shown above in Table 4 indicate that there are few integrators in these markets, and that growers have limited choice. Table 5, above, indicates the level of concentration in the poultry processing industry and shows that integrators operate in concentrated markets.

This rule would allow growers to file complaints against integrators that renege, giving some of the incentive benefit of competition, without compromising the efficiency of having few large processors. In addition to addressing the potential market failure of hold-up, this rule would address inefficiencies due to incomplete and asymmetric information in poultry markets. Poultry growers who lack adequate information on the expected revenue from a growing arrangement may make inefficient investment decisions. For instance, a grower may invest too much money in building new houses or purchasing upgrades relative to what they would choose if they were fully informed about the expected return from those investments. By requiring that growers be provided sufficient information to make informed business decisions, this rule would help mitigate non-optimal investment by growers and improves social welfare.

Contracting, Industry Structure, and Market Failure: Summary of the Need for Regulation

There are benefits of contracting in the poultry industry, as well as structural issues that may result in unequal bargaining power and market failures. These structural issues and market failures would be mitigated by relieving plaintiffs from the requirement to demonstrate competitive injury. For instance, contracting parties can alleviate hold-up problems if they are able to write complete contracts, and are able to litigate to enforce the terms of those contracts when there is an attempt to engage in ex-post hold-up. Because proving competitive injury is difficult and costly, removing that burden facilitate the use of litigation by producers and growers to address violations of the Packers and Stockyards Act. If growers are able to seek legal remedies, then their contracts would be easier to enforce. This will incentivize integrators to avoid exploitation of market power and asymmetric information, as well as behaviors that result in the market failure of hold-up. The result will be improved efficiency in poultry markets. GIPSA has a clear role to ensure that market failures are mitigated so that poultry markets remain fair and competitive. Section 201.214 seeks to fulfill that role by promoting fairness and equity for poultry growers.

Cost-Benefit Analysis of the Proposed Rule

Costs of the Regulations Proposed on June 22, 2010

GIPSA issued a proposed rule on June 22, 2010, with several new regulations, many of which had the potential to impact the poultry industry. A brief summary of the regulations proposed in 2010 follows.

- Proposed § 201.3(c) stated that certain conduct may be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition.
- Proposed § 201.210 would have provided specific examples of conduct that violate section 202(a) regardless of whether the conduct harms or is likely to harm competition.
- Proposed § 201.211 would have provided specific criteria the Secretary may consider when determining whether an undue or unreasonable preference or advantage or an undue or unreasonable prejudice or disadvantage has occurred in violation of section 202(b) of the P&S Act.
- Proposed § 201.213 stated that live poultry dealers obtaining poultry under a poultry growing arrangement must submit a sample copy of each unique contract or agreement to GIPSA for posting on its Web site.
- Proposed § 201.214 would have required live poultry dealers paying growers on a tournament system to pay growers raising the same type and kind of poultry the same base compensation and further required that growers be settled in groups with other growers with like house types. Proposed § 201.214 also would have prohibited live poultry dealers from offering poultry growing arrangements containing provisions that decrease or reduce grower compensation below the base compensation amount.
- Proposed § 201.215 would have provided specific criteria the Secretary may consider when determining whether a poultry grower was provided with reasonable notice prior to suspension of the delivery of birds to a poultry grower.
- Proposed § 201.216 would have set forth specific criteria the Secretary may consider when determining whether a requirement that a poultry grower make additional capital investments constitutes an unfair practice in violation of the P&S Act.
- Proposed § 201.217 would have set forth the conditions under which a poultry grower may be required to make additional capital investments.

• Proposed § 201.218 would have provided specific criteria the Secretary may consider in determining whether a live poultry dealer has provided a poultry grower a reasonable period of time to remedy a breach of contract.

• Proposed § 201.219 would have provided specific criteria the Secretary may consider when determining whether the arbitration process in a contract provides a meaningful opportunity for the poultry grower to participate fully in the arbitration process.

GIPSA considered thousands of comments before proposing the current version of § 201.214. The following provisions were in the 2010 rule, but not in the currently proposed regulation.

• Requirement that live poultry dealers paying poultry growers on a tournament system pay poultry growers raising the same type and kind of poultry the same base compensation, and that poultry growers be settled in groups with other poultry growers with like house types (§ 201.214).

• Prohibition on live poultry dealers from offering growing arrangements containing provisions that decrease or reduce poultry grower compensation below the base compensation amount (§ 201.214(a)).

• Requirement that live poultry dealers submit sample contracts to GIPSA for posting to the public (§ 201.213).

Additionally, GIPSA has adjusted the rule proposed in 2010 to give live poultry dealers more flexibility in suspending the delivery of birds and requiring capital improvements and those adjustments are reflected in current proposed §§ 201.215 and 201.216, respectively.

GIPSA is issuing § 201.3(a) as an interim final rule concurrently in this issue of the **Federal Register**. GIPSA has also revised and is currently proposing new versions of §§ 201.210 and 201.211 concurrently in a separate proposed rule in this issue of the **Federal Register**. In December 2011, GIPSA issued as a final rule §§ 201.215, 201.216, 201.217, and 201.218. Proposed § 201.217, capital investments requirements and prohibitions, was removed, and proposed §§ 201.218 and 201.219 were renumbered as §§ 201.217 and 201.218.

GIPSA has now revised § 201.214 and instead of proscribing certain conduct, new proposed § 201.214 would establish criteria the Secretary may consider in determining whether a live poultry dealer has used a poultry grower ranking system to compensate poultry growers in an unfair, unjustly discriminatory, or deceptive manner, or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.

GIPSA received numerous comments on the proposed rule in 2010. Although many thousands of the comments submitted contained general qualitative assessments of either the costs or benefits of the proposed rule, only two comments systematically described quantitative costs across the rule's provisions.

Comments from the National Meat Association included cost estimates by Informa Economics (the Informa Study). The Informa Study estimated that the proposed rule would cost the U.S. poultry industry approximately $361.6 million.[17] The Informa Study estimated $26.0 million for the one-time direct costs of rewriting contracts, additional record keeping, etc., $33.4 million for the ongoing direct costs, and $302.2 million for cost increases due to efficiency losses.[18] However, these cost estimates assumed all of the 2010 proposed changes, many of which now do not apply.

The Informa Study recognized that the economic costs of the 2010 proposed rule would take time to materialize. The Informa Study estimated that only the direct, one-time costs would occur shortly after implementation and the more significant impacts, such as declining efficiency, would happen more slowly and would not reach the full impact until years 3 and 4 in the poultry industry after the rule become effective.[19] Thus, the $361.6 million cost estimate by the Informa Study was for when the rule reached its full impact in years 3 and 4. The Informa Study further recognized that companies would find ways to adapt to the provisions of the rule and the impact of the rule would decrease after year 4.[20]

The Informa Study posited that the several elements in the proposed rule would likely alter the integrator-grower relationship in such a way as to slow down the adoption of new technologies that increase efficiency and reduce costs.[21] The Informa Study also posited that the proposed rule would significantly increase the threat of litigation, which would reduce monetary incentives to encourage innovation and investment in new technology by growers. The resulting slowdown in investment in new and upgraded buildings would negatively impact efficiency, measured by feed conversion.

Comments from the National Chicken Council included cost estimates prepared by Dr. Thomas E. Elam, President, FarmEcon LLC (the Elam Study).[22] The Elam Study estimated that the proposed rule would cost the chicken industry $84 million in the first year increasing to $337 million in the fifth year, with a total cost of $1.03 billion over the first five years.[23] The Elam Study identified $6 million as one-time administrative costs. The study states that most of the costs would be indirect costs resulting from efficiency losses,[24] while more than half of the costs estimated would be due to a reduced rate of improvement in feed efficiency due to the proposed rule slowing the pace of innovation in the poultry industry. For litigation costs, the Elam Study concluded that the litigation costs are substantial, but unknown. Again, these cost estimates were for all of the 2010 proposed changes, many of which now do not apply.

Estimates of the costs in the Informa Study and the Elam Study were largely due to business practices that live poultry dealers were projected to alter in reaction to the proposed rule rather than changes in business practices directly imposed by the rule proposed in 2010. For example, the Elam Study expected live poultry dealers to assay (a test to determine the quality of feed) each load of feed delivered to growers to avoid litigation.[25]

GIPSA believes the cost estimates presented in the Informa Study and the Elam Study were overstated. The studies relied on interviews that queried the willingness of live poultry dealers to alter their business practices. The estimates, based on interviews, may overstate costs because the live poultry dealers would face adjustment costs from the rule proposed in 2010 and had incentives to respond that they would discontinue current practices. GIPSA also believes that certain adjustments are unlikely to occur. For example, GIPSA believes it is unlikely that live poultry dealers would take on the costly

[17] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Table 9, Page 53.

[18] Ibid. Page 53.

[19] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Page 66.

[20] Ibid, Page 67.

[21] Ibid. Page 37.

[22] See Elam, Dr. Thomas E. ''Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact.'' FarmEcon LLC, 2010.

[23] Ibid. Page 24

[24] Ibid. Page 24

[25] Elam, Page 18.

task of assaying each load of feed solely to avoid litigation.

Cost-Benefit Analysis of Proposed § 201.214

Regulatory Alternatives Considered

Executive Order 12866 requires an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation and an explanation of why the planned regulatory action is preferable to the identified potential alternatives.[26] GIPSA considered three regulatory alternatives. The first alternative that GIPSA considered was to maintain the status quo and not propose the rule. The second alternative that GIPSA considered was revising the version of § 201.214 that GIPSA published in 2010 and proposing it as a new rule. This is GIPSA's preferred alternative as will be explained below. The third alternative that GIPSA considered was proposing a new version of § 201.214, but instituting a phased implementation of the proposed rule. Under this alternative, proposed § 201.214 would only take effect when a poultry growing contract expires, is replaced, or modified. The costs and benefits of the alternatives are discussed in order below.

Regulatory Alternative 1: Status Quo

If § 201.214 is never finalized, there are no marginal costs and marginal benefits as industry participants will not alter their conduct. From a cost standpoint, this is the least cost alternative compared to the other two alternatives. This alternative also has no marginal benefits. Since there are no changes from the status quo under this regulatory alternative, it will serve as the baseline against which to measure the other two alternatives.

Regulatory Alternative 2: The Preferred Alternative—Costs of the Proposed Rule

GIPSA expects that the direct costs of proposed § 201.214 would consist of the costs of developing a consistency management system, providing income projections to poultry growers, keeping additional records, and reviewing and re-writing poultry growing contracts to ensure that poultry grower ranking systems are not used in an unfair, unjustly discriminatory, or deceptive manner or in any way that gives an undue or unreasonable preference, advantage, prejudice, or disadvantage.

Based on its expertise regulating the poultry industry over several decades, GIPSA does not expect the proposed rule to result in a decrease in the use of poultry grower ranking systems, lower capital formation, or decreases in efficiencies in the poultry industry. The only indirect costs that GIPSA anticipates are the effects of the increase in industry costs from the direct costs on supply and demand and the resulting quantity and price impacts on the retail market for chicken and the related input market for broilers.

To estimate the costs of the proposed rule, GIPSA divided costs into two major categories, direct and indirect costs. GIPSA expects that direct costs would be comprised of administrative costs. Administrative costs include items such as the following: (1) Providing income projections to growers; (2) development of company-specific consistency management systems (CMSs) to ensure poultry grower ranking systems are not used in an unfair, unjustly discriminatory, or deceptive manner or in any way that gives an undue or unreasonable preference, advantage, prejudice, or disadvantage; (3) additional record keeping; (4) review of written contracts by attorneys and the employees of regulated companies; and (5) all other administrative office work associated with review of contracts.

Indirect costs include costs caused by changes in supply and/or demand resulting from the proposed rule. Indirect costs also include potential efficiency losses due to potential changes in poultry grower ranking systems.

Regulatory Alternative 2: Direct Costs—Administrative Costs

To estimate administrative costs of the proposed rule, GIPSA relied on its experience reviewing the operations and business records of live poultry dealers, poultry growing contracts, and other business records for compliance with the P&S Act and regulations. GIPSA also considered the impact of each criterion contained in § 201.214 on administrative costs.

Under § 201.214(a), the Secretary may consider whether a live poultry dealer has provided sufficient information to a poultry grower to enable the poultry grower to make informed business decisions. Such information should include information necessary to calculate the expected income from the poultry growing arrangement. Current poultry growers who have been compensated for multiple flocks under a poultry grower ranking system may already have sufficient information because they have already established income patterns by participating in the poultry grower ranking system. The criterion in proposed § 201.214(a) would mainly apply to new growers, those growers switching to different live poultry dealers, or to growers considering housing upgrades where this information is not already available to the poultry grower.

In the past, live poultry dealers commonly provided prospective growers with projection sheets that would provide a grower with estimates of the minimum and maximum compensation they could expect under a contract. GIPSA's experience conducting investigations and compliance reviews in the poultry industry has indicated that not all live poultry dealers currently provide projection sheets to poultry growers.

GIPSA expects that it would not be difficult for live poultry dealers to develop and provide projection sheets for each contract type to all current and prospective growers. GIPSA believes that providing projection sheets to growers that contained the minimum, average, and maximum compensation they can expect for the contract type they are considering or under which they are currently growing would be sufficient information to enable the poultry growers to make informed business decisions about their future compensation and whether the compensation is sufficient to warrant increasing capital investments, for example.

Based on GIPSA's experience regulating live poultry dealers and reviewing their records, it developed time estimates for the number of hours for company managers and information technology (IT) staff to develop new projection sheets or review and revise existing sheets for each type of poultry growing contract that contains a poultry grower ranking system on which to base grower compensation. GIPSA estimates that there are 10 individual contract types for each of the 133 live poultry dealers who report to GIPSA. GIPSA also developed time estimates for legal staff to review the projection sheets and for the company to deliver the projection sheets to all current and prospective growers. GIPSA estimates that each projection sheet for each of the 1,330 unique contract types would take eight hours of management and IT time to prepare, and two hours of attorney time to review and rewrite the contract. In addition, it will take 0.2 hours of administrative time to print, and mail the projection sheets and revised contracts for each of the 21,925 individual poultry production contracts of which GIPSA is aware. GIPSA multiplied the estimated hours to conduct these tasks by the average

[26] See Section 6(a)(3)(C) of Executive Order 12866.

hourly wages for managers and IT staff at $58/hour, attorneys at $83/hour, and administrative assistants at $34/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics.[27] GIPSA estimates the development and delivery of projection sheets to cost the poultry industry $0.99 million.

The criterion in § 201.214(b) permits the Secretary to consider whether a live poultry dealer supplies inputs of comparable quality and quantity to all poultry growers in the ranking group and whether there is a pattern or practice of supplying inferior inputs to one or more poultry growers in the ranking group. Inputs include birds, feed, medication, and any other input supplied by the live poultry dealer.

The U.S. Food and Drug Administration (FDA) approves all medication that can be administered to broilers that are grown for human consumption.[28] GIPSA believes that live poultry dealers would not alter medication to such an extent that inferior medicine is consistently supplied to a grower and that this criterion would not be costly to the industry.

GIPSA also believes that feed provided by live poultry dealers would be consistent across a group of growers and that this criterion would not be costly to the industry. Feed is produced by live poultry dealers at a feedmill and the same batch of feed is distributed to growers until more feed is produced and then that feed is distributed. The process of the production and distribution of feed ensures consistency across the group of growers that receive the same batch of feed. Once a batch of feed is produced, live poultry dealers truck it to growers according to established routes and schedules. All growers on the same route should receive feed of similar quality.

The chicks supplied by a live poultry dealer to a poultry grower have the potential to be inconsistent and GIPSA believes that live poultry dealers would have to take action to ensure a poultry grower is not consistently supplied with inferior chicks. The factors that affect chick quality include the age and breed of the breeder stock and the conditions at the hatchery. Hatchery conditions affecting chick quality include, hatching egg quality, time of collection, egg storage temperature and humidity, incubation temperature, incubator carbon dioxide concentration, and chick hatching time in relation to being removed from the incubator.[29]

It is possible that the rotation of chicks being hatched and delivered could result in the same grower(s) receiving inferior chicks on a consistent basis. In order to avoid the possibility of consistent placement of inferior chicks with the same grower, even if unintentional, live poultry dealers would likely respond by designing and implementing a CMS to identify and evenly distribute inferior chicks.

GIPSA expects the same CMS to be used to demonstrate that a poultry grower ranking system is not used in an unfair, unjustly discriminatory, or deceptive manner, or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage. Proposed § 201.214(c) would allow the Secretary to consider whether a live poultry dealer provides poultry growers with dissimilar production variables in the ranking group in a manner that affects a poultry grower's compensation. Production variables include, but are not limited to, the density at which the live poultry dealer places birds, the target slaughter weights of the birds, and bird ages that vary by more than seven days. The live production and broiler management teams must work together to ensure that medication, bird densities, target bird sizes, and the timing of the harvesting of flocks does not consistently affect grower rankings. Each live poultry dealer, whether large or small, would need to design and implement one CMS to cover all of its breeding, hatching, feedmill, and broiler operations. This CMS would ensure that growers are not treated inconsistently and that there is not a pattern or practice of unfair, unjustly discriminatory, or deceptive treatment or undue or unreasonable preference, advantage, prejudice, or disadvantage.

GIPSA relied on its knowledge of the poultry industry to estimate the cost of designing and implementing a CMS that could be used by both large and small live poultry dealers. GIPSA estimates that it would take 640 hours of management and IT staff time to develop a CMS. GIPSA estimates it would take 8 hours per live poultry dealer for its legal team to review the CMS and 96 hours to train the breeding, hatching, and broiler staff how to use the CMS to ensure the uniform distribution of inferior chicks. GIPSA multiplied the estimated hours to conduct these tasks by the average hourly wages for managers and IT staff at $58/hour, attorneys at $83/hour, and administrative assistants at $34/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics.[30] GIPSA estimates that if all 133 live poultry dealers who report operations to GIPSA develop and implement a CMS, the cost would total $5.46 million. This estimate overstates the cost because some of the 133 live poultry dealers do not use a poultry grower ranking system. Rather than risk underestimating the potential cost, GIPSA chose to include all 133 live poultry dealers in the calculations. We have not estimated any capital costs associated with the creation and implementation of a CMS, as we believe that there are none or existing equipment would be used; however, we seek comment on the validity of this assumption and if commenters disagree with it, to provide estimates of the capital costs.

Each live poultry dealer that uses a poultry grower ranking system to calculate grower compensation would need to keep additional records to demonstrate that poultry grower ranking systems are used in a fair manner after applying the criteria in proposed § 201.214. Proposed § 201.214(d) allows the Secretary to consider whether a live poultry dealer has demonstrated a legitimate business justification for use of a poultry grower ranking system in a manner that may otherwise be unfair, unjustly discriminatory, or deceptive or gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.

Based on GIPSA's knowledge and review of records kept by live poultry dealers, GIPSA believes that the live poultry dealers already keep very detailed records regarding the performance of each grower. The records include all information needed to calculate feed conversion such as weights and quantities of inputs provided, and all other data used to determine grower performance and compensation. Based on GIPSA's experience reviewing these records and the business operations of live poultry dealers, GIPSA estimates that live poultry dealers will spend an additional 8 hours of time preparing records for

[27] All salary costs are based on mean annual 2015 salary adjusted for benefit costs, set to an hourly basis. *http://www.bls.gov/oes/.* Accessed on August 26, 2016.

[28] *http://www.accessdata.fda.gov/scripts/animaldrugsatfda/.* Accessed on August 26, 2016.

[29] The University of Georgia Cooperative Extension Service, ''Hatchery Breeder Tip . . . Chick Quality: An Update,'' May 2005.

[30] All salary costs are based on mean annual 2015 salary adjusted for benefit costs, set to an hourly basis. *http://www.bls.gov/oes/.* Accessed on August 26, 2016.

each poultry contract in order to be able demonstrate that the poultry grower ranking system is used in a fair manner after applying the criteria in proposed § 201.214. GIPSA has data on the number of production contracts between poultry growers and live poultry dealers. GIPSA multiplied 8 hours of time by the average hourly wages of $34/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics [31] and then multiplied this total by the 21,925 individual poultry growing contracts reported to GIPSA by live poultry dealers to arrive at $5.96 million for additional record keeping costs for live poultry dealers. This record keeping estimate includes keeping records to demonstrate legitimate business justifications for proposed § 201.214(d).

Given that proposed § 201.214 is a new regulation, live poultry dealers would need to review the contractual language in their existing contracts with respect to poultry grower ranking systems to ensure that they are used in a fair and non-preferential manner after applying the criteria in proposed § 201.214. GIPSA again relied on its experience and developed time estimates for the number of hours for attorneys and company managers to review and revise verbal and written production contracts and for staff to make changes, copy, and obtain signed copies of the contracts. For poultry growing contracts, GIPSA estimates that each of the 1,330 unique contract types would take 2 hours of attorney time and 2 hours of company management time to review and rewrite, and it would take 2 hours of administrative time to review each of the 21,925 individual poultry production contracts. GIPSA multiplied the estimated hours to conduct these administrative tasks by the average hourly wages for attorneys at $83/hour, managers at $58/hour, and administrative assistants at $34/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics.[32]

GIPSA recognizes that contract review costs would also be borne by poultry growers. GIPSA estimates the each grower would spend 1 hour of time reviewing a contract and would spend 1 hour of their attorney's time to review the contract. GIPSA multiplied 1 hour of grower time and 1 hour of attorney time to conduct the production contract review by the average hourly wages for attorneys at $83/hour and managers at $58/hour. GIPSA then applied this cost to the 21,925 poultry growing contracts that have been reported to GIPSA to arrive at the total contract review costs that would be incurred by poultry growers. GIPSA then added together the contract review costs by live poultry dealers and by poultry growers to arrive at estimated contract review costs of $4.96 million for the poultry industry.

GIPSA then added together all of the estimated types of administrative costs and the estimated first-year total administrative costs appear in the following table:

TABLE 4—FIRST-YEAR ADMINISTRATIVE COSTS OF PROPOSED § 201.214

Administrative cost type	$ millions
Projection Sheet Costs	0.99
Develop Consistency Management System	5.46
Industry Record Keeping	5.96
Contract Review Costs	4.96
Total Industry Administrative Cost	17.37

The first-year total administrative costs would be $17.37 million for the poultry industry. The two largest costs would be industry record keeping and the development of CMSs, followed by record keeping and the costs of developing projection sheets.

A. Regulatory Alternative 2: Direct Costs—Litigation Costs of the Preferred Alternative

Interim final regulation 201.3(a) will already be in effect if and when § 201.214 becomes effective. GIPSA expects that § 201.3(a) will result in additional litigation as this rule states that certain conduct or action can violate sections 202(a) and/or 202(b) of the P&S Act without a harm or likely harm to competition in all cases. Section 201.3(a) formalizes GIPSA's longstanding position that, in some cases, violations of sections 202(a) and 202(b) can be proven without demonstrating harm or likely harm to competition. Section 201.214 provides clarity to the industry by establishing criteria the Secretary may consider in determining whether a live poultry dealer has used a poultry grower ranking system to compensate poultry growers in an unfair, unjustly discriminatory, or deceptive manner, or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.

Regulation 201.3(a) is broad in nature. Section 201.214 simply provides clarity and GIPSA believes that § 201.214 will not lead to litigation above that already expected as a result of § 201.3(a). Thus, GIPSA considers the additional litigation under § 201.3(a) to be the baseline litigation costs for § 201.214 and that the litigation costs for § 201.3(a) already include the litigation costs of § 201.214. Since those litigation costs have already been counted under § 201.3(a), GIPSA does not allocate any additional litigation costs to § 201.214 and for the purposes of this RIA, the marginal litigation costs are zero.

Regulatory Alternative 2: Total Direct Costs of the Preferred Alternative

The total first-year direct costs of proposed § 201.214 would consist of administrative and litigation costs (which are equal to zero) from above and they are summarized in the following table.

TABLE 5—DIRECT COSTS OF PROPOSED § 201.214

Cost type	($ millions)
Admin Costs	17.37
Litigation Costs	0.00
Total Direct Costs	17.37

GIPSA estimates that the direct costs of proposed § 201.214 would be $17.37 million.

Regulatory Alternative 2: Indirect Costs of the Preferred Alternative

As discussed previously, GIPSA does not expect proposed § 201.214 to result in a decrease in the use of poultry grower ranking systems, lower capital formation, or decreases in efficiencies in the poultry industry. The regulation simply establishes the criteria under which the Secretary may determine whether live poultry dealers are using poultry grower ranking systems in an unfair, unjustly discriminatory, or deceptive manner, or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any grower to an undue or unreasonable prejudice or disadvantage.

The only indirect costs that GIPSA anticipates are the effects of the increase in industry costs from the direct administrative costs on supply and demand, and the resulting quantity and price impacts on the retail market for chicken and the related input market for broilers.

GIPSA modeled the impact of the increase in total industry costs resulting from the direct costs of proposed § 201.214 in a Marketing Margins Model

[31] Ibid.

[32] All salary costs are based on mean annual 2015 salary adjusted for benefit costs, set to an hourly basis. *http://www.bls.gov/oes/*. Accessed on August 26, 2016.

(MMM) framework.[33] The MMM allows for the estimation of changes in consumer and producer surplus and the quantification of deadweight loss or gain caused by changes in supply and demand conditions in the retail market for chicken as well as the input market for poultry growing services.

GIPSA modeled the increases in industry costs resulting from higher direct costs as an inward (or upward) shift in the supply curve for chicken. This has the effect of increasing the equilibrium prices and reducing the equilibrium quantity traded. This also has the effect of reducing the derived demand for poultry growing services, which causes a reduction in the equilibrium prices and quantity traded. Established economic theory suggests that these shifts in the supply curve and derived demand curve and the resulting price and quantity impacts will result in a reduction in social welfare through a deadweight loss.

To estimate the output and input supply and demand curves for the MMM, GIPSA constructed linear supply and demand curves around equilibrium price and quantity points using price elasticities of supply and demand from the USDA's Economic Research Service.[34]

GIPSA then shifted the supply curve for chicken up by the amount of the increase in total costs for the poultry industry from Table 5 above. GIPSA calculated the new equilibrium price and quantity traded of chicken. GIPSA also calculated the new equilibrium price and quantity in the poultry growing services market resulting from the decreases in derived demand for growing services. GIPSA calculated the resulting social welfare changes in the input and output markets.

The calculation of the price impact from the increase in poultry industry costs from proposed § 201.214 would have in a price increase of approximately two-hundredths of a cent in the retail price of chicken.[35] This is because the increase in total industry costs is very small in relation to overall industry costs. The result is that the resulting deadweight losses from the increases in total industry costs is indistinguishable from zero and therefore, GIPSA concludes that the indirect costs of proposed § 201.214 are zero.

Regulatory Alternative 2: Total Costs of the Preferred Alternative

GIPSA added all direct costs to the indirect costs, which are equal to zero, to arrive at the estimated total first-year costs of proposed § 201.214. The total costs are summarized in the following table.

TABLE 6—TOTAL COSTS OF PROPOSED § 201.214

Cost type	($ millions)
Admin Costs	17.37
Litigation Costs	0.00
Total Direct Costs	17.37
Total Indirect Costs	0.00
Total Costs	17.37

GIPSA estimates that the total costs of proposed § 201.214 to be $17.37 million for the poultry industry in the first full year of implementation

Regulatory Alternative 2: 10-Year Total Costs of the Preferred Alternative

To arrive at the estimated 10-year costs of proposed § 201.214, GIPSA expects the costs to be constant for the first 5 years while courts are setting precedents for the interpretation of proposed § 201.214 if indeed it is finalized. GIPSA expects that case law with respect to proposed § 201.214 would be settled after 5 years, and by then, industry participants would likely know how GIPSA would enforce the proposed regulation and how courts would interpret the proposed regulation if finalized. The effect of courts establishing precedents is that administrative costs would likely decline after 5 years.

Once courts establish precedents in case law, GIPSA expects the direct administrative costs of reviewing and revising contracts and developing projection sheets would decrease rapidly as contracts would already contain any language modifications necessitated by implementation of the proposed rule, and projection sheets would already have been developed for most contracts. GIPSA also expects that the direct costs of record keeping and operating CMSs would decrease rapidly as courts set precedents on which records would be required and how detailed a CMS must be, and as companies become more efficient in ensuring that poultry grower ranking systems are used in a fair manner after applying the criteria in proposed § 201.214.

To arrive at the estimated 10-year costs of proposed § 201.214, GIPSA estimates that contracts would expire at a steady rate. Based on its expertise, GIPSA believes that 20 percent of contracts would expire on a yearly basis and thus, in the first five years, 20 percent of all contracts would expire and need to be renewed each year or new production contracts would be put in place. Thus in years 2 through year 5, contract review costs would be 20 percent of the costs of review in the first year because the costs of reviewing and revising contracts would only apply to the 20 percent of contracts that are expiring or are new contracts each year. Based on GIPSA's expertise, GIPSA also estimates that in years 2 through year 5, 20 percent of all projection sheets would require updating each year, the cost of operating and updating CMSs would be 20 percent of first-year development costs, and that record keeping costs would be 20 percent of the first-year cost as companies become more efficient in record keeping and learn which records are required. Based on its expertise, GIPSA estimates that in the second 5 years, the direct administrative costs of revising contracts, projection sheets, CMS operation, and record keeping would decrease by 50 percent per year as the courts establish precedents, contracts would contain standard language, and companies would become more efficient at ensuring poultry grower ranking systems are used in a fair manner after applying the criteria in proposed § 201.214. The total 10-year costs of proposed § 201.214 appear in the table below.

TABLE 7—TEN-YEAR TOTAL COSTS OF PROPOSED § 202.214

Year	Total direct ($ millions)
2018[36]	17.37
2019	3.47
2020	3.47
2021	3.47
2022	3.47
2023	1.74
2024	0.87
2025	0.43
2026	0.22
2027	0.11
Totals	34.64

Based on the analysis, GIPSA expects the 10-year total costs of proposed § 201.214 would be $34.64 million.

[33] The framework is explained in detail in Tomek, W.G. and K.L. Robinson "*Agricultural Product Prices,*" third edition, 1990, Cornell University Press.

[34] ERS Price Elasticities: *http://www.ers.usda.gov/data-products/commodity-and-food-elasticities/demand-elasticities-from-literature.aspx.* Accessed on August 26, 2016.

[35] The $17.37 million increase in total industry costs from proposed § 201.214 is only 0.04 percent of total poultry industry costs of approximately $40 billion.

[36] GIPSA uses 2018 as the date for the proposed rule to be in effect for analytical purposes only. The date the proposed rule becomes final is not known.

Regulatory Alternative 2: Net Present Value of Ten-Year Total Costs of the Preferred Alternative

The total costs of proposed § 201.214 in the table above show that the costs are highest in the first year, decline to a constant lower level over the next 4 years, and then gradually decrease again over the subsequent 5 years. Costs to be incurred in the future are less expensive than the same costs to be incurred today. This is because the money that is used to pay the costs in the future can be invested today and earn interest until the time period in which the cost is incurred. After the cost has been incurred, the interest earned would still be available.

To account for the time value of money, the costs of the regulations to be incurred in the future are discounted back to today's dollars using a discount rate. The sum of all costs discounted back to the present is called the net present value (NPV) of total costs. GIPSA relied on both a three percent and seven percent discount rate as discussed in Circular A–4.[37] GIPSA measured all costs using constant dollars.

GIPSA calculated the NPV of the ten-year total costs of the proposed regulation using both a three percent and seven percent discount rate and the NPVs appear in the following table.

TABLE 8—NPV OF TEN-YEAR TOTAL COSTS OF PROPOSED § 201.214

Discount rate	($ millions)
3 Percent	32.16
7 Percent	29.36

GIPSA expects the NPV of the 10-year total costs of § 201.214 will be $32.16 million at a three percent discount rate and $29.36 million at a seven percent discount rate.

Regulatory Alternative 2: Annualized Costs of the Preferred Alternative

GIPSA then annualized the NPV of the 10-year total costs (referred to as annualized costs) of proposed § 201.214 using both a three percent and seven percent discount rate as required by Circular A–4 and the results appear in the following table.[38]

TABLE 9—ANNUALIZED COSTS OF PROPOSED § 201.214

Discount rate	($ millions)
3 Percent	3.77
7 Percent	4.18

GIPSA expects that the annualized costs of § 201.214 would be $3.77 million at a three percent discount rate and $4.18 million at a seven percent discount rate.

Impacts on Costs of Interim Final § 201.3(a)

Concurrent with proposing § 201.214, GIPSA is issuing an interim final version of § 201.3(a). Section 201.3(a) states that conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition in all cases. As a stand-alone regulation, § 201.3(a) formalizes GIPSA's longstanding position that, in some cases, violations of sections 202(a) and 202(b) can be proven without demonstrating harm or likely harm to competition.

In its Regulatory Impact Analysis, GIPSA estimated the annualized costs of § 201.3(a) would range from $6.87 million to $96.01 million at a three percent discount rate and from $7.12 million to $98.60 million at a seven percent discount rate. The range of potential costs is broad and GIPSA relied on its expertise to arrive at a point estimate of expected annualized costs. GIPSA expects the cattle, hog, and poultry industries to primarily take a ''wait and see'' approach to how courts will interpret § 201.3(a) and only slightly adjust its use of AMAs, and incentive or performance-based payment systems. GIPSA estimates that the annualized costs of § 201.3(a) at the point estimate will be $51.44 million at a three percent discount rate and $52.86 million at a seven percent discount rate based on an anticipated ''wait and see'' approach by the cattle, hog, and poultry industries.

GIPSA recognizes that courts, after the implementation of a finalized § 201.3(a), may opt to continue to apply earlier precedents of requiring the showing of harm or potential harm to competition in section 202(a) and 202(b) cases. This has the potential to affect the costs of § 201.214 and 201.211 should they become finalized. GIPSA expects that even if courts continue to require showing of harm or potential harm to competition in section 202(a) and 202(b) cases, that firms would likely still incur costs of complying with § 201.214. Even if regulated entities expect that courts would require showing of a harm to competition for § 201.214 violations, the regulated entities may still expect litigation as private parties test the courts application of § 201.3 as it relates to § 201.214 violations. To reduce this threat of litigation, regulated entities may still incur the administrative costs detailed above. Should § 201.214 become finalized and courts still require a showing of harm or potential harm to competition, regulated entities may still voluntarily undertake the adjustment costs detailed above.

GIPSA expects proposed § 201.214 to reduce the costs of implementing § 201.3 by providing more clarity in the appropriate application of sections 202(a) and (b) of the P&S Act as they apply to poultry grower ranking systems. Section 201.214 provides clarity to the industry by establishing criteria the Secretary may consider in determining whether a live poultry dealer has used a poultry grower ranking system to compensate poultry growers in an unfair, unjustly discriminatory, or deceptive manner, or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.

Regulatory Alternative 2: Benefits of the Preferred Alternative

GIPSA was unable to quantify all the benefits of proposed § 201.214. However, there are a number of important qualitative benefits of proposed § 201.214 that merit discussion. Proposed § 201.214 contains several provisions that GIPSA expects would improve efficiencies and reduce market failures. For regulations to improve efficiencies for market participants and generate benefits for consumers and producers, they must increase the amount of relevant information to market participants, reduce information asymmetries, protect private property rights, or foster competition.

Proposed § 201.214(a) would reduce information asymmetries and result in poultry growers making informed business decisions such as whether to enter the industry and in which capital improvements to invest. Growers having more complete information would result in more efficient levels of capital in the growing industry than with less information. Less information may lead to too much or too little capital. More complete information in the growing industry would allow live poultry dealers to send price signals to growers about levels of capital they desire. For example, if a live poultry dealer desires

[37] *https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.* Accessed on August 26, 2016.

[38] Ibid.

its birds be grown with a more capital-intensive housing type, it can increase its base payment rate in a grower ranking system for that particular housing type and provide projection sheets to growers so they can assess whether to upgrade. Live poultry dealers would have to increase the base compensation to a high enough level to spur the additional capital investment in upgrades. Similarly, too little compensation may result in under investment in capital, which is also inefficient.

Proposed § 201.214(b) would encourage live poultry dealers to supply inputs of more consistent quantity and quality to all growers. Thus, inferior chicks, which are more costly to grow, would likely be distributed more uniformly across growers. This would facilitate a level playing field and foster fair competition in poultry grower ranking systems. If proposed § 201.214 is finalized and becomes effective, growers would be compensated for their performance based more accurately on their skill and less so on the quality of inputs provided. The more efficient growers would receive more compensation in poultry grower ranking systems, which sends a signal to expand their offering of growing services. Less efficient growers would earn less, which sends a signal to reduce their offering of growing services or, at the extreme, to exit the industry. The result is lower costs to the industry as poultry grower ranking systems would incentivize the more efficient growers to expand and less efficient growers to contract or exit the industry.

Proposed § 201.214(c) would also provide a similar benefit to the industry. Under this section, the Secretary may consider whether a live poultry dealer includes poultry growers provided with dissimilar production variables in the ranking group in a manner that affects a poultry grower's compensation. The live poultry dealer would be expected to assure that growers are treated consistently as compared to other growers in the settlement group. This would allow growers to compete in poultry grower ranking systems on their skill level and not be disadvantaged by factors outside of their control. The result, again, is lower costs to the industry as the poultry grower ranking system would likely incentivize the more efficient growers to expand and the less efficient growers to reduce operations or exit the industry.

Proposed § 201.214(d) would benefit the industry by allowing the Secretary to consider whether a live poultry dealer has demonstrated a legitimate business justification for use of a poultry grower ranking system that would otherwise violate the P&S Act. This is a benefit for live poultry dealers as it provides a level of protection against potentially frivolous litigation.

Another important qualitative benefit of proposed § 201.214 is the increased ability for the enforcement of the P&S Act for use of poultry grower ranking systems in a manner that does not result in a harm or likelihood of harm to competition. This occurs through § 201.3(a), which states that conduct can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition and more specifically through § 201.210(b)(10) which clarifies that absent demonstration of a legitimate business justification, failing to use a poultry grower ranking system in a fair manner after applying the criteria in § 201.214 is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of whether it harms or is likely to harm competition.

A simple example is a live poultry dealer consistently supplying inferior chicks to a particular grower. The grower is harmed by this conduct because the grower consistently under-performs in the poultry grower ranking system and receives lower compensation than if the grower had been provided higher quality chicks. This can be considered an unfair and deceptive practice under section 202(a) and/or as subjecting the grower to an unfair disadvantage under section 202(b). The impact of this harm to the grower is very small when compared to the entire industry and there is no harm to competition from this one instance. Because there is no harm or likely harm to competition, courts have been reluctant to find a violation of section 202(a) or (b) of the P&S Act in such a situation, despite the harm suffered by the individual poultry grower.

However, if similar, though unrelated, harm is experienced by a large number of growers, the cumulative effect does result in a harm to competition. The individual harm is inconsequential to the industry, but the sum total of all individual harm has the potential to be quite significant when compared to the industry and therefore, courts have found harm or likely harm to competition in such a situation. The regulations in this proposed rule, in conjunction with § 201.3(a), clarify that consistently supplying inferior chicks, absent demonstration of a legitimate business justification, would constitute unfair, unjustly discriminatory, or deceptive practices or devices under section 202(a) of the P&S Act or the giving of an undue or unreasonable preference, advantage, prejudice or disadvantage under section 202(b) of the P&S Act.

The sum of all individual harm is likely to increase total industry costs of producing poultry due to an inefficient allocation of resources. The cost of all unfair, unjustly discriminatory, or deceptive practices, or undue or unreasonable preferences or advantages to any poultry grower or undue or unreasonable prejudices or disadvantages are reflected in higher costs of producing poultry, with some portion of these costs passed along to consumers in the form of higher prices.

GIPSA expects proposed § 201.214 coupled with §§ 201.3(a) and 201.210(b)(10) to increase enforcement actions against live poultry dealers for use of poultry grower ranking systems in a manner that violates sections 202(a) and/or 202(b) when the use of the poultry grower ranking system does not harm or is not likely to harm to competition. Several appellate courts have disagreed with USDA's interpretation of the P&S Act that harm or likely harm to competition is not necessary in all instances to prove a violation of sections 202(a) or 202(b). In some cases in which the United States was not a party, these courts have concluded that plaintiffs could not prove their claims under section 202(a) and/or (b) without proving harm to competition or likely harm to competition. One reason the courts gave for declining to defer to USDA's interpretation of the statute is that USDA had not previously formalized its interpretation in a regulation.

Section 201.3 addresses that issue and §§ 201.214 and 201.210(b)(10) provide clarity regarding the circumstances under which use of a poultry grower ranking system, absent demonstration of a legitimate business justification, would constitute an unfair, unjustly discriminatory, or deceptive practice or device under section 202(a) of the P&S Act or the giving of an undue or unreasonable preference, advantage, prejudice or disadvantage under section 202(b) of the P&S Act. GIPSA expects the result would be additional enforcement actions successfully litigated, which will serve as a deterrent to using a poultry grower ranking system in a manner that violates sections 202(a) or (b) of the P&S Act. Successful deterrence would likely result in lower overall costs throughout the entire production and marketing complex of all poultry and chicken.

Benefits to the industry and the market also arise from establishing parity of negotiating power between live

poultry dealers and poultry growers by reducing the ability to abuse market power with the resulting deadweight losses.[39] Establishing parity of negotiating power in contracts promotes fairness and equity and is consistent with GIPSA's mission ''[T]o protect fair trade practices, financial integrity, and competitive markets for livestock, meats and poultry.'' [40]

Regulatory Alternative 2: Cost-Benefit Summary of the Preferred Alternative

GIPSA expects the annualized costs of § 201.214 will be $3.77 million at a three percent discount rate and $4.18 million at a seven percent discount rate. GIPSA was unable to quantify the benefits of the regulations, but explained numerous qualitative benefits derived from increased information and reduced information asymmetries. The regulation contains several provisions that GIPSA expects will: (1) Improve efficiencies in the formation of capital in the poultry growing industry; and (2) lower costs to the industry as grower ranking systems will incentivize the more efficient growers to expand and less efficient growers to reduce operations or exit the industry. Another benefit of proposed § 201.214 is the deterrent effect of increased enforcement of the P&S Act for violations of section 202(a) or (b). This, in turn, would reduce instances of unfair, unjustly discriminatory, or deceptive practices or devices and undue or unreasonable preferences, advantages, prejudices, or disadvantages and increased efficiencies in the marketplace. At the same time, allowing the Secretary to consider legitimate business justifications for use of a poultry grower ranking system in a manner that might otherwise be seen as a violation of section 202(a) or (b) of the P&S Act would provide a level of protection against potentially frivolous litigation. Thus, proposed § 201.214 would likely increase efficiency, lower costs, and reduce market failures in the poultry industry. These benefits would accrue to all segments of the poultry value chain, and ultimately consumers.

Regulatory Alternative 3: Contract Duration—Phased Implementation

GIPSA considered a third regulatory alternative of phased implementation. Under this third alternative, proposed § 201.214 would only apply to poultry growing contracts when they expire, are altered, or new contracts are put in place. Consider for example, a poultry growing contract with 3 years remaining in the contract when the regulations become effective. Proposed § 201.214 would not be applicable to this contract, under phased implementation, until the contract expires after 3 years and is either modified or replaced.

Regulatory Alternative 3: Cost Estimation of Phased Implementation

GIPSA estimated the costs of phased implementation by multiplying the majority of the ten-year total costs of the preferred alternative (Table 7) for each year of the first 10 years the rule would be in effect by the percentage of contracts expiring or altered in the same year. The data on contract lengths for broiler production appear in the table below.

TABLE 10—PRODUCTION AND MARKETING CONTRACT DURATIONS

Contract duration	Broiler production [41] (%)
Short Term < = 12 months ...	65.20
Medium Term 13–60 months	19.20
Long Term > 60 months	15.60

The data in the table above show that 65.2 percent of broiler production contracts have a duration of 12 months or less and 84.4 percent have a duration of 60 months or less. Only 15.64 percent of broiler production contracts are longer than 60 months in duration.

For the first year of the regulation, GIPSA multiplied the costs of § 201.214 by 65.20 percent. The one exception is the cost of the development of CMSs. GIPSA's experience reviewing poultry growing contracts suggests that most live poultry dealers have some contracts that are of a short-term duration. Therefore, GIPSA estimates that all live poultry dealers would have to develop a CMS in the first year after the implementation of the regulation. GIPSA allocates 100 percent of CMS development costs in the first year under the phased implementation alternative. All other direct administrative costs are multiplied by 65.20 percent in the first year.

For years 2 through 5, GIPSA followed the same procedure and adjusted total industry costs by 84.4 percent, the number of contracts that are 5 years or less in duration. For years 6 through 10, GIPSA applied 100 percent of the preferred alternative costs to reflect the full phase in of costs.

The following tables show the 10-year total costs of the phased implementation alternative. The 10-year total costs for each year of the preferred alternative (Table 7) are also shown for convenience.

TABLE 11—PHASED IMPLEMENTATION TOTAL COSTS OF § 201.214

Year	Preferred alternative ($ millions)	Phased implementation ($ millions)
2018	17.37	13.23
2019	3.47	2.93
2020	3.47	2.93
2021	3.47	2.93
2022	3.47	2.93
2023	1.74	1.74
2024	0.87	0.87
2025	0.43	0.43
2026	0.22	0.22

[39] MacDonald, J. and N. Key. ''Market Power in Poultry Production Contracting? Evidence from a Farm Survey.'' *Journal of Agricultural and Applied Economics.* 44(4) (November 2012): 477–490. Discusses evidence for the effect of concentration on grower compensation.

[40] See additional discussion in Steven Y. Wu and James MacDonald (2015) ''Economics of Agricultural Contract Grower Protection Legislation,'' *Choices* 30(3): 1–6.

[41] USDA's Economic Research Service Agricultural Resource Management Survey (ARMS) 2011.

TABLE 11—PHASED IMPLEMENTATION TOTAL COSTS OF § 201.214—Continued

Year	Preferred alternative ($ millions)	Phased implementation ($ millions)
2027	0.11	0.11
Totals	34.64	28.32

GIPSA estimates that the first-year total costs of § 201.214 under the phased implementation alternative would be $13.23 million and the 10-year total costs would be $28.32 million. As the table shows, the costs in the first 5 years are lower under the phased implementation option than under the preferred alternative because regulated entities with contracts longer than 1 year are not covered until the contracts expire, are modified, or replaced.

Regulatory Alternative 3: NPV of 10-Year Total Costs of Phased Implementation

GIPSA calculated the NPV of the 10-year total costs of proposed § 201.214 under phased implementation using both a three percent and seven percent discount rate as required by Circular A–4. The NPVs are shown in the following table.

TABLE 12—NPVS OF TEN-YEAR TOTAL COSTS OF PROPOSED § 201.214—PHASED IMPLEMENTATION

Discount rate	($ millions)
3 Percent	26.18
7 Percent	23.77

GIPSA expects the NPV of the 10-year total costs of § 201.214 under the phased implementation option to be $26.18 million at a three percent discount rate and $23.77 million at a seven percent discount rate.

Regulatory Alternative 3: Annualized Costs of Phased Implementation

GIPSA then annualized the costs of § 201.214 using both a three percent and seven percent discount rate as required by Circular A–4 and the results appear in the following table.

TABLE 13—ANNUALIZED COSTS OF PROPOSED § 201.214—PHASED IMPLEMENTATION

Discount rate	($ millions)
3 Percent	3.07
7 Percent	3.38

GIPSA expects the annualized costs of § 201.214 under the phased implementation option to be $3.07 million at a three percent discount rate and $3.38 million at a seven percent discount rate.

Regulatory Alternative 3: Benefits of the Phased Implementation Alternative

The benefits of phased implementation are identical to the benefits of the preferred alternative with the exception of when the benefits will be received and the amount of the benefits. Like the costs, the benefits will be received only when contracts expire, are modified, or new contracts are put in place. Moreover, benefits to be received in the future are worth less than benefits received today. The benefits will be received in the same proportion of the total costs and are based on contract durations. The benefits of phased implementation are less than under the preferred alternative because the full benefits will not be received until all contracts have expired, been modified, or replaced by new contracts. The full benefits of phased implementation will be received beginning in year 6.

Regulatory Alternative 3: Cost-Benefit Summary of Phased Implementation

GIPSA expects the annualized costs of § 201.214 under the phased implementation option to be $3.07 million at a three percent discount rate and $3.38 million at a seven percent discount rate. The benefits will be received in the same proportion as total costs and are based on contract durations. The benefits of the phased implementation alternative are less than under the preferred alternative because the full benefits will not be received until all contracts have expired, been altered, or replaced by new contracts.

Cost-Benefit Comparison of Regulatory Alternatives

The status quo alternative has zero marginal costs and benefits as GIPSA does not expect any changes in the industry. GIPSA compared the annualized costs of the preferred alternative to the annualized costs of the phased implementation alternative by subtracting the annualized costs of phased implementation from the preferred alternative and the results appear in the following table.

TABLE 14—DIFFERENCE IN ANNUALIZED COSTS OF PROPOSED § 201.214 BETWEEN THE PREFERRED ALTERNATIVE AND THE PHASED IMPLEMENTATION ALTERNATIVE

Discount rate	($ millions)
3 Percent	0.70
7 Percent	0.80

The annualized costs of the phased implementation alternative is $0.70 million less expensive using a three percent discount rate and $0.80 million less expensive using a seven percent discount rate. As is the case with costs, the benefits of the preferred alternative will be highest for the preferred alternative because the full benefits will be received immediately and not when contracts have expired, been altered, or replaced by new contracts as is the case under the phased implementation alternative.

Though the phased implementation alternative would save between $0.70 million and $0.80 million on an annualized basis, this alternative would deny the protections offered by proposed § 201.214 to a substantial percentage of poultry growers for five or more years based on the length of their production contracts. As the data in Table 10 show, 15.6 percent of poultry growers have contracts with durations exceeding five years. Under the phased implementation alternative, these growers would continue to be exposed to the potential market failures discussed above until their contracts expire or are renewed. GIPSA considered all three regulatory alternatives and believes that the preferred alternative is the best alternative as the benefits of the regulation will be captured immediately by all growers, regardless of the length of their contracts.

Regulatory Flexibility Analysis

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).[42] Live poultry dealers, NAICS 311615, are considered small businesses if they have fewer than 1,250 employees. Broiler and turkey producers, NAICS 112320 and 112330, are considered small businesses if their sales are less than $750,000 per year.

GIPSA maintains data on live poultry dealers from the annual reports these firms file with GIPSA. Currently, there are 133 live poultry dealers that would be subject to the proposed regulations. According to U.S. Census data on County Business Patterns, there were 74 poultry slaughter firms that had more than 1,000 employees in 2013.[43] The difference yields approximately 59 poultry slaughters that have fewer than 1,000 employees and would be considered small businesses that would be subject to the proposed regulations.

Another factor, however, that is important in determining the economic effect of the regulations is the number of contracts held by a firm. GIPSA records for 2014 indicated there were 21,925 poultry production contracts in effect, of which 13,370, or 61 percent, were held by the largest six live poultry dealers, and 90 percent (19,673) were held by the largest 25 live poultry dealers. These 25 live poultry dealers are all in the large business SBA category, whereas the 21,925 poultry growers holding the other end of the contracts are almost all small businesses by SBA's definitions.

To the extent the proposed rule imposes costs, these costs are expected to be borne by live poultry dealers. The costs likely include legal review of contracts, record-keeping, administrative costs, developing a CMS, and developing projection sheets.

Live poultry dealers classified as large businesses are responsible for about 89.7 percent of the poultry growing contracts. Assuming that live poultry dealers classified as small businesses will bear about 10.3 percent of the costs, expected costs in the first year for live poultry dealers classified as small businesses would be $1.8 million.[44] Expected 10-year costs annualized at a three percent discount rate for live poultry dealers classified as small businesses would be $387,000. Expected 10-year costs annualized at a seven percent discount rate for live poultry dealers classified as small businesses would be $429,000.

In considering the impact on small businesses, GIPSA considered the average costs and revenues of each small business impacted by § 201.214. The number of small businesses impacted by § 201.214, by NAICS code, as well as the per entity, first-year and annualized costs at both the three percent and seven percent discount rates appear in the following table.

TABLE 15—PER ENTITY COSTS TO SMALL BUSINESSES OF § 201.214

NAICS	Number of small business	First year ($)	Annualized costs—3% ($)	Annualized costs—7% ($)
311615—Poultry	59	30,246	6,563	7,278

The following table compares the average per entity first-year and annualized costs of § 201.214 to the average revenue per establishment for all firms in the same NAICS code. The annualized costs are slightly higher at the seven percent rate than at the three percent rate, so only the seven percent rate is shown as it is the higher annualized cost.

TABLE 16—COMPARISON OF PER ENTITY COST TO SMALL BUSINESSES OF § 201.214 TO REVENUES

NAICS	Number of small business	Average first-year cost per entity ($)	Average annualized cost per entity ($)	Average revenue per establishment ($)	First-year cost as percent of revenue (%)	Annualized cost as percent of revenue (%)
311615—Poultry	59	30,246	7,278	13,842,548	0.22	0.05

The revenue figure in the above table come from Census data for live poultry dealers, NAICS code 311615.[45]

As the results in Table 16 demonstrate, the first-year and annualized costs of § 201.214 as a percent of revenue is small at less than one percent.

Based on the above analyses regarding § 201.214, GIPSA certifies that this rule is not expected to have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). While confident in this certification, GIPSA acknowledges that individual businesses may have relevant data to supplement our analysis. We would encourage small stakeholders to submit any relevant data during the comment period.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect, although in some instances they merely reiterate GIPSA's previous interpretation of the P&S Act. This proposed rule would not pre-empt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no

[42] See: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.* Accessed on August 26, 2016.

[43] *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk*. Accessed on August 26, 2016. The U.S. Census data reports data in thousands making 1,000 the closest number of employees to SBA's small business classification of 1,250 employees.

[44] Estimated first year costs of $17.37 million × 10.27 percent of firms that are small businesses = $1.8 million.

[45] Source: *http://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html.* Accessed on November 29, 2016.

administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this proposed rule. Nothing in this proposed rule is intended to interfere with a person's right to enforce liability against any person subject to the P&S Act under authority granted in section 308 of the P&S Act.

Executive Order 13175

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

GIPSA has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under EO 13175. If a tribe requests consultation, GIPSA will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

Paperwork Reduction Act

This proposed rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the federal government.

E-Government Act Compliance

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

List of Subjects in 9 CFR Part 201

Contracts, Poultry, Livestock, Trade Practices.

For the reasons set forth in the preamble, we propose to amend 9 CFR part 201 to read as follows:

PART 201—Regulations Under the Packers and Stockyards Act

■ 1. The authority citation for Part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. Amend § 201.210 by adding paragraph (b)(10) to read as follows:

* * * * *

(b) * * *

(10) Failing to use a poultry grower ranking system in a fair manner after applying the criteria in § 201.214.

■ 2. Add new § 201.214 to read as follows:

§ 201.214 Poultry grower ranking systems.

The Secretary may consider various criteria when determining whether a live poultry dealer has engaged in a pattern or practice to use a poultry grower ranking system to compensate poultry growers in an unfair, unjustly discriminatory, or deceptive manner, or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage. These criteria include, but are not limited to:

(a) Whether a live poultry dealer provides sufficient information to enable a poultry grower to make informed business decisions. Such information should include the anticipated number of flocks per year, the average gross income from each flock, and any other information necessary to enable a poultry grower to calculate the expected income from the poultry growing arrangement;

(b) Whether a live poultry dealer supplies inputs of comparable quality and quantity to all poultry growers in the ranking group; and whether there is a pattern or practice of supplying inferior inputs to one or more poultry growers in the ranking group. Inputs include birds, feed, medication, and any other input supplied by the live poultry dealer;

(c) Whether a live poultry dealer includes poultry growers provided with dissimilar production variables in the ranking group in a manner that affects a poultry grower's compensation. Production variables include, but are not limited to, the density at which the live poultry dealer places birds, the target slaughter weights of the birds, and bird ages that vary by more than seven days; and

(d) Whether a live poultry dealer has demonstrated a legitimate business justification for use of a poultry grower ranking system that may otherwise be unfair, unjustly discriminatory, or deceptive or gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.

Larry Mitchell,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2016–30429 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9501; Directorate Identifier 2016–NM–137–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for The Boeing Company Model 777 airplanes. This proposed AD was prompted by reports of uncommanded altitude display changes in the mode control panel (MCP) altitude window. This proposed AD would require replacing the existing MCP with a new MCP having a different part number. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 3, 2017.

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

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

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone: 206–544–5000, extension 1; fax: 206–766–5680; Internet: *https://www.myboeingfleet.com.* You may view

this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9501.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9501; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Frank Carreras, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6442; fax: 425–917–6590; email: *frank.carreras@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9501; Directorate Identifier 2016–NM–137–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received reports of uncommanded altitude display changes in the MCP altitude window. Most of the reports indicated that the altitude changes occurred in whole increments of 100 feet or 1,000 feet, with a general range of between 1,000 and 2,000 feet (the largest reported change was 12,000 feet). Boeing has also received reports of uncommanded changes in the MCP's speed/mach window. Uncommanded changes to the MCP selected altitude could result in incorrect spatial separation between airplanes, midair collision, or controlled flight into terrain.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Special Attention Service Bulletin 777–22–0034, dated March 3, 2016. The service information describes procedures for replacing the existing MCP with a new MCP having a different part number, in the glareshield in the flight compartment. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.'' For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9501.

Differences Between This Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 777–22–0034, dated March 3, 2016, specifies the compliance time as 1,875 days. For this proposed AD, we specified a compliance time of 60 months.

Costs of Compliance

We estimate that this proposed AD affects 203 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replacement	2 work-hours × $85 per hour = $170	[1] Up to $5,800	Up to $5,970	Up to $1,211,910

[1] We have received no definitive data regarding the cost of the new MCP part number.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company; Docket No. FAA–2016–9501; Directorate Identifier 2016–NM–137–AD.

(a) Comments Due Date

We must receive comments by February 3, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 777–200, –200LR, –300, –300ER, and 777F series airplanes, certificated in any category, identified in Boeing Special Attention Service Bulletin 777–22–0034, dated March 3, 2016.

(d) Subject

Air Transport Association (ATA) of America Code 22, Auto flight.

(e) Unsafe Condition

This AD was prompted by reports of uncommanded altitude display changes in the mode control panel (MCP) altitude window. We are issuing this AD to prevent uncommanded changes to the MCP selected altitude; such uncommanded changes could result in incorrect spatial separation between airplanes, midair collision, or controlled flight into terrain.

(f) Compliance

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

(g) Replacement of MCP

Within 60 months after the effective date of this AD: Replace the existing MCP with a new MCP having a different part number, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–22–0034, dated March 3, 2016.

(h) Alternative Methods of Compliance (AMOCs)

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

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

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

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

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

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

(i) Related Information

(1) For more information about this AD, contact Frank Carreras, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6442; fax: 425–917–6590; email: *frank.carreras@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone: 206–544–5000, extension 1; fax: 206–766–5680; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 2, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–30026 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9502; Directorate Identifier 2016–NM–128–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 757–200 and –200PF series airplanes. This proposed AD was prompted by an evaluation by the design approval holder (DAH) indicating that certain areas of the frame webs are subject to widespread fatigue damage (WFD). This proposed AD would require high frequency eddy current (HFEC) inspections of the frame webs for any open coordinating holes, tooling holes, and insulation blanket attachment holes; repair if necessary; and modification of the frame webs at all open hole locations, which would terminate the repetitive inspections. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 3, 2017.

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

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

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone: 206–544–5000, extension 1; fax: 206–766–5680; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9502.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9502; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Muoi Vuong, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5205; fax: 562–627–5210; email: *muoi.vuong@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9502; Directorate Identifier 2016–NM–128–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

Fatigue damage can occur locally, in small areas or structural design details, or globally, in widespread areas. Multiple-site damage is widespread damage that occurs in a large structural element such as a single rivet line of a lap splice joining two large skin panels. Widespread damage can also occur in multiple elements such as adjacent frames or stringers. Multiple-site damage and multiple-element damage cracks are typically too small initially to be reliably detected with normal inspection methods. Without intervention, these cracks will grow, and eventually compromise the structural integrity of the airplane. This condition is known as widespread fatigue damage. It is associated with general degradation of large areas of structure with similar structural details and stress levels. As an airplane ages, WFD will likely occur, and will certainly occur if the airplane is operated long enough without any intervention.

The FAA's WFD final rule (75 FR 69746, November 15, 2010) became effective on January 14, 2011. The WFD rule requires certain actions to prevent structural failure due to WFD throughout the operational life of certain existing transport category airplanes and all of these airplanes that will be certificated in the future. For existing and future airplanes subject to the WFD rule, the rule requires that DAHs establish a limit of validity (LOV) of the engineering data that support the structural maintenance program. Operators affected by the WFD rule may not fly an airplane beyond its LOV, unless an extended LOV is approved.

The WFD rule (75 FR 69746, November 15, 2010) does not require identifying and developing maintenance actions if the DAHs can show that such actions are not necessary to prevent WFD before the airplane reaches the LOV. Many LOVs, however, do depend on accomplishment of future maintenance actions. As stated in the WFD rule, any maintenance actions necessary to reach the LOV will be mandated by airworthiness directives through separate rulemaking actions.

In the context of WFD, this action is necessary to enable DAHs to propose LOVs that allow operators the longest operational lives for their airplanes, and still ensure that WFD will not occur. This approach allows for an implementation strategy that provides flexibility to DAHs in determining the timing of service information development (with FAA approval), while providing operators with certainty regarding the LOV applicable to their airplanes.

We have received a report indicating that certain Model 757 airplanes have open coordinating holes, tooling holes, and insulation blanket attachment holes in the frame webs that were not filled during production. There have been no reports of frame web cracking at open hole locations. Cracking was found on a fatigue test article where WFD analysis identified the need for the inspection. Open attachment holes, if not corrected, could result in fatigue cracking that could adversely affect the structural integrity of the airplane.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin 757–53A0103, dated June 22, 2016. The service information describes procedures for performing repetitive HFEC inspections of the frame webs for any open coordinating holes, tooling holes, insulation blanket attachment holes; and modifying the frame webs between stringers S–20 and S–25. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.'' For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9502.

Differences Between This Proposed AD and the Service Information

Boeing Alert Service Bulletin 757–53A0103, dated June 22, 2016, specifies to contact the manufacturer for certain instructions, but this proposed AD would require accomplishment of repair methods, modification deviations, and alteration deviations in one of the following ways:

- In accordance with a method that we approve; or

• Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 74 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
HFEC inspection	68 work-hours × $85 per hour = $5,780 per inspection cycle.	$0	$5,780 per inspection cycle.	$427,720 per inspection cycle.
Modification	1 work-hour × $85 per hour = $85	[1] $0	85	85.

[1] Parts supplied by the operator.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2016–9502; Directorate Identifier 2016–NM–128–AD.

(a) Comments Due Date

We must receive comments by February 3, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 757–200 and –200PF series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 757–53A0103, dated June 22, 2016.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by an evaluation by the design approval holder (DAH) indicating that the frame webs between stringers S–20 and S–25 on the left side and right side, from station (STA) 440 to STA 820 and from STA 1300 to STA 1701, are subject to widespread fatigue damage (WFD). We are issuing this AD to prevent fatigue cracking that could adversely affect the reduced structural integrity of the airplane.

(f) Compliance

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

(g) Repetitive High Frequency Eddy Current (HFEC) Inspections of the Frame Webs

At the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 757–53A0103, dated June 22, 2016, do an HFEC inspection of the frame webs for any crack in any open coordinating holes, tooling holes, and insulation blanket attachment holes in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 757–53A0103, dated June 22, 2016. If any cracking is found, repair before further flight using a method approved in accordance with the procedures specified in paragraph (i) of this AD. Repeat the inspection at the time specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 757–53A0103, dated June 22, 2016.

(h) Modification of the Frame Webs

Before the accumulation of 59,000 total flight cycles, modify the frame webs at all open hole locations, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 757–53A0103, dated June 22, 2016. Accomplishment of this modification terminates the repetitive inspection requirements of paragraph (g) of this AD at the modified locations only.

(i) Alternative Methods of Compliance (AMOCs)

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

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager

of the local flight standards district office/certificate holding district office.

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

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

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

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

(j) Related Information

(1) For more information about this AD, contact Muoi Vuong, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles ACO, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5205; fax: 562–627–5210; email: *muoi.vuong@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone: 206–544–5000, extension 1; fax: 206–766–5680; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 2, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–30021 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9505; Directorate Identifier 2016–NM–155–AD]

RIN 2120–AA64

Airworthiness Directives; Learjet, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Learjet Inc. Model 60 airplanes. This proposed AD was prompted by an evaluation by the design approval holder (DAH) indicating that the upper fuselage skin under the aft oxygen line fairing is subject to multi-site damage (MSD). This proposed AD would require a one-time inspection of the fuselage skin for corrosion and related investigative and corrective actions if necessary. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 3, 2017.

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

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

For service information identified in this NPRM, contact Learjet, Inc., One Learjet Way, Wichita, KS 67209–2942; telephone: 316–946–2000; fax: 316–946–2220; email: *ac.ict@aero.bombardier.com;* Internet: *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9505; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Paul Chapman, Aerospace Engineer, Airframe Branch, ACE–118W, FAA, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Dwight D. Eisenhower Airport, Wichita, KS 67209; phone: 316–946–4152; fax: 316–946–4107; email: *Wichita-COS@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9505; Directorate Identifier 2016–NM–155–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received a report indicating that the upper fuselage skin under the aft oxygen line fairing is subject to MSD (corrosion at multiple sites under the fairing). This condition, if not corrected, could result in reduced structural integrity of the airplane.

Related Service Information Under 1 CFR Part 51

We reviewed Learjet 60 Service Bulletin 60–53–19, Revision 3, dated August 29, 2016. The service information describes procedures for inspections of the fuselage crown skin for corrosion and related investigative and corrective actions, if necessary. This service information is reasonably

available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.'' This proposed AD also would require sending the inspection results to the FAA.

Related investigative actions include a high frequency eddy current inspection of the affected skin sections and an ultrasonic skin thickness check. Corrective actions include repairing corrosion.

Differences Between This Proposed AD and the Service Information

Learjet 60 Service Bulletin 60–53–19, Revision 3, dated August 29, 2016, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by a Delegated Engineering Representative (DER) for Learjet Inc., or a Unit Member (UM) of the Learjet Organization Designation Authorization (ODA), whom we have authorized to make those findings.

Interim Action

We consider this proposed AD interim action. Because the cause of the corrosion is not known, the inspection reports will help determine the extent of the corrosion in the affected fleet. Based on the results of these reports, we might determine that further corrective action is warranted. Once further corrective action has been identified, we might consider further rulemaking.

Costs of Compliance

We estimate that this proposed AD affects 284 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections	46 work-hours × $85 per hour = $3,910	$265	$4,175	$1,185,700
Reporting	1 work-hour × $85 per hour = $85	0	85	24,140

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

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this AD is 2120–0056. The paperwork cost associated with this AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW., Washington, DC 20591, ATTN: Information Collection Clearance Officer, AES–200.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Learjet Inc.: Docket No. FAA–2016–9505; Directorate Identifier 2016–NM–155–AD.

(a) Comments Due Date

We must receive comments by February 3, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Learjet Inc. Model 60 airplanes, certificated in any category, serial numbers 60–002 through 60–430 inclusive.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by an evaluation by the design approval holder indicating that the upper fuselage skin under the aft oxygen line fairing is subject to multi-site damage. We are issuing this AD to detect and correct corrosion of the fuselage skin, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Inspection of the Fuselage Skin and Related Investigative and Corrective Actions

At the applicable time specified in paragraph (g)(1), (g)(2), or (g)(3) of this AD: Do a fluorescent dye penetrant inspection of the fuselage skin between stringers (S)–2L and S–2R for corrosion; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Learjet 60 Service Bulletin 60–53–19, Revision 3, dated August 29, 2016, except as required by paragraph (h) of this AD. Do all applicable related investigative and corrective actions before further flight.

(1) For airplanes with more than 12 years since the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness as of the effective date of this AD: Within 12 months after the effective date of this AD.

(2) For airplanes with more than 6 years but equal to or less than 12 years since the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness as of the effective date of this AD: Within 24 months after the effective date of this AD.

(3) For airplanes with 6 years or less since the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness as of the effective date of this AD: Within 36 months after the effective date of this AD.

(h) Service Information Exception

Where Learjet 60 Service Bulletin 60–53–19, Revision 3, dated August 29, 2016, specifies contacting Learjet Inc. for appropriate action: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(i) Reporting

At the applicable time specified in paragraph (i)(1) or (i)(2) of this AD: Submit a report of the findings (both positive and negative) of the inspection required by paragraph (g) of this AD to *Wichita-COS@faa.gov* or Ann Johnson, 1801 Airport Road, Wichita, KS 67209. The report must include the name of the owner, the address of the owner, the name of the organization incorporating Learjet 60 Service Bulletin 60–53–19, the date that inspection was completed, the name of the person submitting the report, the address, telephone number, and email of the person submitting the report, the airplane serial number, the total time (hours) on the airplane, the total landings on the airplane, whether corrosion was detected, whether corrosion was repaired, the structural repair manual (SRM) chapter and revision (if repaired), and whether corrosion exceeded the minimum thickness specified in Learjet 60 Service Bulletin 60–53–19 (and specify the SRM chapter and revision that was used).

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(j) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Learjet 60 Service Bulletin 60–53–19, dated November 23, 2015; Learjet 60 Service Bulletin 60–53–19, Revision 1, dated April 4, 2016; or Learjet 60 Service Bulletin 60–53–19, Revision 2, dated April 18, 2016.

(k) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Wichita ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (m)(1) of this AD.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by a Learjet Inc. Designated Engineering Representative (DER), or a Unit Member (UM) of the Learjet Organization Designation Authorization (ODA), that has been authorized by the Manager, Wichita ACO, to make those findings. To be approved, the repair, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(m) Related Information

(1) For more information about this AD, contact Paul Chapman, Aerospace Engineer, Airframe Branch, ACE–118W, FAA, Wichita ACO, 1801 Airport Road, Room 100, Dwight D. Eisenhower Airport, Wichita, KS 67209; phone: 316–946–4152; fax: 316–946–4107; email: *Wichita-COS@faa.gov.*

(2) For service information identified in this AD, contact Learjet, Inc., One Learjet Way, Wichita, KS 67209–2942; telephone: 316–946–2000; fax: 316–946–2220; email: *ac.ict@aero.bombardier.com;* Internet: *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 2, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–30019 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9500; Directorate Identifier 2016–NM–140–AD]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Dassault Aviation Model FAN JET FALCON, Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes. This proposed AD was prompted by reports of defective fire extinguisher tubes. This proposed AD would require replacement of the affected fire extinguisher tubes with improved fire extinguisher tubes. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 3, 2017.

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

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

For service information identified in this NPRM, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone: 201–440–6700; Internet: *http://www.dassaultfalcon.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9500; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: 425–227–1137; fax: 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9500; Directorate Identifier 2016–NM–140–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2016–0154, dated July 28, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Dassault Aviation Model FAN JET FALCON, Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes. The MCAI states:

> Several defective extinguisher tubes have been found on certain Dassault Aviation Fan Jet Falcon aeroplanes. The results of the investigations concluded that these occurrences were caused by corrosion. This condition, if not corrected, could impact the capability to extinguish a fire in the rear compartment of the aeroplane, possibly resulting in damage to the aeroplane and injury to the occupants.
> For the reason described above, this [EASA] AD requires the replacement of the affected tubes with improved fire extinguisher tube. In addition, this [EASA] AD prohibits (re)installation of the affected fire extinguisher tubes on an aeroplane.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9500.

Related Service Information Under 1 CFR Part 51

We reviewed Dassault Service Bulletin F20–790, dated September 14, 2016. This service information describes procedures for the replacement of affected fire extinguisher tubes with improved fire extinguisher tubes. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

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

Costs of Compliance

We estimate that this proposed AD affects 133 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Fire Extinguisher tube replacement	3 work-hours × $85 per hour = $255	$3,100	$3,355	$446,215

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in ''Subtitle VII,

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Dassault Aviation: Docket No. FAA–2016–9500; Directorate Identifier 2016–NM–140–AD.

(a) Comments Due Date

We must receive comments by February 3, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Dassault Aviation Model FAN JET FALCON, Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 26, Fire protection.

(e) Reason

This AD was prompted by reports of defective fire extinguisher tubes. We are issuing this AD to prevent fire extinguisher failure. Such a failure could result in the inability to extinguish a fire in the rear compartment, and possible damage to the airplane and injury to the occupants.

(f) Compliance

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

(g) Fire Extinguisher Tubes Replacement

Within 450 flight cycles after the effective date of this AD, replace each affected hose, part numbers (P/N) MY20791–121 and P/N MY20791–122, with a serviceable hose, P/N MY20791–121–1 or MY20791–122–1, as applicable, in accordance with the Accomplishment Instructions of Dassault Service Bulletin F20–790, dated September 14, 2016.

(h) Parts Installation Prohibition

No person may install a fire extinguisher tube, P/N MY20791–121 or P/N MY20791–122, on any airplane, as of the applicable time specified in paragraph (h)(1) or (h)(2) of this AD.

(1) For an airplane equipped with an affected fire extinguisher tube as of the effective date of this AD: After modification of that airplane as required by paragraph (g) of this AD.

(2) For an airplane that is not equipped with an affected fire extinguisher tube as of the effective date of this AD: As of the effective date of this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: 425–227–1137; fax: 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

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

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2016–0154, dated July 28, 2016, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9500.

(2) For service information identified in this AD, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone: 201–440–6700; Internet: *http://www.dassaultfalcon.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 6, 2016.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–30027 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9508; Directorate Identifier 2016–NM–065–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2015–22–06 for all Airbus Model A318, A319, A320, and A321 series airplanes. AD 2015–22–06 currently requires revising the After Start Normal Procedures section of the airplane flight manual (AFM) to provide procedures that address latent failures in the Spoiler and Elevator Computer (SEC). Since we issued AD 2015–22–06, there have been reports that some maintenance messages pointed out the loss of elevator servo

control monitoring performed by SEC 1, SEC 2, or both, during the engine start. This proposed AD would add a requirement to install updated SEC software. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 3, 2017.

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

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

For service information identified in this NPRM, contact Airbus, Airworthiness Office–EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425 227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9508; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9508; Directorate Identifier 2016–NM–065–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On October 22, 2015, we issued AD 2015–22–06, Amendment 39–18311 (80 FR 68429, November 5, 2015) (''AD 2015–22–06''). AD 2015–22–06 requires revision of the AFM intended to address an unsafe condition that can occur in the SEC for all Airbus Model A318, A319, A320, and A321 series airplanes.

Since we issued AD 2015–22–06, there have been reports that some maintenance messages were recorded within the Post Flight Report (PFR) that pointed out the loss of elevator servo control monitoring performed by SEC 1, SEC 2, or both, during the engine start.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive, 2016–0056, dated March 18, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus Model A318, A319, A320, and A321 series airplanes. The MCAI states:

> Following the introduction of new Spoiler and Elevator Computer (SEC) hardware C Part Number (P/N) B372CAM0100 with software (SW) standards 122, 124 and 125 (identified by P/N B372CAM0101, P/N B372CAM0102 and P/N B372CAM0103, respectively, and hereafter referred to as an ''affected SEC software standard'' in this [EASA] AD), some airlines reported receiving maintenance messages, *e.g.* ''SEC OR WIRING FROM L or R ELEV POS MON XDCR'' and/or ''SEC OR WIRING FROM G or Y ELEV POS XDCR'', which are associated with servo control or elevator transducer monitoring. Such messages are triggered by a short data inconsistency due to power transients, when the engines are started.
>
> This condition, if not corrected, could lead to an undetected loss of redundancy during flight if an affected SEC cannot control the related elevator servo control(s), possibly resulting in reduced control of the aeroplane.
>
> To address this potential unsafe condition, EASA issued AD 2015–0191 [which corresponds to AD 2015–22–06] to require amendment of the applicable [Airbus] Airplane Flight Manual (AFM) to include the flight crew procedure necessary to recover full SEC redundancy.
>
> Since that [EASA] AD was issued, to fix the software deficiency, SEC software standard 126 (identified by P/N B372CAM0104) was developed, which is embodied in production through Airbus modification (mod) 161208 (installation of SEC software standard 126), and introduced in service through Airbus Service Bulletin (SB) A320–27–1252.
>
> For the reason described above, this [EASA] AD retains the AFM change requirements of EASA AD 2015–0191, which is superseded, and requires the removal and/or upgrade of [an affected] SEC.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9508.

Related Service Information Under 1 CFR Part 51

Airbus has issued the following service information:

- Airbus Service Bulletin A320–27–1252, Revision 01, dated February 18, 2016.
- Airbus Service Bulletin A320–27–1257, dated December 18, 2015.

This service information provides information for identifying affected SECs and updating the software on affected SECs. These documents are distinct since they apply to different airplane configurations.

Airbus also issued A318/A319/A320/A321 Temporary Revision TR572, Issue 1.0, dated August 13, 2015, to the Airbus A318/A319/A320/A321 Airplane Flight Manual. This service information describes the reset of SEC 1 and SEC 2 that must be done after engines start.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

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

develop on other products of these same type designs.

Differences Between This Proposed AD and the Service Information

Subtask 271257–832–006–001, Instructions ''*2*'' and ''*3,*'' in the Accomplishment Instructions of Airbus Service Bulletin A320–27–1257, dated December 18, 2015, have software part numbers that are incorrect. Paragraph (n) of this proposed AD provides the corrected part numbers. The correct part numbers were provided by Airbus in Operators Information Transmission (OIT) 16–0001, Revision 00, dated January 20, 2016.

Costs of Compliance

We estimate that this proposed AD affects 959 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision (retained action from AD 2015–22–06)	1 work-hour × $85 per hour = $85	$0	$85	$81,515
Removal and replacement of SEC (new proposed action).	4 work-hours × $85 per hour = $340	0	340	326,060

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2015–22–06, Amendment 39–18311 (80 FR 68429, November 5, 2015), and adding the following new AD:

Airbus: Docket No. FAA–2016–9508; Directorate Identifier 2016–NM–065–AD.

(a) Comments Due Date

We must receive comments by February 3, 2017.

(b) Affected ADs

This AD replaces AD 2015–22–06, Amendment 39–18311 (80 FR 68429, November 5, 2015) (''AD 2015–22–06'').

(c) Applicability

This AD applies to the Airbus airplanes, certificated in any category, identified in paragraphs (c)(1) through (c)(4) of this AD, all manufacturer serial numbers.

(1) Airbus Model A318–111, –112, –121, and –122 airplanes.

(2) Airbus Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.

(3) Airbus Model A320–211, –212, –214, –231, –232, and –233 airplanes.

(4) Airbus Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Controls.

(e) Reason

This AD was prompted by reports that some maintenance messages were recorded within the Post Flight Report (PFR) that pointed out the loss of elevator servo control monitoring performed by Spoiler and Elevator Computer (SEC) 1, SEC 2, or both, during the engine start. We are issuing this AD to prevent an undetected loss of redundancy during flight if an affected SEC cannot control the related elevator servo control(s), possibly resulting in reduced control of the airplane.

(f) Compliance

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

(g) Retained Airplane Flight Manual Revision, With Revised Compliance Language

This paragraph restates the requirements of paragraph (g) of AD 2015–22–06, with revised compliance language. For airplanes equipped with SEC hardware C part number (P/N) B372CAM0100 with software standards 122 (P/N B372CAM0101), 124 (P/N B372CAM0102), or 125 (P/N B372CAM0103), on SEC position 1 or 2, or both: Within 30 days after November 20, 2015 (the effective date of AD 2015–22–06), revise the After Start Normal Procedures section of the airplane flight manual (AFM) to include the statement specified in figure 1 to paragraph (g) of this AD. This may be done by inserting a copy of this AD, or AD 2015–22–06, or Airbus A318/A319/A320/A321 Temporary Revision TR572, Issue 1.0, dated August 13, 2015, to the Airbus A318/A319/A320/A321 AFM, into the applicable AFM.

Figure 1 to Paragraph (g) of this AD – AFM Temporary Revision

AFTER START NORMAL PROCEDURE

After both engines start:

Turn OFF then ON SEC 1 and SEC 2 one after the other.

Note 1 to paragraph (g) of this AD: When a statement identical to that in figure 1 to paragraph (g) of this AD has been included in the After Start Normal Procedures section of the general revisions of the AFM, the general revisions may be inserted into the AFM, and this AD, or AD 2015–22–06, or Airbus A318/A319/A320/A321 Temporary Revision TR572, Issue 1.0, dated August 13, 2015, may be removed from the AFM.

Note 2 to paragraph (g) of this AD: Airbus Operations Engineering Bulletin OEB–50 provides additional information on the subject addressed by this AD.

(h) Retained Parts Installation Limitation, With No Change

This paragraph restates the requirements of paragraph (i) of AD 2015–22–06, with no change. For all airplanes: As of November 20, 2015 (the effective date of AD 2015–22–06), do not install SEC hardware C P/N B372CAM0100 with software standard 122 (P/N B372CAM0101), 124 (P/N B372CAM0102), or 125 (P/N B372CAM0103), on SEC position 1 or 2, or both, on any airplane, unless the AFM of the airplane is revised concurrently with that installation, as required by paragraph (g) of this AD.

(i) New Requirement of This AD: Replacement of Software

Within 3 months after the effective date of this AD, comply with the actions in paragraphs (i)(1) or (i)(2) of this AD, as applicable.

(1) For an airplane that has received Airbus modification 39429 (installation of SEC hardware C P/N B372CAM0100) in production: Install SEC software standard 126, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–27–1252, Revision 01, dated February 18, 2016.

(2) For an airplane that has not received Airbus modification 39429 in production: Inspect to determine whether an affected SEC software standard is installed. Do the inspection in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–27–1257, dated December 18, 2015, except as required by paragraph (n) of this AD. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number of the SEC C can be conclusively determined from that review. If an affected SEC software standard is found installed, replace the affected software standard using an installation method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA).

(j) New Requirement of This AD: Compliance for Airplanes Having Airbus Modification 161208 Embodied in Production

An airplane on which Airbus modification 161208 has been embodied in production is compliant with the requirements of paragraph (i) of this AD, provided it is determined that no affected SEC software standard, as identified in paragraph (g) of this AD, is installed on that airplane.

(k) New Requirement of This AD: Disposition of AFM After Airplane Modification

After modification of an airplane as required by paragraph (i) of this AD, remove the information specified in Airbus A318/A319/A320/A321 TR572, Issue 1.0, dated August 13, 2015, to the Airbus A318/A319/A320/A321 AFM from the AFM of that airplane.

(l) New Requirement of This AD: Parts Installation Prohibition

As of the effective date of this AD, no person may install on any airplane an affected SEC software standard, or a SEC hardware C hosting an affected SEC software standard.

(m) New Provision of This AD: Installation of Equivalent Software and Hardware

Installation on an airplane of a SEC software standard, or of a SEC hardware standard, approved after the effective date of this AD, is acceptable for compliance with the requirements of paragraph (i) of this AD for that airplane, provided the conditions specified in paragraphs (m)(1) and (m)(2) of this AD are met.

(1) The software and hardware standard, as applicable, is approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA; and

(2) Replacement of the affected software standard is done using an installation method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

(n) Exception to Service Information Specifications

Subtask 271257–832–006–001 of Airbus Service Bulletin A320–27–1257, dated December 18, 2015, includes incorrect instructions. This AD requires that those instructions be followed as specified in paragraphs (n)(1) and (n)(2) of this AD.

(1) For Subtask 271257–832–006–001 instruction ''*2*'': If SEC C 126 software P/N B372CAM0104 is found, no further action is required by this AD.

(2) For Subtask 271257–832–006–001 instruction ''*3*'': If SEC C 122 software P/N B372CAM0101, SEC C 124 software P/N B372CAM0102, or SEC C 125 software P/N B372CAM0103 is found, do corrective actions using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

(o) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

(3) *Required for Compliance (RC):* If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(p) Special Flight Permits

Special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), are not allowed.

(q) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2016–0056, dated March 18, 2016, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9508.

(2) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

Issued in Renton, Washington, on December 7, 2016.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–30018 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9506; Directorate Identifier 2016–NM–090–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This proposed AD was prompted by a report of an aborted takeoff because the rudder pedals were not operating correctly. Investigation revealed a protruding screw in the rudder pedal heel rest adjacent to the pedals. This proposed AD would require a torque check of the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals, and corrective action if necessary. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 3, 2017.

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

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

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9506.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9506; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kelly McGuckin, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6490; fax: 425–917–6590; email: *Kelly.McGuckin@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9506; Directorate Identifier 2016–NM–090–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received a report of an aborted takeoff because the rudder pedals were not operating correctly. Investigation revealed a protruding screw in the rudder pedal heel rest adjacent to the pedals. It was determined that the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals may not have been properly torqued. A protruding screw from the cover assembly of the heel rest of a rudder pedal could restrict rudder pedal motion and reduce differential braking control during takeoff or landing, which could cause a high speed runway excursion.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin 737–25A1732, Revision 1, dated August 15, 2016. The service information describes procedures for a torque check of the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals, and corrective action. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for

and locating Docket No. FAA–2016–9506.

The phrase ''corrective actions'' is used in this proposed AD. Corrective actions correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Costs of Compliance

We estimate that this proposed AD affects 1,187 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Torque check	2 work-hours × $85 per hour = $170 per inspection cycle.	$0	$170	$201,790

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2016–9506; Directorate Identifier 2016–NM–090–AD.

(a) Comments Due Date

We must receive comments by February 3, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 737–25A1732, Revision 1, dated August 15, 2016.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment and Furnishings.

(e) Unsafe Condition

This proposed AD was prompted by a report of an aborted takeoff because the rudder pedals were not operating correctly. Investigation revealed a protruding screw in the rudder pedal heel rest adjacent to the pedals. It was determined that the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals may not have been properly torqued. We are issuing this AD to detect and correct a protruding screw in the cover assembly of the heel rest of a rudder pedal. A protruding screw could restrict rudder pedal motion and reduce differential braking control during takeoff or landing, which could cause a high speed runway excursion.

(f) Compliance

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

(g) Torque Check

Within 21 months after the effective date of this AD: Do a one-time torque check of the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–25A1732, Revision 1, dated August 15, 2016.

(h) Corrective Action

If the results of the torque check required by paragraph (g) of this AD indicate that any screw does not hold torque to the required value, before further flight, replace the affected screw and associated nutplate, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–25A1732, Revision 1, dated August 15, 2016.

(i) Alternative Methods of Compliance (AMOCs)

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

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization

Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

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

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

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

(j) Related Information

(1) For more information about this AD, contact Kelly McGuckin, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6490; fax: 425–917–6590; email: *Kelly.McGuckin@faa.gov*.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 7, 2016.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–30028 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2016–0588; FRL–9957–02–Region 8]

Approval and Promulgation of State Implementation Plans; Interstate Transport for Utah

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing action on a portion of a January 31, 2013 submission and a December 22, 2015 supplemental submission from the State of Utah that are intended to demonstrate that the State Implementation Plan (SIP) meets certain interstate transport requirements of the Clean Air Act (Act or CAA) for the 2008 ozone National Ambient Air Quality Standards (NAAQS). Specifically, the EPA is proposing to approve interstate transport prong 1 for the 2008 ozone NAAQS.

DATES: Comments must be received on or before January 10, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2016–0588 at *http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.,) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Adam Clark, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. (303) 312–7104, *clark.adam@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

What should I consider as I prepare my comments for EPA?

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

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** volume, date, and page number);
- Follow directions and organize your comments;
- Explain why you agree or disagree;
- Suggest alternatives and substitute language for your requested changes;
- Describe any assumptions and provide any technical information and/or data that you used;
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced;
- Provide specific examples to illustrate your concerns, and suggest alternatives;
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats; and
- Make sure to submit your comments by the comment period deadline identified.

II. Background

On March 12, 2008, the EPA revised the levels of the primary and secondary 8-hour ozone standards to 0.075 parts per million (ppm). 73 FR 16436 (March 27, 2008). Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as the EPA may prescribe. Section 110(a)(2) requires states to address structural SIP elements such as requirements for monitoring, basic program requirements, and legal authority that are designed to provide for implementation, maintenance, and enforcement of the NAAQS. The SIP submission required by these provisions is referred to as the ''infrastructure'' SIP. Section 110(a) imposes the obligation upon states to make a SIP submission to the EPA for a new or revised NAAQS, but the contents of individual state

submissions may vary depending upon the facts and circumstances.

CAA Section 110(a)(2)(D)(i)(I) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance, of the NAAQS in another state. The two provisions of this section are referred to as prong 1 (significant contribution to nonattainment) and prong 2 (interfere with maintenance). Section 110(a)(2)(D)(i)(II) requires SIPs to contain adequate provisions to prohibit emissions that will interfere with measures required to be included in the applicable implementation plan for any other state under part C to prevent significant deterioration of air quality (prong 3) or to protect visibility (prong 4).

In this action, the EPA is only addressing prong 1 of CAA section 110(a)(2)(D)(i) with regard to the 2008 ozone NAAQS. The EPA proposed action on prongs 1, 2 and 4 for this NAAQS on May 10, 2016. 81 FR 28807. In that action, we proposed to disapprove prongs 1 and 2 of Utah's SIP for the 2008 ozone NAAQS based a number of deficiencies in the SIP submission and in light of on the results of EPA modeling which initially indicated that emissions from Utah sources contribute to two nonattainment receptors in the Denver, Colorado area. *Id.* at 28810. As described below, the EPA has updated its air quality modeling, and now indicates that Utah sources do not contribute to any nonattainment receptors in the U.S. Details regarding this modeling information, and its impact on this proposed action, are discussed in the following section. The EPA finalized disapproval of Utah's SIP submission with respect to prongs 2 and 4 in a final action published October 19, 2016. 81 FR 71991.

III. State Submissions and EPA's Assessment

The Utah Department of Environmental Quality (Department or UDEQ) submitted a certification of Utah's infrastructure SIP for the 2008 ozone NAAQS on January 31, 2013, and a supplement regarding CAA section 110(a)(2)(D)(i)(I) with respect to the 2008 ozone NAAQS on December 22, 2015.[1]

These infrastructure certifications addressed all of the infrastructure elements including section 110(a)(2)(D)(i), referred to as infrastructure element (D).[2] In this action, we are only addressing element (D) prong 1 from the 2008 ozone certification and the December 22, 2015 supplement which addressed prong 1 for the 2008 ozone NAAQS. All other infrastructure elements from these certifications have been addressed in separate actions.

In its January 31, 2013, 2008 ozone infrastructure submittal, UDEQ addressed 110(a)(2)(D)(i)(I) prongs 1 and 2 by citing EPA Administrator Gina McCarthy's November 19, 2012 memo [3] which outlined the EPA's intention to abide by the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *EME Homer City Generation, L.P.* v. *E.P.A.,* 696 F.3d 7 (D.C. Cir. 2012). The *EME Homer City* decision addressed the Cross-State Air Pollution Rule (CSAPR) promulgated by the EPA to address the interstate transport requirements under section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS, the 1997 fine particulate matter ($PM_{2.5}$) NAAQS, and the 2006 $PM_{2.5}$ NAAQS. Among other things, the D.C. Circuit held that states did not have an obligation to submit SIPs addressing section 110(a)(2)(D)(i)(I) interstate transport requirements as to any NAAQS until the EPA first quantified each state's emissions reduction obligation. *Id.* at 30 through 31. In its submittal, the Department noted that the EPA had not quantified Utah's transport obligation as to the 2008 ozone NAAQS and that Utah's infrastructure SIP was therefore adequate with regard to prongs 1 and 2 of CAA section 110(a)(2)(D)(i)(I).

Subsequent to the UDEQ submission, on April 29, 2014, the U.S. Supreme Court reversed and remanded the D.C. Circuit's *EME Homer City* decision on CSAPR and held, among other things, that under the plain language of the CAA, states must submit SIPs addressing interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) within three years of the promulgation of a new or revised NAAQS, regardless of whether the EPA first provides guidance, technical data or rulemaking to quantify the state's obligation. *EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. 1584, 1601 (2014). UDEQ therefore additionally addressed 110(a)(2)(D)(i) prongs 1 and 2 for the 2008 ozone NAAQS as part of its December 22, 2015 infrastructure submittal that otherwise addressed the 2012 $PM_{2.5}$ NAAQS. As stated, the EPA is proposing action on both the January 31, 2013 and December 22, 2015 certifications with regard to prong 1 for the 2008 ozone NAAQS.

In its December 22, 2015 infrastructure submittal, UDEQ acknowledged the changed legal landscape, and asserted that emissions from the State did not significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in any other state. The Department cited air quality modeling assessing interstate transport of ozone that was released by the EPA on August 4, 2015, (*see* Notice of Availability of the Environmental Protection Agency's Updated Ozone Transport Modeling Data for the 2008 Ozone NAAQS, 80 FR 46271), and explained that it did not consider the modeled contribution levels to nonattainment and maintenance receptors in the Denver, Colorado area and in southern California to be significant.

In the December 22, 2015 supplement, UDEQ cited various SIP-approved area source rules which it asserts will result in additional reductions in ozone precursor emissions as further evidence that emissions from the State do not contribute significantly to nonattainment of the 2008 ozone NAAQS in any other state. The Department listed several VOC emissions limitations on various industries submitted as part of the State's greater $PM_{2.5}$ control strategy, which were recently approved by the EPA.[4] UDEQ also pointed to a rule prohibiting the sale of water heaters that do not comply with low NOx emission rates which will go into effect on November 1, 2017. UDEQ insisted that because NOx and VOC are precursors to ozone, these emission limitations would further reduce ozone transport to downwind nonattainment and maintenance receptors below the levels which Utah claimed were already insignificant. UDEQ did not quantify or explain how these limitations would significantly reduce Utah ozone emissions, or how those reductions might impact downwind transport. UDEQ also cited the general west to east wind direction in the western U.S. as

[1] The 110(a)(2)(D)(i)(I) 2008 ozone supplement was submitted as part of Utah's infrastructure SIP certification for the 2012 $PM_{2.5}$ NAAQS.

[2] For discussion of other infrastructure elements, see EPA's ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and (2),'' September 13, 2013.

[3] Memo from Gina McCarthy to Air Division Directors, Regions 1–10 re: Next Steps for Pending Redesignation Requests and State Implementation Plan Actions Affected by the Recent Court Decision Vacating the 2011 Cross-State Air Pollution Rule (Nov. 19, 2012).

[4] For more detail, see EPA's final action on these area source rules at 81 FR 9343, February 25, 2016, and the associated docket at EPA–R08–OAR–2014–0369.

further evidence that Utah emissions are unlikely to significantly impact ozone pollution in southern California.

The EPA developed technical information and a related analysis to assist states with meeting section 110(a)(2)(D)(i)(I) requirements for the 2008 ozone NAAQS and used this technical analysis to support the recently finalized Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (''CSAPR Update'').[5] As explained below, this analysis supports the conclusions of UDEQ's analysis for prong 1.

In the technical analysis supporting the CSAPR Update, the EPA used detailed air quality analyses to determine where projected nonattainment or maintenance areas would be and whether emissions from an eastern state contribute to downwind air quality problems at those projected nonattainment or maintenance receptors.[6] Specifically, the EPA determined whether the state's contributing emissions were at or above a specific threshold (*i.e.,* one percent of the ozone NAAQS). If a state's contribution did not exceed the one percent threshold, the state was not considered ''linked'' to identified downwind nonattainment and maintenance receptors and was therefore not considered to significantly contribute to nonattainment or interfere with maintenance of the standard in those downwind areas. If a state's contribution was equal to or exceeded the one percent threshold, that state was considered ''linked'' to the downwind nonattainment or maintenance receptor(s) and the state's emissions were further evaluated, taking into account both air quality and cost considerations, to determine what, if any, emissions reductions might be necessary to address the state's obligation pursuant to CAA section 110(a)(2)(D)(i)(I).

As discussed in the final CSAPR Update, the air quality modeling contained in the EPA's technical analysis (1) identified locations in the U.S. where the EPA anticipates nonattainment or maintenance issues in 2017 for the 2008 ozone NAAQS (these are identified as nonattainment and maintenance receptors), and (2) quantified the projected contributions from emissions from upwind states to downwind ozone concentrations at the receptors in 2017. 81 FR 74526. This modeling used the Comprehensive Air Quality Model with Extensions (CAMx version 6.11) to model the 2011 base year, and the 2017 future base case emissions scenarios to identify projected nonattainment and maintenance sites with respect to the 2008 8-hour ozone NAAQS in 2017. The EPA used nationwide state-level ozone source apportionment modeling (the CAMx Ozone Source Apportionment Technology/Anthropogenic Precursor Culpability Analysis technique) to quantify the contribution of 2017 base case NO_X and VOC emissions from all sources in each state to the 2017 projected receptors. The air quality model runs were performed for a modeling domain that covers the 48 contiguous U.S. and adjacent portions of Canada and Mexico. *Id.* at 81 FR 74526 through 74527. The updated modeling data released to support the final CSAPR Update are the most up-to-date information the EPA has developed to inform our analysis of upwind state linkages to downwind air quality problems for the 2008 ozone NAAQS.[7] *See* ''Air Quality Modeling Final Rule Technical Support Document for the Final CSAPR Update'' in the docket for this action for more details regarding the EPA's modeling analysis.

Consistent with the framework established in the original CSAPR rulemaking, the EPA's technical analysis in support of the CSAPR Update applied a threshold of one percent of the 2008 ozone NAAQS of 75 ppb (0.75 ppb) to identify linkages between upwind states and the downwind nonattainment and maintenance receptors. *See* CSAPR Update at 81 FR 74518 through 74519. The EPA considered eastern states whose contributions to a specific receptor meet or exceed the threshold ''linked'' to that receptor and we analyzed these states further to determine if emissions reductions might be required from each state to address the downwind air quality problem. The EPA determined that one percent was an appropriate threshold to use in this analysis because there were important, even if relatively small, contributions to identified nonattainment and maintenance receptors from multiple upwind states. In response to commenters who advocated a higher or lower threshold than one percent, the EPA compiled the contribution modeling results for the CSAPR Update to analyze the impact of different possible thresholds for the eastern United States. The EPA's analysis showed that the one percent threshold captures a high percentage of the total pollution transport affecting downwind states. The EPA's analysis further showed that the application of a lower threshold would result in relatively modest increases in the overall percentage of ozone transport pollution captured, while the use of higher thresholds would result in a relatively large reduction in the overall percentage of ozone pollution transport captured relative to the levels captured at one percent at the majority of the receptors. *Id.; See also* Air Quality Modeling Final Rule Technical Support Document for the Final CSAPR Update, Appendix F, Analysis of Contribution Thresholds. This approach is consistent with the use of a one percent threshold to identify those states ''linked'' to air quality problems with respect to the 1997 ozone NAAQS in the original CSAPR rulemaking, wherein the EPA noted that there are adverse health impacts associated with ambient ozone even at low levels. 76 FR 48208, 48236 through 48237 (August 8, 2011).

As to western states, the EPA noted in the CSAPR Update that there may be geographically specific factors to consider in evaluating interstate transport, and given the near-term 2017 implementation timeframe, the EPA focused the final CSAPR Update on eastern states. *See* CSAPR Update at 81 FR 74523. Consistent with our statements in the CSAPR Update, the EPA intends to address western states, like Utah, on a case-by-case basis.

In spite of deficiencies with Utah's technical analysis described above, the EPA's technical analysis in support of the CSAPR Update indicates that Utah does not contribute above the one percent threshold to any nonattainment receptors.[8] Utah's largest modeled contribution to a nonattainment receptor is .32 ppb, below half of the one percent threshold, at a receptor in Fresno County, California. *Id.* The EPA is not necessarily determining that one percent of the NAAQS is always an appropriate threshold for identifying interstate transport linkages for all states in the west. In this instance, the State's low modeled level of contribution to any receptors identified in the EPA's technical analysis supports Utah's conclusion that the State does not contribute significantly to nonattainment of the 2008 ozone NAAQS in any other state. Thus, the EPA is proposing to approve Utah's SIP

[5] 81 FR 74504 (Oct. 26, 2016).

[6] For purposes of the CSAPR Update, ''eastern'' states refer to all contiguous states east of the Rocky Mountains, specifically not including: Montana, Wyoming, Colorado and New Mexico.

[7] The updated modeling results for the final CSAPR Update can be found in the docket for this action.

[8] Please see the spreadsheet titled ''Final CSAPR Update—Ozone Design Values & Contributions,'' in the docket for this action.

as meeting the 110(a)(2)(D)(i) prong 1 requirement for the 2008 ozone NAAQS. This proposed action supersedes the EPA's May 10, 2016 proposed disapproval of prong 1 of the Utah SIP for the 2008 ozone NAAQS. *See* 81 FR 28807.

IV. Proposed Action

The EPA is proposing to approve the section 110(a)(2)(D)(i)(I) prong 1 portion of Utah's January 31, 2013 submittal and the December 22, 2015 submittal with respect to the 2008 ozone NAAQS. The EPA is soliciting public comments on this proposed action and will consider public comments received during the comment period.

V. Statutory and Executive Order Reviews

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

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

The SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

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

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

Dated: December 12, 2016.

Richard D. Buhl,

Acting Regional Administrator, Region 8.

[FR Doc. 2016–30462 Filed 12–19–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2015–0032; FRL–9956–04]

Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petitions and request for comment.

SUMMARY: This document announces EPA's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before January 19, 2017.

ADDRESSES: Submit your comments, identified by the Docket Identification (ID) Number and the Pesticide Petition Number (PP) of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Robert McNally, Biopesticides and Pollution Prevention Division (7511P), main telephone number: (703) 305–7090, email address: *BPPDFRNotices@epa.gov;* or Michael Goodis, Registration Division (7505P), main telephone number: (703) 305–7090, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each pesticide petition summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT** for the division listed at the

end of the pesticide petition summary of interest.

B. What should I consider as I prepare my comments for EPA?

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

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, EPA seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is EPA taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2), 21 U.S.C. 346a(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this document, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), EPA is publishing notice of the petitions so that the public has an opportunity to comment on these requests for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petitions may be obtained through the petition summaries referenced in this unit.

New Tolerances

1. *PP 5E8440.* (EPA–HQ–OPP–2016–0392). Dow AgroSciences LLC, 9330 Zionsville Rd., Indianapolis, IN 46268, requests to establish tolerances in 40 CFR part 180 without a U.S. registration for residues of the fungicide fenpicoxomid (XDE 777) in or on the raw agricultural commodities banana at 0.1 parts per million (ppm), rye at 0.7 ppm, and wheat at 0.7 ppm; and residues of fenpicoxomid plus its metabolite X12326349, expressed as fenpicoxomid equivalents, in or on meat and fat from cattle, goats, and sheep at 0.01 ppm; and meat byproducts of cattle, goats, and sheep at 0.02 ppm. The Method S12–01537, ''XDE 777 and its Metabolite X642188—Validation of the Method for the Determination of XDE 777 and its Metabolite X642188 in Crops by LC MS/MS,'' was used for the analysis of XDE 777 and its metabolite X642188 in the plant materials. Samples were analyzed by liquid chromatography using a Phenomenex Luna C18 column coupled with positive-ion electrospray tandem mass spectrometry (LC/MS/MS), monitoring two MS/MS transitions characteristic of each analyte. Contact: RD.

2. *PP 5F8403.* (EPA–HQ–OPP–2016–0560). Dow AgroSciences LLC, 9330 Zionsville Rd., Indianapolis, IN 46268, requests to establish tolerances in 40 CFR part 180 for residues of the herbicide florpyrauxifen-benzyl (2-Pyridinecarboxylic acid, 4-amino-3-chloro-6-(4-chloro-2-fluoro-3-methoxyphenyl)-5-fluoro-, phenylmethyl ester) and florpyrauxifen (metabolite; 2-Pyridinecarboxylic acid, 4-amino-3-chloro-6-(4-chloro-2-fluoro-3-methoxyphenyl)-5-fluoro-) in or on the raw agricultural commodities rice, grain (dehulled) at 0.01 ppm; rice, grain at 0.2 ppm; fish, freshwater at 2 ppm; shellfish, crustacean at 0.5 ppm; and shellfish, mollusk at 9 ppm. The liquid chromatography with tandem mass spectrometry analytical method 130794.1 is used to validate rice grain and straw matrices. A separate liquid chromatography with tandem mass spectrometry analytical method 130794.02 is used to validate matrices of rice processed fractions. Contact: RD.

3. *PP 5F8417.* (EPA–HQ–OPP–2015–0787). K–I Chemical USA, Inc., 11 Martine Ave., Suite 970, White Plains, NY 10606, requests to establish tolerances in 40 CFR 180.659 for residues of the herbicide pyroxasulfone (3-[(5-(difluoromethoxy)-1-methyl-3-(trifluoromethyl) pyrazole-4-ylmethylsulfonyl]-4,5-dihydro-5,5-dimethyl-1,2-oxazole) and its metabolites in or on dried shelled peas and beans (crop subgroup 6C) at 0.15 ppm, pea hay at 0.40 ppm, pea vines at 0.20 ppm, cowpea hay at 0.07 ppm, cowpea forage at 3.0 ppm flax at 0.07 ppm, peanut at 0.20 ppm, peanut hay at 3.0 ppm, peanut meal at 0.40 ppm, and vegetable, foliage of legume, except soybean, subgroup 07A at 3.0 ppm. The LC/MS/MS has been proposed to enforce the tolerance expression for pyroxasulfone. Contact: RD.

4. *PP 6E8505.* (EPA–HQ–OPP–2016–0049). Interregional Research Project No. 4 (IR–4), Rutgers, The State University of New Jersey, 500 College Rd. East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR 180.685 for residues of the fungicide oxathiapiprolin, 1-[4-[4-[5-(2,6-difluorophenyl)-4,5-dihydro-3-isoxazolyl]-2-thiazolyl]-1-piperidinyl]-2-[5-methyl-3-(trifluoromethyl)-1H-pyrazol-1-yl]-ethanone, in or on cacao bean, bean at 0.10 ppm; cacao bean, chocolate at 0.15 ppm; cacao bean, cocoa powder at 0.15 ppm; and cacao bean, roasted bean at 0.15 ppm. Adequate analytical methodology, high-pressure liquid chromatography with tandem mass spectrometry (MS/MS) detection, is available for tolerance enforcement purposes. Contact: RD.

5. *PP 6E8511.* (EPA–HQ–OPP–2016–0587). IR–4, Rutgers, The State University of New Jersey, 500 College Rd. East, Suite 201W, Princeton, NJ 08540, requests to establish a tolerance in 40 CFR 180.444 for residues of sulfur dioxide, including its metabolites and degradates, in or on fig at 25 ppm. An analytical enforcement method, the

Monier-Williams Procedure for Sulfites (21 CFR part 101 Appendix A), is available for enforcement of tolerances for sulfites in food. Contact: RD.

6. *PP 6F8507.* (EPA–HQ–OPP–2016–0573). Isagro S.p.A. d/b/a Isagro USA, Inc., 430 Davis Dr., Suite 240, Morrisville, NC 27560, requests to establish tolerances in 40 CFR 180.557 for residues of the fungicide tetraconazole in or on barley at 0.3 ppm; crop group 16, forage, fodder, and straw of cereal grains group (except corn) at 8.0 ppm; dried shelled pea and bean (except soybean) subgroup 6C, hay at 8.0 ppm; dried shelled pea and bean (except soybean) subgroup 6C, seed at 0.15 ppm; dried shelled pea and bean (except soybean) subgroup 6C, vine at 2.0 ppm; rapeseed crop subgroup 20A at 0.9 ppm; and wheat at 0.1 ppm. The adequate enforcement methodology (capillary gas chromatography with electron capture detector (GC/ECD)), as well as a QuEChERS multi-residue method (LC/MS–MS detection), is used to measure and evaluate the chemical tetraconazole. Contact: RD.

Amended Tolerance

1. PP 4F8258. (EPA–HQ–OPP–2014–0357). DuPont Crop Protection, P.O. Box 30, Newark, DE 19714–0030, requests to amend the tolerance in 40 CFR 180.672 for residues of the insecticide cyantraniliprole in or on vegetable, cucurbit (group 9) at 0.70 ppm. Adequate analytical methodology, high-pressure liquid chromatography with tandem mass spectrometry (MS/MS) detection, is available for tolerance enforcement purposes. Contact: RD.

2. *PP 6F8476.* (EPA–HQ–OPP–2016–0360). Albaugh, LLC, P.O. Box 2127, Valdosta, GA 31604, requests to amend the tolerances in 40 CFR 180.441(a)(1) for the residues of the herbicide quizalofop ethyl, including its metabolites and degradates, in or on wheat, bran at 0.40 ppm; wheat, forage at 2.0 ppm; wheat, germ at 0.40 ppm; wheat, hay at 2.0 ppm; wheat, milled byproducts at 0.40 ppm; and wheat, straw at 0.80 ppm. The modified Morse Method-147 is used to measure and evaluate the chemical quizalofop-P-ethyl and quizalofop-P acid, convertible to 6-chloro-2-methoxyquinoxaline (MeCHQ). Contact: RD.

New Tolerance Exemptions

1. *PP IN–10970.* (EPA–HQ–OPP–2016–0606). AgroFresh Inc., 400 Arcola Rd., P.O. Box 7000, Collegeville, PA 19426, requests to establish an exemption from the requirement of a tolerance for residues of polyglycerol polyricinoleic acid (CAS Reg. No. 29894–35–7) with a minimum number average molecular weight (in amu) of 2,000 when used as an inert ingredient in pesticide formulations under 40 CFR 180.960. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. Contact: RD.

2. *PP IN–10984.* (EPA–HQ–OPP–2016–0617). Spring Trading Company, on behalf of Ethox Chemicals, LLC, 1801 Perimeter Rd., Greenville, SC 29605, requests to establish an exemption from the requirement of a tolerance for residues of octadecanoic acid, 12-hydroxy-, homopolymer, ester with α, α′,α″-1,2,3-propanetriyltris[ω-hydroxypoly(oxy-1,2-ethanediyl)] (CAS Reg. No. 1939051–18–9) with a minimum number average molecular weight (in amu) of 5,000 when used as an inert ingredient in pesticide formulations under 40 CFR 180.960. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. Contact: RD.

3. *PP 5F8410.* (EPA–HQ–OPP–2016–0284). AFS009 Plant Protection, Inc., 104 T.W. Alexander Dr., Building 18, Research Triangle Park, NC 27709, requests to establish an exemption from the requirement of a tolerance in 40 CFR part 180 for residues of the fungicide *Pseudomonas chlororaphis* strain AFS009 in or on all food commodities. The petitioner believes no analytical method is needed because it is expected that, when used as proposed, *Pseudomonas chlororaphis* strain AFS009, would not result in residues that are of toxicological concern. Note: In the **Federal Register** of June 22, 2016 (81 FR 40594) (FRL–9947–32), EPA announced the filing of this petition to establish an exemption from the requirement of a tolerance for residues of *Pseudomonas chlororaphis* subsp. *aurantiaca* strain AFS009 in or on all food commodities. Since that time, the petitioner provided additional data on the identity of the active ingredient to EPA. After reviewing these data, EPA now considers the correct identity of the active ingredient to be *Pseudomonas chlororaphis* strain AFS009 and not *Pseudomonas chlororaphis* subsp. *aurantiaca* strain AFS009. In order to give the public an opportunity to comment on this new information, EPA is republishing its receipt of this tolerance exemption petition filing with an updated and accurate description. Contact: BPPD.

4. *PP 6F8485.* (EPA–HQ–OPP–2016–0608). BASF Corporation, 26 Davis Dr., Research Triangle Park, NC 27709, requests to establish an exemption from the requirement of a tolerance in 40 CFR part 180 for residues of the insecticide *Beauveria bassiana* strain PPRI 5339 in or on all food commodities. The petitioner believes no analytical method is needed because it is expected that, when used as proposed, *Beauveria bassiana* strain PPRI 5339, would not result in residues that are of toxicological concern. Contact: BPPD.

Amended Tolerance Exemption

1. *PP 6F8481.* (EPA–HQ–OPP–2016–0578). Verdesian Life Sciences U.S., LLC, 1001 Winstead Dr., Suite 480, Cary, NC 27513, requests to amend an exemption from the requirement of a tolerance in 40 CFR 180.1210 for residues of the systemic fungicide/systemic acquired resistance (SAR) inducer calcium salts of phosphorous acid in or on all food commodities when used as an agricultural fungicide and in or on potatoes when applied as a post-harvest treatment at 35,600 ppm or less phosphorous acid. The two analytical methods available to EPA for the detection and measurement of the pesticide residues are the modified AOAC Method 958.01 and the modified AOAC Method 965.09. Contact: BPPD.

Authority: 21 U.S.C. 346a.

Dated: December 9, 2016.

Robert McNally,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 2016–30647 Filed 12–19–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 141216999–6999–02]

RIN 0648–XD669–X

Endangered and Threatened Wildlife and Plants: Notice of 12-Month Finding on a Petition To List the Gulf of Mexico Bryde's Whale as Endangered Under the Endangered Species Act (ESA); Correction

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

ACTION: Proposed rule; correction.

SUMMARY: NMFS published in the **Federal Register** on December 8, 2016, a document proposing to list the Gulf of Mexico Bryde's whale as an endangered species under the Endangered Species Act of 1973 (ESA). This document

corrects an error regarding the January 30, 2017, scheduled close date of the public comment period and identifies that comments must be received by February 6, 2017. This document also corrects the reference number used to identify public comments submitted electronically through the Federal eRulemaking portal.

DATES: Comments on the proposed rule published in the **Federal Register** on December 8, 2016 (81 FR 88639), must be received by February 6, 2017.

ADDRESSES: You may submit comments, information, or data on this document, identified by the code NOAA–NMFS–2014–0157 by any of the following methods:

- *Electronic Submissions:* Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0157,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments;
- *Mail:* NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701;
- *Hand delivery:* You may hand deliver written information to our office during normal business hours at the street address given above.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Laura Engleby or Calusa Horn, NMFS, Southeast Regional Office (727) 824–5312 or Marta Nammack, NMFS, Office of Protected Resources (301) 427–8469.

Correction

The proposed rule that published in the **Federal Register** on December 8, 2016 (81 FR 88639) contained the wrong closure date for the public comment period. The original language incorrectly stated that the public comment period would close on January 30, 2017. This date does not allow for a 60-day public comment period. Therefore, we are correcting the date and inserting the date of February 6, 2017, allowing for a 60-day public comment period. We are also correcting the Federal Docket Management System reference number associated with this proposed rule so that public comments submitted electronically through *www.regulations.gov* will be associated correctly with this proposed rule.

In the proposed rule (81 FR 88639) published on December 8, 2016, the **DATES** and **ADDRESSES** sections are corrected as set above in this document.

Dated: December 15, 2016.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2016–30659 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 150630567–6999–01]

RIN 0648–BF26

Fisheries of the Northeastern United States; Amendment 18 to the Northeast Multispecies Fishery Management Plan

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

ACTION: Proposed rule; request for comments.

SUMMARY: We are proposing regulations to implement Amendment 18 to the Northeast Multispecies Fishery Management Plan. Amendment 18 was developed by the New England Fishery Management Council to promote fleet diversity in the groundfish fishery and enhance sector management. This action proposes to limit the number of permits and annual groundfish allocation that an entity could hold. This action also removes several effort restrictions to increase operational flexibility for limited access handgear vessels.

DATES: Comments must be received on or before February 3, 2017.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2015–0143, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go *to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2015-0143,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to John K. Bullard, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: ''Comments on Northeast Multispecies Amendment 18.''

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the commenter may be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to the Greater Atlantic Regional Fisheries Office and by email to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–7285.

Copies of Amendment 18, including its environmental impact statement, preliminary Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EIS/RIR/IRFA), are available from the New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950. The EIS/RIR/IRFA is also accessible via the Internet at: *www.greateratlantic.fisheries.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: William Whitmore, Fishery Policy Analyst, 978–281–9182.

SUPPLEMENTARY INFORMATION:

Background

Since the approval of Amendment 16 to the Northeast Multispecies Fishery Management Plan (FMP) and the expanded use of catch shares in the groundfish fishery, many industry members and stakeholders have become increasingly concerned about excessive

fleet consolidation and lack of diversity with regards to the composition of the fishing fleet. Amendment 18 was developed to address these concerns, primarily by limiting both the number of permits and allocation an individual or entity could hold (referred to as an entity from here on).

Development of Amendment 18 began in 2011, with initial public scoping taking place between December 2011 and March 2012. Subsequently, the stock status for many groundfish stocks declined and the associated annual catch limits were significantly reduced. As a result, some groundfish fishermen were concerned that implementing an accumulation limit could be problematic if it reduced flexibility and prevented them from obtaining additional quota necessary to maintain viable fishing operations.

However, many industry members and stakeholders remained concerned that excessive consolidation is a risk to the fishery. Several groundfish stocks, particularly Georges Bank haddock, redfish, and pollock, continue to grow and remain consistently underharvested. As other stocks rebuild and quotas increase, there may be further consolidation and decreased diversity if vessels are able to earn above market rates of return and have an opportunity to acquire more permits.

Under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), we are required to publish proposed rules for comment after preliminarily determining whether they are consistent with applicable law. The Magnuson-Stevens Act permits us to approve, partially approve, or disapprove measures proposed by the Council based only on whether the measures are consistent with the fishery management plan, plan amendment, the Magnuson-Stevens Act and its National Standards, and other applicable law. Otherwise, we must defer to the Council's policy choices. We are seeking comment on the Council's proposed measures in Amendment 18 and whether they are consistent with the Northeast Multispecies FMP, the Magnuson-Stevens Act and its National Standards, and other applicable law.

The primary purpose of this action is to limit the level of allocation that an entity may control to prevent excessive consolidation and retain fleet diversity.

The Council identified four goals for Amendment 18:

1. Promote a diverse groundfish fishery, including different gear types, vessel sizes, ownership patterns, geographic locations, and levels of participation through sectors and permit banks;

2. Enhance sector management to effectively engage industry to achieve management goals and improve data quality;

3. Promote resilience and stability of fishing businesses by encouraging diversification, quota utilization, and capital investment; and

4. Prevent any individual(s), corporation(s), or other entity(ies) from acquiring or controlling excessive shares of the fishery access privileges.

Proposed Measures

The goals and objectives of Amendment 18 are addressed through two mechanisms. First, this action proposes to establish accumulation limits on the number of groundfish permits and the amount of Potential Sector Contribution (PSC) that an entity may hold. PSC is the proportion of total landings of a particular stock associated with the landing history of a limited access permit. PSC also represents the share of allocation that an individual permit contributes to a sector. Second, this action proposes to remove several restrictions on limited access handgear vessels (Handgear A permitted vessels) to promote that small-boat fishery.

1. Accumulation Limits

Background

The New England Fishery Management Council contracted Compass Lexecon, an economic consulting firm, to provide independent advice regarding the establishment of northeast multispecies permit accumulation limits. The Council tasked Compass Lexecon to determine whether any entity already holds an excessive share of permits, and if not, what an excessive share would be in the groundfish fishery. Compass Lexecon defined an excessive share as a share of quota that would allow a permit owner or sector to influence the prices of the fishery's output or the prices paid for leased quota to its advantage, which is called market power. Compass Lexecon's analyses did not find that market power is currently being exercised through the withholding of quota in any part of the groundfish fishery, or in the sales of fish or transfers of permits.

Compass Lexecon recommended setting an excessive-share cap on the PSC conferred to a permit holder at 15.5 percent of the available PSC for any groundfish stock. Analyses suggested that this cap would prevent the accumulation of excessive shares, and that a lower limit was likely not necessary. The final report was completed in December 2013, and was peer reviewed in June 2014 by three reviewers from the Center for Independent Experts and one independent reviewer. A variation of Compass Lexecon's recommendation is proposed in this action.

Accumulation Limit Guidelines

Amendment 18 includes several general measures detailing how permit accumulation limits would be applied.

- Accumulation limits apply to individuals, permit banks, and other entities, including groundfish sectors, at the individual permit and PSC level.
- Accumulation limits do not apply to the amount of annual groundfish allocated to a sector, technically referred to as a sector's annual catch entitlement, or ACE.
- Accumulation limits may be modified in a future framework due to a Federal permit buyback or buyout.
- If an entity held permits or PSC on the control date (April 7, 2011) that exceeded the accumulation limits, it would be exempt from the accumulation limit, but would be restricted to holding no more permits or PSC than it held as of the control date. The grandfathered holdings may be fished or leased by the entity but are not transferrable. Current analyses suggest that no entity exceeds the control date accumulation limits.
- There is no calculation of partial ownership when considering accumulation limits. Any entity that is a partial owner is assumed to have full-ownership when calculating permit and PSC accumulation limits.

Limiting the Number of Permits

This action proposes to limit an entity to holding no more than 5 percent of all limited access groundfish permits. An entity would be prohibited from acquiring a permit that would result in it exceeding the 5-percent permit cap. There are approximately 1,373 limited access permits currently in the fishery; a 5-percent cap would limit an entity to approximately 69 permits. As of May 1, 2014, the most permits held by any entity is 55. Therefore, if approved, this alternative is unlikely to immediately restrict any entity.

Using this permit cap alone could still allow for accumulation of PSC sufficient to exert market power in limited and unlikely circumstances. For example, if only a 5-percent permit cap was adopted, an entity could potentially hold 85 PSC of the Georges Bank winter flounder stock. To address this potential, the Council proposed an additional PSC limit proposed in this action.

Limiting the Potential Sector Contribution

This action also proposes to limit the aggregated average of all allocated groundfish stocks PSC that may be held by an entity to no more than 15.5. With 15 groundfish stocks currently allocated to the fishery, the total PSC across all stocks used by an individual or an entity must be ≤232.5 (an average of 15.5 per stock multiplied by 15 stocks). This would allow an entity to hold PSC for a single stock in excess of 15.5, so long as the total holdings used do not exceed 232.5. If additional groundfish stocks are allocation (or unallocated) to sectors in the future, then this number would change by 15.5 per stock.

This PSC limit was developed based on Compass Lexecon's recommendation to establish a stock-specific PSC limit of 15.5 (as explained above). However, to allow fishermen additional operational flexibility in light of current groundfish stock conditions, the Council elected to use an aggregate average as defined above. Compared to other PSC limit alternatives that the Council considered, this option is the least restrictive because there is no stock-specific limit. Further, an entity would be permitted to purchase a vessel permit during a fishing year that would result in exceeding the aggregate 232.5 PSC limit. In this case, the entity would have to render at least one permit unusable (or ''shelve'' the permit) so that the entity is not operating above the PSC limit the following fishing year. A shelved permit would be unusable for an entire fishing year; a shelved permit could not be enrolled in a sector, fished, or leased, but could be sold. An entity would be prohibited from purchasing any additional permit once it exceeds the PSC limit. This is intended to allow a permit holder to acquire a new permit and improve their operational flexibility, while still restricting them to the overall accumulation limit. A shelved permit that is rendered unusable can be sold.

The aggregate limit provides flexibility for accumulating shares in single stocks. By itself, an aggregate PSC limit could result in an entity accumulating sufficient PSC in a single stock to exert market power, though exerting market power over multiple stocks appears highly unlikely. Recent analyses indicate that no one entity currently holds more than 140.4 PSC. Consequently, if approved, the 232.5 PSC limit is unlikely to immediately constrain any entity. Analyses within sections 7.6 and 9.11 of the Amendment suggest that purchasing vessel permits with enough PSC to exceed the PSC limit of 232.5 would require substantial capital and logistically would likely be complex and time consuming. As a result, the increased flexibility for accumulating PSC in individual stocks is curbed by the combination of the PSC limit and the permit caps.

Effect of Combined Accumulation Limits

The combination of PSC limits and the permit cap make it highly unlikely that market power could be exerted. Analyses show that the maximum allocation that an entity could acquire would be around 20 PSC for the majority of stocks, though PSC for certain stocks such as Georges Bank winter flounder could be acquired at higher levels than others. These analyses suggest that the proposed combination of an aggregate PSC limit of 232.5 and a 5-percent permit cap should be sufficient to prevent market power from being exerted. These analyses are discussed in more detail in sections 7.7.4.5 and 9.11 of the Amendment 18 EIS (see **ADDRESSES**).

Transfer of Permits by an Individual Entity That Has Exceeded the PSC Limit

We have some concern that Amendment 18 does not include any permit transfer restrictions on an individual entity that has exceeded the permit accumulation limit. As proposed, an individual who has exceeded the permit accumulation limit could maintain an interest in the PSC by transferring a permit to a spouse, family member, or business partner at little to no cost. We see this as a potential loophole to the PSC limit restriction. Including a requirement that any permit transfer from an entity that has exceeded the permit accumulation limit be an ''arms-length'' transaction would address this potential loophole. In this case, an arms-length transaction would be a permit transfer in the ordinary course of business between independent and unrelated entities, which would result in the owner who exceeded the limit maintaining no interest in the transferred permit and its PSC. We welcome comment on this topic.

Future Changes to Accumulation Limits

Amendment 18 proposes to allow modifications to the accumulation limits through a future framework adjustment if a vessel/permit buyback or buyout were enacted in the groundfish fishery. However, any other changes to the accumulation limits would require an amendment to the FMP. Should certain factors change dramatically, such as a substantial reduction in the number of northeast multispecies limited access permits (due to permit holders relinquishing their permits), then NMFS would encourage the Council to revisit the accumulation limits proposed in this Amendment.

Ownership Interest

In order for an accumulation limit to be developed and applied it is necessary to first define an ownership interest. A unique definition of ownership interest as applied to the groundfish fishery is proposed for section 50 CFR 648.2 of the regulations. To better identify ownership interest and account for accumulation limits in the groundfish fishery, a permit holder would be required to identify all persons who hold an ownership interest with a particular permit when submitting a groundfish permit application or renewal form.

2. Handgear A Measures

To reduce effort controls and increase flexibility for small boat fishermen, this action proposes to remove or modify several management measures affecting limited access permitted vessels fishing with handgear (Handgear A vessels).

First, this action would remove the March 1–20 spawning-block closure for all Handgear A vessels. Fishing effort by Handgear A vessels is restricted by a very small annual catch limit, and vessels are subject to other spawning closures. This measure would make the regulations for Handgear A vessels more consistent with vessels fishing in sectors, which are already exempted from the 20-day spawning block and is not anticipated to have any substantial biological consequences.

Handgear A vessels would also no longer be required to carry a standard fish tote on board. This measure was initially implemented to aid in the sorting and weighing of fish by both fishermen and enforcement personnel. However, enforcement no longer uses totes for at-sea weight and volume estimates, so the requirement for vessels to carry a tote is no longer necessary.

Lastly, this action would allow a sector to request an exemption from the requirement for Handgear A vessels to use a Vessel Monitoring System (VMS). Handgear A fishermen enrolled in a sector are currently required to utilize a VMS. Handgear A fishermen have commented that installing and utilizing a VMS system makes enrolling in a sector cost prohibitive. Any sector interested in utilizing this exemption would be required to submit an exemption request to us for approval. If a sector exemption is approved, a Handgear A vessel fishing within a sector utilizing the exemption would

declare its trips through the interactive voice response (IVR) call-in system instead of through a VMS. This measure is intended to encourage Handgear A vessels to enroll in a sector by reducing operating expenses. Sectors receive regulatory exemptions and larger allocations that could provide additional flexibility and fishing opportunities to Handgear A vessels.

Measures That Could Be Addressed in a Future Framework

This action proposes to allow two measures analyzed in Amendment 18 to be implemented through a future framework action. The Council explored establishing a separate allocation for the Handgear A fishery. Additionally, there was some interest in considering separate management measures for an inshore/offshore Gulf of Maine (GOM) boundary, including separate allocations for inshore and offshore GOM cod. However, because current catch limits for key groundfish stocks, including GOM cod, are so low, further sub-dividing allocations for the Handgear A, as well as inshore and offshore GOM cod, were controversial and would be difficult to develop and implement at this time. As a result, the Council elected to potentially consider these measures in a future framework.

In addition, several regulatory clarifications are proposed at § 648.90 to better delineate the responsibilities of the groundfish plan development team as well as which Council management measures could be modified in a future framework.

Public comments on the NOA for the FMP/amendment are being solicited through February 6, 2017 (81 FR 87862; December 6, 2016). Public comments on the proposed rule must be received by the end of the comment period on the Amendment, as published in the NOA, to be considered in the approval/disapproval decision on the Amendment. All comments received by the end of the comment period on the Amendment, whether specifically directed to the Amendment, or the proposed rule, will be considered in the approval/disapproval decision. Comments received after that date will not be considered in the approval/disapproval decision on Amendment 18. To be considered, comments must be received by close of business on the last day of the comment period; that does not mean postmarked or otherwise transmitted by that date.

Pursuant to section 303(c) of the Magnuson-Stevens Act, the Council has deemed the proposed regulations to be necessary and appropriate for the purpose of implementing Amendment 18.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has preliminarily determined that this proposed rule is consistent with Amendment 18, the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Council prepared an environmental impact statement (EIS) for Amendment 18 that analyzes the impacts on the environment as a result of this action. A copy of the Amendment 18 EIS is available upon request from the Council and from our Web site (see **ADDRESSES**). A copy is also available from the Federal e-Rulemaking portal at *www.regulations.gov.* Type ''NOAA–NMFS–2015–0143'' in the Enter Keyword or ID field and click search.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact that this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section, in the preamble, and in the **SUMMARY** section of the preamble. A summary of the IRFA follows. A copy of this analysis is available from the Council (see **ADDRESSES**).

The purpose of the Regulatory Flexibility Act (RFA) analysis is to establish a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure such proposals are given serious consideration. The RFA does not contain any decision criteria. Instead, the purpose of the RFA is to inform the agency, as well as the public, of the expected economic impacts of various alternatives contained in the FMP or Amendment (including framework management measures and other regulatory actions) and to ensure the agency considers alternatives that minimize the expected impacts while meeting the goals and objectives of the FMP and applicable statutes.

With certain exceptions, the RFA requires agencies to conduct an Initial Regulatory IRFA for each proposed rule. The IRFA is designed to assess the impacts various regulatory alternatives would have on small entities, including small businesses, and to determine ways to minimize those impacts. An IRFA is primarily conducted to determine whether the proposed action would have a ''significant economic impact on a substantial number of small entities.'' In addition to analyses conducted for the RIR, the IRFA provides:

1. A description of the reasons why action by the agency is being considered;

2. A succinct statement of the objectives of, and legal basis for, the proposed rule;

3. A description and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

4. A description of the projected reporting, record-keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirements of the report or record; and,

5. Identification, to the extent practicable, of all relevant federal rules, which may duplicate, overlap, or conflict with the proposed rule.

Description of the Reasons Why Action by the Agency Is Being Considered

The purpose and need of Amendment 18 are set forth in Section 3.2 of the EIS (see page 30).

Statement of the Objectives of, and Legal Basis for, This Proposed Rule

The goals and objectives of Amendment 18 are set forth in Section 3.3 of the EIS (see page 31–32). These were also summarized in the Background section of the preamble.

Description and Estimate of the Number of Small Entities To Which This Proposed Rule Would Apply

Small entities include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' The Small Business Administration (SBA) has established size standards for all major industry sectors in the U.S. including commercial finfish harvesters (NAICS code 114111), commercial shellfish harvesters (NAICS code 114112), other commercial marine harvesters (NAICS code 114119), for-hire businesses (NAICS code 487210),

marinas (NAICS code 713930), seafood dealers/wholesalers (NAICS code 424460), and seafood processors (NAICS code 311710). A business primarily involved in finfish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $20.5 million for all its affiliated operations worldwide. For commercial shellfish harvesters, the other qualifiers apply and the receipts threshold is $5.5 million. For other commercial marine harvesters, for-hire businesses, and marinas, the other qualifiers apply and the receipts threshold is $7.5 million.

On December 29, 2015, the National Marine Fisheries Service (NMFS) issued a final rule establishing a small business size standard of $11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only (80 FR 81194, December 29, 2015). The $11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. Small Business Administration's (SBA) current standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. Id. at 81194.

Pursuant to the RFA, and prior to July 1, 2016, an IRFA was developed for this regulatory action using SBA's former size standards. NMFS has reviewed the analyses prepared for this regulatory action in light of the new size standard. Under the SBA's size standards, all of the commercial finfish and other marine fishing businesses were considered small, while 12 of the 237 shellfish businesses were determined not to be small (Tables 1 and 2). The new standard could result in a few more commercial shellfish businesses being considered small. Analyses in Tables 2 and 3 below reveal that no groundfish-dependent entities exceeded $5.5 million in gross sales, with the mean gross sale per entity being less than $2 million. As a result, it is unlikely that any finfish, or more specifically, groundfish-dependent vessels, would be considered a large business under the new NMFS size standard.

Amendment 18 regulates commercial fish harvesting entities engaged in the Northeast multispecies limited access fishery. A description of the specific entities that are likely to be impacted is included below for informational purposes, followed by a discussion of those regulated entities likely to be impacted by the proposed regulations. For the purposes of the RFA analysis, the ownership entities, not the individual vessels, are considered the regulated entities.

Ownership Entities in Regulated Commercial Harvesting Businesses

Individually-permitted vessels may hold permits for several fisheries, harvesting species of fish that are regulated by several different FMPs, even beyond those impacted by Amendment 18. Furthermore, multiple permitted vessels and/or permits may be owned by entities affiliated by stock ownership, common management, identity of interest, contractual relationships, or economic dependency. For this analysis, ownership entities are defined by those entities with common ownership personnel as listed on permit application documentation. Only permits with identical ownership personnel are categorized as an ownership entity. For example, if five permits have the same seven personnel listed as co-owners on their application paperwork, those seven personnel form one ownership entity, covering those five permits. If one or several of the seven owners also own additional vessels, with sub-sets of the original seven personnel or with new co-owners, those ownership arrangements are deemed to be separate ownership entities for the purpose of this analysis.

Regulated Commercial Harvesting Entities

Ownership entities are identified on June 1 of each year based on the list of all permit numbers for the most recent complete calendar year that have applied for any type of Northeast Federal fishing permit. The current ownership data set is based on calendar year 2014 permits and contains gross sales associated with those permits for calendar years 2012 through 2014. As of June 1, 2015, there were 661 commercial business entities potentially regulated by this action. Entities permitted to operate in the Northeast multispecies limited access fishery are described in Tables 1 and 2. As of June 1, 2015, there were 1,147 individual limited access permits. The 34 for-hire businesses included here are entities affiliated with limited access commercial groundfish permits, but derive greater than 50% of their gross sales from party/charter operations. All are small businesses (average gross revenues from 2012–14 are less than $7.5 million). The remaining 75 entities had no revenue and are classified as small.

These totals may mask some diversity among the entities. Many, if not most, of these ownership entities maintain diversified harvest portfolios, obtaining gross sales from many fisheries and are not dependent on any one. However, not all are equally diversified. Those that depend most heavily on sales from harvesting species impacted directly by Amendment 18 are most likely to be affected. By defining dependence as deriving greater than 50% of gross sales from sales of regulated species associated with a specific fishery, those ownership groups most likely to be impacted by the proposed regulations can be identified. Using this threshold, 61 entities are groundfish-dependent; all of which are small under both the SBA and NMFS size standards (Table 3).

TABLE 1—ENTITIES REGULATED BY THE PROPOSED ACTION

Type	Number	Number small
Primarily finfish	315	315
Primarily shellfish	237	225
Primarily for-hire	34	34
No Revenue	75	75
Total	661	649

TABLE 2—DESCRIPTION OF REGULATED ENTITIES BY GROSS SALES

Sales category	Number	Number small	Mean gross sales	Median gross sales	Mean permits per entity	Max permits per entity
<$50K	186	186	$10,597	$1,954	1.3	30
$50–100K	71	71	76,466	78,736	1.3	3
$100–500K	225	225	244,672	219,731	1.3	4
$500K–1mil	91	91	734,423	720,668	1.7	7
$1–5.5mil	74	73	1,899,461	1,498,138	2.4	11
$5.5mil+	14	3	11,900,790	7,383,522	12.4	28

TABLE 3—IMPACTED GROUNDFISH-DEPENDENT REGULATED COMMERCIAL GROUNDFISH ENTITIES BY GROSS SALES

Sales	Entities (#)	Large businesses (#)	Average fishing permits owned per entity (#)	Maximum fishing permits per entity (#)	Median gross sales per entity	Mean gross sales per entity	Median groundfish sales per entity	Mean groundfish sales per entity
<$50K	6	0	1.0	1	$10,116	$20,316	$8,831	$16,476
$50–100K	7	0	1.1	2	72,052	67,390	56,221	49,341
$100–500K	22	0	1.6	4	226,938	240,833	116,018	172,331
$500K–1mil	13	0	1.2	2	698,226	718,231	398,548	491,838
$1–5.5mil	13	0	2.2	4	1,553,597	1,854,052	1,292,445	1,403,896
Total ownership entities	61	0						

Description of Projected Reporting, Record Keeping, and Other Compliance Requirements of This Proposed Rule

This action contains a change to an information collection requirement, which has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0648–0202. This revision would require any entity that has exceeded the potential sector contribution (PSC) allocation limit to render one or more permits ''unusable'' so that the entity would be operating within the allocation limit. If an entity exceeds the PSC limit, the entity would be required to complete a ''Permit Shelving Form'' and render one or more permits unusable. If two entities had to complete a ''Permit Shelving Form'', the burden estimate would be 1 hr and cost $1.

Currently, no entity exceeds the PSC allocation limit; the most PSC any entity holds is approximately 140 PSC, and the proposed limit would be 232.5. As a result, it is unlikely that any entity would reach this threshold, and that the proposed action would not affect fishing operations.

Public comment is sought regarding whether this collection of information is necessary for the proper performance of the function of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarify of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS and to OMB (see **ADDRESSES**).

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB control number.

Federal Rules Which May Duplicate, Overlap, or Conflict With This Proposed Rule

No relevant Federal rules have been identified that would duplicate or overlap with Amendment 18.

Description of Significant Alternatives to the Proposed Action Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact on Small Entities

This IRFA summary is intended to analyze how small entities would be impacted by the proposed management measures. These measures are expected to have minimal, if any, impact on small entities regulated by this action. The vast majority (649 out of 661) of potentially regulated entities are classified as small businesses by SBA and NMFS business size standards.

In general, the small entities regulated by this action would be unaffected. The majority of limited access groundfish permit holders possess permits and PSC in far smaller quantities than the proposed accumulation limits. However, as proposed, individuals who comprise a part of, or the entirety of, these small entities could be restricted in the number of permits or the amount of PSC shares they wish to accumulate in the future, which could impact revenue. Based on the Compass Lexecon report, scalability would not be affected by the reduced accumulation potential, although a definitive statement cannot be made at this time. Further, the PSC limit alternative would allow substantial flexibility so that vessel permit holders could continue to accumulate permits in a manner that allows them to maximize fishing opportunities within their portfolio.

There were several other PSC limit alternatives considered in the Amendment that were not selected because the Council determined the alternatives would have been too restrictive. For example, limiting an ownership entity to an accumulation limit equivalent to the PSC held as of the control date could have forced divestiture in the fishery and would have prevented ownership entities from growing. Similarly, establishing a specific accumulation limit for a specific groundfish stock would have reduced opportunities for entities to expand and restricted operational flexibility. Additional information on these alternatives is available in section 4.1 of the Amendment.

Handgear A permit holders would be largely unaffected by the limited access handgear measures. Minimal fishing activity by these vessels occurs during the winter and early spring, and the removal of the March 1–20 closure would not change this behavior. The removal of the standard fish tote requirement would be inconsequential, as this rule is not currently enforced and it is a minor operational change. The sector exemption for VMS requirement would likely also not affect Handgear A permit holders. Joining a sector would remain a challenge for these permit holders, given the small PSC associated with Handgear A permits. However, if they were to join a sector, this provision would reduce the cost burden for those vessels.

Several management measures and alternatives were considered but not selected by the Council. Other alternatives may be considered in a future framework, as explained in the preamble above. Additional information on these alternatives and justifications for the Council's decision are explained in section 4 of the Amendment.

Impacts to Groundfish-Dependent Small Entities

The impacts of the proposed accumulation limits on groundfish-dependent small entities would be minimal. No entity would be immediately impacted by the proposed accumulation limits, and few would be potentially impacted in the long term. For those that are potentially impacted,

it is not possible to state whether scalability would be lessened. The proposed PSC and permit caps would limit the ability of any individual from monopolizing the fishery.

It is not clear how many Handgear A permit holders are groundfish-dependent, but the number is likely very small. There were 28 Handgear A permit holders that took at least one groundfish trip during fishing year 2013; any of these 28 would be minimally impacted by Amendment 18. There may be a few trips taken during the removed March 1–20 closure block. However, groundfish trips taken by Handgear A permit holders have generally been more profitable during the warmer months in recent years. The management measures proposed in this rule would provide greater operational flexibility to Handgear A vessels, therefore benefiting small businesses.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 13, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.2, add a definition for ''*Ownership interest*'' *in alphabetical order* to read as follows:

* * * * *

Ownership interest, in the NE multispecies fishery, includes, but is not limited to holding share(s) or stock in any corporation, any partnership interest, or membership in a limited liability company, or personal ownership, in whole or in part, of a vessel issued a limited access NE multispecies permit or confirmation of permit history (CPH), including any ownership interest in any entity or its subsidiaries or partners, no matter how far removed.

* * * * *

■ 3. In § 648.4, add paragraph (a)(1)(i)(N) and revise paragraph (c)(2)(i) to read as follows:

§ 648.4 Vessel permits.

(a) * * *

(1) * * *

(i) * * *

(N) *Accumulation Limits.* (*1*) *5-percent Permit/CPH Restriction.* Any person with an ownership interest in the NE multispecies fishery is not eligible to be issued a limited access NE multispecies permit or CPH for a vessel after April 7, 2011, if the issuance results in the person having an ownership interest in excess of 5 percent of all limited access NE multispecies permits and CPH that are issued as of the date the permit/CPH application is received by the NMFS.

(*2*) *PSC Limit.* Any person with an ownership interest in the NE multispecies fishery is not eligible to be issued a limited access NE multispecies permit or CPH for a vessel after April 7, 2011, that results in that person's average potential sector contribution (PSC) exceeding a share of 15.5 for all the allocated stocks in aggregate, except as provided in paragraph (a)(1)(i)(N)(*4*) of this section.

(*3*) *Grandfather Provision.* Any person initially issued a limited access NE multispecies permit or CPH prior to April 7, 2011, is eligible to renew such permits(s) and/or CPH, regardless of whether the renewal of the permits or CPH results in the person exceeding the 5-percent ownership restriction or an average PSC share of 15.5 for all the allocated stocks in aggregate. Any additional permitted vessels that a person acquires after April 7, 2011, are subject to the accumulation limits specified within this section.

(*4*) Any person can be issued one limited access NE multispecies permit or CPH that results in that person's total PSC exceeding the PSC limit as described in this section. That person must identify to NMFS on or before March 31 of each year, vessel permits or CPH that will be rendered unusable the upcoming fishing year so that the person's total PSC for the upcoming fishing year is an amount equal to or below the PSC limit. Beginning on May 1, the permits or CPH rendered unusable may not be fished, leased, or enrolled in a sector by that person for the remainder of the fishing year. A permit rendered unusable may be transferred.

* * * * *

(c) * * *

(2) *Vessel permit information requirements.* (i) An application for a permit issued under this section, in addition to the information specified in paragraph (c)(1) of this section, also must contain at least the following information, and any other information required by the Regional Administrator: Vessel name, owner name or name of the owner's authorized representative, mailing address, and telephone number; USCG documentation number and a copy of the vessel's current USCG documentation or, for a vessel not required to be documented under title 46 U.S.C., the vessel's state registration number and a copy of the current state registration; a copy of the vessel's current party/charter boat license (if applicable); home port and principal port of landing, length overall, GRT, NT, engine horsepower, year the vessel was built, type of construction, type of propulsion, approximate fish hold capacity, type of fishing gear used by the vessel, number of crew, number of party or charter passengers licensed to be carried (if applicable), permit category; if the owner is a corporation, a copy of the current Certificate of Incorporation or other corporate papers showing the date of incorporation and the names of the current officers of the corporation, and the names and addresses of all persons holding any ownership interest in a NE multispecies permit or CPH or shareholders owning 25 percent or more of the corporation's shares for other fishery permits; if the owner is a partnership, a copy of the current Partnership Agreement and the names and addresses of all partners; permit number of any current or, if expired, previous Federal fishery permit issued to the vessel.

* * * * *

■ 4. In § 648.14,

■ a. Add paragraphs (k)(2)(v) and (vi);

■ b. Revise paragraph (k)(9)(i); and

■ c. Add paragraph (k)(9)(ii)(N) to read as follows:

§ 648.14 Prohibitions.

* * * * *

(k) * * *

(2) * * *

(v) Fish for, possess, land fish, enroll in a sector, or lease a permit or confirmation of permit history (CPH) as a lessor or lessee, with a permit that has been rendered unusable as specified in § 648.4(a)(1)(i)(N).

(vi) Acquire a limited access NE multispecies permit that would result in a permit holder exceeding any of the ownership accumulation limits specified in § 648.4(a)(1)(i)(N), unless authorized under § 648.4(a)(1)(i)(N).

* * * * *

(9) * * *

(i) If operating under the provisions of a limited access NE multispecies Handgear A permit south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), fail to declare the vessel operator's intent to fish in this area via VMS or fail to obtain or retain on board a letter of authorization from the

Regional Administrator, as required by § 648.82(b)(6)(iii).

* * * * *

(ii) * * *

(N) Act as a lessor or lessee of NE multispecies DAS to or from a limited access permit that has been rendered unusable as specified in § 648.4(a)(1)(i)(N).

* * * * *

■ 5. In § 648.82, revise paragraphs (b)(6) and (g) to read as follows:

§ 648.82 Effort-control program for NE multispecies limited access vessels.

* * * * *

(b) * * *

(6) *Handgear A category.* A vessel qualified and electing to fish under the Handgear A category, as described in § 648.4(a)(1)(i)(A), may retain, per trip, up to 300 lb (135 kg) of cod, one Atlantic halibut, and the daily possession limit for other regulated species and ocean pout, as specified under § 648.86. If either the GOM or GB cod trip limit applicable to a vessel fishing under a NE multispecies DAS permit, as specified in § 648.86(b)(1) and (2), respectively, is reduced below 300 lb (135 kg) per DAS by NMFS, the cod trip limit specified in this paragraph (b)(6) shall be adjusted to be the same as the applicable cod trip limit specified for NE multispecies DAS permits. For example, if the GOM cod trip limit for NE multispecies DAS vessels was reduced to 250 lb (113.4 kg) per DAS, then the cod trip limit for a vessel issued a Handgear A category permit that is fishing in the GOM Regulated Mesh Area would also be reduced to 250 lb (113.4 kg). Qualified vessels electing to fish under the Handgear A category are subject to the following restrictions:

(i) The vessel must not use or possess on board gear other than handgear while in possession of, fishing for, or landing NE multispecies;

(ii) Tub-trawls must be hand-hauled only, with a maximum of 250 hooks; and

(iii) *Declaration.* For any such vessel that is not required to use VMS pursuant to § 648.10(b)(4), to fish for GB cod south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), a vessel owner or operator must obtain, and retain on board, a letter of authorization from the Regional Administrator stating an intent to fish south of the GOM Regulated Mesh Area and may not fish in any other area for a minimum of 7 consecutive days from the effective date of the letter of authorization. For any such vessel that is required, or elects, to use VMS pursuant to § 648.10(b)(4), to fish for GB cod south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), a vessel owner or operator must declare an intent to fish south of the GOM Regulated Mesh Area on each trip through the VMS prior to leaving port, in accordance with instructions provided by the Regional Administrator. Such vessels may transit the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), provided that their gear is stowed and not available for immediate use as defined in § 648.2.

* * * * *

(g) *Spawning season restrictions.* A vessel issued a valid Small Vessel category permit specified in paragraph (b)(5) of this section, or a vessel issued an open access Handgear B permit, as specified in § 648.88(a), may not fish for, possess, or land regulated species or ocean pout from March 1 through March 20 of each year. A common pool vessel must declare out and be out of the NE multispecies DAS program, and a sector must declare that the vessel will not fish with gear capable of catching NE multispecies (*i.e.,* gear that is not defined as exempted gear under this part), for a 20-day period between March 1 and May 31 of each calendar year, using the notification requirements specified in § 648.10. A vessel fishing under a Day gillnet category designation is prohibited from fishing with gillnet gear capable of catching NE multispecies during its declared 20-day spawning block, unless the vessel is fishing in an exempted fishery, as described in § 648.80. If a vessel owner has not declared and been out of the fishery for a 20-day period between March 1 and May 31 of each calendar year on or before May 12 of each year, the vessel is prohibited from fishing for, possessing or landing any regulated species, ocean pout, or non-exempt species during the period from May 12 through May 31.

* * * * *

■ 6. In § 648.87, revise paragraph (c)(2)(i) introductory text to read as follows:

§ 648.87 Sector allocation.

* * * * *

(c) * * *

(2) * * *

(i) *Regulations that may not be exempted for sector participants.* The Regional Administrator may not exempt participants in a sector from the following Federal fishing regulations: Specific times and areas within the NE multispecies year-round closure areas; permitting restrictions (*e.g.,* vessel upgrades, etc.); gear restrictions designed to minimize habitat impacts (*e.g.,* roller gear restrictions, etc.); reporting requirements; and AMs specified in § 648.90(a)(5)(i)(D). For the purposes of this paragraph (c)(2)(i), the DAS reporting requirements specified in § 648.82, the SAP-specific reporting requirements specified in § 648.85, VMS requirements for Handgear A category permitted vessels as specified in § 648.10, and the reporting requirements associated with a dockside monitoring program are not considered reporting requirements, and the Regional Administrator may exempt sector participants from these requirements as part of the approval of yearly operations plans. For the purpose of this paragraph (c)(2)(i), the Regional Administrator may not grant sector participants exemptions from the NE multispecies year-round closures areas defined as Essential Fish Habitat Closure Areas as defined in § 648.81(h); the Fippennies Ledge Area as defined in paragraph (c)(2)(i)(A) of this section; Closed Area I and Closed Area II, as defined in § 648.81(a) and (b), respectively, during the period February 16 through April 30; and the Western GOM Closure Area, as defined at § 648.81(e), where it overlaps with GOM Cod Protection Closures I through III, as defined in § 648.81(f)(4). This list may be modified through a framework adjustment, as specified in § 648.90.

* * * * *

■ 7. In § 648.90, revise paragraphs (a)(2)(i) through (iii) to read as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

* * * * *

(a) * * *

(2) *Biennial review.* (i) At a minimum, the NE multispecies PDT shall meet on or before September 30 every other year to perform a review of the fishery, using the most current scientific information available provided primarily from the NEFSC. Data provided by states, ASMFC, the USCG, and other sources may also be considered by the PDT. The PDT shall review available data pertaining to: Catch and landings, discards, DAS allocations, DAS use, sector operations, and other measures of fishing effort; survey results; stock status; current estimates of fishing mortality and overfishing levels; social and economic impacts; enforcement issues; and any other relevant information. The PDT may also review the performance of different user groups or fleet sectors.

(ii) Based on this review, the PDT shall recommend ACLs for the upcoming fishing year(s), as described in paragraph (a)(4) of this section, and develop options for consideration by the

Council, if necessary, on any changes, adjustments, or additions to DAS allocations, closed areas, or other measures necessary to rebuild overfished stocks and achieve the FMP goals and objectives, which may include a preferred option. The range of options developed by the PDT may include any of the management measures in the FMP, including, but not limited to: ACLs, which must be based on the projected fishing mortality levels required to meet the goals and objectives outlined in the FMP for the 12 regulated species and ocean pout if able to be determined; identifying and distributing ACLs and other sub-components of the ACLs among various segments of the fishery; AMs; DAS changes; possession limits; gear restrictions; closed areas; permitting restrictions; minimum fish sizes; recreational fishing measures; describing and identifying EFH; fishing gear management measures to protect EFH; designating habitat areas of particular concern within EFH; and changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs. The PDT must demonstrate through analyses and documentation that the options it develops are expected to meet the FMP goals and objectives.

(iii) In addition, the PDT may develop ranges of options for any of the management measures in the FMP and the following conditions that may be adjusted through a framework adjustment to achieve FMP goals and objectives including, but not limited to: Revisions to DAS measures, including DAS allocations (such as the distribution of DAS among the four categories of DAS), future uses for Category C DAS, and DAS baselines, adjustments for steaming time, etc.; accumulation limits due to a permit buyout or buyback; modifications to capacity measures, such as changes to the DAS transfer or DAS leasing measures; calculation of area-specific ACLs (including sub-ACLs for specific stocks and areas (*e.g.,* Gulf of Maine cod)), area management boundaries, and adoption of area-specific management measures including the delineation of inshore/offshore fishing practices, gear restrictions, declaration time periods; sector allocation requirements and specifications, including the establishment of a new sector, the disapproval of an existing sector, the allowable percent of ACL available to a sector through a sector allocation, an optional sub-ACL specific to Handgear A permitted vessels, and the calculation of PSCs; sector administration provisions, including at-sea and dockside monitoring measures; sector reporting requirements; state-operated permit bank administrative provisions; measures to implement the U.S./Canada Resource Sharing Understanding, including any specified TACs (hard or target); changes to administrative measures; additional uses for Regular B DAS; reporting requirements; declaration requirements pertaining to when and what time period a vessel must declare into or out of a fishery management area; the GOM Inshore Conservation and Management Stewardship Plan; adjustments to the Handgear A or B permits; gear requirements to improve selectivity, reduce bycatch, and/or reduce impacts of the fishery on EFH; SAP modifications; revisions to the ABC control rule and status determination criteria, including, but not limited to, changes in the target fishing mortality rates, minimum biomass thresholds, numerical estimates of parameter values, and the use of a proxy for biomass may be made either through a biennial adjustment or framework adjustment; changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs; and any other measures currently included in the FMP.

* * * * *

[FR Doc. 2016–30356 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 81, No. 244
Tuesday, December 20, 2016

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 15, 2016.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 19, 2017 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Foreign Agricultural Service

Title: USDA Local and Regional Food Aid Procurement Program.

OMB Control Number: 0551–0046.

Summary of Collection: The U.S. Department of Agriculture's Foreign Agricultural Service (FAS) awards funds to recipients under the USDA Local and Regional Food Aid Procurement Program (USDA LRP Program). The Food, Conservation, and Energy Act of 2008 (the ''2008 Farm Bill''), as amended by the Agricultural Act of 2014 (the ''2014 Farm Bill''), provided that the Secretary of Agriculture will provide grants to, or enter into cooperative agreements with, eligible organizations to implement field-based projects that consist of local or regional procurements of eligible commodities in developing countries to provide development assistance and respond to food crisis and disasters, in the case of emergencies, in consultation with United States Agency for International Development's (USAID) Offices of Food for Peace. The USDA LRP Program aims to support development activities to strengthen the capacity of food-insecure developing countries and address the cause of chronic food insecurity.

Need and Use of the Information: FAS will collect information from the Participant to determine its ability to carry out a food aid program, to establish the terms under which procured commodities will be provided, to monitor the progress of procurement of commodities (including how transportation is procured), to monitor the progress of expenditure of funds, and to evaluate both the program's success and the Participant's effectiveness in meeting intended results.

Description of Respondents: Not-for-profit institutions; Business or other for-profit; Federal Government; State, Local and Tribal Government.

Number of Respondents: 22.

Frequency of Responses: Recordkeeping; Reporting: Semi-annually; Annually.

Total Burden Hours: 14,365.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2016–30567 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2016–0045]

Codex Alimentarius Commission: Meeting of the Codex Committee on Fats and Oils

AGENCY: Office of the Deputy Under Secretary for Food Safety, USDA.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The Office of the Deputy Under Secretary for Food Safety, U.S. Department of Agriculture (USDA), and the Food and Drug Administration (FDA), Center for Food Safety and Applied Nutrition (CFSAN) are sponsoring a public meeting on January 24, 2017. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States (U.S.) positions that will be discussed at the 25th Session of the Codex Committee on Fats and Oils (CCFO) of the Codex Alimentarius Commission (Codex), taking place in Kuala Lumpur, Malaysia, February 27–March 3, 2017. The Deputy Under Secretary for Food Safety and the FDA recognize the importance of providing interested parties the opportunity to obtain background information on the 25th Session of the CCFO and to address items on the agenda.

DATES: The public meeting is scheduled for Tuesday, January 24, 2017 from 2:00 p.m.–4:00 p.m.

ADDRESSES: The public meeting will take place at the Harvey Wiley Building, United States Food and Drug Administration, CFSAN, 5001 Campus Drive, Room Number 1A–001, College Park, MD 20740.

Documents related to the 25th Session of the CCFO will be accessible via the Internet at the following address: *http://www.codexalimentarius.org/meetings-reports/en/.*

Paul South, U.S. Delegate to the 25th Session of the CCFO, invites U.S.

interested parties to submit their comments electronically to the following email address: *Paul.South@fda.hhs.gov.*

Call-in-Number: If you wish to participate in the public meeting for the 25th Session of the CCFO by conference call, please use the call-in-number and participant code listed below.

Call-in-Number: 1–888–844–9904.

The participant code will be posted on the following Web page below: *http://www.fsis.usda.gov/wps/portal/fsis/topics/international-affairs/us-codex-alimentarius/public-meetings.*

FOR FURTHER INFORMATION ABOUT THE 25TH SESSION OF THE CCFO CONTACT: Paul South, Review Chemist, Office of Food Safety, Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration, 5100 Paint Branch Parkway, College Park, MD 20740, Telephone: (240) 402–1640, Fax: (301) 436–2632, Email: *Paul.South@fda.hhs.gov.*

FOR FURTHER INFORMATION ABOUT THE PUBLIC MEETING CONTACT: Marie Maratos, U.S. Codex Office, 1400 Independence Avenue SW., Room 4861, Washington, DC 20250, Telephone: (202) 205–7760, Fax: (202) 720–3157, Email: *Marie.Maratos@fsis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Codex was established in 1963 by two United Nations organizations, the Food and Agriculture Organization and the World Health Organization. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, the Codex seeks to protect the health of consumers and ensure that fair practices are used in the food trade.

The CCFO is responsible for elaborating worldwide standards for fats and oils of animal, vegetable and marine origin including margarine and olive oil. The Committee is hosted by Malaysia.

Issues To Be Discussed at the Public Meeting

The following items on the Agenda for the 25th Session of the CCFO will be discussed during the public meeting:

- Matters referred by the Codex Alimentarius Commission and other Subsidiary Bodies;
- Activities of International Organizations relevant to the Work of the CCFO;
- Proposed draft Standard for Fish Oils and Proposed draft Revision to the Standard for Olive Oils and Olive Pomace Oils (CODEX STAN 33–1981): Revision of the Limit for Campesterol;
- Proposed draft revision to the Standard for Named Vegetable Oils (CODEX STAN 210–1999): Addition of Palm Oil with High Oleic Acid (OxG);
- Proposed draft revision to the Standard for Named Vegetable Oils (CODEX STAN 210–1999): Revision of Fatty Acid Composition and Other Quality Factors of Peanut Oil;
- Proposals for the transfer of provisions, other than those in Table 3 and Table 4, from the Appendix into the main body of the Standard for Named Vegetable Oils (CODEX STAN 210–1999);
- Review of the List of Acceptable Previous Cargoes (Appendix II to RCP 36–1987);
- Discussion Paper on the Revision of Limits of Oleic and Linoleic Acids in Sunflower seed Oils in the Standard for Named Vegetable Oils (CODEX STAN 210–1999);
- Discussion Paper on the Inclusion of Provisions for Walnut Oil, Almond Oil, Hazelnut Oil, Pistachio Oil, Flaxseed Oil, and Avocado Oil in the Standard for Named Vegetable Oils (CODEX STAN 210–1999);
- Discussion Paper on the Replacement of Acid Value with Free Fatty Acids for Virgin Palm Oils in the Standard for Named Vegetable Oils (CODEX STAN 210–1999);
- Discussion Paper on the Inclusion of Quality Parameters for Crude Rice Bran Oil in the Standard for Named Vegetable Oils (CODEX STAN 210–1999);
- Discussion Paper on the Inclusion of Unrefined Edible Tallow in the Standard for Named Animal Fats (CODEX STAN 211–1999); and
- Other business and future work.

Each issue listed will be fully described in documents distributed, or to be distributed, by the Secretariat before to the Meeting. Members of the public may access or request copies of these documents (see **ADDRESSES**).

Public Meeting

At the January 24, 2017 public meeting, draft U.S. positions on the agenda items will be described and discussed. Attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to the U.S. Delegate for the 25th Session of CCFO, Paul South (see **ADDRESSES**). Written comments should state that they relate to activities of the 25th Session of the CCFO.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS Web page located at: *http://www.fsis.usda.gov/federal-register*.

FSIS also will make copies of this publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The Update is available on the FSIS Web page. Through the Web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe*. Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250–9410, *Fax:* (202) 690–7442, *Email: program.intake@usda.gov.*

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, on December 13, 2016.

Paulo Almeida,

Acting U.S. Manager for Codex Alimentarius.

[FR Doc. 2016–30600 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2016–0036]

Notice of Request for a New Information Collection: In-Home Food Safety Behaviors and Consumer Education: Annual Observational Study

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and Office of Management and Budget (OMB) regulations, the Food Safety and Inspection Service (FSIS) is announcing its intention to collect information in the form of observational studies to inform the development of food safety communication products and to evaluate public health education and communication activities.

DATES: Submit comments on or before February 21, 2017.

ADDRESSES: FSIS invites interested persons to submit comments on this information collection. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including CD–ROMs, etc.:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Docket Clerk, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8–163A, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to Patriots Plaza 3, 355 E Street SW., Room 8–163A, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2016–0036. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E Street SW., Room 8–164, Washington, DC 20250–3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW., Room 6065, South Building, Washington, DC 20250–3700; (202) 720–5627.

SUPPLEMENTARY INFORMATION: *Title:* In-Home Food Safety Behaviors and Consumer Education: Annual Observational Study.

Type of Request: New information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary of Agriculture (7 CFR 2.18, 2.53) as specified in the Federal Meat Inspection Act and the Poultry Products Inspection Act (21 U.S.C. 453 *et seq.,* 601 *et seq.*). FSIS protects the public by verifying that meat and poultry products are wholesome, not adulterated, and properly marked, labeled, and packaged.

The U.S. Department of Agriculture's Food Safety and Inspection Service's Office of Public Affairs and Consumer Education (USDA, FSIS, OPACE) ensures that all segments of the farm-to-table chain receive valuable food safety information. The consumer education programs developed by OPACE's Food Safety Education Staff inform the public on how to safely handle, prepare, and store meat, poultry, and processed egg products to minimize incidence of foodborne illness.

OPACE strives to continuously increase consumer awareness of recommended food safety practices with the intent to improve food-handling behaviors at home. OPACE shares its messages through The *Food Safe Families* campaign (a cooperative effort of USDA, Food and Drug Administration, and Centers for Disease Control and Prevention); other advertising; social media; AskKaren (an online database of frequently asked food safety questions); the FSIS Web site; the Meat and Poultry Hotline; publications; and events. These messages are focused on the four core food safety behaviors: Clean, separate, cook, and chill.

To test new consumer messaging and tailor existing messaging, FSIS can help ensure that it is effectively communicating with the public and working to improve consumer food safety practices. This behavioral research will provide insight into the effect FSIS consumer outreach campaigns have on consumers' food safety behaviors. The results of this research will be used to enhance messaging and accompanying materials to improve their food safety behavior. Additionally, this research will provide useful information for tracking progress toward the goals outlined in the FSIS Fiscal Years 2017–2021 Strategic Plan.

To inform the development of food safety communication products and to evaluate public health education and communication activities, FSIS is requesting approval for a new information collection to conduct observational studies using an experimental design. Previous research suggests that self-reported data (*e.g.,* surveys) on consumers' food safety practices are unreliable, thus observational studies are a preferred approach for collecting information on consumers' actual food safety practices. These observational studies will help FSIS assess adherence to the four recommended food safety behaviors of clean, separate, cook, and chill, and to determine whether food safety messaging focused on those behaviors affects consumer food safety handling behaviors and whether consumers introduce cross-contamination during food preparation. For this 3-year study, FSIS plans to conduct an observational study each year and to focus on a different behavior, food and food preparation task, and food safety communication product each year. The initial study will examine participants' use of a food thermometer to determine if meat and poultry products are cooked to the proper temperatures. FSIS may decide to continue to conduct these studies annually, and if so, will request a renewal to extend the expiration date for the information collection request.

FSIS has contracted with RTI International to conduct the observational studies. The observational studies will be conducted in North Carolina State University's test kitchen. Participants will be recruited using convenience sampling, and recruited participants will reflect the demographics of the U.S. population with regard to race, ethnicity, age, education, income, and household size. Using a fully randomized experimental design, participants will be assigned to a treatment or control group. Treatment participants will receive food safety messaging prior to the study, while control participants will receive messaging unrelated to food safety. Participants will be given ingredients and asked to prepare a meal consisting of ready to eat products and meat or

poultry products. Prior to meal preparation, the meat/poultry product will be inoculated with a harmless tracer bacterium or virus to assess the extent of cross-contamination. Researchers will video-record meal preparation. Trained researchers will subsequently view the videos and use a coding rubric to assess adherence to recommended practices and notational analysis to assess recorded actions and their frequency.

Following food preparation, trained surface sample collectors will take surface swab samples from multiple sites within the test kitchen. The swabs will be plated at a laboratory to determine presence of the tracer bacterium or virus and concentration of the tracer if any is present. The presence of this tracer will indicate that cross-contamination occurred during food preparation. The level of cross-contamination will be compared across the sampling sites to determine the highest risk areas. Kitchen surfaces, appliances, and other potentially contaminated sites will be cleaned and sanitized after each participant in order to ensure that any bacterial samples collected were from the participant's behaviors.

Participants will be asked to complete an interview after the observation to collect additional information on food handling practices and what they would do in particular situations when practices could not be observed. Certain relevant food handling practices are unable to be observed during the course of the in-person study; therefore, participants will be asked to provide information on these practices.

Statistical analysis will be conducted comparing the differences in handling behavior scores between the treatment and control groups for the four food handling behaviors. A comparative analysis will also be conducted on the samples collected from the designated kitchen sites and food samples to determine whether levels of cross-contamination differed between the two groups, as well as to identify the kitchen sites with the highest levels of contamination. This information will help to determine whether the food safety communication products tested in the experimental study affect consumer food handling behavior and thus help OPACE refine existing materials or inform the development of new food safety communication products. Improving consumer food safety practices in the home may help to minimize incidence of foodborne illness.

Estimate of Burden: Each year of the 3-year study, it is expected that 833 individuals will complete the web-based screener and it is assumed that 625 will be eligible and subsequently contacted by phone to schedule an appointment for the observation study. Of these, it is assumed that 500 will agree to take part in the study and schedule an appointment, and of these, it is assumed that 400 will show up and complete the observation study and interview. Each web-screening is expected to take 8 minutes (0.133 hour) and each phone call to schedule an appointment is expected to take 7 minutes (0.116 hour). Taking part in the observation study appointment will take a total of 120 minutes (2 hours): 15 minutes (0.25 hours) to obtain informed consent and provide exposure to the messaging, 90 minutes (1.5 hours) for the meal preparation/observation, and 15 minutes (0.25 hours) for the post-observation interview. For each iteration of the study, the estimated annual reporting burden is 983.289 hours, which is the sum of the burden estimates for each component of the study (including the burden for consumers who initially completed the web-based survey but do not agree to participate or do not show up for the observation study). For a 3-year study the estimated total number of individuals to be screened is 2,499 (833 each year) and the estimated total number of individuals to complete the observation study is 1,200 (400 each year). The estimated total burden for the 3-year study is 2,949.867 hours (983.289 *3).

ESTIMATED ANNUAL REPORTING BURDEN FOR EACH ITERATION OF THE OBSERVATIONAL STUDY

Study component	Estimated number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
Web-based screening questionnaire	833	1	833	0.133 (8 min.)	110.789
Appointment phone script, confirmation email, reminder phone script.	625	1	625	0.116 (7 min.)	72.5
Consent Form and Messaging	400	1	400	0.25 (15 min.)	100.0
Food Preparation Task/Observation	400	1	400	1.5 (90 min.)	600.0
Post-observation interview	400	1	400	0.25 (15 min.)	100.0
Total					983.289

Respondents: Consumers.

Estimated Number of Respondents: 2,499.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Total Burden on Respondents: 2,949.867 hours.

Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence SW., Room 6077, South Building, Washington, DC 20250, (202) 690–6510.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20253.

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

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS Web page located at: *http://www.fsis.usda.gov/federal-register.*

FSIS also will make copies of this publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The Update is available on the FSIS Web page. Through the Web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250–9410, *Fax:* (202) 690–7442, *Email: program.intake@usda.gov.*

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, on December 15, 2016.

Alfred V. Almanza,

Acting Administrator.

[FR Doc. 2016–30599 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Confidentiality Pledge Revision Notice

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice.

SUMMARY: Under 44 U.S.C. 3506(e), and 44 U.S.C. 3501, the National Agricultural Statistics Service (NASS) is renewing a revision to the confidentiality pledge it provides to its respondents under CIPSEA and Title 7, Chapter 55, Section 2276. This renewal will be valid for three years. The revision was originally approved by the Office of Management and Budget (OMB) on December 1, 2016 under an emergency request. The original request was warranted by the passage and implementation of provisions of the Federal Cybersecurity Enhancement Act of 2015 (H.R. 2029, Division N, Title II, Subtitle B, Sec. 223), which permits and requires the Secretary of Homeland Security to provide federal civilian agencies' information technology systems with cybersecurity protection for their Internet traffic. More details on this announcement are presented in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Comments on this notice must be received by February 21, 2017 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0260, by any of the following methods:

- *Email: omboffficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *E-fax:* (855) 838–6382.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336, South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: R. Renee Picanso, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333, or email *HQOA@nass.usda.gov.* Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS—OMB Clearance Officer, at (202) 690–2388 or at *omboffficer@nass.usda.gov.*

SUPPLEMENTARY INFORMATION: Under CIPSEA; Title 7, Chapter 55, Section 2276; and similar statistical confidentiality protection statutes, many federal statistical agencies, including NASS, make statutory pledges that the information respondents provide will be seen only by statistical agency personnel or their sworn agents, and will be used only for statistical purposes. CIPSEA and Title 7, Chapter 55, Section 2276 protect such statistical information from administrative, law enforcement, taxation, regulatory, or any other non-statistical use and immunize the information submitted to statistical agencies from legal process. Moreover, many of these statutes carry criminal penalties of a Class E felony (fines up to $250,000, or up to five years in prison, or both) for conviction of a knowing and willful unauthorized disclosure of covered information.

As part of the Consolidated Appropriations Act for Fiscal Year 2016 signed on December 17, 2015, the Congress included the Federal Cybersecurity Enhancement Act of 2015 (H.R. 2029, Division N, Title II, Subtitle B, Sec. 223). This Act, among other provisions, permits and requires the Secretary of Homeland Security to provide federal civilian agencies' information technology systems with cybersecurity protection for their Internet traffic. The technology currently used to provide this protection against cyber malware is known as ''Einstein 3A''. It electronically searches Internet traffic in and out of federal civilian agencies in real time for malware signatures.

When such a signature is found, the Internet packets that contain the malware signature are shunted aside for further inspection by Department of Homeland Security (DHS) personnel. Because it is possible that such packets entering or leaving a statistical agency's information technology system may contain confidential statistical data, statistical agencies can no longer promise their respondents that their responses will be seen only by statistical agency personnel or their sworn agents. However, they can promise, in accordance with provisions of the

Federal Cybersecurity Enhancement Act of 2015, that such monitoring can be used only to protect information and information systems from cybersecurity risks, thereby, in effect, providing stronger protection to the integrity of the respondents' submissions.

Consequently, with the passage of the Federal Cybersecurity Enhancement Act of 2015, the federal statistical community has an opportunity to welcome the further protection of its confidential data offered by DHS' Einstein 3A cybersecurity protection program. The DHS cybersecurity program's objective is to protect federal civilian information systems from malicious malware attacks. The federal statistical system's objective is to ensure that the DHS Secretary performs those essential duties in a manner that honors the Government's statutory promises to the public to protect their confidential data. Given that the Department of Homeland Security is not a federal statistical agency, both DHS and the federal statistical agencies have been engaged in finding a way to balance both objectives and achieve these mutually reinforcing objectives.

Accordingly, DHS and federal statistical agencies (including NASS), in cooperation with their parent departments, have developed a Memorandum of Agreement for the installation of Einstein 3A cybersecurity protection technology to monitor their Internet traffic and have incorporated an associated Addendum on Highly Sensitive Agency Information that provides additional protection and enhanced security handling of confidential statistical data. However, CIPSEA; Title 7, Chapter 55, Section 2276; and similar statistical confidentiality pledges promise that respondents' data will be seen only by statistical agency personnel or their sworn agents. Since it is possible that DHS personnel could see some portion of those confidential data in the course of examining the suspicious Internet packets identified by the Einstein 3A technology, statistical agencies need to revise their confidentiality pledges to reflect this process change.

Therefore, NASS is providing this notice to alert the public to this confidentiality pledge revision in an efficient and coordinated fashion. Below is the revised confidentiality pledge as it will appear on NASS survey questionnaires, as well as the revision to NASS's confidentiality Web page. A list of the NASS OMB numbers and information collection titles that will be affected by this revision is also included below.

The revised confidentiality pledge to appear on NASS questionnaires is below:

The information you provide will be used for statistical purposes only. Your responses will be kept confidential and any person who willfully discloses ANY identifiable information about you or your operation is subject to a jail term, a fine, or both.

This survey is conducted in accordance with the Confidential Information Protection provisions of Title V, Subtitle A, Public Law 107–347 and other applicable Federal laws. For more information on how we protect your information please visit: *https://www.nass.usda.gov/confidentiality.*

For voluntary surveys the statement, ''Response to this survey is voluntary.'' will follow this pledge. For mandatory surveys the statement, ''Response to this survey is mandatory.'' or ''Response to this survey is required by law.'' will follow.

The NASS confidentiality pledge Web page: *https://www.nass.usda.gov/confidentiality* will be revised to include a fifth item explaining that DHS will monitor the transmission of data for cybersecurity threats. Item 5 is below:

5. Data Are Protected From Cybersecurity Threats

Per the Cybersecurity Enhancement Act of 2015, your data are further protected by the Department of Homeland Security (DHS) through cybersecurity monitoring of the systems that transmit your data. DHS will be monitoring these systems to look for viruses, malware and other threats. In the event of a cybersecurity incident, and pursuant to any required legal process, information from these sources may be used to help identify and mitigate the incident.

Affected information collections:

OMB No.	Expiration date	Information collection title
0535–0001	04/30/2019	Cold Storage.
0535–0002	10/31/2018	Field Crops Production.
0535–0003	07/31/2019	Agricultural Prices.
0535–0004	01/31/2019	Egg, Chicken, and Turkey Surveys.
0535–0005	11/30/2017	Livestock Slaughter.
0535–0007	01/31/2019	Stocks Reports.
0535–0020	07/31/2018	Milk and Milk Products.
0535–0037	08/31/2019	Vegetable Surveys.
0535–0039	10/31/2019	Fruit, Nuts, and Specialty Crops.
0535–0088	07/31/2018	Field Crops Objective Yield.
0535–0093	11/30/2018	Floriculture Survey.
0535–0109	03/31/2018	Agricultural Labor.
0535–0140	01/31/2019	List Sampling Frame Survey.
0535–0150	06/30/2017	Aquaculture.
0535–0153	12/31/2018	Honey Survey.
0535–0212	11/30/2018	Mink Survey.
0535–0213	06/30/2017	Agricultural Surveys Program.
0535–0218	07/31/2018	Agricultural Resource Management and Chemical Use Surveys (ARMS).
0535–0220	03/31/2017	Cotton Ginnings.
0535–0226	10/31/2019	Census of Agriculture.
0535–0243	08/31/2018	Census of Agriculture Content Test.
0535–0244	11/30/2019	Nursery Production Survey and Nursery and Floriculture Chemical Use Survey.
0535–0245	09/30/2017	CEAP—NRI Conservation Tillage and Nutrient Management Survey.
0535–0248	04/30/2019	Generic Clearance of Survey Improvement Projects.
0535–0249	12/31/2017	Organic Production Survey.
0535–0251	05/30/2019	Residue and Biomass Field Survey.
0535–0254	07/31/2017	Current Agricultural Industrial Reports (CAIR).
0535–0255	04/30/2018	Colony Loss.
0535–0256	06/30/2018	Feral Swine Survey.
0535–0257	10/31/2018	Organic Certifier Census.

OMB No.	Expiration date	Information collection title
0535–0258	11/30/2018	Cost of Pollination Survey.
0535–0259	03/31/2019	Local Foods Survey.

Signed at Washington, DC, December 12, 2016.

R. Renee Picanso,

Associate Administrator.

[FR Doc. 2016–30658 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Census Bureau 2020 Advisory Committee

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of Committee Establishment.

SUMMARY: The Bureau of the Census (Census Bureau) is hereby giving notice that the Secretary of Commerce has determined that the establishment of the Census Bureau 2020 Advisory Committee is necessary and in the public interest. The Committee will function solely as an advisory body and in compliance with provisions of the Federal Advisory Committee Act. Copies of the charter will be filed with the appropriate Committees of the U.S. Congress and with the Library of Congress.

FOR FURTHER INFORMATION CONTACT: Tara Dunlop Jackson, Branch Chief for Advisory Committees, Customer Liaison and Marketing Services Office, *tara.t.dunlop@census.gov,* Department of Commerce, U.S. Census Bureau, Room 8H177, 4600 Silver Hill Road, Washington, DC 20233, telephone 301–763–5222. For TTY callers, please use the Federal Relay Service 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Census Bureau 2020 Advisory Committee will advise the Director of the Census Bureau on the full range of 2020 Census programs including an incremental transition from current state to target state, along with operationalizing methods and new technology across multiple locations and time zones to deliver a secure and successful, cost-effective 2020 Census. The Committee will advise the Census Bureau through the 2020 Census Lifecycle on the identification of new strategies for improved census operations and on ways to increase 2020 Census participation and beyond.

The Committee will address census policies, methodology, tests, operations, communications/messaging, and other activities to ascertain needs and best practices to improve the 2020 Census program. The Committee will provide advice on 2020 Census programs that will use a complete address list, generate the largest possible self-response, employ administrative records and third-party data, and reengineer nonresponse follow-up.

The Committee will review and provide formal recommendations and feedback on key operations and the efficacy of planned and implemented innovations related to accurately counting every person living in America while saving taxpayer money.

Dated: December 9, 2016.

John H. Thompson,

Director, Bureau of the Census.

[FR Doc. 2016–30606 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Census Bureau 2020 Advisory Committee

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of Request for Nominations.

SUMMARY: The Bureau of the Census (Census Bureau) is requesting nominations of organizations to the Census Bureau 2020 Advisory Committee. The Census Bureau will consider nominations received in response to this notice, as well as from other sources. The **SUPPLEMENTARY INFORMATION** section of this notice provides Committee and membership criteria.

DATES: Please submit nominations by January 19, 2017.

ADDRESSES: Please submit nominations to Tara Dunlop Jackson, Branch Chief for Advisory Committees, Customer Liaison and Marketing Services Office, *tara.t.dunlop@census.gov,* Department of Commerce, U.S. Census Bureau, Room 8H177, 4600 Silver Hill Road, Washington, DC 20233, telephone 301–763–5222.

FOR FURTHER INFORMATION CONTACT: Tara Dunlop Jackson, Branch Chief for Advisory Committees, Customer Liaison Marketing Services Offices, U.S. Census Bureau, Room 8H177, 4600 Silver Hill Road, Washington, DC 20233, telephone (301) 763–5222 or *tara.t.dunlop@census.gov.* For TTY callers, please use the Federal Relay Service 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Census Bureau 2020 Advisory Committee (''Committee'') is established in accordance with the Federal Advisory Committee Act (FACA), Title 5, United States Code (U.S.C.), Appendix 2. The following provides information about the Committee, membership, and the nomination process.

Objectives and Duties

1. The Committee will provide formal review and feedback related to 2020 Census plans and execution to devise strategies to increase census awareness, reduce barriers to response, and enhance the public's trust and willingness to respond.

2. The Committee will consider implications of enumeration strategies, new technologies, the role of state and local governments, social media and marketing, and the outreach and mobilization needs of historically undercounted populations.

3. The Committee will address and provide recommendations on external factors and policies that may affect 2020 Census plans and identify strategies to increase Census awareness, participation and response by the American public.

4. The Committee will help the Census Bureau communicate with and educate diverse audiences on 2020 Census plans and operations.

5. The Committee will provide recommendations to educate the public at key 2020 Census decision points, milestones, and production dates to ensure maximum self-response and participation by the public in the 2020 Census.

6. The Committee will devise and recommend strategies to motivate people to respond to the 2020 Census through Internet self-response and other forms of enumeration, as appropriate (*i.e.,* paper or by telephone through the Census Questionnaire Assistance Program).

7. The Committee will consider the Census Bureau's outreach,

communications, and partnership efforts providing perspectives on community trends, challenges, and opportunities to increase public awareness and participation in the 2020 Census.

8. The Committee will provide insight, perspectives, and expertise on all aspects of 2020 Census planning and implementation to assist the Census Bureau in conducting an accurate decennial census.

9. The Committee will function solely as an advisory body and shall fully comply with the provisions of the FACA in providing insight, perspectives, and expertise on 2020 Census plans and execution.

Membership

1. The Committee will consist of up to 25 members who will be appointed by and serve at the discretion of the Director.

2. Member organizations will be selected from the public and private sectors, and have expertise in census and survey matters. Members will represent specific areas to include: Diverse populations; national, state, local and tribal interest; hard-to-count populations; research; community-based organizations; academia; business interests; marketing and media industries; and professional associations.

3. Membership shall include representatives of organizations reflecting diverse populations; national, state, local and tribal interests; organizations serving hard to count populations; community-based organizations; and the private sector.

4. Organizations should designate both a primary and an alternate representative.

5. Members will serve for a three-year term. All members will be reevaluated at the conclusion of each term with the prospect of renewal, pending Committee and 2020 decennial census needs. Active attendance and participation in meetings and activities (*i.e.,* conference calls and assignments) will be factors considered when determining term renewal or membership continuance. Members may be appointed for a second, three-year term at the discretion of the Director.

6. The Committee aims to have a balanced representation among its members, considering such factors as geography, technical expertise, community involvement and knowledge of census programs and/or activities.

7. No employee of the federal government can serve as a member of the Committee.

8. Members will be selected according to protocols and applicable Department of Commerce guidance.

Miscellaneous

1. Members of the Committee serve without compensation, but receive reimbursement for Committee-related travel and lodging expenses.

2. The Committee meets at least twice a year, budget permitting, but additional meetings may be held as deemed necessary by the Census Director or Designated Federal Officer. All Committee meetings are open to the public in accordance with the FACA.

Nomination Process

1. Nominations should satisfy the requirements described in the Membership section above.

2. Individuals, groups, and/or organizations may submit nominations on behalf of candidates. A summary of the candidate's qualifications (resumé or curriculum vitae) *must* be included along with the nomination letter. Nominees must be able to actively participate in the tasks of the Committee, including, but not limited to regular meeting attendance, Committee meeting discussant responsibilities, review of materials, as well as participation in conference calls, webinars, working groups, and/or special Committee activities.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Advisory Committee membership.

Dated: December 9, 2016.

John H. Thompson,

Director, Bureau of the Census.

[FR Doc. 2016–30605 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and Opportunity for Public Comment.

Pursuant to Section 251 of the Trade Act 1974, as amended (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

[12/10/2016 through 12/14/2016]

Firm name	Firm address	Date accepted for investigation	Product(s)
Lester Electrical of Nebraska, Inc..	625 West A Street, Lincoln, NE 68522.	12/13/2016	The firm manufactures battery chargers and other electrical power conversion/storage products for industrial and commercial vehicle applications.
Current River Die Sinking, Inc.	100 E. Loyal Hood, Industrial Park, Doniphan, MO, 63935.	12/14/2016	The firm manufactures tool and die made of metal primarily for the forging industry.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 71030, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public

hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Miriam Kearse,

Lead Program Analyst.

[FR Doc. 2016–30536 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

International Trade Administration

Civil Nuclear Trade Advisory Committee: Cancellation of the Meeting of the Civil Nuclear Trade Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce

ACTION: Cancellation of Federal Advisory Committee Meeting.

SUMMARY: This notice announces cancellation of the December 21 meeting of the Civil Nuclear Trade Advisory Committee (CINTAC).

DATES: The meeting scheduled for Wednesday, December 21, 2016, from 10:30 a.m. to 11:30 a.m. Eastern Standard Time (EST) is cancelled. The meeting will be rescheduled in early 2017. The **Federal Register** Notice announcing this meeting was published on December 12, 2016 (*https://www.federalregister.gov/documents/2016/12/12/2016–29703/civil-nuclear-trade-advisory-committee-meeting-of-the-civil-nuclear-trade-advisory-committee*).

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Chesebro, Office of Energy & Environmental Industries, International Trade Administration, Room 20010, 1401 Constitution Ave. NW., Washington, DC 20230. (Phone: 202–482–1297; Fax: 202–482–5665; email: *jonathan.chesebro@trade.gov*).

SUPPLEMENTARY INFORMATION:

Background: The CINTAC was established under the discretionary authority of the Secretary of Commerce and in accordance with the Federal Advisory Committee Act (5 U.S.C. App.), in response to an identified need for consensus advice from U.S. industry to the U.S. Government regarding the development and administration of programs to expand United States exports of civil nuclear goods and services in accordance with applicable U.S. laws and regulations, including advice on how U.S. civil nuclear goods and services export policies, programs, and activities will affect the U.S. civil nuclear industry's competitiveness and ability to participate in the international market.

Man Cho,

Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2016–30616 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–968]

Aluminum Extrusions from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2014

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has completed its administrative review of the countervailing duty (CVD) order on aluminum extrusions from the People's Republic of China (PRC) for the January 1, 2014 through December 31, 2014 period of review (POR). We have determined that mandatory respondents Jangho and Zhongya received countervailable subsidies during the POR. The final net subsidies are listed below in the section entitled ''Final Results of Administrative Review.''

DATES: Effective December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Davina Friedmann or Tyler Weinhold, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0698 or (202) 482–1121, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department selected Jangho [1] and Zhongya [2] as mandatory respondents in this administrative review of the CVD order [3] on aluminum extrusions from

[1] For purposes of this administrative review, ''Jangho'' refers to the crossed-owned entities consisting of the following members and affiliates of the Jangho Group: Guangzhou Jangho Curtain Wall System Engineering Co., Ltd.; Guangzhou Jangho's parent company, Jangho Group Co., Ltd.; Jangho Group Company's corporate parent, Beijing Jiangheyuan Holding Com., Ltd.; and Jangho Group Company's producer subsidiaries, Beijing Jangho Curtain Wall System Engineering Co., Ltd., Shanghai Jangho Curtain Wall System Engineering Co., Ltd., and Chengdu Jangho Curtain Wall System Engineering Co., Ltd. As stated above, we have used ''Jangho'' to refer to the cross-owned entities to which we will assign a subsidy rate. *See* ''Final Results of Administrative Review,'' below. We have used ''the Jangho Group'' and ''Jangho Group'' to refer to the corporate group consisting of Jangho Group Company and its subsidiaries (*i.e.,* not including Beijing Jiangheyuan Holding Com., Ltd. and Jangho Group Company's other corporate parent, Xinjiang Jianghe Huizhong Equity Investment Limited Partnership). We have used ''the Jangho companies,'' to refer to the members of the Jangho Group as well as Beijing Jiangheyuan Holding Com., Ltd.and Xinjiang Jianghe Huizhong Equity Investment Limited Partnership. Further, Jangho Curtain Wall Hong Kong Ltd. is an affiliated Hong Kong reseller/trading company and member of the Jangho Group. For these final results, we are treating Jangho Curtain Wall Hong Kong Ltd. as a Hong Kong, or non-PRC, company, and have not attributed any subsidies to Jangho Curtain Wall Hong Kong Ltd., consistent with 19 CFR 351.525(b)(7). Any shipments of subject merchandise to the United States by Jangho Curtain Wall Hong Kong Ltd. will be subject to the Department's cash deposit requirements. For entries of subject merchandise exported by Jangho Curtain Wall Hong Kong Ltd., the Department intends to instruct CBP to collect cash deposits according to the appropriate rates assigned to the producer, or the all-others rate if the producer does not have its own assigned cash deposit rate.

[2] For purposes of the final results of this administrative review, ''Zhongya'' refers to the following companies: Guangdong Zhongya Aluminium Company Limited, Zhaoqing New Zhongya Aluminum Co., Ltd., New Zhongya Aluminum Factory, Karlton Aluminum Company Ltd., and Zhongya Shaped Aluminum (HK) Holding Limited (collectively, ''Zhongya''). ''Zhongya'' includes companies selected as mandatory respondents, as well as companies that responded to the Department's initial questionnaire as a group by submitting a letter indicating that they would not be participating in this administrative review. *See* ''*Application of Adverse Facts Available to Non-Cooperative Mandatory Respondent Zhongya*'' for more information. We inadvertently omitted Zhongya Shaped Aluminum (HK) Holding Limited from the list of companies included in ''Zhongya'' in the *Preliminary Results,* but did include all companies in the Department's draft cash deposit and liquidation instructions, which were released to interested parties for comment. We clarify that it was the Department's intent to include Zhongya Shaped Aluminum (HK) Holding Limited in ''Zhongya.'' No parties commented in case briefs on the Department's treatment of these companies as a group in the *Preliminary Results* or on the Department's draft instructions. Use of ''Zhongya'' to refer to these companies collectively does not denote a cross-ownership determination with respect to any of these companies in this administrative review.

[3] *See Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30653 (May 26, 2011) (*Order*).

the PRC. The Department issued the *Preliminary Results* of this administrative review on June 3, 2016, and published them in the **Federal Register** on June 13, 2016.[4] At that time, we invited interested parties to comment on the *Preliminary Results.* On June 9, 2016, we received a case brief from Wuxi Huida Aluminum Co., Ltd. (Wuxi Huida), a non-selected respondent.[5] On July 13, 2016 and July 22, 2016, we granted parties extensions of time to submit case and rebuttal briefs.[6] On July 18, 2016, we received case briefs from the Aluminum Extrusions Fair Trade Committee (Petitioner), the Government of China (GOC), Jangho, and RMD Kwikform North America, Inc. (RMD).[7] On July 28, 2016, we received rebuttal briefs from the Petitioner and Jangho.[8] On August 4, 2016, the Department released draft cash deposit and liquidation instructions, and on August 9, 2016, released a letter inviting comments on these draft instructions.[9] On August 11, 2016, RMD and Jangho Americas, importers of subject merchandise, submitted comments on the draft customs instructions.[10] While the Department received a request for a hearing, that request was subsequently withdrawn; therefore, the Department did not conduct a hearing for the instant administrative review.[11] The Department extended the final results of this administrative review on October 4, 2016 and October 20, 2016.[12] On November 14, 2016, the Department extended the deadline for the final results to November 20, 2016.[13]

Scope of the Order

The merchandise covered by the order is aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents).

Imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States (''HTSUS''): 9405.99.40.20, 8424.90.90.80, 9031.90.90.95, 7616.10.90.90, 7609.00.00, 7610.10.00, 7610.90.00, 7615.10.30, 7615.10.71, 7615.10.91, 7615.19.10, 7615.19.30, 7615.19.50, 7615.19.70, 7615.19.90, 7615.20.00, 7616.99.10, 7616.99.50, 8479.89.98, 8479.90.94, 8513.90.20, 9403.10.00, 9403.20.00, 7604.21.00.00, 7604.29.10.00, 7604.29.30.10, 7604.29.30.50, 7604.29.50.30, 7604.29.50.60, 7608.20.00.30, 7608.20.00.90, 8302.10.30.00, 8302.10.60.30, 8302.10.60.60, 8302.10.60.90, 8302.20.00.00, 8302.30.30.10, 8302.30.30.60, 8302.41.30.00, 8302.41.60.15, 8302.41.60.45, 8302.41.60.50, 8302.41.60.80, 8302.42.30.10, 8302.42.30.15, 8302.42.30.65, 8302.49.60.35, 8302.49.60.45, 8302.49.60.55, 8302.49.60.85, 8302.50.00.00, 8302.60.90.00, 8305.10.00.50, 8306.30.00.00, 8414.59.60.90, 8415.90.80.45, 8418.99.80.05, 8418.99.80.50, 8418.99.80.60, 8419.90.10.00, 8422.90.06.40, 8473.30.20.00, 8473.30.51.00, 8479.90.85.00, 8486.90.00.00, 8487.90.00.80, 8503.00.95.20, 8508.70.00.00, 8515.90.20.00, 8516.90.50.00, 8516.90.80.50, 8517.70.00.00, 8529.90.73.00, 8529.90.97.60, 8536.90.80.85, 8538.10.00.00, 8543.90.88.80, 8708.29.50.60, 8708.80.65.90, 8803.30.00.60, 9013.90.50.00, 9013.90.90.00, 9401.90.50.81, 9403.90.10.40, 9403.90.10.50, 9403.90.10.85, 9403.90.25.40, 9403.90.25.80, 9403.90.40.05, 9403.90.40.10, 9403.90.40.60, 9403.90.50.05, 9403.90.50.10, 9403.90.50.80, 9403.90.60.05, 9403.90.60.10, 9403.90.60.80, 9403.90.70.05, 9403.90.70.10, 9403.90.70.80, 9403.90.80.10, 9403.90.80.15, 9403.90.80.20, 9403.90.80.41, 9403.90.80.51, 9403.90.80.61, 9506.11.40.80, 9506.51.40.00, 9506.51.60.00, 9506.59.40.40, 9506.70.20.90, 9506.91.00.10, 9506.91.00.20, 9506.91.00.30, 9506.99.05.10, 9506.99.05.20, 9506.99.05.30, 9506.99.15.00, 9506.99.20.00, 9506.99.25.80, 9506.99.28.00, 9506.99.55.00, 9506.99.60.80, 9507.30.20.00, 9507.30.40.00, 9507.30.60.00, 9507.90.60.00, and 9603.90.80.50.

The subject merchandise entered as parts of other aluminum products may be classifiable under the following additional Chapter 76 subheadings: 7610.10, 7610.90, 7615.19, 7615.20, and 7616.99, as well as under other HTSUS chapters. In addition, fin evaporator coils may be classifiable under HTSUS numbers: 8418.99.80.50 and 8418.99.80.60. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order, which is contained in the

[4] *See Aluminum Extrusions from the People's Republic of China: Preliminary Results of the Countervailing Duty Administrative Review and Preliminary Intent to Rescind, in Part; 2014,* 81 FR 38137 (June 13, 2016) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[5] *See* Letter from Wuxi Huida Aluminum Co., Ltd., Regarding: ''Aluminum Extrusions from the People's Republic of China: Case Brief of Wuxi Huida,'' dated June 9, 2016.

[6] *See* Letter from Robert James, Program Manager, Office VI, to Interested Parties, Regarding: ''2014 Countervailing Duty Review of the Antidumping Duty Order on Aluminum Extrusions from the People's Republic of China: Deadline to Provide Case Briefs,'' dated July 13, 2016, and Letter from Robert James, Program Manager, Office VI, to Interested Parties, Regarding: ''2014 Countervailing Duty Review of the Antidumping Duty Order on Aluminum Extrusions from the People's Republic of China: Deadline to Provide Rebuttal Briefs,'' dated July 22, 2016.

[7] *See* Letter from Petitioner, Regarding: ''Aluminum Extrusions from the People's Republic of China: Case Brief,'' dated July 18, 2016 (Petitioner's Case Brief); Letter from the GOC, Regarding: '' Aluminum Extrusions from China; 4th CVD Administrative Review GOC Case Brief,'' dated July 18, 2016 (the GOC's Case Brief); Letter from Guangzhou Jangho Curtain Wall System Engineering Co., Ltd. and Jangho Curtain Wall Hong Kong Ltd. regarding: ''Aluminum Extrusions from the People's Republic of China: Case Brief,'' dated July 18, 2016 (Jangho's Case Brief); and Letter from RMD regarding: ''Aluminum Extrusions from the People's Republic of China,'' dated July 18, 2016 (RMD's Case Brief).

[8] *See* Letter from Petitioner Regarding: ''Aluminum Extrusions from the People's Republic of China: Rebuttal Brief,'' dated July 28, 2016 (Petitioner's Rebuttal Brief), and Letter from Guangzhou Jangho Curtain Wall System Engineering Co., Ltd. and Jangho Curtain Wall Hong Kong Ltd. Regarding: ''Aluminum Extrusions from the People's Republic of China: Rebuttal Brief,'' dated July 28, 2016 (Jangho's Rebuttal Brief).

[9] *See* Letter from the Department to interested parties regarding: ''Aluminum Extrusions from the People's Republic of China: Submission of Comments on Draft Customs Instructions for the Preliminary Results,'' dated August 9, 2016.

[10] Letter from RMD to the Department, regarding: ''Aluminum Extrusions from People's Republic of China {sic.}—Comments on Draft Customs Instructions,'' dated August 11, 2016 (RMD's Customs Instructions Comments); and Letter from Jangho Americas to the Department, regarding: ''Aluminum Extrusions from the People's Republic of China: Submission of Comments on Draft Customs Instructions for the Preliminary Results,'' dated August 11, 2016 (Jangho Americas' Customs Instructions Comments).

[11] *See* Memorandum to The File regarding, ''Aluminum Extrusions from the People's Republic of China: Ex Parte Telephone Conversation Concerning Withdrawal of Request for Hearing,'' dated September 29, 2016.

[12] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, regarding: ''Aluminum Extrusions from the People's Republic of China: Extension of Deadline for Final Results of Countervailing Duty Administrative Review,'' dated October 4, 2016; Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, regarding: ''Aluminum Extrusions from the People's Republic of China: Extension of Deadline for Final Results of Countervailing Duty Administrative Review,'' dated October 20, 2016.

[13] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, regarding: ''Aluminum Extrusions from the People's Republic of China: Extension of Deadline for Final Results of Countervailing Duty Administrative Review,'' dated November 14, 2016.

accompanying Issues and Decision Memorandum is dispositive.[14]

Analysis of Comments Received

All issues raised in the parties' briefs are addressed in the Issues and Decision Memorandum, dated concurrently with this notice, and which is hereby adopted by this notice. A list of issues addressed is attached to this notice at Appendix I. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov*; the Issues and Decision Memorandum is available to all parties in the Central Records Unit (CRU), Room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Methodology

The Department conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we find that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[15] For a full description of the methodology underlying all of the Department's conclusions, including any determination that relied upon the use of adverse facts available pursuant to sections 776(a) and (b) of the Act, *see* the Issues and Decision Memorandum.

Partial Rescission of Review

For those companies named in the *Initiation Notice*[16] for which all review requests have timely been withdrawn, we are rescinding this administrative review in accordance with 19 CFR 351.213(d)(1). These companies are listed at Appendix II to this notice. For these companies, countervailing duties shall be assessed at rates equal to the rates of the cash deposits for estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the POR, in accordance with 19 CFR 351.212(c)(2).

Also, between July 1, 2015 and August 1, 2015, the Department timely received no-shipment certifications from certain companies. In the *Preliminary Results,* the Department stated its intention to rescind the review with respect to these companies. The Department inquired with U.S. Customs and Border Protection (CBP) whether these companies had shipped merchandise to the United States during this review period,[17] and CBP provided no evidence to contradict the claims made by these companies. However, these companies were also included in the Petitioner's timely withdrawal of its review requests, and because no party other than the Petitioner requested a review of these companies, the Department is rescinding the administrative review of these companies pursuant to 19 CFR 351.213(d)(1).

Rate for Non-Selected Companies Under Review

In this review, and in addition to the two selected mandatory respondents, there are 45 companies for which a review was requested and not rescinded (non-selected companies). For these non-selected companies, we could not calculate a rate by weight averaging Jangho's and Zhongya's individual rates, as Zhongya's rate is based entirely on adverse facts available.[18] Instead, for these final results, we based the non-selected companies' rate on the subsidy rate calculated for Jangho. For further information on the calculation of the non-selected companies' rate, refer to the section in the Issues and Decision Memorandum entitled, ''Final *Ad Valorem* Rate for Non-Selected Companies Under Review.''

Final Results of Administrative Review

In accordance with 19 CFR 351.221(b)(5), we determine the following final net subsidy rates for the 2014 administrative review:

Company	2014 *Ad valorem* rate (percent)
Jangho	16.08
Zhongya	195.69
Allied Maker Limited	16.08
A-Plus Industries Ltd	16.08
Asia Pacific Industrial (Group) Co., Ltd	16.08
Birchwoods (Lin'an) Leisure Products Co., Ltd	16.08
Changzhou Jinxi Machinery Co., Ltd	16.08
Classic & Contemporary Inc	16.08
Dongguang Aoda Aluminum Co., Ltd	16.08
Dongguan Dazhan Metal Co., Ltd	16.08
Dongguan Golden Tiger Hardware Industrial Co., Ltd	16.08
ETLA Technology (Wuxi) Co., Ltd	16.08
Fenghua Metal Product Factory	16.08
Foshan Golden Source Aluminum Products Co., Ltd	16.08
Foshan Guangcheng Aluminium Co., Ltd	16.08
Genimex Shanghai, Ltd	16.08
Global Hi-Tek Precision Limited	16.08
Global Point Technology (Far East) Limited	16.08

[14] For a full description of the scope of the order, *see* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado Assistant Secretary for Enforcement and Compliance regarding: ''Decision Memorandum for the Final Results of Countervailing Duty Administrative Review: Aluminum Extrusions from the People's Republic of China, 2014 (Fourth Review),'' dated concurrently with this notice (Issues and Decision Memorandum).

[15] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[16] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 80 FR 37588 (June 1, 2015) (*Initiation Notice*).

[17] On August 27, 2015, the Department issued a message to CBP inquiring whether certain companies shipped merchandise to the United States during the instant review period, which was subsequently confirmed by CBP. *See* public message number 5239314.

[18] *See* sections 703(d) and 705(c)(5)(A) of the Act.

Company	2014 *Ad valorem* rate (percent)
Golden Dragon Precise Copper Tube Group, Inc	16.08
Gold Mountain International Development, Ltd	16.08
Guangdong Whirlpool Electrical Appliances Co., Ltd	16.08
Guang Ya Aluminium Industries Co., Ltd	16.08
Hebei Xusen Wire Mesh Products Co., Ltd	16.08
Jackson Travel Products Co., Ltd	16.08
Jiangsu Shengrun Industry Co, Ltd	16.08
Jiangsu Susun Group (HK) Co., Ltd	16.08
Jiangsu Zhenhexiang New Material Technology Co., Ltd	16.08
Johnson Precision Engineering (Suzhou) Co Ltd	16.08
JMA (HK) Company Limited	16.08
Kam Kiu Aluminum Products Sdn Bhd	16.08
Markem Imaje China (China) Co. Ltd	16.08
Metaltek Group Co., Ltd	16.08
Ningbo Haina Machine Co., Ltd	16.08
Ningbo Innopower Tengda Machinery Co., Ltd	16.08
Ningbo Yinzhou Sanhua Electric Machine Factory	16.08
Precision Metal Works Ltd	16.08
Sapa Profiles (Shanghai) Co., Ltd	16.08
Shanghai Automobile Air-Conditioner Accessories Co., Ltd	16.08
Shanghai Tongtai Precise Aluminum Alloy Manufacturing Co., Ltd	16.08
Summit Heat Sinks Metal Co., Ltd	16.08
Suzhou New Hongji Precision Part Co	16.08
Taishan City Kam Kiu Aluminium Extrusion Co., Ltd	16.08
Taizhou United Imp & Export Corp., Ltd	16.08
Tianjin Jinmao Import & Export Corp., Ltd	16.08
Whirlpool Canada L.P	16.08
Whirlpool Microwave Products Development Ltd	16.08
Wuxi Huida Aluminum Co., Ltd	16.08
Zhejiang Dongfeng Refrigeration Components Co., Ltd	16.08

Assessment Rates

The Department intends to issue appropriate assessment instructions directly to CBP, 15 days after publication of these final results of review, to liquidate shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after January 1, 2014, through December 31, 2014, at the *ad valorem* rates listed above.

Cash Deposit Requirements

The Department also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts indicated above for each company listed on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. For all non-reviewed firms, we will instruct CBP to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. Accordingly, the cash deposit requirements that will be applied to companies covered by this order, but not examined in this administrative review, are those established in the most recently completed segment of the proceeding for each company. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Administrative Protective Order

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 12, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Final Decision Memorandum

Remuneration for Jangho's Aluminum Extrusions and Glass Purchases.
Comment 9: Whether Commercial Loans from PRC Banks to Aluminum Extrusions Producers are Covered by the Policy Loans Program Previously Countervailed by the Department.
Comment 10: Whether the Department's Benchmark Interest Rate Computations are Arbitrary, Unsupported by the Record, or Unlawful.
Comment 11: Whether the Preferential Tax Policies for High or New Technology Enterprises Program and the Tax Offset for Research and Development Program are Specific.
Comment 12: Whether the Department has the Authority to Investigate or Countervail the Technology Innovation Assistance Fund (the Niulanshan Industrial Development Center—Technology Products Fund), Enterprise Technology Center Fund, and Trade Promotion and Brand Building Fund (the 2014 Guangdong Trade Promoting by Science & Tech and Brand Building Fund).
Comment 13: Whether the Department Erred in its Calculations of Benchmark Aluminum Extrusions and Glass Prices.
Comment 14: Whether the Department Should Include Exports of Merchandise Under HTS Heading 7610.10 in its Calculation of Benchmark Aluminum Extrusions Prices.
Comment 15: Whether the Department Erred by Excluding Wuxi Huida From the List of Companies for Which the Department Calculated a Net Countervailable Subsidy Rate.
Comment 16: Whether the Department Erred by Including Jiangsu Susun Among the List of Companies for Which the Department Intends to Rescind the Administrative Review.
Comment 17: The Department's Liquidation Instructions to United States Customs and Border Protection (CBP) Should Ensure That All of Jangho's Entries Remain Suspended Pursuant to the Preliminary Injunction Granted in December 2014.

Conclusion

Appendix II

List of Companies for Which We Are Rescinding this Administrative Review [19]

1. Acro Import and Export Co.
2. Activa International Inc.
3. Alnan Aluminum Co. Ltd.
4. Aluminicaste Fundicion de Mexico
5. Bracalente Metal Products (Suzhou) Co., Ltd.[20]
6. Changshu Changshen Aluminum Products Co., Ltd.
7. Changzhou Tenglong Auto Parts Co., Ltd.
8. China Zhongwang Holdings, Ltd.
9. Chiping One Stop Industrial & Trade Co., Ltd.
10. Clear Sky Inc.
11. Cosco (J.M.) Aluminum Co., Ltd.
12. Danfoss Micro Channel Heat Exchangers (Jia Xing) Co., Ltd.[21]
13. Dragonluxe Limited
14. Dynabright International Group (HK) Limited
15. Dynamic Technologies China
16. Ever Extend Ent. Ltd.[22]
17. First Union Property Limited
18. Foreign Trade Co. of Suzhou New & High-Tech. Industrial Development Zone
19. Foshan City Nanhai Hongjia Aluminum Alloy Co., Ltd.
20. Foshan Jinlan Aluminum Co. Ltd.
21. Foshan JMA Aluminum Company Limited
22. Foshan Shanshui Fenglu Aluminum Co., Ltd.
23. Foshan Shunde Aoneng Electrical Applicances Co., Ltd
24. Foshan Yong Li Jian Aluminum Co., Ltd.
25. Fujian Sanchuan Aluminum Co., Ltd.
26. Global PMX Dongguan Co., Ltd.
27. Gran Cabrio Capital Pte. Ltd.
28. Gree Electric Appliances
29. GT88 Capital Pte. Ltd.
30. Guangdong Hao Mei Aluminum Co., Ltd.
31. Guangdong Jianmei Aluminum Profile Company Limited
32. Guangdong JMA Aluminum Profile Factory (Group) Co., Ltd.
33. Guangdong Nanhai Foodstuffs Imp. & Exp. Co., Ltd.
34. Guangdong Weiye Aluminum Factory Co., Ltd.
35. Guangdong Xingfa Aluminum Co., Ltd.
36. Guangdong Xin Wei Aluminum Products Co., Ltd.[23]
37. Guangdong Yonglijian Aluminum Co., Ltd.
38. Guangzhou Mingcan Die-Casting Hardware Products Co., Ltd.
39. Hangzhou Xingyi Metal Products Co., Ltd.
40. Hanwood Enterprises Limited
41. Hao Mei Aluminum Co., Ltd.
42. Hao Mei Aluminum International Co., Ltd.
43. Hanyung Alcoba Co., Ltd.
44. Hanyung Alcobis Co., Ltd.
45. Hanyung Metal (Suzhou) Co., Ltd.
46. Henan New Kelong Electrical Appliances Co., Ltd.
47. Hong Kong Gree Electric Appliances Sales Limited
48. Honsense Development Company
49. Hui Mei Gao Aluminum Foshan Co., Ltd.
50. IDEX Dinglee Technology (Tianjin) Co., Ltd.[24]
51. IDEX Health [25]
52. IDEX Technology Suzhou Co., Ltd.[26]
53. Innovative Aluminum (Hong Kong) Limited
54. iSource Asia
55. Jiangmen Qunxing Hardware Diecasting Co., Ltd.
56. Jiangsu Changfa Refrigeration Co., Ltd.
57. Jiangyin Trust International Inc.
58. Jiangyin Xinhong Doors and Windows Co., Ltd.
59. Jiaxing Jackson Travel Products Co., Ltd.
60. Jiaxing Taixin Metal Products Co., Ltd.
61. Jiuyan Co., Ltd.
62. Justhere Co., Ltd.
63. Kanal Precision Aluminum Product Co., Ltd.
64. Kromet International Inc.
65. Kunshan Giant Light Metal Technology Co., Ltd.
66. Liaoning Zhongwang Group Co., Ltd.
67. Liaoyang Zhongwang Aluminum Profile Co. Ltd.
68. Longkou Donghai Trade Co., Ltd.
69. Metaltek Metal Industry Co., Ltd.
70. Midea Air Conditioning Equipment Co., Ltd.
71. Midea International Training Co., Ltd.
72. Midea International Trading Co., Ltd.
73. Miland Luck Limited
74. Nanhai Textiles Import & Export Co., Ltd.
75. New Asia Aluminum & Stainless Steel Product Co., Ltd.
76. Nidec Sankyo (Zhejang) Corporation
77. Nidec Sankyo Singapore Pte. Ltd.
78. Ningbo Coaster International Co., Ltd.
79. Ningbo Hi Tech Reliable Manufacturing Company
80. Ningbo Ivy Daily Commodity Co., Ltd.
81. Ningbo Yili Import and Export Co., Ltd.[27]
82. North China Aluminum Co., Ltd.
83. North Fenghua Aluminum Ltd.
84. Northern States Metals
85. PanAsia Aluminum (China) Limited
86. Pengcheng Aluminum Enterprise Inc.
87. Permasteelisa Hong Kong Ltd.[28]
88. Permasteelisa South China Factory [29]
89. Pingguo Aluminum Company Limited
90. Pingguo Asia Aluminum Co., Ltd.
91. Popular Plastics Company Limited
92. Press Metal International Ltd
93. Samuel, Son & Co., Ltd.
94. Sanchuan Aluminum Co., Ltd.
95. Shangdong Huasheng Pesticide Machinery Co.
96. Shangdong Nanshan Aluminum Co., Ltd.
97. Shanghai Canghai Aluminum Tube Packaging Co., Ltd
98. Shanghai Dongsheng Metal
99. Shanghai Shen Hang Imp & Exp Co., Ltd.
100. Shenyang Yuanda Aluminum Industry Engineering Co. Ltd.
101. Shenzhen Hudson Technology Development Co., Ltd.
102. Shenzhen Jiuyuan Co., Ltd.
103. Sihui Shi Guo Yao Aluminum Co., Ltd.
104. Sincere Profit Limited
105. Skyline Exhibit Systems (Shanghai) Co., Ltd.
106. Suzhou JRP Import & Export Co., Ltd.
107. Tai-Ao Aluminum (Taishan) Co. Ltd.
108. Taizhou Lifeng Manufacturing Co., Ltd.
109. tenKsolar (Shanghai) Co., Ltd.
110. Tianjin Ganglv Nonferrous Metal Materials Co., Ltd.
111. Tianjin Ruxin Electric Heat Transmission Technology Co., Ltd.
112. Tianjin Xiandai Plastic & Aluminum Products Co., Ltd.
113. Tiazhou Lifeng Manufacturing Corporation/Taizhou Lifeng

[19] According to information on the record of this review, certain companies listed below made no shipments to the United States during the instant review period. Each such company is identified as a ''no shipments company.''

[20] No shipments company.

[21] No shipments company.

[22] No shipments company.

[23] No shipments company.

[24] No shipments company.

[25] No shipments company.

[26] No shipments company.

[27] No shipments company.

[28] No shipments company.

[29] No shipments company.

Manufacturing Corporation, Ltd.
114. Top-Wok Metal Co., Ltd.
115. Traffic Brick Network, LLC
116. Union Industry (Asia) Co., Ltd.
117. USA Worldwide Door Components (Pinghu) Co., Ltd.
118. Wenzhou Shengbo Decoration & Hardware
119. Whirlpool (Guangdong)
120. WTI Building Products, Ltd.
121. Xin Wei Aluminum Co.[30]
122. Xin Wei Aluminum Company Limited[31]
123. Xinya Aluminum & Stainless Steel Product Co., Ltd.
124. Yongji Guanghai Aluminium Industry Co., Ltd.[32]
125. Zahoqing China Square Industry Limited/Zhaoqing China Square Industry Limited
126. Zhaoqing Asia Aluminum Factory Company Ltd.
127. Zhaoqing China Square Industrial Ltd.
128. Zhejiang Anji Xinxiang Aluminum Co., Ltd.
129. Zhejiang Yongkang Listar Aluminum Industry Co., Ltd.
130. Zhejiang Zhengte Group Co., Ltd.
131. Zhenjiang Xinlong Group Co., Ltd.
132. Zhongshan Daya Hardware Co., Ltd.
133. Zhongshan Gold Mountain Aluminum Factory Ltd.
134. Zhuhai Runxingtai Electrical Equipment Co., Ltd.

[FR Doc. 2016–30581 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–839, A–583–833]

Certain Polyester Staple Fiber From the Republic of Korea and Taiwan: Final Results of Expedited Sunset Review of the Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) finds that revocation of the antidumping duty order (AD) orders on certain cased polyester staple fiber from the Republic of Korea (Korea) and Taiwan would be likely to lead to continuation or recurrence of dumping at the level indicated in the ''Final Results of Review'' section of this notice.

DATES: Effective December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Mary Kolberg, Office I, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1785.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2016, the Department initiated a sunset review of the *AD Orders* [1] on certain polyester staple fiber from Korea and Taiwan pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] Auriga Polymers Inc. (Auriga), DAK Americas, LLC (DAK Americas), and Nan Ya Plastics Corporation, America (Nan Ya America) notified the Department of their intent to participate in both sunset reviews as domestic interested parties on August 12, 2016, pursuant to 19 CFR 351.218(d)(1)(i).[3] Each of these companies claimed interested party status under section 771(9)(C) of the Act, as domestic producers of the domestic like product.

On August 31, 2016, the Department received a collective substantive response from Auriga, DAK Americas, and Nan Ya America, within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[4] The Department did not receive a substantive response from any respondent interested party to the sunset proceeding. Because the Department received no response from the respondent interested parties, the Department conducted an expedited review of these *AD Orders,* pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(l)(ii)(C)(2).

Scope of the Orders

Imports covered by the orders are defined as synthetic staple fibers, not carded, combed or otherwise processed for spinning, of polyesters measuring 3.3 decitex (3 denier, inclusive) or more in diameter. This merchandise is cut to lengths varying from one inch (25 mm) to five inches (127 mm). The merchandise subject to the order may be coated, usually with a silicon, or other finish, or not coated. Polyester staple fiber is generally used as stuffing in sleeping bags, mattresses, ski jackets, comforters, cushions, pillows, and furniture. Merchandise of less than 3.3 decitex (less than 3 denier) currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheading 5503.20.00.25 is specifically excluded from the order. Also, specifically excluded from the order are polyester staple fibers of 10 to18 denier that are cut to lengths of 6 to 8 inches (fibers used in the manufacture of carpeting). In addition, low-melt polyester staple fiber is excluded from the order. Low-melt polyester staple fiber is defined as a bi-component fiber with an outer sheath that melts at a significantly lower temperature than its inner core. The merchandise subject to the order is currently classifiable in the HTSUS at subheadings 5503.20.00.45 and 5503.20.00.65. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the merchandise covered by the scope of the order is dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the Issues and Decision Memorandum, which is dated concurrently with this notice.[5] The issues discussed in the Issues and Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail if the *AD Orders* were revoked. Parties can find a complete discussion of all issues raised in this expedited sunset review and the corresponding recommendations in this public memorandum, which is on file electronically *via* the Enforcement and Compliance Antidumping and

[30] No shipments company.

[31] No shipments company.

[32] In the third administrative review, the role of this company was that of an input supplier. Absent information to the contrary placed on the record of this administrative review, we are treating this company as an input supplier, and are, therefore, rescinding the review of this company.

[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea and Antidumping Duty Orders: Certain Polyester Staple Fiber From the Republic of Korea and Taiwan,* 65 FR 33807, 33808 (May 25, 2000); *see also Certain Polyester Staple Fiber from Korea: Notice of Amended Final Determination and Amended Order Pursuant to Final Court Decision,* 68 FR 74552, 74553 (December, 24, 2003) (*AD Orders*).

[2] *See Initiation of Five-Year (''Sunset'') Review,* 81 FR 50462 (August 1, 2016).

[3] *See* letter from Auriga, DAK Americas, LLC, and Nan Ya America, re: ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Polyester Staple Fiber From the Republic of Korea—Notice of Intent to Participate,'' dated August 12, 2016; *see also* letter from Auriga, DAK Americas, and Nan Ya America, re: ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Polyester Staple Fiber From Taiwan—Notice of Intent to Participate,'' dated August 12, 2016.

[4] *See* letter from Auriga, DAK Americas, LLC, and Nan Ya America, re: ''Five-Year Sunset Review of Antidumping Duty Order on Polyester Staple Fiber From the Republic of Korea—Domestic Interested Parties' Substantive Response to Notice of Initiation,'' dated August 31, 2016; *see also* letter from Auriga, DAK Americas, and Nan Ya America, re: ''Five-Year Sunset Review of Antidumping Duty Order on Polyester Staple Fiber From Taiwan—Domestic Interested Parties' Substantive Response to Notice of Initiation,'' dated August 31, 2016.

[5] *See* Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, ''Issues and Decision Memorandum for the Final Results of the Expedited Five-Year Sunset Review of the Antidumping Duty Orders on Certain Polyester Staple Fiber from the Republic of Korea and Taiwan,'' dated November 29, 2016.

Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov* and in the Central Records Unit, room B8024 of the main Department of Commerce building. A list of topics discussed in the Issues and Decision Memorandum is included as an Appendix to this notice. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/index.html.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Final Results of Review

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, we determine that revocation of the *AD Orders* on certain staple fiber from Korea and Taiwan would be likely to lead to continuation or recurrence of dumping at weighted-average percent margins up to 7.48 percent and 9.90 percent, respectively.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.218.

Dated: November 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2016–30625 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–827]

Certain Cased Pencils From the People's Republic of China: Amended Final Results of Antidumping Duty New Shipper Review; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Department) is amending the final results of the new shipper review (NSR) of the antidumping duty order on certain cased pencils from the People's Republic of China (PRC) to correct ministerial errors. The Department has reviewed Wah Yuen's allegation and determined that there were errors in the calculation of Wah Yuen's weighted-average dumping margin.

DATES: Effective December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Mary Kolberg, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1785.

SUPPLEMENTARY INFORMATION:

Background

On October 27, 2016, the Department published the final results of the NSR of the antidumping duty order on certain cased pencils from the PRC. The review covers Wah Yuen Stationery Co., Ltd. and its affiliate, Shandong Wah Yuen Stationery Co., Ltd. (collectively, Wah Yuen) for the period of review (POR) December 1, 2014, through May 31, 2015.

On October 28, 2016, Wah Yuen filed an allegation that the Department's calculation of the margin for Wah Yuen contained ministerial errors. In its ministerial error comments, Wah Yuen alleged that the Department erred in its calculation of the extended values for alkyd resin and acrylic resin. Wah Yuen argued that the Department calculated the freight component of the two input values incorrectly because it omitted the factors of production variable in both calculations. The Department reviewed the allegation and revised the calculation of the two inputs by multiplying the freight component for each input by the respective factor of production variable.[1]

Amended Final Results

The corrected weighted-average dumping margin for Wah Yuen is as follows:

[1] *See* Memorandum to The File From Mary Kolberg, International Trade Analyst, re: ''Analysis for the Amended Final Results of the Antidumping Duty New Shipper Review of Certain Cased Pencils from the People's Republic of China,'' dated October 31, 2016.

Exporter	Producer	Revised weighted-average dumping margin (percent)
Wah Yuen Stationery Co., Ltd.	Shandong Wah Yuen Stationery Co., Ltd	30.55

Assessment Rates

Consistent with section 751(a)(2)(C) of the Tariff Act of 1930, as amended, (the Act) and 19 CFR 351.212(b)(1), we intend to issue assessment instructions to the U.S. Customs and Border Protection (CBP) fifteen days after the date of publication of these amended final results. We will instruct CBP to assess antidumping duties on period of review entries in the corrected amount shown above.

Cash Deposit Requirements

The following cash deposit requirements will be effective October 27, 2016, the date of publication of the final results of this NSR for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For merchandise produced by Shandong Wah Yuen Stationery Co., Ltd. and exported by Wah Yuen Stationery Co., Ltd., the cash deposit rates will be that established in the amended final results of this review (except, if the rate is zero or *de minimis,* then zero cash deposit will be required); (2) for subject merchandise exported by Wah Yuen Stationery Co., Ltd. but not produced by Shandong Wah Yuen Stationery Co., Ltd., the cash deposit rate will be that for the PRC-wide entity (*i.e.,* 114.90 percent); and (3) for subject merchandise produced by Shandong Wah Yuen Stationery Co., Ltd. but not exported by Wah Yuen Stationery Co., Ltd., the cash deposit rate will be that applicable to the exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

The Department intends to disclose calculations performed in connection with these amended final results within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

This corrected notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.214.

Dated: November 28, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–30626 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–501]

Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On June 13, 2016, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on welded carbon steel standard pipe and tube products (welded pipe and tube) from Turkey. The period of review (POR) is May 1, 2014 through April 30, 2015. Based on our analysis of the comments received, we have made certain changes in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled, ''Final Results of the Review.'' Further, we continue to find that Erbosan and Yucel Group had no reviewable shipments of subject merchandise during the POR.

DATES: Effective December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Michael J. Heaney or Scott Hoefke, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4475 or (202) 482–4947, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 13, 2016, the Department published the *Preliminary Results* of this review in the **Federal Register**.[1] For the events following the *Preliminary Results,* see (insert cite to memo.) The Department conducted this review in accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise subject to the order is welded pipe and tube. The welded pipe and tube subject to the order is currently classifiable under subheading 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, and 7306.30.5090 of the Harmonized Tariff Schedule of the United States (HTSUS). The HTSUS subheadings are provided for convenience and customs purposes only. The written description is dispositive.[2]

Final Determination of No Shipments

In the *Preliminary Results,* the Department preliminarily determined that Erbosan and Yucel Group had no shipments during the POR.[3] Following publication of the *Preliminary Results,* we received no comments from interested parties regarding these companies. As a result, and because the record contains no evidence to the contrary, we continue to find that Erbosan and Yucel Group made no shipments during the POR. Accordingly, consistent with the Department's practice, we will instruct U.S. Customs and Border Protection (CBP) to liquidate

[1] *See Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Preliminary Results of Antidumping Duty Administrative Review, and Partial Rescission of Review; 2014–2015,* 81 FR 38131 (June 13, 2015) (*Preliminary Results*) and the accompanying Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2014–2015 Administrative Review,'' dated June 6, 2016 (Preliminary Decision Memorandum).

[2] A full written description of the scope of the order is contained in the memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, ''Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2014–2015,'' (Issues and Decision Memorandum), dated concurrently with this notice and incorporated herein by reference.

[3] *See Preliminary Results,* 81 FR at 38132, and accompanying Preliminary Decision Memorandum, at 3–4.

any existing entries of merchandise produced by Erbosan and Yucel Group, but exported by other parties without their own rate, at the all-others rate.[4]

Analysis of the Comments Received

All issues raised in the case and rebuttal briefs submitted in this review are addressed in the Issues and Decision Memorandum, which is hereby adopted with this notice. A list of the issues raised is attached as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov* and it is available to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/index.html.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we made certain changes to the *Preliminary Results.* For Toscelik, we adjusted its duty drawback adjustment, its indirect selling expense ratio, and its net financial expense ratio. For Borusan, we excluded its overrun and further processed sales, and adjusted its duty drawback adjustment, its indirect selling expenses, and its movement expenses. For a full discussion of these changes, *see* Issues and Decision Memorandum.

Rates for Non-Examined Companies

The statute and the Department's regulations do not address the establishment of a rate to be applied to companies not selected for examination when the Department limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, the Department looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual review in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

In this review, we have a calculated a weighted-average dumping margin for Toscelik that is not zero, *de minimis,* or determined entirely on the basis of facts available. Accordingly, the Department assigns to the companies not individually examined (Borusan Birlesik, Borusan Gemlik, Borusan Ihracat, Borusan Ithicat, and Tubeco) the 1.91 percent weighted-average dumping margin calculated for Toscelik.

Final Results of the Review

As a result of this review, we determine that the following weighted-average dumping margins exist for the period May 1, 2014 through April 30, 2015:

Producer or exporter	Weighted-average dumping margin (percent)
Borusan Mannesmann Boru Sanayi ve Ticaret A.S.[5]	0.00
Toscelik Profil ve Sac Endustrisi A.S.[6]	1.91
Borusan Birlesik Boru Fabrikalari San ve Tic	1.91
Borusan Gemlik Boru Tesisleri A.S.	1.91
Borusan Ihracat Ithalat ve Dagitim A.S.	1.91
Borusan Ithicat ve Dagitim A.S.	1.91
Tubeco Pipe and Steel Corporation	1.91

Disclosure

We intend to disclose the calculations performed for these final results of review within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b).

For Toscelik, because its weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent), the Department has calculated importer-specific antidumping duty assessment rates. We calculated importer-specific *ad valorem* antidumping duty assessment rates by aggregating the total amount of dumping calculated for the examined sales of each importer and dividing each of these amounts by the total entered value associated with those sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review where an importer-specific assessment rate is not zero or *de minimis.* Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the importer-specific assessment rate is zero or *de minimis.*

For Borusan, we will instruct CBP to liquidate its entries during the POR imported by the importers identified in its questionnaire responses without regard to antidumping duties because its weighted-average dumping margin in these final results is zero.[7] Consistent with the Department's assessment practice, for entries of subject merchandise during the POR produced by Borusan, Erbosan, Yucel Group, or Toscelik for which they did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[8]

For the companies which were not selected for individual review, we will assign an assessment rate based on the methodology described in the ''Rate for Non-Examined Companies'' section, above. We intend to issue instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2) of the Act: (1) The cash deposit rates will be equal to the weighted-average dumping margins established in the final results of this review; (2) for previously reviewed or

[4] *See, e.g., Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 26922, 26923 (May 13, 2010), unchanged in *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review,* 75 FR 56989 (September 17, 2010).

[5] Also includes Borusan Istikbal Ticaret T.A.S. *See* footnote 3.

[6] Also includes Tosyali Dis Ticaret A.S. *See* footnote 4.

[7] *See Antidumping Proceeding: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8103, 8103 (February 14, 2012).

[8] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company was reviewed; (3) if the exporter is not a firm covered in this review, a previous review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the manufacturer of subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 14.74 percent, the all-others rate established in the LTFV investigation.[9] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 12, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2016–30541 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–DS–P

[9] *See Antidumping Duty Order; Welded Carbon Steel Standard Pipe and Tube Products from Turkey,* 51 FR 17784 (May 15, 1986).

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No. 161116999–6999–02]

Announcing Request for Nominations for Public-Key Post-Quantum Cryptographic Algorithms

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice and request for nominations for candidate post-quantum algorithms.

SUMMARY: This notice solicits nominations from any interested party for candidate algorithms to be considered for public-key post-quantum standards. The submission requirements and the minimum acceptability requirements of a ''complete and proper'' candidate algorithm submission, as well as the evaluation criteria that will be used to appraise the candidate algorithms, can be found at *http://www.nist.gov/pqcrypto.*

DATES: Proposals must be received by November 30, 2017. Further details are available at *http://www.nist.gov/pqcrypto.*

ADDRESSES: Algorithm submission packages should be sent to Dr. Dustin Moody, Information Technology Laboratory, Attention: Post-Quantum Cryptographic Algorithm Submissions, 100 Bureau Drive—Stop 8930, National Institute of Standards and Technology, Gaithersburg, MD 20899–8930. Submissions may also be sent by email to: *pqc-submissions@nist.gov.* Note that for email submissions, some of the supporting documentation requires a signature and must be physically mailed to the above address. See *http://www.nist.gov/pqcrypto* for complete submission instructions.

FOR FURTHER INFORMATION CONTACT: For general information, send email to *pqc-comments@nist.gov.* For questions related to a specific submission package, contact Dr. Dustin Moody, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8930, Gaithersburg, MD 20899–8930, email: *dustin.moody@nist.gov,* or by telephone: (301) 975–8136.

A public email list-serve has been set up for announcements, as well as a forum to discuss the standardization effort being initiated by NIST. For directions on how to subscribe, please visit *http://www.nist.gov/pqcrypto.*

SUPPLEMENTARY INFORMATION: The National Institute of Standards and Technology (NIST) has initiated a process to develop and standardize one or more additional public-key cryptographic algorithms to augment FIPS 186–4, Digital Signature Standard, as well as special publications SP 800–56A, Revision 2, Recommendation for Pair-Wise Key Establishment Schemes Using Discrete Logarithm Cryptography, and SP 800–56B, Recommendation for Pair-Wise Key-Establishment Schemes Using Integer Factorization Cryptography. It is intended that the new public-key cryptography standards will specify one or more additional unclassified, publicly disclosed digital signature, public-key encryption, and key-establishment algorithms that are capable of protecting sensitive government information well into the foreseeable future, including after the advent of quantum computers.

As a first step in this process, NIST solicited public comment on draft minimum acceptability requirements, submission requirements, and evaluation criteria for candidate algorithms. The comments received are posted at *http://www.nist.gov/pqcrypto,* along with a summary of the changes made as a result of these comments.

The purpose of this notice is to announce that nominations for post-quantum candidate algorithms may now be submitted, up until the final deadline of November 30, 2017. Complete instructions on how to submit a candidate package, including the minimal acceptability requirements, are posted at *http://www.nist.gov/pqcrypto.* The finalized evaluation criteria which will be used to assess the submissions are also posted at the same Web site.

Authority: In accordance with the Information Technology Management Reform Act of 1996 (Pub. L. 104–106) and the Federal Information Security Management Act of 2002 (FISMA) (Pub. L. 107–347), the Secretary of Commerce is authorized to approve FIPS. NIST activities to develop computer security standards to protect

federal sensitive (unclassified) information systems are undertaken pursuant to specific responsibilities assigned to NIST by Section 20 of the National Institute of Standards and Technology Act (15 U.S.C. 278g–3), as amended.

Kevin Kimball,

NIST Chief of Staff.

[FR Doc. 2016–30615 Filed 12–19–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF065

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys in the Gulf of Mexico

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

ACTION: Notice; receipt of revised application for marine mammal incidental take regulations (ITRs); request for comments and information; extension of public comment period.

SUMMARY: NMFS has received a revised application for ITRs from the Bureau of Ocean Energy Management (BOEM), on behalf of oil and gas industry operators. The specified activity considered in the application is geophysical survey activity conducted in the Gulf of Mexico (GOM), over the course of five years from the date of issuance. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of BOEM's request for the development of regulations governing the incidental taking of marine mammals. NMFS invites the public to provide information, suggestions, and comments on BOEM's application.

The original notice announcing receipt of the revised application (81 FR 88664; December 8, 2016) indicated that comments and information must be received no later than January 9, 2017, which allowed 30 days for public input. We subsequently received a request to extend the comment period by a period of 14 days and have granted that request.

DATES: Comments and information must be received no later than January 23, 2017.

ADDRESSES: Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Laws@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *www.nmfs.noaa.gov/pr/permits/incidental/oilgas.htm* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

Electronic copies of the application and supporting documents may be obtained online at: *www.nmfs.noaa.gov/pr/permits/incidental/oilgas.htm*. BOEM has separately released a draft Programmatic Environmental Impact Statement (EIS) for public review (September 30, 2016; 81 FR 67380). This draft EIS was prepared in order to evaluate the potential significant effects of multiple geological and geophysical activities on the GOM Outer Continental Shelf (OCS) pursuant to the National Environmental Policy Act. The document is available online at: *www.boem.gov/GOM-G-G-PEIS/*.

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued.

Incidental taking shall be allowed if NMFS finds that the taking will have a negligible impact on the species or stock(s) affected and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).''

The use of sound sources such as those described in the application (*e.g.,* airgun arrays) may result in the disturbance of marine mammals through disruption of behavioral patterns or may cause auditory injury of marine mammals. Therefore, incidental take authorization under the MMPA is warranted.

Summary

BOEM was formerly known as the Minerals Management Service (MMS) and, later, the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). On December 20, 2002, MMS petitioned NMFS for rulemaking under Section 101(a)(5)(A) of the MMPA to authorize take of sperm whales (*Physeter macrocephalus*) incidental to conducting geophysical surveys during oil and gas exploration activities in the GOM. On March 3, 2003, NMFS published a notice of receipt of MMS's application and requested comments and information from the public (68 FR 9991). This comment period was later extended to April 16, 2003 (68 FR 16263). MMS subsequently submitted a revised petition on September 30, 2004, to include a request for incidental take authorization of additional species of marine mammals. On April 18, 2011, BOEMRE submitted a revision to the petition, which incorporated updated information and analyses. NMFS published a notice of receipt of this revised petition on June 14, 2011 (76 FR 34656). In order to incorporate the best available information, BOEM submitted another revision to the petition on March 28, 2016, which was followed on

October 17, 2016, by a revised version that we have deemed adequate and complete based on our implementing regulations at 50 CFR 216.104.

The requested regulations would establish a framework for authorization of incidental take by Level A and Level B harassment through Letters of Authorization (LOAs). Following development of the ITRs, implementation could occur via issuance of LOAs upon request from individual industry applicants planning specific geophysical survey activities.

Specified Activities

The application describes geophysical survey activity, conducted by industry operators in OCS waters of the GOM within BOEM's GOM planning areas (*i.e.,* the Western, Central, and Eastern Planning Areas). Geophysical surveys are conducted by industry operators to characterize the shallow and deep structure of the OCS, including the shelf, slope, and deepwater ocean environment, in order to obtain data for hydrocarbon exploration and production, aid in siting oil and gas structures and facilities, identify possible seafloor or shallow-depth geologic hazards, and locate potential archaeological resources and benthic habitats that should be avoided.

Deep penetration seismic surveys, used largely for oil and gas exploration and development and involving a vessel or vessels towing an airgun or array of airguns that emit acoustic energy pulses through the overlying water and into the seafloor, are one of the most extensive survey types and are expected to carry the greatest potential for effects to marine mammals. Non-airgun high resolution geophysical surveys are used to detect and monitor geohazards, archaeological resources, and certain types of benthic communities.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning BOEM's request (see **ADDRESSES**). NMFS will consider all relevant information, suggestions, and comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals, as appropriate.

Dated: December 14, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–30492 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Southeast Region Permit Family of Forms

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

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act (PRA) of 1995.

DATES: Written comments must be submitted on or before February 21, 2017.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Adam Bailey, NMFS Southeast Regional Office (SERO), 263 13th Avenue South, St. Petersburg, FL 33701, phone: 727–824–5305, or email: *adam.bailey@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a renewal with revisions to the existing reporting requirements approved under the Office of Management and Budget's (OMB) Control Number 0648–0205, Southeast Region Permit Family of Forms. The SERO Permits Office administers Federal fishing permits in the United States (U.S.) exclusive economic zone (EEZ) of the Caribbean Sea, Gulf of Mexico (Gulf), and South Atlantic under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801. The SERO Permits Office also proposes to revise parts of the current collection-of-information approved under OMB Control Number 0648–0205.

The National Marine Fisheries Service (NMFS) Southeast Region manages the U.S. Federal fisheries in the Caribbean, Gulf, and South Atlantic under the fishery management plans (FMPs) for each region. The regional fishery management councils prepared the FMPs pursuant to the Magnuson-Stevens Act. The regulations implementing the FMPs, including those that have reporting requirements, are at 50 CFR part 622.

The recordkeeping and reporting requirements at 50 CFR part 622 form the basis for this collection of information. The NMFS Southeast Region requests information from fishery participants. This information, upon receipt, results in an increasingly more efficient and accurate database for management and monitoring of the Federal fisheries in the Caribbean, Gulf, and South Atlantic.

The SERO Permits Office proposes to revise the collection-of-information approved under OMB Control Number 0648–0205. NMFS proposes to revise the Federal permit applications for Vessels Fishing in the EEZ (Vessel EEZ), Harvest of Aquacultured Live Rock in the EEZ, Vessels Fishing for Wreckfish in the South Atlantic States (Wreckfish), and the Annual Dealer permit.

The purpose of revising certain Southeast Region permit application forms is to better comply with National Standard 4 (NS4) of the Magnuson-Stevens Act, the Regulatory Flexibility Act (RFA) and the Small Business Administration's regulations implementing the RFA, Executive Order 12898, and the ''fairness and equitable distribution'' provisions of the Magnuson-Stevens Act, including NS4 and section 303(b)(6).

The SERO Permits Office also proposes to split the single application form, Federal Permit Application for the Harvest of Aquacultured Live Rock, into two application forms, Federal Permit Application for New Permit for the Harvest of Aquacultured Live Rock (Aquacultured Live Rock New Permit) and Federal Permit Application to Renew Permit for the Harvest of Aquacultured Live Rock (Aquacultured Live Rock Permit Renewal).

The Aquacultured Live Rock New Permit includes the collection of data previously collected via a separate form, Aquaculture Site Evaluation Report, among other revisions. The proposed revisions to establish the Aquacultured Live Rock New Permit application do not affect the time burden for applicants for new sites or new permit holders, but should clarify the application process for most applicants of new sites. The application form for the Aquacultured Live Rock Permit Renewal does not include the Aquaculture Site Evaluation Report; however, the Aquacultured Live

Rock Permit Renewal form does include other clarifying revisions. NMFS does not anticipate these revisions to both forms will materially change the time burden to the applicants.

The proposed revisions to the specified application forms are administrative and generally divide existing data fields into smaller parts to gather information that is more specific. NMFS intends the revisions to make the requested information clearer and easier to understand, and therefore, applications may require less time to complete in some cases. Additionally, NMFS removed some data fields that were collecting less meaningful data. NMFS estimates that the proposed revisions would not change the annual number of respondents or responses, or annual costs to affected permit applicants from estimates in the currently approved collection. Across the application forms, NMFS estimates these revisions would increase the overall time burden.

In addition to the proposed revisions above, NMFS also increases its estimated time burden for the Vessel Permit Transfers and Notarizations form and the Annual Landings Report for Gulf of Mexico Shrimp form to more accurately account for the time required to complete these forms.

II. Method of Collection

Respondents complete applications on paper forms, and then can either mail or bring applications to the SERO Permits Office. Online application renewals are currently available only for some of the permits included on the Federal Permit Application for Vessels Fishing in the Exclusive Economic Zone. The SERO Permits Office can mail applications and instructions or they can be downloaded from the SERO Permits Office Web site at *sero.nmfs.noaa.gov/permits.*

III. Data

OMB Control Number: 0648–0205.

Form Number(s): None.

Type of Review: Regular submission (revision and extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 13,909.

Estimated Time per Response:

- Dealer Permit Application, 30 minutes;
- Vessel EEZ Permit Application, including Golden Tilefish Endorsement and Smoothhound Shark Permit, 40 minutes;
- Wreckfish Permit Application, 40 minutes;
- Vessel Operator Card Application for Dolphin/Wahoo or Rock Shrimp, 21 minutes;
- Fishing in Colombian Treaty Waters Vessel Permit Application, 30 minutes;
- Golden Crab Permittee Zone Transit Notification, 12 minutes;
- Notifications of Authorization for Retrieval of Lost or Stolen Traps (golden crab, reef fish, snapper-grouper, spiny lobster), 13 minutes;
- Vessel Permit Transfers and Notarizations, 10 minutes;
- Annual Landings Report for Gulf of Mexico Shrimp, 20 minutes;
- International Maritime Organization (IMO) Number Registration, 30 minutes;
- Aquacultured Live Rock Permitting and Reporting—New Permit—Deposit Harvest Report, 15 minutes; Notice of Intent to Harvest, 5 minutes; Site Evaluation Report, 20 minutes; Federal Permit Application, including Site Evaluation Report, 50 minutes; and
- Aquacultured Live Rock Permitting and Reporting—Renew Permit—Deposit Harvest Report, 15 minutes; Notice of Intent to Harvest, 5 minutes; Federal Permit Application, 30 minutes.

Estimated Total Annual Burden Hours: 7,940.

Estimated Total Annual Cost to Public: $483,828 in recordkeeping or reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 15, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–30594 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF087

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a webinar meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a meeting of its Pulley Ridge Working Group via webinar.

DATES: The webinar will convene on Wednesday, January 4, 2017, 10 a.m. to 12 p.m. EST.

ADDRESSES: The meeting will take place via webinar.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Dr. Morgan Kilgour, Fishery Biologist, Gulf of Mexico Fishery Management Council; *morgan.kilgour@gulfcouncil.org,* telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Wednesday, January 4, 2017; 10 a.m.–12 p.m., EST:

Agenda: The working group will discuss available information about Pulley Ridge and potential boundary modifications to the existing habitat area of particular concern.

—Meeting Adjourns—

You may register for Pulley Ridge Working Group webinar on January 4, 2017 at: *https://attendee.gotowebinar.com/register/3018060841235901185.*

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on the Council's file server. To access the file server, the URL is *https://public.gulfcouncil.org:5001/webman/index.cgi* or go to the Council's Web site and click on the FTP link in the lower left of the Council Web site (*http://www.gulfcouncil.org*). The username and password are both ''gulfguest''. Click on the ''Library Folder'' then scroll down to ''Pulley Ridge Working Group Jan 2017''.

The meeting will be webcast over the internet. A link to the webcast will be available on the Council's Web site, *http://www.gulfcouncil.org.*

Although other non-emergency issues not on the agenda may come before the Working Group for discussion, in

accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Working Group will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Dated: December 14, 2016.

Tracey L. Thompson,

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

[FR Doc. 2016–30500 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Submission for OMB Review; Comment Request; Secrecy and License To Export

The United States Patent and Trademark Office (USTPO) will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: United States Patent and Trademark Office, Commerce.

Title: Secrecy and License to Export.

OMB Control Number: 0651–0034.

Form Number(s): None.

Type of Request: Revision of a currently approved collection.

Number of Respondents: 2,559 per year.

Average Hours Per Response: Between 30 minutes (0.5 hours) and 4 hours to gather the necessary information, prepare the materials, and to submit it to the USPTO, depending upon the instrument used and the complexity of the situation.

Burden Hours: 1607.5 hours.

Cost Burden: $448,267.70.

Needs and Uses: This information is required by 35 U.S.C. 181–188 and administered by the USPTO through 37 CFR 5.1–5.22 and 1.17. This collection includes the information needed by the USPTO to review the various types of petitions regarding secrecy orders and to issue or revoke foreign filing licenses. Responses to this information collection is necessary to obtain a permit to disclose, modify or rescind a secrecy order; to obtain general or group permits; to obtain foreign filing licenses, including retroactive foreign filing licenses; or to change the scope of a license.

Affected Public: Businesses or other for-profits; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Kimberly R. Keravouri, email: *Kimberly_R_Keravouri@omb.eop.gov.*

Once submitted, the request will be publicly available in electronic format through *reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0034 copy request'' in the subject line of the message.
- *Mail:* Marcie Lovett, Records Management Division Director, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Written comments and recommendations for the proposed information collection should be sent on or before January 19, 2017 to Kimberly R. Keravouri, OMB Desk Officer, via email to *Kimberly_R_Keravouri@omb.eop.gov,* or by fax to 202–395–5167, marked to the attention of Kimberly R. Keravouri.

Dated: December 13, 2016.

Marcie Lovett,

Records Management Division Director, OCIO, United States Patent and Trademark Office.

[FR Doc. 2016–30506 Filed 12–19–16; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Divert Activities and Exercises, Commonwealth of the Northern Mariana Islands

ACTION: Notice of Availability (NOA) Record of Decision (ROD).

SUMMARY: On December 7, 2016, the United States Air Force signed the ROD for the Divert Activities and Exercises, Commenwealth of the Northern Mariana Islands Final Environmental Impact Statement (EIS). This ROD states the Air Force decision is to implement Alternative 2—Modified Tinian Alternative, and specifically the North Option. The decision means that the Air Force will construct the facilities and infrastructure needed to achieve divert capabilities in the western Pacific and conduct military exercises.

The decision was based on matters discussed in the Final EIS; inputs from the public, Federal, the Commonwealth of the Northern Mariana Islands, and local units of government, and regulatory agencies; and other relevant factors. The Final EIS was made available to the public on September 26, 2016 through a NOA in the **Federal Register** (Volume 81, Page 66013) with a post-filing waiting period that ended on October 26, 2016. This ROD documents only the Air Force decision on the proposed actions analyzed in the Final EIS. Authority: This NOA is published pursuant to the regulations (40 CFR Sec. 1506.6) implementing the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*) and the Air Force's Environmental Impact Analysis Process (32 CFR Secs. 989.21(b) and 989.24(b)(7)).

FOR FURTHER INFORMATION CONTACT: Mark Petersen, 25 E Street, C–310, JBPHH, HI 96853, (808) 449–1078.

Henry Williams,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2016–30488 Filed 12–19–16; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant an Exclusive License; Adaptive Phage Therapeutics, Inc.

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant Adaptive Phage Therapeutics, Inc. a revocable, nonassignable, exclusive license to practice worldwide the Government owned inventions described in U.S. Provisional Patent Application 62/353,517, filed 22 June 2016 and entitled ''Bacteriophage compositions and methods of selection of components against specific bacteria'' as well as any issued patent, divisional or continuation from that and related foreign filings in the field of antibiotics and drug-resistant bacteria control.

DATES: Anyone wishing to object to the grant of this license has fifteen (15) days from the date of this notice to file written objections along with supporting evidence, if any, not later than January 4, 2017.

ADDRESSES: Written objections are to be filed with Attn: Naval Medical Research Center, Code 1URO/OPBD, 503 Robert Grant Avenue, Silver Spring, MD 20910–7500.

FOR FURTHER INFORMATION CONTACT: Dr. T.A. Ponzio, Director, Partnerships & Business Development, Naval Medical Research Center, 503 Robert Grant Ave., Silver Spring, MD 20910–7500; *todd.a.ponzio.civ@mail.mil;* telephone: 240–762–0673.

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: December 14, 2016.

A.M. Nichols,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2016–30590 Filed 12–19–16; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant an Exclusive License; DBC Medical Innovations, LLC

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant DBC Medical Innovations, LLC a revocable, nonassignable, exclusive license to practice worldwide the Government owned inventions described in U.S. Patent Application 15/090,047, filed 04 April 2016 and entitled ''User Adjustable Prosthetic Ankle That Compensates for Different Heel Heights'' as well as any issued patent, divisional or continuation from that and related foreign filings in the field of prosthetics.

DATES: Anyone wishing to object to the grant of this license has fifteen (15) days from the date of this notice to file written objections along with supporting evidence, if any, not later than January 4, 2017.

ADDRESSES: Written objections are to be filed with Attn: Naval Medical Research Center, Code 1URO/OPBD, 503 Robert Grant Avenue, Silver Spring, MD 20910–7500.

FOR FURTHER INFORMATION CONTACT: Dr. T.A. Ponzio, Director, Partnerships & Business Development, Naval Medical Research Center, 503 Robert Grant Ave., Silver Spring, MD 20910–7500; *todd.a.ponzio.civ@mail.mil;* telephone: 240–762–0673.

Authority: 35 U.S.C. 207, 37 CFR Part 404.

Dated: December 13, 2016.

A.M. Nichols,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2016–30582 Filed 12–19–16; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant an Exclusive License; SpringStar Inc.

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant SpringStar Inc. a revocable, nonassignable, exclusive license to practice worldwide the Government owned inventions described in U.S. Patent Application 14/870,170 filed April 22, 2015 and entitled ''Modular insect trap,'' as well as any issued patent, divisional or continuation from that and related foreign filings in the field of insect control.

DATES: Anyone wishing to object to the grant of this license has fifteen (15) days from the date of this notice to file written objections along with supporting evidence, if any, not later than January 4, 2017.

ADDRESSES: Written objections are to be filed with Attn: Naval Medical Research Center, Code 1URO/OPBD, 503 Robert Grant Avenue, Silver Spring, MD 20910–7500.

FOR FURTHER INFORMATION CONTACT: Dr. T.A. Ponzio, Director, Partnerships & Business Development, Naval Medical Research Center, 503 Robert Grant Ave., Silver Spring, MD 20910–7500; *todd.a.ponzio.civ@mail.mil;* telephone: 240–762–0673.

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: December 13, 2016.

A.M. Nichols,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2016–30591 Filed 12–19–16; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive Patent License; Solar Tech, Inc.

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to Solar Tech, Inc., a revocable, nonassignable, exclusive license to practice in the field of use of flexible solar cells for renewable energy generation for application on a building or structure in the United States, the Government-owned inventions described in U.S. Patent Application No. 14/051,134: Spray Deposition Method for Inorganic Nanocrystal Solar Cells, Navy Case No. 101,963.//U.S. Patent Application No. 14/051,226: Inorganic Nanocrystal Solar Cells, Navy Case No. 101,963.//U.S. Patent Application No. 14/256,263: Top to Bottom Solution Deposition of Inorganic Solar Modules, Navy Case No. 102,634.//U.S. Patent Application No. 15/266,878: Top to Bottom Solution Deposition of Inorganic Solar Modules, Navy Case No. 102,634 and any continuations, divisionals or re-issues thereof.

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than January 4, 2017.

ADDRESSES: Written objections are to be filed with the Naval Research Laboratory, Code 1004, 4555 Overlook Avenue SW., Washington, DC 20375–5320.

FOR FURTHER INFORMATION CONTACT: Charles Steenbuck, Acting Head, Technology Transfer Office, NRL Code 1004, 4555 Overlook Avenue SW., Washington, DC 20375–5320, telephone 202–767–3083. Due to U.S. Postal delays, please fax 202–404–7920, email: *NRL1004@research.nrl.navy.mil* or use courier delivery to expedite response.

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: December 12, 2016.

A.N. Michols,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2016–30586 Filed 12–19–16; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant an Exclusive License; Rotunda Scientific Technologies, LLC

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant DBC Medical Innovations, LLC a

revocable, nonassignable, exclusive license to practice worldwide the Government owned inventions described in U.S. Provisional Patent Application 62/267,969, filed 16 December 2015 and entitled ''Device For Noninvasively Verifying Time Temperature Profile Of A Thermoluminescent Dosimeter Card Reader'' as well as any issued patent, divisional or continuation from that and related foreign filings in the field of dosimetry and radiation protection.

DATES: Anyone wishing to object to the grant of this license has fifteen (15) days from the date of this notice to file written objections along with supporting evidence, if any, not later than January 4, 2017.

ADDRESSES: Written objections are to be filed with Attn: Naval Medical Research Center, Code 1URO/OPBD, 503 Robert Grant Avenue, Silver Spring, MD 20910–7500.

FOR FURTHER INFORMATION CONTACT: Dr. T.A. Ponzio, Director, Partnerships & Business Development, Naval Medical Research Center, 503 Robert Grant Ave., Silver Spring, MD 20910–7500; *todd.a.ponzio.civ@mail.mil;* telephone: 240–762–0673.

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: December 13, 2016.

A.M. Nichols,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2016–30585 Filed 12–19–16; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Teacher and School Leader Incentive Program

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice.

Overview Information

Teacher and School Leader Incentive Program (TSL) Notice inviting applications for new awards for fiscal year (FY) 2017.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.374A.

DATES:

Applications Available: December 20, 2016.

Deadline for Notice of Intent to Apply: February 4, 2017.

Dates of Pre-Application Workshops: For information about pre-application workshops, visit the TSL Web site at: *http://innovation.ed.gov/what-we-do/teacher-quality/teacher-incentive-fund/.*

Deadline for Transmittal of Applications: March 24, 2017.

Deadline for Intergovernmental Review: April 23, 2017.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of TSL is to assist States, local educational agencies (LEAs), and nonprofit organizations to develop, implement, improve, or expand comprehensive performance-based compensation systems or human capital management systems for teachers, principals, and other school leaders (especially for teachers, principals, and other school leaders in high-need schools) who raise student academic achievement and close the achievement gap between high- and low-performing students. In addition, a portion of TSL funds are dedicated to study the effectiveness, fairness, quality, consistency, and reliability of performance-based compensation systems or human capital management systems for teachers, principals, and other school leaders.

Background:

The Elementary and Secondary Education Act of 1965 (ESEA), as reauthorized on December 10, 2015, by the Every Student Succeeds Act (ESSA),[1] established the Teacher and School Leader Incentive Fund (TSL) program. TSL builds on the former Teacher Incentive Fund (TIF) program and promotes Performance-Based Compensation Systems (PBCSs)[2] and comprehensive Human Capital Management Systems (HCMSs) that support teachers, principals, and other school leaders (*i.e.,* Educators as used in this notice). In recognition of the importance that effective school leadership has on student achievement, TSL also promotes comprehensive Evaluation and Support Systems for all Educators within an LEA, especially those serving in high-need schools. In addition, TSL seeks to contribute to the body of knowledge regarding impactful approaches to enhancing Educator effectiveness by promoting the study of the efficacy, fairness, quality, consistency, and reliability of these systems to support Educators through an independent, Department-led evaluation to assess the program's effectiveness and relevant lessons learned. Further, the Department seeks to ensure that the design of the TSL competition reflects the new provisions of the TSL statute in ESEA sections 2211–2213, as well as the lessons learned from 10 years of implementing the TIF program.

Results from the TIF program have varied across and within the portfolio of five cohorts of TIF grantees, comprised of over 140 grantees that received a total of about $2 billion in grant awards. Successful TIF grantees implemented comprehensive efforts to help teachers and principals learn and grow throughout their professional trajectories. Successful TIF grantees also considered recruitment, induction, support and career development, and growth and leadership opportunities aligned with the LEA's overall improvement strategy; and they used multi-measure evaluation systems to inform the development of innovative incentives and structures that support teachers' and principals' growth and advancement. LEAs also used TIF funds to develop their cadre of leaders.

With the priorities, requirements, definitions, and selection criterion used for this competition, we seek to build on the efforts of the TIF program and abundant research over two decades showing that teachers and teacher effectiveness are the most critical in-school factors in improving student outcomes.[3]

In addition, we have learned that effective principals and other School Leaders are crucial to strengthening teaching and school communities, and play a critical role in students' academic success—especially in high-need schools—by creating cultures of high expectations.[4] Indeed, teachers cite a principal's support and effectiveness as a leading factor that contributes to their decision to remain in the profession.[5] Effective School Leaders directly impact the quality of instruction through hiring decisions of school personnel that provide instructional leadership, support, and develop teachers—which, in turn, can help teachers focus their

[1] Unless otherwise noted, references in this notice to sections of the ESEA as reauthorized by ESSA are identified as sections of the ESEA.

[2] Throughout this notice, all defined terms are denoted with capitals.

[3] Aaronson, Daniel, Barrow, Lisa, & Sander, William, ''Teachers and Student Achievement in the Chicago Public High Schools.'' (2007), *Journal of Labor Economics,* 25(1), 95–135; Rivkin, Steven, Hanushek, Eric & Kain, John, ''Teachers, Schools, and Academic Achievement.'' (2005), *Econometrica,* 73(2), 417–458.

[4] ''Impact Evaluation of Support for Principals,'' *http://ies.ed.gov/ncee/projects/evaluation/tq_principals.asp* (2014); Leithwood, Kenneth, *et al.,* ''How Leadership Influences Student Learning: Review of Research'' (2004) New York: The Wallace Foundation, available at *http://www.wallacefoundation.org/knowledge-center/Documents/How-Leadership-Influences-Student-Learning.pdf.*

[5] Ingersoll, Richard. ''Teacher Turnover, Teacher Shortages, and the Organization of Schools.'' University of Washington. (2001).

efforts on student learning.[6] Effective School Leaders also create a vision of academic success for all children in their schools and encourage other Educators to take on leadership roles and responsibilities.

Given the importance of ensuring that Educators are as effective as possible—especially in high-need schools, where equal educational opportunity is particularly important for historically underserved students—TSL is designed to utilize PBCSs and other supports for Educators as a central part of an LEA's effort to improve student academic achievement. Indeed, the TSL statute gives priority to applicants that propose to focus supports on Educators in High-Need Schools. By providing Educators with PBCSs, in which performance-based compensation may include robust career ladder opportunities for effective Educators, TSL aims to reward Educators for their effectiveness and improved student outcomes.

Recent cohorts of TIF grantees expanded LEA teacher and principal evaluation systems to include all teachers and principals in a given LEA, and measured educator performance using multiple factors, including classroom observations and gains in student academic achievement. Using the information generated from these more comprehensive teacher and principal evaluation systems, successful TIF grantees began to transform how effective teachers and principals were compensated, moving beyond the episodic performance-based bonuses that were more typical of early TIF cohorts. Recent cohorts of TIF grantees also began complementing their compensation incentives with non-compensation supports in order to build stronger support systems throughout teachers' and principals' trajectory, from pre-service through retention. These strategies included using teacher and principal evaluation systems to inform decisions about recruitment, retention, tenure, compensation, support, and leadership potential.

Successful TIF grantees also demonstrated that implementing successful Educator Evaluation and Support Systems that inform performance-based compensation can occur across a wide range of contexts. However, based on reports from grantees and from evaluations of early TIF cohorts, the most promising TIF-supported efforts appear to be those that are designed to support instructional improvements through use of classroom and school-level data, to create a shared understanding of effective classroom-level practices.

In recent years, many States and LEAs have developed high-quality Educator Evaluation and Support systems as part of their efforts to improve LEAs' hiring practices, provide Educators with meaningful feedback and targeted professional development, and use information on Educator performance to inform key school- and district-level decisions. As such, an increasing number of LEAs are well-equipped to make human capital decisions that both support Educators and improve student outcomes. In view of the work and resources that many LEAs have already invested in an HCMS, PBCS, and Educator Evaluation and Support Systems that already meet provisions of the TSL statute, and the desire to have make awards to applicants who are ready to expand upon their existing work, we have structured this competition to permit LEAs to build upon and improve existing HCMS, PBCS, and Educator Evaluation and Support Systems that meet the definitions of these terms in this notice that come from the TSL statute. Doing so could include efforts to improve the Educator Evaluation and Support Systems (*e.g.,* make them even more fair, reliable, and credible; better align formative and summative assessments with college- and career-ready standards; or provide more mentoring and coaching to support Educators) as well as efforts to have the HCMS and Educator Evaluation and Support Systems address new challenges or opportunities (*e.g.,* partnering with institutions of higher education to strengthen pre-service programming or creating a teacher residency program, including one that is consistent with the definition of the term in section 2002(5) of the ESEA.) The Department encourages applicants to reflect these types of efforts in their TSL applications.

Moreover, much work remains to ensure that students, particularly those whose families live in poverty, have equitable access to the most effective Educators. In order to help ensure that every public school student has equitable access to excellent Educators, in 2014 the Department asked each State educational agency (SEA) to submit a State Plan to Ensure Equitable Access to Excellent Educators describing how it will ensure that ''poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers,'' as formerly required by section 1111(b)(8)(C) of the ESEA, as reauthorized by the No Child Left Behind Act (now section 1111(g)(1)(B) of the ESEA, as amended by ESSA). All 50 States, the District of Columbia, and the Commonwealth of Puerto Rico developed plans that the Department approved in 2015. States began to implement these plans in the 2015–16 school year. Several of the States' proposed approaches reflected in these plans include performance-based compensation, including strategies such as career pathways that TSL funds could support. Therefore, the Department encourages applicants to align their TSL proposals to their State plans, and has established a priority for this purpose. In addition, given the emerging literature on the importance of educator diversity, the Department encourages applicants to leverage TSL resources to diversify their Educator workforce, and, similarly, has established a second priority for this purpose. More information on the importance of educator workforce diversity can be found in the Department's report on The State of Racial Diversity in the Educator Workforce at the following link: *https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf.*

Historically, the TIF program focused its efforts on implementing performance-based compensation in high-need schools. Under provisions that include ESEA sections 2211(a) and (b)(2) and 2212(d)(1), TSL continues to ensure that grantees focus their activities on teachers and School Leaders in high-need schools. In this regard, ESEA section 2211(b)(2) defines a High-Need School as a public elementary or secondary school that is located in an area in which the percentage of students from families with incomes below the poverty line is 30 percent or more. The definition of poverty line in ESEA section 8101(41) effectively requires the Department to use poverty line data gathered by the U.S. Census Bureau since no other data that meet this definition are available.

However, the Department has determined that the school-level poverty-line data required by the definition of High-Need School are unavailable; the U.S. Census Bureau reports these data only by LEA. As such,

[6] Papa, Frank, Hamilton Lankford, and James Wyckoff, ''Hiring Teachers in New York's Public Schools: Can the Principal Make a Difference?'' University (2008) available at Albany, SUNY. *www.tandfonline.com/doi/full/10.1080/15700760701655524?mobileUi=0&;* Wallace Foundation, ''The School Principal as Leader: Guiding Schools to Better Teaching and Learning'' (2013 available at *www.wallacefoundation.org/knowledge-center/Documents/The-School-Principal-as-Leader-Guiding-Schools-to-Better-Teaching-and-Learning-2nd-Ed.pdf;* Ikemoto, Gina, et al., New Leaders, ''Playmakers: How great principals build and lead great teams of teachers''(2012) available at *www.newleaders.org/wp-content/uploads/Playmakers.pdf.*

in order to ensure that awards made under this competition still focus on schools that are high-poverty, the Secretary is exercising the orderly transition authority in section 4(b) of ESSA to define a High-Need School for purposes of this competition using the same poverty measure applicable to the definition of a High-Need School for the past three TIF competitions. Since the income of a family below the poverty line is much lower than the income a family needs to enable its children to be eligible for free or reduced-price lunch subsidies under the Richard B. Russell National School Lunch Act (the poverty measure used in all prior TIF competitions), we believe that use of the prior TIF poverty measure to determine which schools are high-need is also a reasonable approach to implementing Congressional intent for TSL.

Priorities: This notice contains four absolute priorities and two competitive preference priorities. We are establishing these priorities, requirements, and definitions for the FY 2017 grant competition, and any subsequent year in which we make awards from the list of unfunded applications from this competition, in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1).

Absolute Priorities: The following priorities are absolute priorities. Under 34 CFR 75.105(c)(3), applications must meet the following absolute priorities in order to be considered for awards:

- *Absolute Priority 1:* Human Capital Management System; and one of the three following Absolute Priorities:
- *Absolute Priority 2:* Evaluation and Support Systems for Teachers;
- *Absolute Priority 3:* Evaluation and Support Systems for School Leaders; or
- *Absolute Priority 4:* Evaluation and Support Systems for Teachers and School Leaders.

Note: Applicants must indicate in their applications under which absolute priorities they are applying. Applications that do not clearly address Absolute Priority 1 and one of the other absolute priorities (Absolute Priorities 2, 3, or 4) will not be reviewed.

Assuming that applications in each funding category are of sufficient quality, the Secretary intends to award grants under each of the three following funding categories:

(a) Evaluation and Support Systems for Teachers;

(b) Evaluation and Support Systems for School Leaders; and

(c) Evaluation and Support Systems for Teachers and School Leaders.

Applications in each funding category will be peer reviewed, scored based on the selection criteria announced in this notice, and placed in rank order. Consistent with section 2212(d)(2) of the ESEA, to the extent practicable, the Secretary will award an equitable geographic distribution of grants, including the distribution of such grants between rural and urban areas.

The absolute priorities are:

Absolute Priority 1: Human Capital Management System (HCMS). To meet this priority, the applicant must include, in its application, a description of its existing LEA-wide HCMS (or, in the case of a consortium application or an SEA application, the shared HCMS that currently exists across the proposed LEAs that will participate in this project), including a description of its PBCS. In addition, the application must describe—

(1) How the HCMS currently includes an Evaluation and Support System for teachers, School Leaders, or both, that reflects clear and fair measures of performance, based in part on demonstrated improvement in student academic achievement;

(2) Any proposed modifications of the HCMS under the proposed project, including modifications that expand or improve the Evaluation and Support System as defined in this notice;

(3) How the Evaluation and Support System will provide ongoing, differentiated, targeted, and personalized support and feedback for improvement, including professional development opportunities designed to increase effectiveness during the entire project period;

(4) A data system that links Educators with student academic achievement data; and

(5) How the HCMS uses performance information from the Evaluation and Support System to inform key school- and district-level human capital decisions as decisions on preparation, recruitment, hiring, placement, retention, dismissal, compensation (including performance-based compensation), professional development, tenure, and promotion, particularly as they affect Educators working in High-Need Schools in the LEA or LEAs the project will serve.

Note: The described HCMS, PBCS, and the applicable Educator Evaluation and Support Systems must meet the definition of these terms in this notice. In addition, applicants may optionally include other school personnel (*e.g.,* support staff, counselors, and aides) in their HCMS as local circumstances warrant.

Absolute Priority 2: Evaluation and Support Systems for Teachers. To meet this priority, the applicant must include, in its application, a description of how its project would enhance its Evaluation and Support System for teachers in High-Need Schools in the LEA or LEAs the project will serve.

Absolute Priority 3: Evaluation and Support Systems for School Leaders. To meet this priority, the applicant must include, in its application, a description of how its project would enhance its Evaluation and Support System for School Leaders in High-Need Schools in the LEA or LEAs the project will serve.

Absolute Priority 4: Evaluation and Support Systems for Teachers and School Leaders. To meet this priority, the applicant must include, in its application, a description of how its project would enhance its Evaluation and Support System for teachers and School Leaders in High-Need Schools in the LEA or LEAs the project will serve.

Competitive Preference Priorities: For FY 2017 and any subsequent year in which we make awards from the list of unfunded applications from this competition, the following priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2) we award additional points to an application depending on how well the application meets the competitive preference priorities.

Applicants may apply under one, two, or both competitive preference priorities. An application can receive up to 10 points for meeting Competitive Preference Priority 1 and up to 5 points for meeting Competitive Preference Priority 2, depending on how well the application meets these competitive preference priorities. The maximum total competitive preference priority points an application may receive under this competition is 15.

The competitive preference priorities are:

Competitive Preference Priority 1: Using the HCMS to Improve Equitable Access to Effective Educators (up to 10 points). Projects that are designed to address the most significant gaps or insufficiencies in student access to effective teachers, School Leaders, or both teachers and School Leaders, in High-Need Schools, including gaps or inequities in how effective teachers, School Leaders, or both, are distributed across the LEA or LEAs the project will serve. At minimum, applicants must:

(1) Identify the most significant gaps or insufficiencies in student access to effective teachers, School Leaders, or both, in High-Need Schools, including gaps or inequities in how effective teachers, School Leaders, or both, are distributed across the LEA(s) the project will serve;

(2) Identify relevant factors used in determining such gaps, such as data on

availability of school resources, staffing patterns, school climate, and educator support; and

(3) Describe how the strategies proposed for closing the identified gaps are aligned to and are consistent with the strategies identified in the State's Plan to Ensure Equitable Access to Excellent Educators, approved by the Department in 2015.

Competitive Preference Priority 2: Attracting, Supporting, and Retaining a Diverse and Effective Workforce (up to 5 points). Projects that are designed to attract, support, and retain a diverse and effective workforce, including effective teachers, School Leaders, or both, from historically underrepresented populations. At minimum, applicants must provide a description detailing their commitment to creating and maintaining a diverse workforce, and their plan for attracting, supporting, and retaining diverse Educators.

Requirements: The following requirements are from ESEA sections 2212 and 2213:

Requirement 1—Use of Funds:

Each applicant must demonstrate how it will use TSL grant funds to develop, implement, improve, or expand, in collaboration with Educators and members of the public, one or more of the following:

(A) Developing or improving an Evaluation and Support System, including as part of an HCMS, that—

(i) Reflects clear and fair measures of teacher or School Leader performance, or both, based in part on demonstrated improvement in student academic achievement; and

(ii) Provides teachers, or School Leaders, or both, with ongoing, differentiated, targeted, and personalized support and feedback for improvement, including professional development opportunities designed to increase effectiveness.

(B) Conducting outreach within an LEA or a State to gain input on how to construct an Evaluation and Support System and to develop support for the Evaluation and Support System, including by training appropriate personnel in how to observe and evaluate teachers, or School Leaders, or both.

(C) Providing School Leaders with—

(i) Balanced autonomy to make budgeting, scheduling, and other school-level decisions in a manner that meets the needs of the school without compromising the intent or essential components of the policies of the LEA or State; and

(ii) Authority to make staffing decisions that meet the needs of the school, such as building an instructional leadership team that includes teacher leaders or offering opportunities for teams or pairs of effective teachers or candidates to teach or start teaching in High-Need Schools together.

(D) Implementing, as part of a comprehensive PBCS, a differentiated salary structure, which may include bonuses and stipends, to one or both of the following:

(i) Teachers who—

(I) Teach in High-Need Schools or high-need subjects;

(II) Raise student academic achievement; or

(III) Take on additional leadership responsibilities; or

(ii) School Leaders who serve in High-Need Schools and raise student academic achievement in the schools.

(E) Improving the LEA's system and process for the recruitment, selection, placement, and retention of effective teachers, or School Leaders, or both, in High-Need Schools, such as by improving LEA policies and procedures to ensure that High-Need schools are competitive and timely in—

(i) Attracting, hiring, and retaining effective Educators;

(ii) Offering bonuses or higher salaries to effective Educators; or

(iii) Establishing or strengthening School Leader Residency Programs and Teacher Residency Programs.

(F) Instituting career advancement opportunities characterized by increased responsibility and pay that reward and recognize effective teachers, principals, or other School Leaders in High-Need Schools and enable them to expand their leadership and results, such as through teacher-led professional development, mentoring, coaching, hybrid roles, administrative duties, and career ladders.

Requirement 2—Matching:

Each applicant must provide a signed assurance attesting to its intent and ability to meet the TSL requirement in section 2212(f) of the ESEA that the applicant provide, from non-Federal sources, an amount equal to 50 percent of the amount of the grant, which may be provided in cash or in kind, to carry out the activities supported by the grant. Applicants and grantees must budget their matching contributions on an annual basis relative to each annual award of TSL grant funds.

Requirement 3—Documentation of High-Need Schools:

Each applicant must demonstrate, in its application, that at least the majority of schools whose Educators will participate in the implementation of the TSL-funded PBCS are High-Need Schools (as defined in this notice). In doing so, each applicant must provide, in its application—

(a) A list of schools in which the proposed TSL-supported PBCS would be implemented, and an identification of which of these schools are High-Need Schools;

(b) For each High-Need School listed, the most current data on the percentage of students who are eligible for free or reduced-price lunch subsidies under the Richard B. Russell National School Lunch Act, or are considered students from low-income families based on another poverty measure that the LEA uses under section 1113(a)(5) of the ESEA (20 U.S.C. 6313(a)(5)); and

(c) A description of the applicant's rationale for extending the TSL-funded PBCS to any Educators who are not working in High-Need Schools.

Note: Data provided to demonstrate eligibility as a High-Need School must be school-level data; the Department will not accept LEA- or State-level data for purposes of documenting whether a school is a High-Need School.

Definitions: The definitions of *Evaluation and Support System, Evidence-Based, Human Capital Management System (HCMS), Performance-Based Compensation System, School Leader, School Leader Residency Program,* and *Teacher Residency Program* are from sections 2002, 2211, 2212, 8101(21), and 8101(44) of the ESEA. The definition of *High-Need School* is based on definitions of the term used in the 2012 and 2016 TIF competitions but, like the definition in section 2211(b) of the ESEA, focuses only on the extent of family poverty of the students the school serves. We are establishing the definitions for *Correlational Study with Statistical Controls for Selection Bias, Demonstrates a Rationale, Educators, Experimental Study, Large Sample, Logic Model, Meets What Works Clearinghouse Evidence Standards with Reservations, Meets What Works Clearinghouse Evidence Standards without Reservations, Moderate Evidence, Multi-Site Sample, Project Component, Promising Evidence, Quasi-Experimental Design Study, Randomized Controlled Trial, Regression Discontinuity Design Study, Relevant Finding, Relevant Outcome, Single-Case Design Study, and Strong Evidence* for the FY 2017 grant competition only, in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1).

Correlational Study with Statistical Controls for Selection Bias means a study that (1) estimates how a relevant outcome varies with the receipt of a

project component, and (2) uses sampling of analysis methods (*e.g.,* multiple regression) to account for at least some of the differences between the groups being compared.

Demonstrates a Rationale means the project component is supported by a reasonable logic model that is informed by research or an evaluation that suggests how the project component is likely to improve relevant outcomes.

Educator means a teacher, principal or other School Leader.

Evaluation and Support System means a system that is fair, rigorous, valid, reliable, and objective and reflects clear and fair measures of teacher, principal, or other School Leader performance, based in part on demonstrated improvement in student academic achievement; and provides teachers, principals, or other School Leaders with ongoing, differentiated, targeted, and personalized support and feedback for improvement, including professional development opportunities designed to increase effectiveness. (ESEA Section 2212(c)(4) and (e)(2)(A))

Evidence-Based means the proposed activity, strategy, or intervention is: supported by strong evidence, supported by moderate evidence, supported by promising evidence, or demonstrates a rationale. (ESEA section 8101(21))

Experimental Study means a study, such as a *Randomized Controlled Trial* (RCT), that is designed to compare outcomes between two groups of individuals that are otherwise equivalent except for their assignment to either a treatment group receiving a project component or a control group that does not. In some circumstances, a finding from a R*egression Discontinuity Design Study* (RDD) or findings from a collection of *Single-Case Design Studies* (SCDs) may be considered equivalent to a finding from an RCT. RCTs and RDDs, and collections of SCDs, depending on design and implementation, can Meet What Works Clearinghouse Evidence Standards without Reservations.

High-Need School means a school with 50 percent or more of its enrollment from low-income families, based on eligibility for free or reduced-price lunch subsidies under the Richard B. Russell National School Lunch Act, or other poverty measures that LEAs use consistent with ESEA section 1113(a)(5) (20 U.S.C. 6313(a)(5). For middle and high schools, eligibility may be calculated on the basis of comparable data from feeder schools. Eligibility as a High-Need School under this definition is determined on the basis of the most currently available data.

Human Capital Management System (HCMS) means a system—

(A) By which a LEA makes and implements human capital decisions, such as decisions on preparation, recruitment, hiring, placement, retention, dismissal, compensation, professional development, tenure, and promotion; and

(B) That includes a Performance-Based Compensation System. (ESEA section 2211(b)(3))

Large Sample means an analytic sample of 350 or more students (or other single analysis units), or 50 or more groups (such as classrooms or schools) that each contain, on average, 10 or more students (or other single analysis units, regardless of whether these single analysis units are disaggregated in the analysis of outcomes for the groups). Multiple studies can cumulatively meet the Multi-Site Sample and Large Sample requirements of Moderate Evidence or Strong Evidence, as long as each study meets the other requirements of the particular level of evidence (*i.e.,* Moderate Evidence or Strong Evidence).

Logic Model (also known as a theory of action) means a reasonable conceptual framework that identifies key components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key components and outcomes.

Meets What Works Clearinghouse Evidence Standards without Reservations is the highest possible rating for a study finding reviewed by the What Works Clearinghouse (WWC). Studies receiving this rating provide the highest degree of confidence that an estimated effect was caused by the project component studied. Experimental studies (as defined above) may receive this highest rating. These standards are described in the WWC Procedures and Standards Handbooks, Version 3.0, which can be accessed at *http://ies.ed.gov/ncee/wwc/Handbooks.*

Meets What Works Clearinghouse Evidence Standards with Reservations is the second-highest rating for a group design study reviewed by the WWC. Studies receiving this rating provide a reasonable degree of confidence that an estimated effect was caused by the project component studied. Both Experimental Studies (such as Randomized Controlled Trials with high rates of sample attrition) and Quasi-Experimental Design Studies (as defined below) may receive this rating if they establish the equivalence of the treatment and comparison groups in key baseline characteristics. These standards are described in the WWC Procedures and Standards Handbooks, Version 3.0, which can be accessed at *http://ies.ed.gov/ncee/wwc/Handbooks.http://ies.ed.gov/ncee/wwc/Handbooks.*

Moderate Evidence means the following conditions are met:

(a) There is at least one Experimental or Quasi-Experimental Design Study of the effectiveness of the project component with a Relevant Finding that Meets What Works Clearinghouse Evidence Standards With or without Reservations (*e.g.,* a Quasi-Experimental Design Study or high-attrition Randomized Controlled Trial that establishes the equivalence of the treatment and comparison groups in student achievement at baseline);

(b) The Relevant Finding in the study described in paragraph (a) of this definition is of a statistically significant and positive (*i.e.,* favorable) effect on a student outcome or other Relevant Outcome, with no statistically significant and overriding negative (*i.e.,* unfavorable) evidence on that project component from other findings reviewed by and reported in the What Works Clearinghouse that Meet What Works Clearinghouse Evidence Standards with or without Reservations;

(c) The Relevant Finding in the study described in paragraph (a) of this definition is based on a sample that overlaps with the populations (*e.g.,* the types of student served) *or* settings proposed to receive the project component (*e.g.,* an after-school program studied in urban high schools and proposed for rural high schools); and

(d) The Relevant Finding in the study described in paragraph (a) of this definition is based on a Large Sample and a Multi-Site Sample.

Multi-Site Sample means more than one site, where site can be defined as a local educational agency (LEA), locality, or State. A sample could be multi-site if it includes campuses in two or more localities (*e.g.,* cities or counties), even if the campuses all belong to the same LEA or postsecondary school system. Multiple studies can cumulatively meet the Multi-Site Sample and Large Sample requirements of Moderate Evidence or Strong Evidence, as long as each study meets the other requirements of the particular level of evidence (*i.e.* Moderate Evidence or Strong Evidence).

Performance-Based Compensation System (PBCS) means a system of compensation for teachers, principals, or other School Leaders—

(A) That differentiates levels of compensation based in part on measurable increases in student academic achievement; and

(B) Which may include—

(i) Differentiated levels of compensation, which may include bonus pay, on the basis of the employment responsibilities and success of effective teachers, principals, or other School Leaders in hard-to-staff schools or high-need subject areas; and

(ii) Recognition of the skills and knowledge of teachers, principals, or other School Leaders as demonstrated through—

(I) Successful fulfillment of additional responsibilities or job functions, such as teacher leadership roles; and

(II) Evidence of professional achievement and mastery of content knowledge and superior teaching and leadership skills. (ESEA section 2211(b)(4))

Project Component means an activity, strategy, or intervention included in a project. Evidence may pertain to an individual project component, or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

Promising Evidence means the following conditions are met:

(a) There is at least one study that is a Correlational Study with Statistical Controls for selection bias with a Relevant Finding; and

(b) The Relevant Finding in the study described in paragraph (a) of this definition is of a statistically significant and positive (*i.e.,* favorable) effect of the Project Component on a student outcome or other Relevant Outcome with no statistically significant and overriding negative (*i.e.,* unfavorable) evidence on that Project Component from other findings on the intervention reviewed by and reported in the What Works Clearinghouse that Meets What Works Clearinghouse Evidence Standards with or without Reservations.

Quasi-Experimental Design Study (QED) means a study using a design that attempts to approximate an Experimental Design by identifying a comparison group that is similar to the treatment group in important respects. This type of study, depending on design and implementation, can Meet What Works Clearinghouse Evidence Standards with Reservations (but not without Reservations).

Randomized Controlled Trial (RCT) means a study that employs random assignment of, for example, students, teachers, classrooms, or schools, to receive the Project Component being evaluated (the treatment group) or not to receive the Project Component (the control group). The estimated effectiveness of the Project Component is the difference between the average outcomes for the treatment group and for the control group. These studies, depending on design and implementation, can Meet What Works Clearinghouse Evidence Standards without Reservations.

Regression Discontinuity Design Study (RDD) means a study that assigns the Project Component being evaluated using a measured variable (*e.g.,* assigning students reading below a cutoff score to tutoring or developmental education classes) and controls for that variable in the analysis of outcomes. The effectiveness of the Project Component is estimated for individuals who barely qualify to receive that component. These studies, depending on design and implementation, can Meet What Works Clearinghouse Evidence Standards without Reservations.

Relevant Finding means a finding from a study regarding the relationship between (A) an activity, strategy, or intervention included as a component of the Logic Model for the proposed project, and (B) a student outcome or other Relevant Outcome included in the Logic Model for the proposed project.

Relevant Outcome means the student outcome(s) (or the ultimate outcome if not related to students) the proposed Project Component is designed to improve, consistent with the specific goals of a program.

School Leader means a principal, assistant principal, or other individual who is:

(A) An employee or officer of an elementary school or secondary school, LEA, or other entity operating an elementary school or secondary school; and

(B) Responsible for the daily instructional leadership and managerial operations in the elementary school or secondary school building. (ESEA section 8101(44))

School Leader Residency Program means a school-based principal or other School Leader preparation program in which a prospective principal or other school leader—

(A) For one academic year, engages in sustained and rigorous clinical learning with substantial leadership responsibilities and an opportunity to practice and be evaluated in an authentic school setting; and

(B) During that academic year—

(i) Participates in Evidence-Based coursework, to the extent the State (in consultation with LEAs in the State) determines that such evidence is reasonably available, that is integrated with the clinical residency experience; and

(ii) Receives ongoing support from a mentor principal or other school leader, who is effective. (ESEA section 2002(1))

Single-case Design Study (SCD) means a study that uses observations of a single case (*e.g.,* a student eligible for a behavioral intervention) over time in the absence and presence of a controlled treatment manipulation to determine whether the outcome is systematically related to the treatment. According to the WWC Single Case Design Pilot Standards, a collection of these studies, depending on design and implementation (*e.g.,* including a sufficient number of cases and of data points per condition), can Meet What Works Clearinghouse Evidence Standards without Reservations.

Strong Evidence means the following conditions are met:

(a) There is at least one Experimental Study (*e.g.,* a Randomized Controlled Trial) of the effectiveness of the Project Component that has a Relevant Finding that Meets the What Works Clearinghouse Evidence Standards without Reservations (*e.g.,* a randomized controlled trial with low rates of sample attrition overall and between the treatment and control groups);

(b) The Relevant Finding in the study described in paragraph (a) of this definition is of a statistically significant and positive (*i.e.,* favorable) effect on a student outcome or other Relevant Outcome, with no statistically significant and overriding negative (*i.e.,* unfavorable) evidence on that Project Component from other findings that Meet What Works Clearinghouse Evidence Standards with or without Reservations;

(c) The Relevant Finding in the study described in paragraph (a) of this definition is based on a sample that overlaps with the populations (*e.g.,* the types of student served) *and* settings proposed to receive the Project Component (*e.g.,* an after-school program both studied in, and proposed for, urban high schools); and

(d) The Relevant Finding in the study described in paragraph (a) of this definition is based on a Large Sample and a Multi-Site Sample.

Teacher Residency Program means a school-based teacher preparation program in which a prospective teacher—

(A) For not less than one academic year, teaches alongside an effective teacher, as determined by the State or LEA, who is the teacher of record for the classroom;

(B) Receives concurrent instruction during the year described in subparagraph (A)—

(i) Through courses that may be taught by LEA personnel or by faculty of the teacher preparation program; and

(ii) In the teaching of the content area in which the teacher will become certified or licensed; and

(C) Acquires effective teaching skills, as demonstrated through completion of a residency program, or other measure determined by the State, which may include a teacher performance assessment. (ESEA section 2002(5))

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities, definitions, and requirements. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements, regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition under sections 2211–2213 of the ESEA, as amended by the ESSA, and therefore qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forego public comment on the priorities, requirements, and definitions under section 437(d)(1) of GEPA. These priorities, requirements, and definitions will apply to the FY 17 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition.

Program Authority: Sections 2211–13 of the ESEA.

Applicable Regulations: (a) The Education Department General Administrative Regulations in (EDGAR) 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget (OMB) Guidelines to Agencies on Government-wide Debarment and Suspension (Non-procurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $159 million.

For FY 2017, the Administration has requested $250,000,000 under TSL. We intend to use an estimated $159,000,000 of this funding for new awards under this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications now to allow enough time to complete the grant process if Congress appropriates funds for this program. Contingent upon the availability of funds and the quality of applications, we may make additional awards in future years from the list of unfunded applications from this competition.

Estimated Range of Awards: $500,000–$12,000,000 for the first year of the project period.

Note: The Department estimates a wide range of awards given the potentially large differences in the scope of funded projects, including the size and number of participating LEAs.

Estimated Average Size of Awards: $10,000,000 for the first year of the project period. Funding for the second through fifth years of the project period is subject to the availability of funds and the approval of continuation awards (see 34 CFR 75.253).

Estimated Number of Awards: 15–20.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months, with renewal of up two additional years if the grantee demonstrates to the Secretary that the grantee is effectively using funds. Such renewal may include allowing the grantee to scale up or replicate the successful program. Consistent with ESEA section 2212(b)(3), a grantee may receive a TSL grant (whether individually or as part of a consortium or partnership) only twice.

III. Eligibility Information

1. *Eligible Applicants:*

(a) An LEA, including a charter school that is an LEA, or a consortium of LEAs.

(b) An SEA or other State agency designated by the Chief Executive of a State to participate.

(c) The Bureau of Indian Education; or

(d) A partnership consisting of—

(i) One or more agencies described in subparagraph (a), (b), or (c); and

(ii) At least one nonprofit organization as defined in 2 CFR 200.70 or at least one for-profit entity.

2. *Cost Sharing or Matching:*

a. *Matching:* Under section 2212(f) of the ESEA, each grant recipient must provide, from non-Federal sources an amount equal to 50 percent of the amount of the grant (which may be provided in cash or in kind) to carry out the activities supported by the grant. Each applicant will be required to provide a signed assurance attesting to its intent and ability to meet the matching requirement.

b. *Supplement-Not-Supplant:* This program involves supplement-not-supplant funding requirements. In accordance with section 2212(g) of the ESEA, funds made available under this program must be used to supplement, and not supplant, other Federal or State funds that would otherwise be expended to carry out activities under this program. The Secretary considers all schools funded by the Department of Interior's Bureau of Indian Education to be LEAs, and the funds that these schools receive from the Department of Interior's annual appropriation to be neither Federal nor State funds. Further, the prohibition against supplanting also means that grantees seeking to charge indirect costs to TSL funds will need to use their negotiated restricted indirect cost rates. See 34 CFR 75.563.

3. *Other: Application Requirements:*

All applicants must meet the following application requirements in order to be considered for funding. The application requirements are from ESEA section 2212(c).

Each eligible applicant desiring a grant under this program must submit an application that contains—

(a) A description of the PBCS or HCMS that the eligible applicant proposes to develop, implement, improve, or expand through the grant;

(b) A description of the most significant gaps or insufficiencies in student access to effective teachers, principals, or other School Leaders in High-Need Schools, as applicable to the proposed project, including gaps or inequities in how effective teachers, principals, or other School Leaders are distributed across the LEA, as identified using factors such as data on school resources, staffing patterns, school environment, educator support systems, and other school-level factors;

(c) A description and evidence of the support and commitment from teachers, principals, or other School Leaders, as applicable to the proposed project, which may include charter school leaders, in the school (including organizations representing teachers, principals, or other school leaders), the community, and the LEA to the activities proposed under the grant;

(d) A description of how the eligible applicant will develop and implement a fair, rigorous, valid, reliable, and objective process to evaluate teacher, principal, or other school leader performance, as applicable to the proposed project, under the system that is based in part on measures of student academic achievement, including the baseline performance against which evaluations of improved performance will be made;

(e) A description of the LEAs or schools to be served under the grant, including student academic

achievement, demographic, and socioeconomic information as identified in the application package for this program;

(f) A description of the effectiveness of teachers, principals, or other School Leaders, as applicable to the proposed project, in the LEA or LEAs and the schools to be served under the grant, and the extent to which the system will increase the effectiveness of teachers, principals, or other School Leaders in such schools;

(g) A description of how the eligible applicant will use grant funds in each year of the grant, including a timeline for implementation of key grant activities;

(h) A description of how the eligible applicant will continue the activities assisted under the grant after the grant period ends;

(i) A description of the State, local, or other public or private funds that will be used to supplement the grant, including funds under Title II, part A of the ESEA, and sustain the activities assisted under the grant after the end of the grant period;

(j) A description of the rationale for the project; how the proposed activities are evidence-based; and if applicable the prior experience of the eligible entity in developing and implementing such activities.

Note: In order to demonstrate that the activities are evidence-based, an applicant may, among other things, provide supporting documentation for the study or studies that serve as the evidence base for one or more of the activities that will be implemented as part of the proposed project. Additionally, we encourage applicants to demonstrate in their application that at least one of the activities to be implemented as part of their proposed project is based on Promising Evidence (as defined in this notice). In recent years, the TIF program has released various reports that document the value of, and explore the implementation of, an HCMS [7] that includes a PBCS.[8] In addition, other recent research also explores TSL-type activities. We encourage applicants to include evidence-based activities when considering the full set of TSL activities, such as:

- Educator preparation [9]
- Recruitment
- Educator Induction [10]
- Retention [11]
- Mentoring [12]

(k) A description of how grant activities will be evaluated, monitored, and reported to the public.

Note: In addition, under 34 CFR 75.591, all TSL grantees must cooperate in any evaluation of the program conducted by the Department.

IV. Application and Submission Information

1. *Address to Request Application Package:* Orman Feres, U.S. Department of Education, 400 Maryland Avenue SW., Room 453–6921 4W109, Washington, DC 20202–6200. Telephone: (202) 453–6921 or by email: *TSL@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content and form of an application, together with the forms you must submit, are in the application package for this program.

Notice of Intent to Apply: We will be able to develop a more efficient process for reviewing grant applications if we can anticipate the number of applicants that intend to apply for funding under this competition. Therefore, we strongly encourage each potential applicant to notify us of the applicant's intent to submit an application for funding by sending a short email message. This short email should provide (1) the applicant organization's name and address; and (2) all priorities the applicant intends to address. Please send this email notification to *TSL@ed.gov* with ''Intent to Apply'' in the email subject line. Applicants that do not provide this email notification may still apply for funding and are not required to, or prohibited from, addressing priorities they do not mention in their notice of intent to apply.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Applicants should limit the application narrative to no more than 40 pages, using the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Calibri, or Arial.

The suggested page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the suggested page limit does apply to all of the application narrative.

b. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for TSL, an application may include business information that the applicant considers proprietary. The Department's regulations define ''business information'' in 34 CFR 5.11.

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application,

[7] Springer, M.G., Ballou, D., & Peng, A. (2008) Impact of the Teacher Advancement Program on student test score gains: Findings from an independent appraisal.'' Nashville: National Center for Performance Incentives.

[8] Chiang, H., Wellington, A., Hallgren, K., Speroni, C., Herrmann, M., Glazerman, S., and Constantine, J. (2015). Evaluation of Teacher Incentive Fund: Implementation and impacts of pay-for-performance after two years (NCEE 2015–4020). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education.

[9] Silva, Tim, Allison McKie, Virginia Knechtel, Philip Gleason, Libby Makowsky. (2014, available at *https://ies.ed.gov/ncee/pubs/20154015/*) Teaching Residency Programs: A Multisite Look at a New Model to Prepare Teachers for High-Need Schools (NCEE 2015–4002). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education.

[10] Glazerman, S., Dolfin, S., Bleeker, M., Johnson, A., Isenberg, E., Lugo-Gil, J., Grider, M., & Britton, E. (2008). Impacts of comprehensive teacher induction: Results from the first year of a randomized controlled study (NCEE 2009–4034) (available at *http://ies.ed.gov/ncee/wwc/Study/67264.* Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education

[11] Allen, J.P., Pianta, R.C., Gregory, A., Mikami, A.Y., & Lun, J. (2011). An interaction-based approach to enhancing secondary school instruction and student achievement. Science, 333(6045), 1034–1037 (available at *https://www.ncbi.nlm.nih.gov/pubmed/21852503*); New findings on the retention of novice teachers from teaching residency programs Extending work from earlier study.

[12] Allen, J.P., Pianta, R.C., Gregory, A., Mikami, A.Y., & Lun, J. (2011). An interaction-based approach to enhancing secondary school instruction and student achievement. *Science, 333*(6045), 1034–1037.

under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Submission Dates and Times:*

Applications Available: December 20, 2016.

Deadline for Notice of Intent to Apply: February 4, 2017.

Deadline for Transmittal of Applications: March 24, 2017.

Pre-application workshops will be held for this competition shortly after the date that this notice will publish. The workshops are intended to provide technical assistance to all interested grant applicants. Detailed information regarding the pre-application workshops times, and online registration form, can be found on the TSL Web site at: *http://innovation.ed.gov/what-we-do/teacher-quality/teacher-incentive-fund/.*

Applications for grants under this program must be submitted electronically using the *Grants.gov* Apply site (*Grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to *Other Submission Requirements* in section IV of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: April 23, 2017.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following Web site: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, it may be 24 to 48 hours before you can access the information in, and submit an application through, *Grants.gov.*

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a *SAM.gov* Tip Sheet, which you can find at: *www2.ed.gov/fund/grant/apply/sam-faqs.html.*

In addition, if you are submitting your application via *Grants.gov*, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with *Grants.gov* as an AOR. Details on these steps are outlined at the following *Grants.gov* Web page: *www.grants.gov/web/grants/register.html.*

7. *Other Submission Requirements:*

Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under TSL, CFDA number 84.374A, must be submitted electronically using the Government-wide *Grants.gov* Apply site at *www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the TSL competition at *www.Grants.gov.*You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.374, not 84.374A).

Please note the following:

- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the *Grants.gov* system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does

not comply with the deadline requirements. When we retrieve your application from *Grants.gov*, we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov*.
- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this program to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* under News and Events on the Department's G5 system home page at *www.G5.gov.* In addition, for specific guidance and procedures for submitting an application through *Grants.gov*, please refer to the *Grants.gov* Web site at: *www.grants.gov/web/grants/applicants/apply-for-grants.html.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a read-only, non-modifiable Portable Document Format (PDF). Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF (*e.g.,* Word, Excel, WordPerfect, etc.) or submit a password-protected file, we will not review that material. Please note that this could result in your application not being considered for funding because the material in question—for example, the application narrative—is critical to a meaningful review of your proposal. For that reason it is important to allow yourself adequate time to upload all material as PDF files. The Department will not convert material from other formats to PDF.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. This notification indicates receipt by *Grants.gov* only, not receipt by the Department. *Grants.gov* will also notify you automatically by email if your application met all the *Grants.gov* validation requirements or if there were any errors (such as submission of your application by someone other than a registered Authorized Organization Representative, or inclusion of an attachment with a file name that contains special characters). You will be given an opportunity to correct any errors and resubmit, but you must still meet the deadline for submission of applications.

Once your application is successfully validated by *Grants.gov*, the Department will retrieve your application from *Grants.gov* and send you an email with a unique PR/Award number for your application.

These emails do not mean that your application is without any disqualifying errors. While your application may have been successfully validated by *Grants.gov*, it must also meet the Department's application requirements as specified in this notice and in the application instructions. Disqualifying errors could include, for instance, failure to upload attachments in a read-only, non-modifiable PDF; failure to submit a required part of the application; or failure to meet applicant eligibility requirements. It is your responsibility to ensure that your submitted application has met all of the Department's requirements.

- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through *Grants.gov*, please contact the *Grants.gov* Support Desk, toll free, at 1–800–518–4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with *Grants.gov*, along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that the problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. We will contact you after we determine whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the application deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the *Grants.gov* system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the *Grants.gov* system; and
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Orman Feres, U.S. Department of Education, 400 Maryland Avenue SW., Room 4W109,

Washington, DC 20202–6200. FAX: (202) 260–8969.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.374A), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

We will not consider applications postmarked after the application deadline date.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.374A), 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* We are establishing the selection criterion ''The extent to which the proposed project demonstrates a rationale'' and criterion (c)(3) for the FY 2017 grant competition only, in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1). The other selection criteria for this program are from 34 CFR 75.210.

The maximum score for all the selection criteria is 100 points. The maximum score for each criterion is indicated in parentheses. The selection criteria for this competition are as follows:

(a) *Evidence of Support(30 points).*

In determining evidence of support of the proposed project, the Secretary considers the following factors:

(1) The extent to which the proposed project is part of a comprehensive effort to improve teaching and learning and support rigorous academic standards for students.

(2) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(3) The extent to which the proposed project will integrate with or build on similar or related efforts to improve relevant outcomes (as defined in 34 CFR 77.1(c)), using existing funding streams from other programs or policies supported by community, State, and Federal resources.

(b) *Need for Project (25 points).*

In determining the need for the proposed project, the Secretary considers the following factors:

(1) The extent to which the proposed project will provide services or otherwise address the needs of students at risk of educational failure.

(2) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

(c) *Quality of the Project Design (20 points).*

In determining the quality of the project design of the proposed project, the Secretary considers the following factors:

(1) The extent to which the proposed project demonstrates a rationale.

(2) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(3) The extent to which the grant activities will be evaluated, monitored, and reported to the public.

(d) *Quality of the management plan (20 points).*

In determining the quality of the management plan for the proposed project, the Secretary considers the adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(e) *Adequacy of resources (5 points).*

The Secretary considers the adequacy of resources for the proposed project based on the following factors:

(1) The potential for continued support of the project after Federal funding ends, including, as appropriate, the demonstrated commitment of appropriate entities to such support.

(2) The potential for the incorporation of project purposes, activities, or benefits into the ongoing program of the agency of organization at the end of the Federal funding.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Special Conditions:* Consistent with 2 CFR 200.205, before awarding grants under

this program the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $150,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through SAM. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

(d) By reporting on these performance measures in annual and final performance reports, grantees will satisfy the requirement in Section 8101 (21)(A)(ii)(II) of the ESEA, as amended, for projects relying on the ''demonstrates a rationale'' evidence level, to have ''ongoing efforts to examine the effects'' of the funded activity, strategy, or intervention.

4. *Performance Measures:* Pursuant to the Government Performance and Results Act of 1993, the Department has established the following performance measures that it will use to evaluate the overall effectiveness of the grantee's project, as well as the TIF program as a whole:

(a) The percentage of Educators in all schools who earned Performance-Based Compensation.

(b) The percentage of Educators in all High-Need Schools who earned Performance-Based Compensation.

(c) The gap between the retention rate of Educators receiving Performance-Based Compensation and the average retention rate of Educators in each High-Need School whose Educators participate in the project.

(d) The number of school districts participating in a TSL grant that use Educator Evaluation and Support Systems to inform the following human capital decisions: recruitment; hiring; placement; retention; dismissal; professional development; tenure; promotion; or all of the above.

(e) The number of High-Need Schools within districts participating in a TSL grant that use Educator Evaluation and Support Systems to inform the following human capital decisions: recruitment; hiring; placement; retention; dismissal; professional development; tenure; promotion; or all of the above.

(f) The percentage of Performance-Based Compensation paid to Educators with State, local, or other non-TIF Federal resources.

(g) The percentage of teachers and principals who receive the highest effectiveness rating.

(h) The percentage of teachers and principals in High-Needs Schools who receive the highest effectiveness rating.

5. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Orman Feres, U.S. Department of Education, 400 Maryland Avenue SW., Room 4W109, Washington, DC 20202–6200. Telephone: (202) 453–6921 or by email: *TSL@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is

the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or PDF. To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Nadya Chinoy Dabby,

Assistant Deputy Secretary for Office of Innovation and Improvement.

[FR Doc. 2016–30643 Filed 12–19–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2016–ICCD–0113]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; NCER–NPNCER–NPSAS Grant Study—Financial Aid Nudges 2017: A National Experiment To Increase Retention of Financial Aid and College Persistence

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before January 19, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0113. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–347, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact NCES Information Collections at *NCES.Information.Collections@ed.gov*.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: NCER–NPNCER–NPSAS Grant Study—Financial Aid Nudges 2017: A National Experiment to Increase Retention of Financial Aid and College Persistence.

OMB Control Number: 1850–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 102,000.

Total Estimated Number of Annual Burden Hours: 10,540.

Abstract: In 2010, the National Center for Education Research (NCER) and the National Center for Education Statistics (NCES), both within the U.S. Department of Education's Institute of Education Sciences (IES), began collaborating on an education grant opportunity related to the cross-sectional National Postsecondary Student Aid Study (NPSAS). NPSAS is a large, nationally-representative sample of postsecondary institutions and students that contains student-level records on student demographics and family background, work experience, expectations, receipt of financial aid, and postsecondary enrollment (see *http://nces.ed.gov/surveys/npsas/about.asp*; (OMB #1850–0666)). Since 1987, NPSAS has been fielded every 3 to 4 years, most recently during the 2015–16 academic year. The goal of the NCER–NPSAS grant opportunity collaboration is to provide researchers with the possibility of developing unique research projects pertaining to college persistence and completion that utilize a subset of the NPSAS sample that is not already set aside for one of the NPSAS-based longitudinal studies (BPS or B&B). Under the NCER–NPSAS grant opportunity, researchers can submit applications to the Postsecondary and Adult Education topic within the Education Research Grants program (CFDA 84.305A), under either the Exploration or Efficacy and Replication research goal. Consistent with these two goals, NCER supports research projects using NPSAS to: (1) Explore relationships between malleable factors (*e.g.,* information on benefits of financial aid and FAFSA renewal) and postsecondary persistence and completion, as well as the mediators and moderators of those relationships; and (2) evaluate the efficacy of interventions aimed at improving persistence and completion of postsecondary education (e. g., financial aid and FAFSA renewal advice delivered via text messaging). Researchers approved for funding through this program can obtain indirect access to a subsample of the national NPSAS sample (after the study's student interviews are completed) in order to conduct unique research projects that adhere to the guidelines set forth in the Request for Applications (RFA) for the Education Research Grants Program, as well as guidelines set forth by NCES and the NPSAS program. This request is to conduct, in 2017, the ''Financial Aid Nudges 2017: A National Experiment to Increase Retention of Financial Aid and College Persistence'' study, funded by the NCER–NPSAS grant and designed to measure the effectiveness of an intervention that will provide financial aid information, reminders, and advising to college students who were initially interviewed as part of NPSAS:16.

Dated: December 14, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–30505 Filed 12–19–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2016–ICCD–0112]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; NCER–NPSAS Grant Study—Connecting Students With Financial Aid (CSFA) 2017: Testing the Effectiveness of FAFSA Interventions on College Outcomes

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before January 19, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0112. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–347, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact NCES Information Collections at *NCES.Information.Collections@ed.gov*.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: NCER–NPSAS Grant Study—Connecting Students with Financial Aid (CSFA) 2017: Testing the Effectiveness of FAFSA Interventions on College Outcomes.

OMB Control Number: 1850–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 54,100.

Total Estimated Number of Annual Burden Hours: 5,684.

Abstract: In 2010, the National Center for Education Research (NCER) and the National Center for Education Statistics (NCES), both within the U.S. Department of Education's Institute of Education Sciences (IES), began collaborating on an education grant opportunity related to the cross-sectional National Postsecondary Student Aid Study (NPSAS). NPSAS is a large, nationally-representative sample of postsecondary institutions and students that contains student-level records on student demographics and family background, work experience, expectations, receipt of financial aid, and postsecondary enrollment (see *http://nces.ed.gov/surveys/npsas/about.asp*; (OMB #1850–0666)). Since 1987, NPSAS has been fielded every 3 to 4 years, most recently during the 2015–16 academic year. The goal of the NCER–NPSAS grant opportunity collaboration is to provide researchers with the possibility of developing unique research projects pertaining to college persistence and completion that utilize a subset of the NPSAS sample that is not already set aside for one of the NPSAS-based longitudinal studies (BPS or B&B). Under the NCER–NPSAS grant opportunity, researchers can submit applications to the Postsecondary and Adult Education topic within the Education Research Grants program (CFDA 84.305A), under either the Exploration or Efficacy and Replication research goal. Consistent with these two goals, NCER supports research projects using NPSAS to: (1) Explore relationships between malleable factors (*e.g.,* information on benefits of financial aid and FAFSA renewal) and postsecondary persistence and completion, as well as the mediators and moderators of those relationships; and (2) evaluate the efficacy of interventions aimed at improving persistence and completion of postsecondary education (*e. g.,* financial aid and FAFSA renewal advice delivered via text messaging). Researchers approved for funding through this program can obtain indirect access to a subsample of the national NPSAS sample (after the study's student interviews are completed) in order to conduct unique research projects that adhere to the guidelines set forth in the Request for Applications (RFA) for the Education Research Grants Program, as well as guidelines set forth by NCES and the NPSAS program. This request is to conduct, in 2017, the ''Connecting Students with Financial Aid (CSFA) 2017: Testing the Effectiveness of FAFSA Interventions on College Outcomes'' study, funded by the NCER–NPSAS grant and designed to measure the effectiveness of an intervention that will provide financial aid information and reminders to college students who were initially interviewed as part of NPSAS:16.

Dated: December 14, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–30504 Filed 12–19–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP17–2–000]

National Fuel Gas Supply Corporation; Notice of Intent To Prepare an Environmental Assessment for the Proposed Heath Compressor Station Abandonment and Line FM–92 Refunctionalization Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Heath Compressor Station Abandonment and Line FM–92 Refunctionalization Project involving construction and operation of facilities by National Fuel Gas Supply Corporation (National Fuel) in Jefferson County, Pennsylvania. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the EA. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before January 13, 2017.

If you sent comments on this project to the Commission before the opening of this docket on October 14, 2016, you will need to file those comments in Docket No. CP17–2–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

Public Participation

For your convenience, there are three methods you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*. Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature on the Commission's Web site (*www.ferc.gov*) under the link to *Documents and Filings.* This is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature on the Commission's Web site (*www.ferc.gov*) under the link to *Documents and Filings.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' If you are filing a comment on a particular project, please select ''Comment on a Filing'' as the filing type; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket number (CP17–2–000) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Summary of the Proposed Project

National Fuel proposes to abandon the Heath Compressor Station and to refunctionalize its existing 3.0 mile, 12-inch diameter Line FM–92 pipeline from a jurisdictional natural gas transmission pipeline to a non-jurisdictional natural gas gathering pipeline in Jefferson County, Pennsylvania. Existing above ground structures and piping, not required for gathering, would be removed. Underground pipelines associated with the compressor station would be abandoned in place.

The purpose of the Project is to abandon the compressor station due to production decline rendering the facility idle.

National Fuel would also install non-jurisdictional facilities, including 610 feet of new non-jurisdictional 12-inch diameter plastic pipeline to maintain gas flow along Line FM–92 and gathering compression facilities about 3.0 miles northwest of the Heath Compressor Station.

The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

The Project would disturb about 2.9 acres of land owned by National Fuel for the aboveground facilities removal and FM–92 refunctionalization. No new access roads or temporary work space will be utilized outside the existing right of way. National Fuel will remain in ownership of the land following project activities.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [2] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Air quality and noise;
- Endangered and threatened species;
- Public safety; and
- Cumulative impacts

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission.

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section, beginning on page 2.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the applicable State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies of the EA will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the ''Document-less Intervention Guide'' under the ''e-filing'' link on the Commission's Web site. Motions to intervene are more fully described at *http://www.ferc.gov/resources/guides/how-to/intervene.asp.*

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.,* CP17–2). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: December 13, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–30549 Filed 12–19–16; 8:45 am]

BILLING CODE 6717–01–P

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[4] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17–46–000.

Applicants: Pio Pico Energy Center, LLC.

Description: Application of Pio Pico Energy Center, LLC for Approval Under Section 203 of the Federal Power Act with Privileged Confidential Exhibit I.

Filed Date: 12/12/16.

Accession Number: 20161212–5289.

Comments Due: 5 p.m. ET 1/3/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–569–013 ER10–1849–012; ER10–1887–012 ER10–1920–014; ER10–1928–014; ER10–1952–012 ER10–1961–012; ER10–1971–031; ER10–2720–014 ER11–2037–012; ER11–4428–014; ER11–4462–022 ER12–1228–014; ER12–1880–013; ER12–2227–012 ER12–895–012; ER13–2474–008; ER13–712–014 ER14–2707–009; ER14–2708–010; ER14–2709–009 ER14–2710–009; ER15–1925–006; ER15–2676–005 ER15–30–007; ER15–58–007; ER16–1440–003; ER16–1672–003; ER16–2191–002; ER16–2240–002; ER16–2241–002; ER16–2275–002; ER16–2276–002; ER16–2297–002; ER16–2453–002.

Applicants: Blackwell Wind, LLC, Brady Interconnection, LLC, Brady Wind II, LLC, Breckinridge Wind Project, LLC, Cedar Bluff Wind, LLC, Chaves County Solar, LLC, Cimarron Wind Energy, LLC, Elk City Wind, LLC, Elk City II Wind, LLC, Ensign Wind, LLC, FPL Energy Cowboy Wind, LLC, FPL Energy Oklahoma Wind, LLC, FPL Energy Sooner Wind, LLC, Gray County Wind Energy, LLC, High Majestic Wind Energy Center, LLC, High Majestic Wind II, LLC, Kingman Wind Energy I, LLC, Kingman Wind Energy II, LLC,

Mammoth Plains Wind Project, LLC, Minco Wind Interconnection Services, LLC, Minco Wind, LLC, Minco Wind II, LLC, Minco Wind III, LLC, Ninnescah Wind Energy, LLC, Osborn Wind Energy, LLC, Palo Duro Wind Interconnection Services, LLC, Palo Duro Wind Energy, LLC, Roswell Solar, LLC, Rush Springs Wind Energy, LLC, Seiling Wind Interconnection Services, LLC, Seiling Wind, LLC, Seiling Wind II, LLC, Steele Flats Wind Project, LLC, NEPM II, LLC, NextEra Energy Power Marketing, LLC.

Description: Notification of Non-material Change in Status of the NextEra Resources Entities.

Filed Date: 12/12/16.

Accession Number: 20161212–5283.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–311–000.

Applicants: SR South Loving LLC.

Description: Second Supplement to November 4, 2016 SR South Loving LLC tariff filing.

Filed Date: 12/9/16.

Accession Number: 20161209–5254.

Comments Due: 5 p.m. ET 12/19/16.

Docket Numbers: ER17–526–000.

Applicants: PacifiCorp.

Description: § 205(d) Rate Filing: BPA NITSA (Idaho Falls Power) Rev 1 to be effective 12/1/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5243.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–527–000.

Applicants: InterGen Energy Solutions, LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 12/31/2016.

Filed Date: 12/12/16.

Accession Number: 20161212–5244.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–528–000.

Applicants: Baltimore Gas and Electric Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: BGE Revisions to Attachment H–2A Concerning Various Tax Issues to be effective 2/11/2017.

Filed Date: 12/13/16.

Accession Number: 20161213–5027.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–529–000.

Applicants: Midcontinent Independent System Operator, Inc., Dairyland Power Cooperative.

Description: § 205(d) Rate Filing: 2016–12–13_Dairyland Power Cooperative RTO Adder Request to be effective 3/1/2017.

Filed Date: 12/13/16.

Accession Number: 20161213–5062.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–530–000.

Applicants: Wheelabrator Ridge Energy Inc.

Description: § 205(d) Rate Filing: 2017 normal to be effective 2/12/2017.

Filed Date: 12/13/16.

Accession Number: 20161213–5082.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–531–000.

Applicants: Wheelabrator South Broward Inc.

Description: § 205(d) Rate Filing: 2017 South Normal to be effective 2/12/2017.

Filed Date: 12/13/16.

Accession Number: 20161213–5083.

Comments Due: 5 p.m. ET 1/3/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 13, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–30542 Filed 12–19–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Applications

	Docket Nos.
Port Arthur LNG, LLC and PALNG Common Facilities Company, LLC.	CP17–20–000 PF15–18–000
Port Arthur Pipeline, LLC ..	CP17–21–000 PF15–19–000

Take notice that on November 29, 2016, Port Arthur LNG, LLC (Port Arthur LNG) and PALNG Common Facilities Company, LLC, 2925 Briarpark, Suite 900, Houston, Texas 77042, filed an application, in Docket No. CP17–20–000, pursuant to section 3(a) of the Natural Gas Act (NGA) and Parts 153 and 380 of the Commission's Regulations, requesting authorization to site, construct, modify, and operate a natural gas liquefaction facility and liquefied natural gas export marine and truck loading terminal facilities (Liquefaction Project), located in Jefferson County, Texas.

Also, take notice that on November 29, 2016, Port Arthur Pipeline, LLC (Port Arthur Pipeline), 2925 Briarpark, Suite 900, Houston, Texas 77042, filed an application pursuant to section 7(c) of the NGA, and Parts 157 and 284 of the Commission's regulations, an application in Docket No. CP17–21–000 for (1) a certificate of public convenience and necessity (i) authorizing Port Arthur Pipeline to construct, own, and operate a new natural gas pipeline system, (ii) approving a *pro forma* Tariff, and (iii) approving the proposed initial rates for service; (2) a Part 157, Subpart F blanket certificate authorizing Port Arthur Pipeline to engage in certain self-implementing routine activities; and (3) a Part 284, Subpart G blanket certificate authorizing Port Arthur Pipeline to transport natural gas, on an open-access and self-implementing basis with pre-granted abandonment authority.

Specifically, Port Arthur LNG's proposed Liquefaction Project consists of two liquefaction trains with a total capacity of 13.5 MTPA (1,865 MMcf/d), three LNG tanks capable of storing 160,000 m^3 each, for a total working capacity of 480,000 m^3, marine and truck loading facilities, and all necessary ancillary and support facilities. Port Arthur LNG states that the purpose of the Liquefaction Project is liquefying supplies of domestic natural gas for export to foreign markets.

Port Arthur Pipeline proposes to construct 34.2 miles of new 42-inch-diameter pipeline, approximately 4.65 miles of variable diameter lateral pipelines, two compressor stations totaling 65,052 horsepower, and associated facilities to deliver up to 2,000 MMcf/d of natural gas to the Liquefaction Project. Port Arthur Pipeline's proposed facilities will be located in Orange and Jefferson Counties, Texas and Cameron Parish, Louisiana. Port Arthur Pipeline estimates the proposed pipeline facilities cost to be approximately $899,739,889, all as more fully set forth in the applications which are on file with the Commission and open to public inspection. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in

the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

On March 31, 2015, the Commission staff granted Port Arthur LNG's and Port Arthur Pipeline's requests to use the National Environmental Policy Act (NEPA) Pre-Filing Process and assigned Docket Nos. PF15–18–000 and PF15–19–000, respectively, to staff activities involved in the above referenced projects. Now, as of the filing of these applications on November 29, 2016, the NEPA Pre-Filing Process for this project has ended. From this time forward, these proceedings will be conducted in Docket Nos. CP17–20–000 and CP17–21–000, as noted in the caption of this Notice.

Any questions regarding these two applications should be directed to Dan King, Director & Regulatory Counsel, Port Arthur LNG/Pipeline, 488 8th Avenue, HQ12S1, San Diego, CA 92101, by phone at (619) 696–4350, or by email to *daking@semprausgp.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice, the Commission staff will issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) for this proposal. The issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit five copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and five copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: January 3, 2017.

Dated: December 13, 2016 .

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–30550 Filed 12–19–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link.

Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket No.	File date	Presenter or requester
Prohibited:		
1. CP15–554–000	12–2–2016	Peggy Quarles.
2. CP15–138–000	12–6–2016	Shania Kellenberger and family.
3. CP15–500–000	12–12–2016	Eddy N.
Exempt:		
1. CP13–483–000, CP13–492–000	11–29–2016	Routt County Board of County Commissioners.
2. CP13–483–001	11–29–2016	Garfield County, Colorado Commissioners.
3. CP16–116–000	11–30–2016	FERC Staff. [1]
4. CP16–96–000	11–30–2016	City of Boston, Massachusetts Mayor Martin J. Walsh.
5. P–13102–000	12–5–2016	U.S. Department of the Interior Fish and Wildlife Service.

[1] Phone record reporting September 23, 2016 call with Eduardo Campirano of the Brownsville Navigation District regarding the Brazos Island Harbor Channel Improvement Project.

Dated: December 13, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–30546 Filed 12–19–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–3079–011; ER11–2539–004; ER11–2540–004; ER11–2542–004.

Applicants: Tyr Energy, LLC, Plains End, LLC, Plains End II, LLC, Rathdrum Power, LLC.

Description: Updated Market Power Analysis for the Northwest region of Tyr Energy, LLC, et al.

Filed Date: 12/14/16.

Accession Number: 20161214–5196.

Comments Due: 5 p.m. ET 2/13/17.

Docket Numbers: ER17–544–000.

Applicants: Beacon Solar 1, LLC.

Description: Baseline eTariff Filing: Beacon Solar 1, LLC MBR Tariff to be effective 12/15/2016.

Filed Date: 12/14/16.

Accession Number: 20161214–5115.

Comments Due: 5 p.m. ET 1/4/17.

Docket Numbers: ER17–545–000.

Applicants: Provider Power CT, LLC.

Description: Notice of cancellation of market base tariff of Provider Power CT, LLC.

Filed Date: 12/14/16.

Accession Number: 20161214–5159.

Comments Due: 5 p.m. ET 1/4/17.

Docket Numbers: ER17–546–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: Two GIA's and DSA's ACES Projects WDT1425 and WDT1426 to be effective 12/15/2016.

Filed Date: 12/14/16.

Accession Number: 20161214–5173.

Comments Due: 5 p.m. ET 1/4/17.

Docket Numbers: ER17–547–000.

Applicants: San Diego Gas & Electric Company.

Description: § 205(d) Rate Filing: 2017 SDGE RS Update to Transmission Owner Tariff to be effective 1/1/2017.

Filed Date: 12/14/16.

Accession Number: 20161214–5197.

Comments Due: 5 p.m. ET 1/4/17.

Docket Numbers: ER17–548–000.

Applicants: Southern California Edison Company.

Description: Tariff Cancellation: Cancel Six Letter Agreements ACES Projects to be effective 8/22/2016.

Filed Date: 12/14/16.

Accession Number: 20161214–5223.

Comments Due: 5 p.m. ET 1/4/17.

Docket Numbers: ER17–549–000.

Applicants: New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 205 filing tariff revision to Hybrid GT Pricing Logic to be effective 12/31/9998.

Filed Date: 12/14/16.

Accession Number: 20161214–5236.

Comments Due: 5 p.m. ET 1/4/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 14, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–30548 Filed 12–19–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–532–000]

PPA Grand Johanna LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding PPA Grand Johanna LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to

intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 3, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 13, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–30545 Filed 12–19–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–339–000.

Applicants: 96WI 8ME, LLC.

Description: Supplement to November 10, 2016 96WI 8ME, LLC tariff filing.

Filed Date: 12/7/16.

Accession Number: 20161207–5220.

Comments Due: 5 p.m. ET 12/19/16.

Docket Numbers: ER17–532–000.

Applicants: PPA Grand Johanna LLC.

Description: Baseline eTariff Filing: Market Based Rate Tariff Baseline Filing to be effective 12/30/2016.

Filed Date: 12/13/16.

Accession Number: 20161213–5111.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–533–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Queue Position #AB2–001, First Revised Service Agreement No. 3175 to be effective 11/15/2016.

Filed Date: 12/13/16.

Accession Number: 20161213–5112.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–534–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2016–12–13_SA 2974 Missouri Basin Municipal-Marshall Cogen GIA (J391) to be effective 12/14/2016.

Filed Date: 12/13/16.

Accession Number: 20161213–5199.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–535–000.

Applicants: Entergy Louisiana, LLC.

Description: § 205(d) Rate Filing: ELL–SRMPA 12th Extension of Interim Agreement to be effective 1/1/2017.

Filed Date: 12/13/16.

Accession Number: 20161213–5203.

Comments Due: 5 p.m. ET 1/3/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 13, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–30543 Filed 12–19–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17–47–000.

Applicants: Wisconsin Power and Light Company, Wisconsin Public Service Corporation, Madison Gas and Electric Company.

Description: Joint Application under Section 203 of the Federal Power Act of Wisconsin Power and Light Company, et al.

Filed Date: 12/13/16.

Accession Number: 20161213–5296.

Comments Due: 5 p.m. ET 1/3/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–38–001.

Applicants: Puget Sound Energy, Inc.

Description: Compliance filing: Amendment to Order Nos. 827 and 828 Compliance Filing to be effective 10/14/2016.

Filed Date: 12/13/16.

Accession Number: 20161213–5243.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–219–000.

Applicants: PacifiCorp.

Description: Answer to Protests and Comments of PacifiCorp under ER17–219.

Filed Date: 12/14/16.

Accession Number: 20161214–5024.

Comments Due: 5 p.m. ET 1/4/17.

Docket Numbers: ER17–351–000; ER17–354–000.

Applicants: American Falls Solar, LLC, American Falls Solar II, LLC.

Description: Supplement to November 11, 2016 American Falls Solar, LLC and American Falls Solar, LLC tariff filings.

Filed Date: 12/12/16.

Accession Number: 20161212–5277.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–536–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: GIA and Amended DSA Center Install EGT WDT1429 to be effective 12/14/2016.

Filed Date: 12/13/16.

Accession Number: 20161213–5251.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–537–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: First Amendment to GIA and DSA and Cancellation of Letter Agreement to be effective 12/14/2016.

Filed Date: 12/13/16.
Accession Number: 20161213–5252.
Comments Due: 5 p.m. ET 1/3/17.
Docket Numbers: ER17–539–000.
Applicants: Wildwood Solar I, LLC.
Description: Baseline eTariff Filing: MBR Application and Tariff to be effective 12/15/2016.
Filed Date: 12/14/16.
Accession Number: 20161214–5070.
Comments Due: 5 p.m. ET 1/4/17.
Docket Numbers: ER17–540–000.
Applicants: Wildwood Solar II, LLC.
Description: Baseline eTariff Filing: MBR Application and Tariff to be effective 12/15/2016.
Filed Date: 12/14/16.
Accession Number: 20161214–5072.
Comments Due: 5 p.m. ET 1/4/17.
Docket Numbers: ER17–541–000.
Applicants: Wildwood Solar I, LLC.
Description: § 205(d) Rate Filing: Co-Tenancy and Shared Facilities Agreement to be effective 12/15/2016.
Filed Date: 12/14/16.
Accession Number: 20161214–5073.
Comments Due: 5 p.m. ET 1/4/17.
Docket Numbers: ER17–542–000.
Applicants: Wildwood Solar II, LLC.
Description: § 205(d) Rate Filing: Co-Tenancy and Shared Facilities Agreement to be effective 12/15/2016.
Filed Date: 12/14/16.
Accession Number: 20161214–5074.
Comments Due: 5 p.m. ET 1/4/17.
Docket Numbers: ER17–543–000.
Applicants: Duke Energy Piketon, LLC.
Description: § 205(d) Rate Filing: Duke Energy SAM NOS Filing to be effective 2/13/2017.
Filed Date: 12/14/16.
Accession Number: 20161214–5086.
Comments Due: 5 p.m. ET 1/4/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 14, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–30547 Filed 12–19–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–527–000]

InterGen Energy Solutions, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of InterGen Energy Solutions, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 3, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 13, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–30544 Filed 12–19–16; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Notice

[BAC 6735–01]

TIME AND DATE: December 16, 2016, 10:00 a.m., Thursday, January 19, 2017.

PLACE: The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (enter from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Consolidation Coal Company,* Docket Nos. VA 2012–42 et al. (Issues include whether the Judge erred by ruling that a deep cut in violation of the operator's roof control plan was not ''significant and substantial.'')

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Emogene Johnson (202) 434–9935, (202) 708–9300 for TDD Relay, 1–800–877–8339 for toll free.

PHONE NUMBER FOR LISTENING TO MEETING: 1 (866) 867–4769; Passcode: 129–339.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2016–30771 Filed 12–16–16; 4:15 pm]

BILLING CODE 6735–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 3, 2017.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Steven L. Bihlmaier, Osborne, Kansas, and Douglas D. Bihlmaier, Dairen, Connecticut;* to acquire shares of Osborne Investments, Inc., of The Farmers Bank of Osborne, both of Osborne, Kansas and thereby acquire shares and for approval as a member of the Bihlmaier Family Group. In addition, Cheryl A. Bihlmaier, Osborne, Kansas, as a member of the Bihlmaier Family Group, to retain shares of Osborne Investments, Inc.

Board of Governors of the Federal Reserve System, December 14, 2016.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2016–30499 Filed 12–19–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 19, 2017.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045–0001. Comments can also be sent electronically to *Comments.applications@ny.frb.org:*

1. *PCSB Financial Corporation,* Yorktown Heights, New York; to become a bank holding company by acquiring 100 percent of the voting shares of PCSB Bank, Brewster, New York.

2. *Community Bank System, Inc.,* Dewitt, New York; to acquire 100 percent of Merchants Bancshares, Inc. and thereby indirectly acquire Merchants Bank, both of South Burlington, Vermont.

Board of Governors of the Federal Reserve System, December 15, 2016.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2016–30629 Filed 12–19–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association and nonbanking companies owned by the savings and loan holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the HOLA (12 U.S.C. 1467a(e)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 10(c)(4)(B) of the HOLA (12 U.S.C. 1467a(c)(4)(B)). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 13, 2017.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org*:

1. *Community First Bancshares, MHC, Covington, Georgia;* to become a mutual savings and loan holding company, and Community First Bancshares, Inc., to become a mid-tier stock savings and loan holding company, by acquiring 100 percent of Newton Federal Bank, all of Covington, Georgia.

Board of Governors of the Federal Reserve System, December 14, 2016.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2016–30498 Filed 12–19–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project ''*Generic*

Clearance for the Collection of Data Through ACTION III Field-Based Investigations to Improve Health Care Delivery.'' In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by February 21, 2017.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at *doris.lefkowitz@AHRQ.hhs.gov.*

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by emails at *doris.lefkowitz@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

Generic Clearance for the Collection of Data Through ACTION III Field-Based Investigations To Improve Health Care Delivery

The Agency for Healthcare Research and Quality (AHRQ) is requesting OMB approval of a generic clearance for purposes of conducting field-based research to improve care delivery in diverse health care settings. More specifically, AHRQ seeks this clearance to support timely and meaningful answers to research questions investigated through AHRQ's ACTION Program. ACTION III research produces field-based, stakeholder-informed knowledge about ways to improve care delivery, and real-world-driven implementation and dissemination of evidence across diverse care settings. A generic clearance to support expedited performance of ACTION III research activities would enable us to more efficiently meet agency goals while fully meeting the intent and requirements of the Paperwork Reduction Act in a timely manner.

Collection of the information described in this request is essential to supporting AHRQ's mission, which is to produce evidence to make health care safer, higher quality, more accessible, equitable, and affordable, and to work with HHS and other partners to make sure that the evidence is understood and used. More specifically, in support of this mission, AHRQ initiates and oversees projects with the following overarching aims:

- Expand knowledge about how specific changes to processes or structures of care delivery might improve care quality;
- Develop and test interventions, strategies, tools, trainings and guidance for putting that knowledge into practice;
- Disseminate and implement evidence-based practices across diverse care settings

This study is being conducted by AHRQ through its contractor, WESTAT, pursuant to AHRQ's statutory authority to conduct and support research on health care and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of health care services and with respect to quality measurement and improvement. 42 U.S.C 299a(a)(1) and (2).

Method of Collection

Information collections conducted under this clearance will be collected via the following methods:

- Interviews—Interviews (telephone or in-person) will be conducted with clinical or management staff from diverse health care settings, patients, or other providers or recipients of care with the purposes of: Expanding knowledge about how specific changes to processes or structures of care delivery might improve care quality; obtaining stakeholder-informed input about how and why an intervention or strategy will or won't work in a particular real world setting; identifying contextual factors that facilitate or impede implementation of complex system interventions or evidence-based practices; identifying needs and challenges of intended users of tools and/or beneficiaries of trainings and other resources.
- Small discussion groups/Focus groups—Small discussion groups/Focus groups will be conducted with providers or recipients of care from diverse health care settings with the purposes of: Obtaining stakeholder-informed input about how and why an intervention or strategy is or is not working in a particular real world setting and identifying needs and gaining user/beneficiary feedback on value and limitations of prototype redesigned care processes, tools, resources or trainings.
- Implementation Logs will be used to track activities, time and resource use associated with use of tools, trainings or other resources, and to monitor progress and identify needed revisions to implementation methods.
- Recruitment and Screening calls will be used to identify and enroll individuals, groups, or organizations that will be willing to participate in the broader research study
- Questionnaires or brief surveys will be used to capture broad, high level staff or patient level feedback on experience with tools, redesigned care processes, trainings or other resources.
- Cognitive testing of surveys, Web sites, or other resources will be used to support the development of materials that resonate and can be understood by intended users.
- Collection of published and internal documents, performance assessments, and other data or information will provide important contextual information about the specific settings of care into which new tools, resources, training, or redesigned care processes will be introduced.

AHRQ will use the proposed generic clearance to obtain field-based, stakeholder-informed input and feedback about how and why interventions or strategies designed to improve care quality (*i.e.,* safety, effectiveness, patient-centeredness, timeliness, efficiency, and equity) do or do not work in the real world. Information collected under this clearance would be expected to increase understanding of how contextual factors and other key variables might affect the implementation and effectiveness of specific strategies, interventions or tools when utilized in particular settings. This knowledge would help health care providers and other decision-makers consider whether, when and how to use and adapt such strategies, interventions or tools to conform to their own needs and to the distinctive characteristics of the intended settings. Additionally, information collected under this clearance would be expected to increase AHRQ's understanding of contextual variables and other factors that facilitate or impede dissemination and implementation of clinical guidelines, evidence-based practices, and other research-based findings from the Patient-Centered Outcomes Research Institute (PCORI), National Institutes of Health (NIH), and other partners.

Estimated Annual Respondent Burden

As described above a variety of instruments and platforms will be used to collect information from respondents, though few, if any, single projects would be expected to use all the methods listed.

The average number annual burden hours per year requested (2189.5) are presented in Table 1 below, and is based on an assumed average of 5 projects per year (we rounded up the past average of 4.5 projects per year to 5). The

maximum total burden across all three years is thus 6568.5 hours.

TABLE 1—ESTIMATED ANNUALIZED BURDEN HOURS

Data collection type	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Interviews	375	2	1	750
Focus Groups/Small Discussions	420	1.5	1.5	945
Implementation Logs	20	8	1	160
Recruitment and Screening	139	1	0.5	69.5
Cognitive Testing	40	1	1	40
Questionnaires/Brief Surveys	1,000	1	0.2	200
Collection of Internal Documents	25	1	1	25
Total				2,189.5

TABLE 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents	Total burden hours	Average hourly wage rate *	Total cost burden
Interviews	250	500	[a] $95.05	$47,525.00
(Clinicians—line 1; Patients—line 2)	125	250	[b] 27.12	6780.00
Focus Groups/Small Discussions	420	945	[c] 27.12	25,628.40
Implementation Logs	20	160	[c] 27.12	4,339.20
Recruitment and Screening	139	69.5	[a] 95.05	6,605.98
Cognitive Testing	40	40	[c] 27.12	1,084.80
Questionnaires/Brief Surveys	1000	200	[c] 27.12	5,424.00
Collection of Internal Documents	25	25	[a] 95.05	2,376.25
Total				99,763.63

* National Compensation Survey: Occupational wages in the United States May 2015 "U.S. Department of Labor, Bureau of Labor Statistics:" *http://www.bls.gov/oes/current/oes_stru.htm.*

[a] Based on the mean wages for *29–1069 Physicians and Surgeons, All Other.*

[b] Based on the mean wages for *00–0000 All Occupations.*

[c] Based on the mean wages for *29–9099 Miscellaneous Health Practitioners and Technical Workers: Healthcare Practitioners and Technical Workers, All Other.*

Using average wage rates for relevant job categories from 2016 BLS data, the total annual costs associated with these data collections per year are $116,746.13 as shown in Table 2 above, for a total cost for all three years of $350,238.39.

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Sharon B. Arnold,

Deputy Director.

[FR Doc. 2016–30603 Filed 12–19–16; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Common Formats for Reporting on Health Care Quality and Patient Safety

AGENCY: Agency for Healthcare Research and Quality (AHRQ), Department of Health and Human Services (HHS).

ACTION: Notice of Availability—New Common Formats.

SUMMARY: As authorized by the Secretary of HHS, AHRQ coordinates the development of sets of common definitions and reporting formats (Common Formats) for reporting on health care quality and patient safety. The purpose of this notice is to announce the release of the Common Formats—Community Pharmacy Version 1.0.

DATES: Ongoing public input.

ADDRESSES: The Common Formats—Community Pharmacy Version 1.0 and the remaining Common Formats can be accessed electronically at the following HHS Web site: *http://www.pso.ahrq.gov/common/.*

FOR FURTHER INFORMATION CONTACT: Dr. Barbara Choo, Center for Quality Improvement and Patient Safety, AHRQ, 5600 Fishers Lane, Room 06N100B, Rockville, MD 20857; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; Email: *pso@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. 299b–21 to b–26, (Patient Safety Act) and the related Patient Safety and Quality Improvement Final Rule, 42 CFR part 3 (Patient Safety Rule), published in the **Federal Register** on November 21, 2008, 73 FR 70732–70814, provide for the formation of Patient Safety Organizations (PSOs), which collect, aggregate, and analyze confidential information regarding the quality and safety of health care delivery. The collection of patient safety work product allows the aggregation of data that help to identify and address underlying causal factors of patient safety and quality issues.

The Patient Safety Act and Patient Safety Rule establish a framework by which doctors, hospitals, skilled nursing facilities, and other health care providers may assemble information regarding patient safety events and quality of care. Information that is assembled and developed by providers for reporting to PSOs and the information received and analyzed by PSOs—called ''patient safety work product''—is privileged and confidential. Patient safety work product is used to conduct patient safety activities, which may include identifying events, patterns of care, and unsafe conditions that increase risks and hazards to patients. Definitions and other details about PSOs and patient safety work product are included in the Patient Safety Act and Patient Safety Rule which can be accessed electronically at: *http://www.pso.ahrq.gov/legislation/.*

Definition of Common Formats

The term ''Common Formats'' refers to the common definitions and reporting formats, specified by AHRQ, that allow health care providers to collect and submit standardized information regarding patient quality and safety to PSOs and other entities. The Common Formats are not intended to replace any current mandatory reporting system, collaborative/voluntary reporting system, research-related reporting system, or other reporting/recording system; rather the formats are intended to enhance the ability of health care providers to report information that is standardized both clinically and electronically.

In collaboration with the interagency Federal Patient Safety Workgroup (PSWG), the National Quality Forum (NQF), and the public, AHRQ has developed Common Formats for three settings of care—acute care hospitals, skilled nursing facilities, and community pharmacies—in order to facilitate standardized data collection and analysis. The scope of Common Formats applies to all patient safety concerns including: Incidents—patient safety events that reached the patient, whether or not there was harm; near misses or close calls—patient safety events that did not reach the patient; and unsafe conditions—circumstances that increase the probability of a patient safety event.

AHRQ's Common Formats for patient safety event reporting include:

- Event descriptions (definitions of patient safety events, near misses, and unsafe conditions to be reported);
- Specifications for patient safety aggregate reports that derive from event descriptions;
- Delineation of data elements and algorithms to be used for collection of adverse event data to populate the reports; and
- Technical specifications for electronic data collection and reporting.

The technical specifications promote standardization of collected patient safety event information by specifying rules for data collection and submission, as well as by providing guidance for how and when to create data elements, their valid values, conditional and go-to logic, and reports. These specifications will ensure that data collected by PSOs and other entities have comparable clinical meaning. They also provide direction to software developers, so that the Common Formats can be implemented electronically, and to PSOs, so that the Common Formats can be submitted electronically to the PSO Privacy Protection Center (PPC) for data de-identification and transmission to the Network of Patient Safety Databases.

Common Formats Development

In anticipation of the need for Common Formats, AHRQ began their development by creating an inventory of functioning private and public sector patient safety reporting systems. This inventory provided an evidence base to inform construction of the Common Formats. The inventory included many systems from the private sector, including prominent academic settings, hospital systems, and international reporting systems (*e.g.,* from the United Kingdom and the Commonwealth of Australia). In addition, virtually all major Federal patient safety reporting systems were included, such as those from the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), the Department of Defense (DoD), and the Department of Veterans Affairs (VA).

Since February 2005, AHRQ has convened the PSWG to assist AHRQ with developing and maintaining the Common Formats. The PSWG includes major health agencies within HHS—CDC, Centers for Medicare & Medicaid Services, FDA, Health Resources and Services Administration, Indian Health Service, National Institutes of Health, National Library of Medicine, Office of the National Coordinator for Health Information Technology, Office of Public Health and Science, and Substance Abuse and Mental Health Services Administration—as well as the DoD and VA.

Since the initial release of the Common Formats in August 2008, AHRQ has regularly revised the formats based upon public comment. First, AHRQ reviews existing patient safety practices and event reporting systems. Then, AHRQ works in collaboration with the PSWG and Federal subject matter experts to develop and draft the Common Formats. In addition, the PSWG assists AHRQ with assuring the consistency of definitions/formats with those of relevant government agencies as refinement of the Common Formats continues. Next, AHRQ solicits feedback from private sector organizations and individuals. Finally, based upon the feedback received, AHRQ further revises the Common Formats.

Participation by the private sector in the development and subsequent revision of the Common Formats is achieved through working with the NQF. The Agency engages the NQF, a non-profit organization focused on health care quality, to solicit comments and advice regarding proposed versions of the Common Formats. AHRQ began this process with the NQF in 2008, receiving feedback on AHRQ's 0.1 Beta release of the Common Formats for Event Reporting—Hospital. After receiving public comment, the NQF solicits the review and advice of its Common Formats Expert Panel and subsequently provides feedback to AHRQ. The Agency then revises and refines the Common Formats and issues them as a production version. AHRQ has continued to employ this process for all subsequent versions of the Common Formats.

In 2014, representatives from U.S. community pharmacies approached AHRQ regarding collaboration to develop Common Formats for the community pharmacy setting. Development of the new Formats began using the existing AHRQ Common Formats Medication module from the AHRQ Common Formats for Event

Reporting—Hospital, Version 1.2, as a starting point. AHRQ, in conjunction with community pharmacy representatives, designed these new formats to facilitate improved detection and understanding of medication-related events originating in pharmacies. If implemented as specified, the Common Formats—Community Pharmacy Version 1.0 will allow aggregation of medication-related data across different pharmacy providers.

On October 6, 2015, AHRQ announced the availability of the—Common Formats Retail Pharmacy Version 0.1 Beta—for review and comment in the **Federal Register** (80 FR 60385–60387). After obtaining feedback from both the private and public sectors, the Agency finalized the format and renamed it Common Formats—Community Pharmacy Version 1.0. All elements—including the event description, aggregate reports, data elements and algorithms, and technical specifications—will be posted at the PSOPPC Web site: *https://www.psoppc.org/psoppc_web.*

More information on the Common Formats can be obtained through AHRQ's PSO Web site: *http://www.pso.ahrq.gov/.*

Sharon B. Arnold,

Deputy Director.

[FR Doc. 2016–30604 Filed 12–19–16; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Mine Safety and Health Research Advisory Committee: Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that the Mine Safety and Health Research Advisory Committee, Centers for Disease Control and Prevention, Department of Health and Human Services, has been renewed for a 2-year period through November 30, 2018.

For information, contact Jeffrey H. Welsh, B.A., Designated Federal Officer, Mine Safety and Health Research Advisory Committee, Centers for Disease Control and Prevention, Department of Health and Human Services, 626 Cochrans Mill Road, Mailstop P05, Pittsburgh, Pennsylvania 15236, Telephone (412) 386–4040 or fax (412) 386–6614.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Catherine Ramadei,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2016–30525 Filed 12–19–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Board on Radiation and Worker Health (ABRWH or the Advisory Board), Subcommittee on Procedures Review (SPR), National Institute for Occupational Safety and Health (NIOSH)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC), announces the following meeting for the aforementioned subcommittee:

Time and Date: 11:00 a.m.–4:30 p.m., EST, January 10, 2017

Place: Audio Conference Call via FTS Conferencing.

Status: Open to the public, but without a public comment period. The public is welcome to submit written comments in advance of the meeting, to the contact person below. Written comments received in advance of the meeting will be included in the official record of the meeting. The public is also welcome to listen to the meeting by joining the teleconference at the USA toll-free, dial-in number at 1–866–659–0537 and the pass code is 9933701.

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines that have been promulgated by the Department of Health and Human Services (HHS) as a final rule; advice on methods of dose reconstruction, which have also been promulgated by HHS as a final rule; advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program; and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, rechartered on March 22, 2016, pursuant to Executive Order 13708, and will expire on September 30, 2017.

Purpose: The Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advise the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class. SPR was established to aid the Advisory Board in carrying out its duty to advise the Secretary, HHS, on dose reconstruction. SPR is responsible for overseeing, tracking, and participating in the reviews of all procedures used in the dose reconstruction process by the NIOSH Division of Compensation Analysis and Support (DCAS) and its dose reconstruction contractor (Oak Ridge Associated Universities—ORAU).

Matters for Discussion: The agenda for the Subcommittee meeting includes: discussion of procedures in the following ORAU and DCAS technical documents:

OCAS Technical Information Bulletin (TIB) 0013 and ORAUT Procedure 0042 (''Individual Dose Adjustment Procedure for Y–12 Dose Reconstruction'' and ''Accounting for Incomplete Personal Monitoring Data on Penetrating Gamma-Ray Doses to Workers in Radiation Areas at the Oak Ridge Y–12 Plant Prior to 1961''); Program Evaluation Report OCAS–PER–011, (''K–25 TBD and TIB Revisions''), PER–055 (''TBD 6000 Revisions''), PER–057 (''General Steel Industries''), PER 60 (''Blockson Chemical Company''), PER–064 (''DuPont Deep Water Works''), and PER–066 (''Huntington Pilot Plant''), and a continuation of the comment-resolution process for other dose

reconstruction procedures under review by the Subcommittee.

The agenda is subject to change as priorities dictate.

Contact Person for More Information: Theodore Katz, Designated Federal Officer, NIOSH, CDC, 1600 Clifton Road, Mailstop E–20, Atlanta, Georgia 30333, Telephone (513)533–6800, Toll Free 1(800) CDC–INFO, Email *ocas@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Catherine Ramadei,

Acting Director, Management Analysis and Services Office Centers for Disease Control and Prevention.

[FR Doc. 2016–30520 Filed 12–19–16; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces a meeting for the initial review of applications in response to Funding Opportunity Announcement (FOA) PAR15–352, Occupational Safety and Health Training Projects.

SUMMARY: This publication corrects a notice that was published in the **Federal Register** on December 6, 2016, 2016 Volume 81, Number 234, pages 87938–87939. The dates should read as follows:

1:00 p.m.–6:00 p.m., EST, January 18, 2017 (Closed)

1:00 p.m.–6:00 p.m., EST, January 19, 2017 (Closed)

CONTACT PERSON FOR MORE INFORMATION: Nina L. Turner, Ph.D., Scientific Review Officer, CDC, 1095 Willowdale Road, Mailstop L1055, Morgantown, WV Telephone: (304) 285–6047, *NTURNER@CDC.GOV*. The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Catherine Ramadei,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2016–30518 Filed 12–19–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Board on Radiation and Worker Health (ABRWH or the Advisory Board), Subcommittee for Dose Reconstruction Reviews (SDRR), National Institute for Occupational Safety and Health (NIOSH)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC), announces the following meeting for the aforementioned subcommittee:

Time and Date: 10:30 a.m.–5:00 p.m., EST, January 30, 2017.

Place: Audio Conference Call via FTS Conferencing.

Status: Open to the public, but without a public comment period. The public is welcome to submit written comments in advance of the meeting, to the contact person below. Written comments received in advance of the meeting will be included in the official record of the meeting. The public is also welcome to listen to the meeting by joining the teleconference at the USA toll-free, dial-in number at 1–866–659–0537 and the pass code is 9933701.

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines that have been promulgated by the Department of Health and Human Services (HHS) as a final rule; advice on methods of dose reconstruction, which have also been promulgated by HHS as a final rule; advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program; and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, rechartered on March 22, 2016 pursuant to Executive Order 13708, and will expire on September 30, 2017.

Purpose: The Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advise the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class. The Subcommittee for Dose Reconstruction Reviews was established to aid the Advisory Board in carrying out its duty to advise the Secretary, HHS, on dose reconstruction.

Matters for Discussion: The agenda for the Subcommittee meeting includes the following dose reconstruction program quality management and assurance activities: dose reconstruction cases under review from Sets 14–23, including the Oak Ridge sites (Y–12, K–25, Oak Ridge National Laboratory), Hanford, Feed Materials Production Center (''Fernald''), Mound Plant, Rocky Flats Plant, Nevada Test Site, Idaho National Laboratory, Savannah River Site, and other facilities.

The agenda is subject to change as priorities dictate.

Contact Person for More Information: Theodore Katz, Designated Federal Officer, NIOSH, CDC, 1600 Clifton Road, Mailstop E–20, Atlanta, Georgia 30329, Telephone (513)533–6800, Toll Free 1(800)CDC–INFO, Email *ocas@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and

Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2016–30521 Filed 12–19–16; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, Office of Infectious Diseases (BSC, OID)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC), announces the following meeting of the aforementioned committee:

Time and Date: 11:00 a.m.–1:00 p.m., EST, January 23, 2017.

Place: Teleconference.

Status: The meeting is open to the public; the toll free dial in number is 1–877–951–7311 with a pass code of 4530516.

Purpose: The BSC, OID, provides advice and guidance to the Secretary, Department of Health and Human Services; the Director, CDC; the Director, OID; and the Directors of the National Center for Immunization and Respiratory Diseases, the National Center for Emerging and Zoonotic Infectious Diseases, and the National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, CDC, in the following areas: Strategies, goals, and priorities for programs; research within the national centers; and overall strategic direction and focus of OID and the national centers.

Matters for Discussion: Topics to be discussed during the teleconference include (1) discussion and vote on the Food Safety Modernization Act Surveillance Working Group Annual Report to the Secretary of Health and Human Services and (2) a report back from a recent external review of CDC's advanced molecular detection activities.

The agenda and any supplemental material will be available at *www.cdc.gov/oid/BSC/meetingschedule.html* after January 16.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Robin Moseley, M.A.T., Designated Federal Officer, OID, CDC, 1600 Clifton Road NE., Mailstop D10, Atlanta, Georgia 30333, Telephone: (404) 639–4461.

The Director, Management Analysis and Services Office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Catherine Ramadei,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2016–30523 Filed 12–19–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Board on Radiation and Worker Health (ABRWH or the Advisory Board), National Institute for Occupational Safety and Health (NIOSH)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention announces the following committee meeting:

Time and Date: 11:00 a.m.–2:00 p.m., EST, January 25, 2017.

Place: Audio Conference Call via FTS Conferencing.

Status: Open to the public. The public is welcome to submit written comments in advance of the meeting, to the contact person below. Written comments received in advance of the meeting will be included in the official record of the meeting. The public is also welcome to listen to the meeting by joining the teleconference at the USA toll-free, dial-in number, 1–866–659–0537 and the passcode is 9933701.

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines, which have been promulgated by the Department of Health and Human Services (HHS) as a final rule; advice on methods of dose reconstruction, which have also been promulgated by HHS as a final rule; advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program; and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to the CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, rechartered on March 22, 2016 pursuant to Executive Order 13708, and will expire on September 30, 2017.

Purpose: This Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advising the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

Matters for Discussion: The agenda for the conference call includes: Reporting Final SEC Petition Vote Count from November ABRWH Meeting for Area IV of Santa Susanna Field Laboratory (Ventura County, CA); Follow-up on Hooker Site Profile Review; Work Group and Subcommittee Reports; Status of SEC Petitions Update; Plans for the March 2017 Advisory Board Meeting; and Advisory Board Correspondence.

The agenda is subject to change as priorities dictate.

Contact Person for More Information: Theodore M. Katz, Designated Federal Officer, NIOSH, CDC, 1600 Clifton Road NE., Mailstop: E–20, Atlanta, GA 30329, Telephone (513)533–6800, Toll Free 1–800–CDC–INFO, Email *ocas@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Catherine Ramadei,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2016–30519 Filed 12–19–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number NIOSH 278]

Request for Nominations of Candidates To Serve on the Board of Scientific Counselors (BSC), National Institute for Occupational Safety and Health (NIOSH)

The Centers for Disease Control and Prevention (CDC) is soliciting nominations for possible membership on the BSC, NIOSH.

The BSC, NIOSH consists of 15 experts in fields related to occupational safety and health. The members are selected by the Secretary of the U.S. Department of Health and Human Services (HHS). The board advises the NIOSH Director on occupational safety and health research and prevention programs. The board also provides advice on standards of scientific excellence, current needs in the field of occupational safety and health, and the applicability and dissemination of research findings. This advice may take the form of reports or verbal communications to the NIOSH Director during BSC meetings. Nominations are being sought for individuals who have expertise and qualifications necessary to contribute to the accomplishment of the board's mission. More information is available on the NIOSH BSC Web site: *http://www.cdc.gov/niosh/BSC/default.html.*

Nominees will be selected based on expertise in occupational safety and health fields, such as occupational medicine, occupational nursing, industrial hygiene, occupational safety and health engineering, toxicology, chemistry, safety and health education, ergonomics, epidemiology, biostatistics, and psychology. Members may be invited to serve for terms of two to four years. Selected nominees would begin service on the BSC, NIOSH in January 2018.

The U.S. Department of Health and Human Services policy stipulates that committee membership shall be balanced in terms of points of view represented, and the committee's function. Appointments shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, gender identity, HIV status, disability, and cultural, religious, or socioeconomic status. Nominees must be U.S. citizens, and cannot be full-time employees of the U.S. Government or federally registered lobbyists. Current participation on federal workgroups or prior experience serving on a federal advisory committee does not disqualify a candidate; however, HHS policy is to avoid excessive individual service on advisory committees and multiple committee memberships. Board members are Special Government Employees, requiring the filing of financial disclosure reports at the beginning and annually during their terms. CDC reviews potential candidates for the Board membership each year, and provides a slate of nominees for consideration to the Secretary of HHS for final selection.

Candidates should submit the following items:

- Current *curriculum vitae,* including complete contact information (name, affiliation, mailing address, telephone number, email address)
- A letter of recommendation stating the qualifications of the candidate.

Nominations must be submitted (postmarked or electronically received) by January 31, 2017.

Submissions must be electronic or by mail. Submissions should reference docket 278. Electronic submissions: You may electronically submit nominations, including attachments, to *nioshdocket@cdc.gov.*

Attachments in Microsoft Word are preferred. Regular, Express, or Overnight Mail: Written nominations may be submitted (one original and two copies) to the following address only: NIOSH Docket 278, c/o Richie Dickerson, Committee Management Specialist, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS: E–20, Atlanta, Georgia 30329. Telephone and facsimile submissions cannot be accepted.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention, and the Agency for Toxic Substances and Disease Registry.

Catherine Ramadei,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2016–30522 Filed 12–19–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–4320]

Sun Pharmaceutical Industries, Inc.; Withdrawal of Approval of 28 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of 28 abbreviated new drug applications held by Sun Pharmaceutical Industries, Inc. (Sun Pharmaceutical), U.S. Agent for Sun Pharmaceutical Industries Limited, 270 Prospect Plains Rd., Cranbury, NJ 08512. The drug products are no longer marketed, and Sun Pharmaceutical has requested that the approval of the applications be withdrawn.

DATES: January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Florine P. Purdie, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6248, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: The applications listed in the table in this document are no longer marketed, and Sun Pharmaceutical has requested that FDA withdraw approval of the applications. The company has also, by its request, waived its opportunity for a hearing.

Application No.	Drug
065007	Cephalexin Capsules USP, Equivalent to (EQ) 250 milligrams (mg) base and EQ 500 mg base.
065016	Amoxicillin Capsules USP, 250 mg and 500 mg.
065021	Amoxicillin Tablets USP (Chewable), 125 mg and 250 mg.
065059	Amoxicillin Tablets USP, 500 mg and 875 mg.
065060	Amoxicillin Tablets USP (Chewable), 200 mg and 400 mg.
065081	Cephalexin for Oral Suspension USP, EQ 125 mg base/5 milliliters (mL) and EQ 250 mg base/5 mL.
065082	Cefpodoxime Proxetil for Oral Suspension USP, EQ 50 mg base/5 mL and EQ 100 mg base/5 mL.
065083	Cefpodoxime Proxetil Tablets USP, EQ 100 mg base and EQ 200 mg base.

Application No.	Drug
065102	Amoxicillin and Clavulanate Potassium Tablets USP, 875 mg/EQ 125 mg base.
065109	Amoxicillin and Clavulanate Potassium Tablets USP, 500 mg/EQ 125 mg base.
065113	Amoxicillin for Oral Suspension USP, 200 mg/5 mL and 400 mg/5 mL.
065115	Cefadroxil for Oral Suspension USP, EQ 125 mg base/5 mL, EQ 250 mg base/5 mL, and EQ 500 mg base/5 mL.
065118	Cefuroxime Axetil Tablets USP, EQ 125 mg base, EQ 250 mg base, and EQ 500 mg base.
065132	Amoxicillin and Clavulanate Potassium for Oral Suspension USP, 200 mg/EQ 28.5 mg base per 5 mL and 400 mg/EQ 57 mg base per 5 mL.
065161	Amoxicillin and Clavulanate Potassium Tablets USP (Chewable), 200 mg/EQ 28.5 mg base and 400 mg/EQ 57 mg base.
065207	Amoxicillin and Clavulanate Potassium for Oral Suspension USP, 600 mg/EQ 42.9 mg base per 5 mL.
065323	Cefuroxime Axetil for Oral Suspension USP, EQ 125 mg base/5 mL and EQ 250 mg base/5 mL.
074975	Acyclovir Capsules USP, 200 mg.
074980	Acyclovir Tablets USP, 400 mg and 800 mg.
075132	Ranitidine Tablets USP, EQ 75 mg base.
075439	Ranitidine Tablets USP, EQ 150 mg base and EQ 300 mg base.
076041	Sotret (isotretinoin) Capsules USP, 10 mg, 20 mg, and 40 mg.
076285	Simvastatin Tablets USP, 5 mg, 10 mg, 20 mg, 40 mg, and 80 mg.
076332	Fluconazole for Oral Suspension, 10 mg/mL and 40 mg/mL.
076409	Nefazodone Hydrochloride Tablets USP, 50 mg, 100 mg, 150 mg, 200 mg, and 250 mg.
076503	Sotret (isotretinoin) Capsules USP, 30 mg.
076606	Gabapentin Capsules USP, 100 mg, 300 mg, and 400 mg.
076739	Fosinopril Sodium and Hydrochlorothiazide Tablets USP, 10 mg/12.5 mg and 20 mg/12.5 mg.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)) and under authority delegated to the Director, Center for Drug Evaluation and Research, by the Commissioner, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn, effective January 19, 2017.

Dated: December 15, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30623 Filed 12–19–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0969]

Authorization of Emergency Use of an In Vitro Diagnostic Device for Detection of Zika Virus; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of an Emergency Use Authorization (EUA) (the Authorization) for an in vitro diagnostic device for detection of the Zika virus in response to the Zika virus outbreak in the Americas. FDA issued this Authorization under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as requested by Abbott Molecular, Inc. The Authorization contains, among other things, conditions on the emergency use of the authorized in vitro diagnostic device. The Authorization follows the February 26, 2016, determination by the Secretary of Health and Human Services (HHS) that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad and that involves Zika virus. On the basis of such determination, the Secretary of HHS declared on February 26, 2016, that circumstances exist justifying the authorization of emergency use of in vitro diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under the FD&C Act. The Authorization, which includes an explanation of the reasons for issuance, is reprinted in this document.

DATES: The Authorization is effective as of November 21, 2016.

ADDRESSES: Submit written requests for single copies of the EUA to the Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4338, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the Authorization may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the Authorization.

FOR FURTHER INFORMATION CONTACT: Carmen Maher, Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4347, Silver Spring, MD 20993–0002, 301–796–8510 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Background

Section 564 of the FD&C Act (21 U.S.C. 360bbb–3) as amended by the Project BioShield Act of 2004 (Pub L. 108–276) and the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (Pub L. 113–5) allows FDA to strengthen the public health protections against biological, chemical, nuclear, and radiological agents. Among other things, section 564 of the FD&C Act allows FDA to authorize the use of an unapproved medical product or an unapproved use of an approved medical product in certain situations. With this EUA authority, FDA can help assure that medical countermeasures may be used in emergencies to diagnose, treat, or prevent serious or life-threatening diseases or conditions caused by biological, chemical, nuclear, or radiological agents when there are no adequate, approved, and available alternatives.

Section 564(b)(1) of the FD&C Act provides that, before an EUA may be issued, the Secretary of HHS must declare that circumstances exist justifying the authorization based on one of the following grounds: (1) A determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear agent or agents; (2) a determination by the Secretary of Defense that there is a military

emergency, or a significant potential for a military emergency, involving a heightened risk to U.S. military forces of attack with a biological, chemical, radiological, or nuclear agent or agents; (3) a determination by the Secretary of HHS that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of U.S. citizens living abroad, and that involves a biological, chemical, radiological, or nuclear agent or agents, or a disease or condition that may be attributable to such agent or agents; or (4) the identification of a material threat by the Secretary of Homeland Security under section 319F–2 of the Public Health Service (PHS) Act (42 U.S.C. 247d–6b) sufficient to affect national security or the health and security of U.S. citizens living abroad.

Once the Secretary of HHS has declared that circumstances exist justifying an authorization under section 564 of the FD&C Act, FDA may authorize the emergency use of a drug, device, or biological product if the Agency concludes that the statutory criteria are satisfied. Under section 564(h)(1) of the FD&C Act, FDA is required to publish in the **Federal Register** a notice of each authorization, and each termination or revocation of an authorization, and an explanation of the reasons for the action. Section 564 of the FD&C Act permits FDA to authorize the introduction into interstate commerce of a drug, device, or biological product intended for use when the Secretary of HHS has declared that circumstances exist justifying the authorization of emergency use. Products appropriate for emergency use may include products and uses that are not approved, cleared, or licensed under sections 505, 510(k), or 515 of the FD&C Act (21 U.S.C. 355, 360(k), and 360e) or section 351 of the PHS Act (42 U.S.C. 262). FDA may issue an EUA only if, after consultation with the HHS Assistant Secretary for Preparedness and Response, the Director of the National Institutes of Health, and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the applicable circumstances), FDA [1] concludes: (1) That an agent referred to in a declaration of emergency or threat can cause a serious or life-threatening disease or condition; (2) that, based on the totality of scientific evidence available to FDA, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that: (A) The product may be effective in diagnosing, treating, or preventing (i) such disease or condition; or (ii) a serious or life-threatening disease or condition caused by a product authorized under section 564, approved or cleared under the FD&C Act, or licensed under section 351 of the PHS Act, for diagnosing, treating, or preventing such a disease or condition caused by such an agent; and (B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product, taking into consideration the material threat posed by the agent or agents identified in a declaration under section 564(b)(1)(D) of the FD&C Act, if applicable; (3) that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition; and (4) that such other criteria as may be prescribed by regulation are satisfied.

No other criteria for issuance have been prescribed by regulation under section 564(c)(4) of the FD&C Act. Because the statute is self-executing, regulations or guidance are not required for FDA to implement the EUA authority.

[1] The Secretary of HHS has delegated the authority to issue an EUA under section 564 of the FD&C Act to the Commissioner of Food and Drugs.

II. EUA Request for an In Vitro Diagnostic Device for Detection of the Zika Virus

On February 26, 2016, the Secretary of HHS determined that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad and that involves Zika virus. On February 26, 2016, under section 564(b)(1) of the FD&C Act, and on the basis of such determination, the Secretary of HHS declared that circumstances exist justifying the authorization of emergency use of in vitro diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under section 564 of the FD&C Act. Notice of the determination and declaration of the Secretary was published in the **Federal Register** on March 2, 2016 (81 FR 10878). On November 9, 2016, Abbott Molecular, Inc. requested, and on November 21, 2016, FDA issued, an EUA for the Abbott Real Time ZIKA assay, subject to the terms of the Authorization.

III. Electronic Access

An electronic version of this document and the full text of the Authorization are available on the Internet at *https://www.regulations.gov.*

IV. The Authorization

Having concluded that the criteria for issuance of the Authorization under section 564(c) of the FD&C Act are met, FDA has authorized the emergency use of an in vitro diagnostic device for detection of Zika virus subject to the terms of the Authorization. The Authorization in its entirety (not including the authorized versions of the fact sheets and other written materials) follows and provides an explanation of the reasons for its issuance, as required by section 564(h)(1) of the FD&C Act.

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Silver Spring, MD 20993

November 21, 2016

Stacy Ferguson
Regulatory Affairs Project Manager
Abbott Molecular Inc.
1300 East Touhy Avenue
Des Plaines, IL 60018

Dear Ms. Ferguson:

This letter is in response to your request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of Abbott Molecular Inc.'s ("Abbott") RealTi*me* ZIKA assay for the qualitative detection of RNA from Zika virus in human serum, EDTA plasma, and urine (collected alongside a patient-matched serum or plasma specimen) from individuals meeting Centers for Disease Control and Prevention (CDC) Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated), by laboratories in the United States (U.S.) that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. §263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories, pursuant to section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. § 360bbb-3).[1] Test results are for the identification of Zika virus RNA. Zika virus RNA is generally detectable in these specimens during the acute phase of infection and, according to the updated CDC Guidance for U.S. Laboratories Testing for Zika Virus Infection,[2] up to 14 days in serum and urine (possibly longer in urine), following onset of symptoms, if present. Positive results are indicative of current infection.

On February 26, pursuant to section 564(b)(1)(C) of the Act (21 U.S.C. § 360bbb-3(b)(1)(C)), the Secretary of Health and Human Services (HHS) determined that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad and that involves Zika virus.[3] Pursuant to section 564(b)(1) of the Act (21 U.S.C. § 360bbb-3(b)(1)), and on the basis of such determination, the Secretary of HHS then declared that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under 21 U.S.C. § 360bbb-3(a).[4]

[1] For ease of reference, this letter will refer to "laboratories in the United States (U.S.) that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories" as "authorized laboratories."

[2] Available at http://www.cdc.gov/zika/laboratories/lab-guidance.html (last updated on November 16, 2016).

[3] As amended by the Pandemic and All Hazards Preparedness Reauthorization Act, Pub. L. No. 113-5, under section 564(b)(1)(C) of the Act, the Secretary may make a determination of a public health emergency, or of significant potential for a public health emergency.

[4] HHS. *Determination and Declaration Regarding Emergency Use of in Vitro Diagnostic Tests for Detection of Zika*

Having concluded that the criteria for issuance of this authorization under section 564(c) of the Act (21 U.S.C. § 360bbb-3(c)) are met, I am authorizing the emergency use of the Abbott RealTi*m*e ZIKA assay (as described in the Scope of Authorization section of this letter (Section II)) in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated) (as described in the Scope of Authorization section of this letter (Section II)) for the detection of Zika virus infection by authorized laboratories, subject to the terms of this authorization.

I. Criteria for Issuance of Authorization

I have concluded that the emergency use of the Abbott RealTi*m*e ZIKA assay for the detection of Zika virus and diagnosis of Zika virus infection in the specified population meets the criteria for issuance of an authorization under section 564(c) of the Act, because I have concluded that:

1. The Zika virus can cause Zika virus infection, a serious or life-threatening disease or condition to humans infected with the virus;

2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that the Abbott RealTi*m*e ZIKA assay, when used with the specified instrument(s) and in accordance with the Scope of Authorization, may be effective in detecting Zika virus and diagnosing Zika virus infection, and that the known and potential benefits of the Abbott RealTi*m*e Zika assay for detecting Zika virus and diagnosing Zika virus infection outweigh the known and potential risks of such product; and

3. There is no adequate, approved, and available alternative to the emergency use of the Abbott RealTi*m*e ZIKA assay for detecting Zika virus and diagnosing Zika virus infection.[5]

II. Scope of Authorization

I have concluded, pursuant to section 564(d)(1) of the Act, that the scope of this authorization is limited to the use of the authorized Abbott RealTi*m*e ZIKA assay by authorized laboratories for the detection of RNA from Zika virus and diagnosis of Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

The Authorized Abbott RealTi*m*e ZIKA assay

The Abbott RealTi*m*e ZIKA assay is a real-time reverse transcription polymerase chain reaction (RT-PCR) assay for the qualitative detection of RNA from Zika virus in human serum, EDTA

Virus and/or Diagnosis of Zika Virus Infection. 81 Fed. Reg. 10878 (March 2, 2016).

[6] No other criteria of issuance have been prescribed by regulation under section 564(c)(4) of the Act.

plasma, urine (collected alongside a patient-matched serum or plasma specimen) and other authorized specimen types.

To perform the Abbott RealTi*m*e ZIKA assay, nucleic acids are isolated from the sample and purified using the Abbott *m*Sample Preparation System on the Abbott *m*2000*sp* instrument, an automated instrument for performing sample preparation, or other authorized instruments. Magnetic microparticle technology captures nucleic acids, and the particles are washed to remove unbound sample components. The bound nucleic acids are eluted and transferred to a 96 deep-well plate. The purified nucleic acid is reverse transcribed into cDNA which is then amplified in the Abbott *m*2000*rt* instrument, or other authorized instruments. This is followed by the detection of the target of interest.

The Abbott RealTi*m*e ZIKA assay uses the following materials, or other authorized materials or ancillary products:

- Abbott *m*Sample Preparation System, containing
  - Abbott *m*Lysis
  - *m*Wash 1
  - *m*Wash 2
  - *m*Elution Buffer
  - *m*Microparticles reagent bottles

- Abbott RealTi*m*e ZIKA Amplification Reagent Kit, containing
  - Abbott RealTi*m*e ZIKA Internal Control in negative human serum
  - Abbott RealTi*m*e ZIKA Amplification Reagent (Thermostable rTth Polymerase Enzyme; ZIKA Amplification Reagent with primers, probes and nucleotides; Activation Reagent)

The Abbott RealTi*m*e ZIKA assay requires the following control materials, or other authorized control materials, to be included in each run; all controls listed below must generate expected results in order for a test to be considered valid, as outlined in the Abbott RealTi*m*e ZIKA Instructions for Use:

- Abbott RealTi*m*e ZIKA Control Kit
  - Abbott RealTi*m*e ZIKA Negative Control: Negative human plasma is used for monitoring of contaminations.
  - Abbott RealTi*m*e ZIKA Positive Control: Inactivated Zika virus (strain PRVABC59) in human serum monitors for substantial reagent failure and is used throughout the extraction and PCR set-up for each run.

- Internal Control: noninfectious Armored RNA with internal control sequences in negative human plasma. It confirms the validity of the extraction process and identifies potential PCR inhibition; it is used throughout the extraction and PCR set-up for each sample.

To produce a valid run the test controls must meet the performance specifications outlined in the Abbott RealTi*m*e ZIKA Instructions for Use.

The Abbott RealTime ZIKA assay also requires the use of additional materials and ancillary reagents commonly used in clinical laboratories and that are described in the authorized Abbott RealTime ZIKA Instructions for Use.

The above described Abbott RealTime ZIKA assay, when labeled consistently with the labeling authorized by FDA entitled "Abbott RealTime ZIKA Instructions for Use" and "Abbott RealTime ZIKA Control Kit" (available at http://www.fda.gov/MedicalDevices/Safety/EmergencySituations/ucm161496.htm), which may be revised by Abbott in consultation with the Division of Microbiology Devices (DMD)/Office of In Vitro Diagnostics and Radiological Health (OIR)/Center for Devices and Radiological Health (CDRH), is authorized to be distributed to and used by authorized laboratories under this EUA, despite the fact that it does not meet certain requirements otherwise required by federal law.

The above described Abbott RealTime ZIKA assay is authorized to be accompanied by the following information pertaining to the emergency use, which is authorized to be made available to healthcare providers and patients, including pregnant women:

- Fact Sheet for Healthcare Providers: Interpreting Abbott RealTime ZIKA Assay Results
- Fact Sheet for Patients: Understanding Results from the Abbott RealTime ZIKA Assay

As described in Section IV below, Abbott and its authorized distributors are also authorized to make available additional information relating to the emergency use of the authorized Abbott RealTime ZIKA assay that is consistent with, and does not exceed, the terms of this letter of authorization.

I have concluded, pursuant to section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of the authorized Abbott RealTime ZIKA assay in the specified population, when used for detection of Zika virus and to diagnose Zika virus infection and used consistently with the Scope of Authorization of this letter (Section II), outweigh the known and potential risks of such a product.

I have concluded, pursuant to section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that the authorized Abbott RealTime ZIKA assay may be effective in the detection of Zika virus and diagnosis of Zika virus infection, when used consistently with the Scope of Authorization of this letter (Section II), pursuant to section 564(c)(2)(A) of the Act.

FDA has reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, and concludes that the authorized Abbott RealTime ZIKA assay, when used for detection of Zika virus and to diagnose Zika virus infection in the specified population (as described in the Scope of Authorization of this letter (Section II)), meets the criteria set forth in section 564(c) of the Act concerning safety and potential effectiveness.

The emergency use of the authorized Abbott RealTime ZIKA assay under this EUA must be consistent with, and may not exceed, the terms of this letter, including the Scope of

Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of HHS's determination described above and the Secretary of HHS's corresponding declaration under section 564(b)(1), the Abbott RealTi*m*e ZIKA assay described above is authorized to detect Zika virus and diagnose Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika virus transmissions at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

This EUA will cease to be effective when the HHS declaration that circumstances exist to justify the EUA is terminated under section 564(b)(2) of the Act or when the EUA is revoked under section 564(g) of the Act.

III. Waiver of Certain Requirements

I am waiving the following requirements for the Abbott RealTi*m*e ZIKA assay during the duration of this EUA:

- Current good manufacturing practice requirements, including the quality system requirements under 21 CFR Part 820 with respect to the design, manufacture, packaging, labeling, storage, and distribution of the Abbott RealTi*m*e ZIKA assay.

- Labeling requirements for cleared, approved, or investigational devices, including labeling requirements under 21 CFR 809.10 and 21 CFR 809.30, except for the intended use statement (21 CFR 809.10(a)(2), (b)(2)), adequate directions for use (21 U.S.C. 352(f)), (21 CFR 809.10(b)(5), (7), and (8)), any appropriate limitations on the use of the device including information required under 21 CFR 809.10(a)(4), and any available information regarding performance of the device, including requirements under 21 CFR 809.10(b)(12).

IV. Conditions of Authorization

Pursuant to section 564 of the Act, I am establishing the following conditions on this authorization:

Abbott Molecular Inc. and Its Authorized Distributor(s)

A. Abbott and its authorized distributor(s) will distribute the authorized Abbott RealTi*m*e ZIKA assay with the authorized labeling only to authorized laboratories. Changes to the authorized labeling may be made by Abbott in consultation with, and require concurrence of, DMD/OIR/CDRH.

B. Abbott and its authorized distributor(s) will provide to authorized laboratories the authorized Abbott RealTi*m*e ZIKA assay Fact Sheet for Healthcare Providers and the authorized Abbott RealTi*m*e ZIKA assay Fact Sheet for Patients.

C. Abbott and its authorized distributor(s) will make available on their websites the

authorized Abbott RealTi*m*e ZIKA assay Fact Sheet for Healthcare Providers and the authorized Abbott RealTi*m*e ZIKA assay Fact Sheet for Patients.

D. Abbott and its authorized distributor(s) will inform authorized laboratories and relevant public health authority(ies) of this EUA, including the terms and conditions herein.

E. Abbott and its authorized distributor(s) will ensure that the authorized laboratories using the authorized Abbott RealTi*m*e ZIKA assay have a process in place for reporting test results to healthcare providers and relevant public health authorities, as appropriate.[6]

F. Through a process of inventory control, Abbott and its authorized distributor(s) will maintain records of device usage.

G. Abbott and its authorized distributor(s) will collect information on the performance of the test. Abbott will report to FDA any suspected occurrence of false positive and false negative results and significant deviations from the established performance characteristics of the test of which Abbott becomes aware.

H. Abbott and its authorized distributor(s) are authorized to make available additional information relating to the emergency use of the authorized Abbott RealTi*m*e ZIKA assay that is consistent with, and does not exceed, the terms of this letter of authorization.

Abbott Molecular Inc.

I. Abbott will notify FDA of any authorized distributor(s) of the Abbott RealTi*m*e ZIKA assay, including the name, address, and phone number of any authorized distributor(s).

J. Abbott will provide its authorized distributor(s) with a copy of this EUA, and communicate to its authorized distributor(s) any subsequent amendments that might be made to this EUA and its authorized accompanying materials (e.g., Fact Sheets, Instructions for Use).

K. Abbott may request changes to the authorized Abbott RealTi*m*e ZIKA assay Fact Sheet for Healthcare Providers and the authorized Abbott RealTi*m*e ZIKA assay Fact Sheet for Patients. Such requests will be made by Abbott in consultation with, and require concurrence of, DMD/OIR/CDRH.

L. Abbott may request the addition of other instruments for use with the authorized Abbott RealTi*m*e ZIKA assay. Such requests will be made by Abbott in consultation with, and require concurrence of, DMD/OIR/CDRH.

[7] For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Abbott, other authorized distributor(s), and authorized laboratories consult with the applicable country, state or territory health department(s). According to CDC, Zika virus disease is a nationally notifiable condition (see http://www.cdc.gov/zika/).

M. Abbott may request the addition of other extraction methods for use with the authorized Abbott RealTi*me* ZIKA assay. Such requests will be made by Abbott in consultation with, and require concurrence of, DMD/OIR/CDRH.

N. Abbott may request the addition of other specimen types for use with the authorized Abbott RealTi*me* ZIKA assay. Such requests will be made by Abbott in consultation with, and require concurrence of, DMD/OIR/CDRH.

O. Abbott may request the addition of other control materials for use with the authorized Abbott RealTi*me* ZIKA assay. Such requests will be made by Abbott in consultation with, and require concurrence of, DMD/OIR/CDRH.

P. Abbott may request the addition and/or substitution of other ancillary reagents and materials for use with the authorized Abbott RealTi*me* ZIKA assay. Such requests will be made by Abbott in consultation with, and require concurrence of, DMD/OIR/CDRH.

Q. Abbott will assess traceability[7] of the Abbott RealTi*me* ZIKA assay with FDA-recommended reference material(s). After submission to FDA and DMD/OIR/CDRH's review of and concurrence with the data, Abbott will update its labeling to reflect the additional testing.

R. Abbott, assuming the medical device reporting responsibilities of the manufacturer of the Abbott RealTi*me* ZIKA assay, will track adverse events and report to FDA under 21 CFR Part 803.

Authorized Laboratories

S. Authorized laboratories will include with reports of the results of the Abbott RealTi*me* ZIKA assay the authorized Fact Sheet for Healthcare Providers and the authorized Fact Sheet for Patients. Under exigent circumstances, other appropriate methods for disseminating these Fact Sheets may be used, which may include mass media.

T. Authorized laboratories will perform the Abbott RealTi*me* ZIKA assay using nucleic acid extraction and PCR set-up procedures automated by the Abbott *m*2000*sp* instruments, or other authorized instruments.

U. Authorized laboratories will perform the Abbott RealTi*me* ZIKA assay on the Abbott *m*2000*rt* instrument, or other authorized instruments.

V. Authorized laboratories will perform the Abbott RealTi*me* ZIKA assay using the Abbott *m*Sample Preparation System for nucleic acid extraction, or other authorized extraction methods.

W. Authorized laboratories will perform the Abbott RealTi*me* ZIKA assay on human serum, EDTA plasma, or urine (collected alongside a patient-matched serum or plasma specimen) or other authorized specimen types.

[7] Traceability refers to tracing analytical sensitivity/reactivity back to a FDA recommended reference material.

X. Authorized laboratories will have a process in place for reporting test results to healthcare providers and relevant public health authorities, as appropriate.[8]

Y. Authorized laboratories will collect information on the performance of the test and report to Abbott any suspected occurrence of false positive or false negative results of which they become aware.

Z. All laboratory personnel using the test should be appropriately trained in RT-PCR techniques and use appropriate laboratory and personal protective equipment when handling this kit, and use the test in accordance with the authorized labeling.

Abbott Molecular Inc., Its Authorized Distributor(s) and Authorized Laboratories

AA. Abbott, its authorized distributor(s), and authorized laboratories, will ensure that any records associated with this EUA are maintained until notified by FDA. Such records will be made available to FDA for inspection upon request.

Conditions Related to Advertising and Promotion

BB. All advertising and promotional descriptive printed matter relating to the use of the authorized Abbott RealTi*m*e ZIKA assay shall be consistent with the Fact Sheets and authorized labeling, as well as the terms set forth in this EUA and the applicable requirements set forth in the Act and FDA regulations.

CC. All advertising and promotional descriptive printed matter relating to the use of the authorized Abbott RealTi*m*e ZIKA assay shall clearly and conspicuously state that:

- This test has not been FDA cleared or approved;
- This test has been authorized by FDA under an EUA for use by authorized laboratories;
- This test has been authorized only for the detection of RNA from Zika virus and diagnosis of Zika virus infection, not for any other viruses or pathogens; and
- This test is only authorized for the duration of the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection under section 564(b)(1) of the Act, 21 U.S.C. § 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

[8] For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Abbott, other authorized distributor(s), and authorized laboratories consult with the applicable country, state or territory health department(s). According to CDC, Zika virus disease is a nationally notifiable condition. http://www.cdc.gov/zika/.

Page 9 – Ms. Stacy Ferguson, Abbott Molecular Inc., USA

No advertising or promotional descriptive printed matter relating to the use of the authorized Abbott RealTi*me* ZIKA assay may represent or suggest that this test is safe or effective for the diagnosis of Zika virus infection.

The emergency use of the authorized Abbott RealTi*me* ZIKA assay as described in this letter of authorization must comply with the conditions and all other terms of this authorization.

V. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection is terminated under section 564(b)(2) of the Act or the EUA is revoked under section 564(g) of the Act.

Sincerely,

Robert M. Califf, M.D.
Commissioner of Food and Drugs

Enclosures

Dated: December 14, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30532 Filed 12–19–16; 8:45 am]

BILLING CODE 4164–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–E–0626]

Determination of Regulatory Review Period for Purposes of Patent Extension; COSENTYX

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for COSENTYX and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by February 21, 2017. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 19, 2017. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–E–0626 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; COSENTYX.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper

submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product COSENTYX (secukinumab). COSENTYX is indicated for treatment of moderate to severe plaque psoriasis in adult patients who are candidates for systemic therapy or phototherapy. Subsequent to this approval, the USPTO received a patent term restoration application for COSENTYX (U.S. Patent No. 7,807,155) from Novartis AG, and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated May 2, 2016, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of COSENTYX represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for COSENTYX is 3,381 days. Of this time, 2,926 days occurred during the testing phase of the regulatory review period, while 455 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* October 21, 2005. The applicant claims December 17, 2006, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was October 21, 2005, which was thirty days after FDA receipt of an earlier IND.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262*): October 24, 2013. FDA has verified the applicant's claim that the biologics license application (BLA) for COSENTYX (BLA 125504/0) was initially submitted on October 24, 2013.

3. *The date the application was approved:* January 21, 2015. FDA has verified the applicant's claim that BLA 125504/0 was approved on January 21, 2015.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 629 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *http://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 14, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30528 Filed 12–19–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–0620]

Question-Based Review for the Chemistry, Manufacturing, and Controls Technical Section of Animal Drug Applications; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a guidance for industry #234 entitled ''Question-Based Review for the Chemistry, Manufacturing, and Controls Technical Section of Animal Drug Applications.'' To improve the process for submission and review of chemistry, manufacturing, and controls (CMC) information for animal drugs, the Center for Veterinary Medicine has developed a series of questions that focus on the critical scientific and regulatory issues and pharmaceutical attributes essential for ensuring the quality of new animal drug substances and products. Termed Question-based Review, these questions provide a general framework for original CMC submissions to investigational new animal drug files, generic investigational new animal drug files, new animal drug applications, abbreviated new animal drug applications, conditional approval of applications for conditional approval, and veterinary master files.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–D–0620 for ''Question-Based Review for the Chemistry, Manufacturing, and Controls Technical Section of Animal Drug Applications.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Julie Bailey, Center for Veterinary Medicine (HFV–145), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0700, *julie.bailey@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of March 18, 2016 (81 FR 14859), FDA published the notice of availability for a draft guidance entitled ''Question-Based Review for the Chemistry, Manufacturing, and Controls Technical Section of Animal Drug Applications'' giving interested persons until May 17, 2016, to comment on the draft guidance. FDA received no comments on the draft guidance. The guidance announced in this notice finalizes the draft guidance dated March 2016.

II. Significance of Guidance

This level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Question-Based Review for the Chemistry, Manufacturing, and Controls Technical Section of Animal Drug Applications.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements

of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 514 have been approved under OMB control number 0910–0032; the collections of information in section 512(n)(1) of the FD&C Act (21 U.S.C. 360b(n)(1)) have been approved under OMB control number 0910–0669.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm* or *https://www.regulations.gov.*

Dated: December 15, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30613 Filed 12–19–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0139]

Agency Information Collection Activities: Electronic Visa Update System

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Electronic Visa Update System (EVUS). CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before February 21, 2017 to be assured of consideration.

ADDRESSES: All submissions received must include the OMB Control Number 1651–0139 in the subject line and the agency name. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Email.* Submit comments to: (*CBP_PRA@cbp.dhs.gov*). The email should include the OMB Control number in the subject line.

(2) *Mail.* Submit written comments to CBP PRA Officer, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Economic Impact Analysis Branch, 10th Floor, 90 K St NE., Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Paperwork Reduction Act Officer, U.S. Customs and Border Protection, Regulations and Rulings, Office of Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, or via email (*CBP_PRA@cbp.dhs.gov*). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP Web site at *https://www.cbp.gov/*. For additional help: *https://help.cbp.gov/app/home/search/1*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following Information collection:

Title: Electronic Visa Update System.

OMB Number: 1651–0139.

Form Number: N/A.

Abstract: The Electronic Visa Update System (EVUS) provides a mechanism through which visa information updates can be obtained from certain nonimmigrant aliens in advance of their travel to the United States. This provides CBP access to updated information without requiring aliens to apply for a visa more frequently. The EVUS requirements apply to nonimmigrant aliens who hold a passport issued by an identified country containing a U.S. nonimmigrant visa of a designated category. EVUS enrollment is currently limited to nonimmigrant aliens who hold unrestricted, maximum validity B–1 (business visitor), B–2 (visitor for pleasure), or combination B–1/B–2 visas, which are generally valid for 10 years, contained in a passport issued by the People's Republic of China.

EVUS provides for greater efficiencies in the screening of international travelers by allowing DHS to identify nonimmigrant aliens who may be inadmissible before they depart for the United States, thereby increasing security and reducing traveler delays upon arrival at U.S. ports of entry. EVUS aids DHS in facilitating legitimate travel while also enhancing public safety and national security.

Current Actions: This submission is being made to extend the expiration date. There are no changes to the information collected.

Type of Review: Extension without change to the burden hours.

Affected Public: Individuals.

Estimated Number of Respondents: 3,595,904.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Responses: 3,595,904.

Estimated Time per Response: 25 minutes.

Estimated Total Annual Burden Hours: 1,499,492.

Dated: December 14, 2016.

Seth Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2016–30527 Filed 12–19–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5976–N–05]

Housing Opportunity Through Modernization Act of 2016: Solicitation of Comments on Implementation of Public Housing Income Limit: Extension of Comment Period

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice for comment, Extension of public comment period.

SUMMARY: On November 29, 2016, HUD published a notice in the **Federal Register** inviting public comment on the methodology HUD proposes to use to implement a new income limit in public housing. The November 29, 2016, notice set December 29, 2016, as the comment due date. In response to recent requests for additional time to submit public comments, this notice announces that HUD is extending the public comment period for an additional 30-day period to January 30, 2017.

DATES: *Comment Due Date:* For the notice published on November 29, 2016, (81 FR 85996), the comment due date is extended to January 30, 2017.

ADDRESSES: Interested persons are invited to submit comments regarding this notice for comment. All communications must refer to the above docket number and title. There are two methods for submitting public comments.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov*. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make comments immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., weekdays, at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number). Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: If you have any questions, please send an email to *HOTMAquestions@hud.gov*.

SUPPLEMENTARY INFORMATION: On November 29, 2016, at 81 FR 85996, HUD published a notice for comment seeking the public's input on a proposed methodology to implement the public income limit created by section 103 of the Housing Opportunity Through Modernization Act of 2016 (HOTMA) (Public Law 114–201, 130 Stat. 782). That notice set out the proposed methodology and included specific requests for comment. In response to recent requests for additional time to submit public comments, HUD is announcing through this notice that it is extending the public comment period for an additional 30-day period. Interested persons should refer to the November 29, 2016 notice for the list of topics for which HUD is seeking information.

Dated: December 15, 2016.

Aaron Santa Anna,

Assistant General Counsel for Regulations.

[FR Doc. 2016–30627 Filed 12–19–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5958–N–01]

Request for Comments and Recommendations on a Revised Methodology To Track the Extent to Which Moving to Work Agencies Continue To Serve Substantially the Same Number of Eligible Families

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: This Notice solicits comments and recommendations on developing a revised methodology to be used to track the extent to which Public Housing Agencies (PHAs) in the Moving to Work (MTW) Demonstration Program are meeting the statutory requirement in Section 204 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, (1996 MTW Statute) to serve substantially the same number of families had they not combined their funds under the MTW Demonstration Program. This statutory requirement is further reinforced in the Standard MTW Agreements for all 39 current MTW PHAs.

DATES: Comments Due Date: February 21, 2017.

ADDRESSES: Interested persons are invited to submit comments and recommendations to the Moving to Work Office, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4130, Washington, DC 20410–0001 or email at *mtw-info@hud.gov*. HUD strongly encourages commenters to submit comments electronically. Communications must refer to the above docket number and title and should contain the information specified in the ''Request for Public Comments'' section.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. A summary of comments received by HUD will be made available on HUD's Web site at: *http://www.hud.gov/mtw*.

FOR FURTHER INFORMATION CONTACT: Questions concerning this Notice should be directed to the Moving to Work Office, Office of Public and Indian Housing, Department of Housing and Urban Development at: *mtw-info@hud.gov*. Communications must refer to the above docket number and title.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the MTW Demonstration Program, as provided in the 1996 MTW Statute (Pub. L. 104–134; 42 U.S.C. 1437f note), is to give PHAs and HUD the flexibility to design and test various approaches for providing and administering housing assistance that:

- Reduce cost and achieve greater cost effectiveness in federal expenditures;
- give incentives to families with children where the head of household is working; is seeking work; or is preparing for work by participating in job training, educational programs, or

programs that assist people to obtain employment and become economically self-sufficient; and

• increase housing choices for eligible low-income families.

In addition to the ability to request statutory and regulatory flexibility from certain public housing and Housing Choice Voucher (HCV) program rules under the U.S. Housing Act of 1937, as amended, 42 U.S.C. 1437, *et seq,* (1937 Act) [1] MTW PHAs combine public housing operating, public housing capital, and HCV assistance into a single agency-wide funding source referred to as the ''MTW Block Grant.'' [2]

Throughout participation in the MTW Demonstration Program, MTW PHAs must continue to meet five statutory requirements. These five statutory requirements, also provided in the 1996 MTW Statute, are:

• *Statutory Requirement #1:* To ensure at least 75% of families assisted are very low-income as defined in Section 3(b)(2) of the 1937 Act;

• *Statutory Requirement #2:* To establish a reasonable rent policy that is designed to encourage employment and self-sufficiency;

• *Statutory Requirement #3:* To continue to assist substantially the same total number of eligible low-income families as would have been served had funds not been combined (herein after, the ''STS requirement'');

• *Statutory Requirement #4:* To maintain a comparable mix of families (by family size) as would have been provided had the funds not been used under the MTW Demonstration Program; and

• *Statutory Requirement #5:* To ensure housing assisted under the MTW Demonstration Program meets housing quality standards established or approved by the Secretary.

HUD has processes in place to effectively monitor statutory requirements numbers 1, 2, 4, and 5. In 2013, HUD published PIH Notice 2013–02, detailing a process for monitoring and quantifying compliance with the STS Requirement, which was previously verified with only an annual certification by the MTW PHA. Since publishing PIH Notice 2013–02, HUD has determined that its methodology requires revision in order to more accurately ensure that an MTW PHA is serving substantially the same number of families as would have been served had it not combined its funds under the MTW Demonstration Program.

PIH Notice 2013–02 currently utilizes a ratio that compares the number of families served annually by each MTW PHA (the numerator) to an approximation of how many families the MTW PHA would have served absent participation in the MTW Demonstration Program (the denominator). HUD then analyzes that ratio, represented as a percentage, and makes an annual determination of whether each MTW PHA is meeting the statutory requirement to serve substantially the same number of families. Through this Notice, HUD seeks to maintain the overall structure of the methodology described in PIH Notice 2013–02, but requests public feedback in revising some of the variables and how they are calculated in order to address areas identified as needing improvement.

Throughout calendar year 2015, HUD had numerous conversations with the existing 39 MTW PHAs on potential changes to improve the tracking of the STS Requirement. At that time, many points of agreement between HUD and the 39 MTW PHAs were reached, including: Any tracking of the STS Requirement should be based on a combined look at public housing and HCV programs to account for an MTW PHA's available fungibility between these two programs; at a minimum, all families housed by an MTW PHA with Section 8 and Section 9 funds should be counted towards the STS Requirement in some way; and the statutory language of ''substantially'' indicates some flexibility below the full number of families to be served.

From these conversations between HUD and the existing 39 MTW PHAs, the following areas of feedback were developed. Specifically, the areas are:

• Connecting the number of families an MTW PHA must serve to funding received;

• Addressing the varied subsidy levels at which MTW PHAs serve families;

• Accounting for the development of affordable units with the MTW Block Grant that are outside of the public housing and HCV programs;

• Setting reasonable levels and categories of compliance;

• Adjusting for changes to the capacity of an MTW PHA to serve families and unforeseen effects; and

• Ensuring predictability under the STS Requirement for current and future MTW PHAs.

II. Request for Public Comments

HUD requests public comments and recommendations on how to revise the methodology to determine compliance with the STS Requirement in order to strengthen the areas identified for improvement. MTW and non-MTW PHAs, HUD-assisted housing residents, resident advocacy organizations, researchers, and HUD stakeholders are encouraged to submit comments. While all comments are welcome, HUD specifically requests comments in the following areas:

A. Connecting the Number of Families an MTW PHA Must Serve to Funding Received

The current methodology contained in PIH Notice 2013–02 relies on a historic snapshot of public housing occupancy and HCV utilization rates in order to set the number of families an MTW PHA is obligated to serve (the denominator of the ratio). In collecting these figures, issues related to availability and accuracy of historic data and anomalies associated with a ''point-in-time'' approach have arisen. Subsequent inventory adjustments affecting the denominator also rely on historic data, compounding these concerns. Further, historic public housing occupancy and HCV utilization figures do not necessarily correlate to the funding resources that MTW PHAs receive today.

Connecting the number of families an MTW PHA must serve to the MTW Block Grant funding it receives ensures equity between MTW PHAs that entered the MTW Demonstration Program at differing levels of public housing occupancy and HCV utilization and ensures that the data upon which the STS Requirement methodology relies is accurate and verifiable by HUD systems. While the denominator will still be set as a snapshot at a point in time that is then adjusted up or down according to incremental changes in inventory, connecting the denominator to funding more directly ties the STS Requirement to an MTW PHA's capacity to house families (regardless of participation in the MTW Demonstration Program).

(1) HCV Denominator of STS Requirement Ratio

To connect the number of families an MTW PHA must serve to the funding it receives in the HCV program, HUD is considering starting with a snapshot of HCV funds received by the MTW PHA in the first calendar year the revised methodology is effective (excluding Administrative Fees and, to the extent feasible, funds provided for specific

[1] For more information about the MTW Demonstration Program and the specific programs of current MTW PHAs, please refer to the MTW Web site at: *http://www.hud.gov/mtw.*

[2] Funds awarded under Sections 8(o), 9(d), and 9(e) of the 1937 Act are eligible for inclusion in the MTW Block Grant, with the exception of funds provided for specific non-MTW HCV sub-programs.

non-MTW HCV subprograms) and dividing that figure by the average agency cost to house a family in the HCV program.

One way to capture the average agency cost to house a family in the HCV program would be to take an annualized payment standard amount based on the MTW PHA's HUD-published Fair Market Rent [3] and subtract an annualized average tenant contribution. This average cost to serve a family in the HCV program would need to be calculated and weighted to account for the different household sizes in each MTW PHA's locality.

(a) How should the average agency cost to house a family in the HCV program for MTW PHAs be established to ensure it: Is unaffected by MTW flexibilities already in place, is accurately weighted by household size, and reflects local market costs and factors?

(b) If payment standards are utilized in determining the average cost to house a family in the HCV program for MTW PHAs, what level of payment standard should be used? [4]

(c) What other factors should HUD consider in establishing the number of families an MTW PHA must serve with HCV funds?

(2) Public Housing Denominator of STS Requirement Ratio

To connect the number of families an MTW PHA must serve to the funding it receives in the public housing program, HUD is considering starting with a snapshot of public housing operating funds received by the MTW PHA in the first calendar year the revised methodology is effective and dividing that figure by the average agency cost to operate a public housing unit.

One way to capture the average agency cost to operate a public housing unit would be to approximate the amount of public housing operating subsidy the MTW PHA would receive per unit under regulation for the MTW PHA's existing inventory of public housing units.

HUD seeks suggestions on other approaches that establish a public housing denominator that encourages the use of existing public housing units and ensures accountability for MTW PHAs that receive more public housing operating subsidy than other MTW and non-MTW PHAs.[5]

(a) How should the average agency cost to operate a public housing unit for MTW PHAs be established to ensure it: Is unaffected by MTW flexibilities already in place, accounts for local market costs and factors, and ensures accountability for MTW PHAs that receive higher levels of public housing operating subsidy?

(b) What other factors should HUD consider in establishing the number of families an MTW PHA must serve with public housing funds?

B. Addressing the Varied Subsidy Levels at Which MTW PHAs Serve Families

The MTW Demonstration Program allows MTW PHAs to design local programs that serve eligible families in unique ways to address local issues and needs. This may result in an MTW PHA creating a rental assistance structure that offers a lower level of subsidy than would be available to non-MTW PHAs in the traditional HCV and public housing programs. For example, an MTW PHA may lower its share of housing assistance, increasing the tenant share, to serve a larger number of families that do not require a high level of housing assistance. Such local programs in the MTW Demonstration Program are often referred to as ''Shallow Subsidies.'' In order to maintain the integrity of the STS Requirement and avoid allowing Shallow Subsidies to artificially inflate the numerator of the ratio, it is necessary to include families served in this manner, but also to count them in a modified way.

HUD is considering approaching Shallow Subsidies by identifying families receiving assistance from the MTW PHA with a rent burden of 50% or greater and counting those families with half a credit in the numerator of a ratio. For example, two households with a rent burden of 50% or greater would count as one full family served in the numerator of the ratio.

(1) How should HUD define and address Shallow Subsidies in the STS Requirement methodology?

(2) If the rent burden of the family receiving assistance is utilized in defining Shallow Subsidies, what level of rent burden should be used? How should the households meeting that level of rent burden be counted in the numerator of the STS Requirement methodology?

(3) If the rent burden of the family receiving assistance is utilized in defining Shallow Subsides, should certain exceptions be made for households paying minimum rent, zero income households, and/or households opting for a unit in an area of opportunity that is above the standard affordability threshold? Are there other households that should be included as exceptions, therefore receiving a full credit despite rent burden?

(4) What other factors should HUD consider in addressing Shallow Subsidies?

C. Accounting for the Development of Affordable Units With the MTW Block Grant That Are Outside of the Public Housing and HCV Programs

The MTW Demonstration Program allows MTW PHAs to use the MTW Block Grant to develop affordable housing units that are outside of the public housing and HCV programs. Such development allows for the creation of important affordable housing resources, but must be balanced with the existing and immediate needs of families waiting for housing assistance. It is therefore necessary to relate the amount of the MTW PHA's MTW Block Grant investment to the number of affordable units developed.

One way to accomplish this is to divide the MTW Block Grant investment in the development of affordable housing units outside the public housing and HCV programs by the HUD-published Total Development Cost (TDC).[6] This number of units would then be credited annually in the numerator of the MTW PHA's STS Requirement calculation for the length of time the units remained affordable. There would be no effect on the denominator.

(1) Does the MTW Block Grant investment amount divided by TDC approach appropriately capture this type of MTW flexibility?

(2) Are there other suggestions for how the development of affordable housing units outside of the public housing and HCV programs can be included in the numerator of the ratio?

D. Setting Reasonable Levels and Categories of Compliance

PIH Notice 2013–02 currently measures compliance of the STS Requirement annually based the fiscal year of the MTW PHA. This annual

[3] Fair Market Rents are calculated by HUD annually and available at: *www.huduser.gov/portal/datasets/fmr.html.*

[4] Non-MTW PHAs may set payment standards between 90–110% of HUD-published Fair Market Rents. For non- MTW PHAs payment standards outside of this basic range must be approved by HUD.

[5] While the public housing operating subsidy is calculated differently for some MTW PHAs, all MTW PHAs receive public housing capital funds in accordance with regulation (24 CFR part 905 or its successor).

[6] Total Development Costs are calculated by HUD annually and available at: *http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/capfund.* HUD would use these and not any locally defined Total Development Costs, in this analysis.

assessment is important in ensuring ongoing monitoring, but as HUD seeks to connect the methodology of the STS Requirement to annual funding received (which is provided based on a calendar year), a transition to determinations being made each calendar year for all MTW PHAs is necessary.

In making annual determinations, PIH Notice 2013–02 established levels of compliance that allow for small or ''nominal'' dips below 100 percent and that recognize a variety of scenarios that may cause an MTW PHA to have lower percentages in a given year or years. With a revised methodology to track the STS Requirement, it is necessary to reexamine the levels and categories of compliance.

(1) How should ''Substantially the Same'' be interpreted under the 1996 MTW Statute?

(2) Should there be a percentage below 100% that is considered fully compliant with the STS Requirement without further justification by the MTW PHA? What should this level be and why?

(3) Should there be a percentage below 100% that is considered fully compliant with the STS Requirement with further justification by the MTW PHA and approval by HUD? What should this level be and why? What justifications should be allowable?

(4) What should be considered ''non-compliance'' under the STS Requirement? What enforcement actions should be taken by HUD and what opportunities for corrective actions should be available to MTW PHAs?

E. Adjusting for Changes to the Capacity of an MTW PHA To Serve Families and Unforeseen Effects

To determine the number of families an MTW PHA must serve under the STS Requirement, HUD envisions annually aggregating the HCV and public housing denominators (discussed in Section II.A(1) and (2) above) and then adjusting that figure up or down according to increases or decreases in an MTW PHA's capacity to serve families (incremental changes to the MTW PHA's inventory). This approach addresses standard inventory changes and is similar to that contained in the existing PIH Notice 2013–02.

In addition to annual adjustments for standard inventory changes, there may also be a need for limited adjustments to account for unforeseen effects caused by changes in markets and costs. As the revised STS methodology will likely rely on variables that include market and program costs, an opportunity to account for significant changes that occur to those costs after the denominator is established may be necessary. This would be separate from any of the standard incremental inventory increases or decreases contained in PIH Notice 2013–02.

(1) The variables that result in standard, annual incremental increases or decreases to an MTW PHA's capacity to serve families are listed in PIH Notice 2013–02. Should HUD consider any changes to this list?

(2) Should there be future adjustments of the denominator to account for cost changes outside the scope of the MTW Demonstration Program? If so should such adjustments be elective for each MTW PHA or applied at fixed points to all MTW PHAs? If applied at fixed points, at what intervals should such adjustments occur? What types and levels of changes to costs should be considered in such potential recalculations?

F. Ensuring Predictability Under the STS Requirement for Current MTW PHAs

If a new methodology for tracking the STS Requirement for current MTW PHAs is put in place, sufficient transition and notification of such a change would be important. With this in mind:

(1) What, if any, transition time should be made available to current MTW PHAs in moving from the existing methodology in PIH Notice 2013–02 to the revised methodology?

(2) What testing and provisional data should be made available to MTW PHAs in moving from the existing methodology in PIH Notice 2013–02 to the revised methodology?

(3) What are other suggestions to ensure predictability for MTW PHAs with regard to the STS Requirement?

G. Other Feedback

In addition to the specific areas above, the Department welcomes any feedback from the public on improvements that could be made to improve monitoring of the STS Requirement.

(1) What are other suggestions to improve monitoring of the STS Requirement not covered in other portions of this Notice?

(2) Should this revised methodology apply to both current MTW PHAs and PHAs that will be added to the MTW Demonstration Program through the MTW Expansion detailed in the 2016 Consolidated Appropriations Act, Public Law 114–113, Sec. 239?

Dated: December 14, 2016.

Jemine A. Bryon,

General Deputy Assistant, Secretary for Public and Indian Housing.

[FR Doc. 2016–30622 Filed 12–19–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5913–N–37]

60-Day Notice of Proposed Information Collection: HUD Conditional Commitment/Statement of Appraised Value

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date: February 21, 2017.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Cheryl Walker, Director, Home Valuation Policy Division, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email at *Cheryl.B.Walker@hud.gov* or telephone 202–708–2121, x6880. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: HUD Conditional Commitment/Direct Endorsement Statement of Appraised Value.

OMB Approval Number: 2502–0494.

Type of Request: Revision.

Form Number: HUD 92800.5b.

Description of the need for the information and proposed use: Lenders must provide to loan applicants either a completed copy of form HUD–92800.5B, or a copy of the completed appraisal report, at or before loan closing. Form HUD 92800.5B serves as the mortgagee's conditional commitment/direct endorsement statement of value of FHA mortgage insurance on the property. The form provides a section for a statement of the property's appraised value and other required FHA disclosures to the homebuyer, including specific conditions that must be met before HUD can endorse a firm commitment for mortgage insurance. HUD uses the information only to determine the eligibility of a property for mortgage insurance.

Respondents (i.e. affected public): Business.

Estimated Number of Respondents: 1800.

Estimated Number of Responses: 928,119.

Frequency of Response: On occasion.

Average Hours per Response: .12.

Total Estimated Burdens: 111,374.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: December 8, 2016.

Janet M. Golrick,

Associate General Deputy Assistant Secretary for Housing-Associate Deputy Federal Housing Commissioner.

[FR Doc. 2016–30612 Filed 12–19–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5991–N–01]

Section 8 Housing Assistance Payments Program—Annual Adjustment Factors, Fiscal Year 2017

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice of Fiscal Year (FY) 2017 Annual Adjustment Factors (AAFs).

SUMMARY: The United States Housing Act of 1937 requires that certain assistance contracts signed by owners participating in the Department's Section 8 housing assistance payment programs provide annual adjustments to monthly rentals for units covered by the contracts. This notice announces FY 2017 AAFs for adjustment of contract rents on the anniversary of those assistance contracts. The factors are based on a formula using residential rent and utility cost changes from the most recent annual Bureau of Labor Statistics Consumer Price Index (CPI) survey. Beginning with the FY 2014 AAFs and continuing with these FY 2017 AAFs, the Puerto Rico CPI is used in place of the South Region CPI for all areas in Puerto Rico. These factors are applied at the anniversary of Housing Assistance Payment (HAP) contracts for which rents are to be adjusted using the AAF for those calendar months commencing after the effective date of this notice. A separate **Federal Register** Notice that will be published at a later date will identify the inflation factors that will be used to adjust FY 2017 tenant-based rental assistance funding.

DATES: December 20, 2016.

FOR FURTHER INFORMATION: Contact Becky Primeaux, Director, Management and Operations Division, Office of Housing Voucher Programs, Office of Public and Indian Housing, 202–708–1380, for questions relating to the Project-Based Certificate and Moderate Rehabilitation programs (not the Single Room Occupancy program); Ann Oliva, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, 202–708–4300, for questions regarding the Single Room Occupancy (SRO) Moderate Rehabilitation program; Catherine Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, 202–708–3000, for questions relating to all other Section 8 programs; and Marie Lihn, Economist, Economic and Market Analysis Division, Office of Policy Development and Research, 202–402–5866, for technical information regarding the development of the schedules for specific areas or the methods used for calculating the AAFs. The mailing address for these individuals is: Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410. Hearing- or speech-impaired persons may contact the Federal Information Relay Service at 800–877–8339 (TTY). (Other than the ''800'' TTY number, the above-listed telephone numbers are not toll free.)

SUPPLEMENTARY INFORMATION: Tables showing AAFs will be available electronically from the HUD data information page at *http://www.huduser.gov/portal/datasets/aaf.html*.

I. Applying AAFs to Various Section 8 Programs

AAFs established by this Notice are used to adjust contract rents for units assisted in certain Section 8 housing assistance payment programs during the initial (*i.e.,* pre-renewal) term of the HAP contract and for all units in the Project-Based Certificate program. There are three categories of Section 8 programs that use the AAFs:

Category 1: The Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation programs;

Category 2: The Section 8 Loan Management (LM) and Property Disposition (PD) programs; and

Category 3: The Section 8 Project-Based Certificate (PBC) program.

Each Section 8 program category uses the AAFs differently. The specific application of the AAFs is determined by the law, the HAP contract, and appropriate program regulations or requirements.

AAFs are not used in the following cases:

Renewal Rents. With the exception of the Project-Based Certificate program, AAFs are not used to determine renewal rents after expiration of the original Section 8 HAP contract (either for projects where the Section 8 HAP contract is renewed under a restructuring plan adopted under 24 CFR part 401; or renewed without restructuring under 24 CFR part 402). In

general, renewal rents are established in accordance with the statutory provision in the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA), as amended, under which the HAP is renewed. After renewal, annual rent adjustments will be provided in accordance with MAHRA.

Budget-based Rents. AAFs are not used for budget-based rent adjustments. For projects receiving Section 8 subsidies under the LM program (24 CFR part 886, subpart A) and for projects receiving Section 8 subsidies under the PD program (24 CFR part 886, subpart C), contract rents are adjusted, at HUD's option, either by applying the AAFs or by budget-based adjustments in accordance with 24 CFR 886.112(b) and 24 CFR 886.312(b). Budget-based adjustments are used for most Section 8/202 projects.

Tenant-based Certificate Program. In the past, AAFs were used to adjust the contract rent (including manufactured home space rentals) in both the tenant-based and project-based certificate programs. The tenant-based certificate program has been terminated and all tenancies in the tenant-based certificate program have been converted to the Housing Choice Voucher Program, which does not use AAFs to adjust rents. All tenancies remaining in the project-based certificate program continue to use AAFs to adjust contract rent for outstanding HAP contracts.

Voucher Program. AAFs are not used to adjust rents in the Tenant-Based or the Project-Based Voucher programs.

II. Adjustment Procedures

This section of the notice provides a broad description of procedures for adjusting the contract rent. Technical details and requirements are described in HUD notices H 2002–10 (Section 8 New Construction and Substantial Rehabilitation, Loan Management, and Property Disposition) and PIH 97–57 (Moderate Rehabilitation and Project-Based Certificates).

Because of statutory and structural distinctions among the various Section 8 programs, there are separate rent adjustment procedures for the three program categories:

Category 1: Section 8 New Construction, Substantial Rehabilitation, and Moderate Rehabilitation Programs

In the Section 8 New Construction and Substantial Rehabilitation programs, the published AAF factor is applied to the pre-adjustment contract rent. In the Section 8 Moderate Rehabilitation program (both the regular program and the single room occupancy program) the published AAF is applied to the pre-adjustment base rent.

For Category 1 programs, the Table 1 AAF factor is applied before determining comparability (rent reasonableness). Comparability applies if the pre-adjustment gross rent (pre-adjustment contract rent plus any allowance for tenant-paid utilities) is above the published Fair Market Rent (FMR).

If the comparable rent level (plus any initial difference) is lower than the contract rent as adjusted by application of the Table 1 AAF, the comparable rent level (plus any initial difference) will be the new contract rent. However, the pre-adjustment contract rent will not be decreased by application of comparability.

In all other cases (*i.e.,* unless the contract rent is reduced by comparability):

- Table 1 AAF is used for a unit occupied by a new family since the last annual contract anniversary.
- Table 2 AAF is used for a unit occupied by the same family as at the time of the last annual contract anniversary.

Category 2: Section 8 Loan Management Program (24 CFR Part 886, Subpart A) and Property Disposition Program (24 CFR Part 886, Subpart C)

At this time Category 2 programs are not subject to comparability. Comparability will again apply if HUD establishes regulations for conducting comparability studies under 42 U.S.C. 1437f(c)(2)(C).

The applicable AAF is determined as follows:

- Table 1 AAF is used for a unit occupied by a new family since the last annual contract anniversary.
- Table 2 AAF is used for a unit occupied by the same family as at the time of the last annual contract anniversary.

Category 3: Section 8 Project-Based Certificate Program

The following procedures are used to adjust contract rent for outstanding HAP contracts in the Section 8 PBC program:

- Table 2 AAF is always used. The Table 1 AAF is not used.
- Table 2 AAF is always applied before determining comparability (rent reasonableness).
- Comparability always applies. If the comparable rent level is lower than the rent to owner (contract rent) as adjusted by application of the Table 2 AAF, the comparable rent level will be the new rent to owner.
- The new rent to owner will not be reduced below the contract rent on the effective date of the HAP contract.

III. When to Use Reduced AAFs (From AAF Table 2)

In accordance with Section 8(c)(2)(A) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(A)), the AAF is reduced by 0.01:

- For all tenancies assisted in the Section 8 Project-Based Certificate program.
- In other Section 8 programs, for a unit occupied by the same family at the time of the last annual rent adjustment (and where the rent is not reduced by application of comparability (rent reasonableness)).

The law provides that:

> Except for assistance under the certificate program, for any unit occupied by the same family at the time of the last annual rental adjustment, where the assistance contract provides for the adjustment of the maximum monthly rent by applying an annual adjustment factor and where the rent for a unit is otherwise eligible for an adjustment based on the full amount of the factor, 0.01 shall be subtracted from the amount of the factor, except that the factor shall not be reduced to less than 1.0. In the case of assistance under the certificate program, 0.01 shall be subtracted from the amount of the annual adjustment factor (except that the factor shall not be reduced to less than 1.0), and the adjusted rent shall not exceed the rent for a comparable unassisted unit of similar quality, type and age in the market area. 42 U.S.C. 1437f(c)(2)(A).

Legislative history for this statutory provision states that ''the rationale [for lower AAFs for non-turnover units is] that operating costs are less if tenant turnover is less . . .'' (see Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1995, Hearings Before a Subcommittee of the Committee on Appropriations 103d Cong., 2d Sess. 591 (1994)). The Congressional Record also states the following:

> Because the cost to owners of turnover-related vacancies, maintenance, and marketing are lower for long-term stable tenants, these tenants are typically charged less than recent movers in the unassisted market. Since HUD pays the full amount of any rent increases for assisted tenants in section 8 projects and under the Certificate program, HUD should expect to benefit from this 'tenure discount.' Turnover is lower in assisted properties than in the unassisted market, so the effect of the current inconsistency with market-based rent increases is exacerbated. (140 Cong. Rec. 8659, 8693 (1994)).

To implement the law, HUD publishes two separate AAF Tables, Table 1 and Table 2. The difference between Table 1 and Table 2 is that each AAF in Table 2 is 0.01 less than the corresponding AAF in Table 1. Where

an AAF in Table 1 would otherwise be less than 1.0, it is set at 1.0, as required by statute; the corresponding AAF in Table 2 will also be set at 1.0, as required by statute.

IV. How to Find the AAF

AAF Table 1 and Table 2 are posted on the HUD User Web site at *http://www.huduser.gov/portal/datasets/aaf.html.* There are two columns in each AAF table. The first column is used to adjust contract rent for rental units where the highest cost utility is included in the contract rent, *i.e.,* where the owner pays for the highest cost utility. The second column is used where the highest cost utility is not included in the contract rent, *i.e.,* where the tenant pays for the highest cost utility.

The applicable AAF is selected as follows:

- Determine whether Table 1 or Table 2 is applicable. In Table 1 or Table 2, locate the AAF for the geographic area where the contract unit is located.
- Determine whether the highest cost utility is or is not included in contract rent for the contract unit.
- If highest cost utility is included, select the AAF from the column for ''Highest Cost Utility Included.'' If highest cost utility is not included, select the AAF from the column for ''Highest Cost Utility Excluded.''

V. Methodology

AAFs are rent inflation factors. Two types of rent inflation factors are calculated for AAFs: Gross rent factors and shelter rent factors. The gross rent factor accounts for inflation in the cost of both the rent of the residence and the utilities used by the unit; the shelter rent factor accounts for the inflation in the rent of the residence, but does not reflect any change in the cost of utilities. The gross rent inflation factor is designated as ''Highest Cost Utility Included'' and the shelter rent inflation factor is designated as ''Highest Cost Utility Excluded.''

AAFs are calculated using CPI data on ''rent of primary residence'' and ''fuels and utilities.'' [1] The CPI inflation index for rent of primary residence measures the inflation of all surveyed units regardless of whether utilities are included in the rent of the unit or not. In other words, it measures the inflation of the ''contract rent'' which includes units with all utilities included in the rent, units with some utilities included in the rent, and units with no utilities included in the rent. In producing a gross rent inflation factor and a shelter rent inflation factor, HUD decomposes the contract rent CPI inflation factor into parts to represent the gross rent change and the shelter rent change. This is done by applying data from the Consumer Expenditure Survey (CEX) on the percentage of renters who pay for heat (a proxy for the percentage of renters who pay shelter rent) and also American Community Survey (ACS) data on the ratio of utilities to rents. For Puerto Rico, the Puerto Rico Community Survey (PRCS) is used to determine the ratio of utilities to rents, resulting in different AAFs for some metropolitan areas in Puerto Rico.[2]

Survey Data Used to Produce AAFs

The rent and fuel and utilities inflation factors for large metropolitan areas and Census regions are based on changes in the rent of primary residence and fuels and utilities CPI indices from 2014 to 2015. The CEX data used to decompose the contract rent inflation factor into gross rent and shelter rent inflation factors come from a special tabulation of 2015 CEX survey data produced for HUD for the purpose of computing AAFs. The utility-to-rent ratio used to produce AAFs comes from 2014 ACS median rent and utility costs.

Geographic Areas

AAFs are produced for all Class A CPI cities (CPI cities with a population of 1.5 million or more) and for the four Census Regions. They are applied to core-based statistical areas (CBSAs), as defined by the Office of Management and Budget (OMB), according to how much of the CBSA is covered by the CPI city-survey. If more than 75 percent of the CBSA is covered by the CPI city-survey, the AAF that is based on that CPI survey is applied to the whole CBSA and to any HUD-defined metropolitan area, called the ''HUD Metro FMR Area'' (HMFA), within that CBSA. If the CBSA is not covered by a CPI city-survey, the CBSA uses the relevant regional CPI factor. All non-metropolitan counties use regional CPI factors. For areas assigned the Census Region CPI factor, both metropolitan and non-metropolitan areas receive the same factor.

Each metropolitan area that uses a local CPI update factor is listed alphabetically in the tables and each HMFA is listed alphabetically within its respective CBSA. Each AAF applies to a specific geographic area and to units of all bedroom sizes. AAFs are provided:

- For separate metropolitan areas, including HMFAs and counties that are currently designated as non-metropolitan, but are part of the metropolitan area defined in the local CPI survey.
- For the four Census Regions (to be used for those metropolitan and non-metropolitan areas that are not covered by a CPI city-survey).

AAFs use the same OMB metropolitan area definitions, as revised by HUD, that are used for the FY 2017 FMRs.

Area Definitions

To make certain that they are using the correct AAFs, users should refer to the Area Definitions Table section at *http://www.huduser.gov/portal/datasets/aaf.html.* The Area Definitions Table lists CPI areas in alphabetical order by state, and the associated Census region is shown next to each state name. Areas whose AAFs are determined by local CPI surveys are listed first. All metropolitan areas with local CPI surveys have separate AAF schedules and are shown with their corresponding county definitions or as metropolitan counties. In the six New England states, the listings are for counties or parts of counties as defined by towns or cities. The remaining counties use the CPI for the Census Region and are not separately listed in the Area Definitions Table at *http://www.huduser.gov/portal/datasets/aaf.html.*

Puerto Rico uses its own AAFs calculated from the Puerto Rico CPI as adjusted by the PRCS, the Virgin Islands uses the South Region AAFs and the Pacific Islands uses the West Region AAFs. All areas in Hawaii use the AAFs listed next to ''Hawaii'' in the Tables which are based on the CPI survey for the Honolulu metropolitan area. The Pacific Islands use the West Region AAFs.

Dated: December 12, 2016.

Katherine M. O'Regan,

Assistant Secretary for Policy Development and Research.

[FR Doc. 2016–30618 Filed 12–19–16; 8:45 am]

BILLING CODE 4210–67–P

[1] CPI indexes CUUSA103SEHA and CUSR0000SAH2 respectively.

[2] The formulas used to produce these factors can be found in the Annual Adjustment Factors overview and in the FMR documentation at *www.HUDUSER.gov.*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5916–N–20]

60-Day Notice of Proposed Information Collection: Application for Resident Opportunity & Self Sufficiency (ROSS) Grant Forms

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* February 21, 2017.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW., (L'Enfant Plaza, Room 2206), Washington, DC 20410; telephone 202–402–4109, (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Mussington.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Application for the Resident Opportunities and Self Sufficiency (ROSS) Program.

OMB Approval Number: 2577–0229.

Type of Request: Revision of a currently approved collection.

Form Number: ROSS Grant Application forms: HUD 52752; HUD 52753; HUD–52755; HUD–57268; HUD–96010; SF–424; HUD–2880; HUD–2990; HUD–2991; SF–LLL, HUD–2993, HUD–2994–A.

The Department is submitting this PRA request in order to revise the HUD–52768 form in an effort to streamline the application process. In addition, ROSS will no longer be asking applicants to fill out the HUD–52754 and the HUD–52769 (the HUD–52769 form has been combined with the HUD–52768 form).

Description of the need for the information and proposed use: The forms are used to evaluate capacity and eligibility of applicants to the ROSS program.

Respondents (i.e., affected public): Public Housing Authorities, tribes/TDHEs, public housing resident associations, and nonprofit organizations.

Estimated Number of Respondents: 350.

Estimated Number of Responses: 350.

Frequency of Response: 1.

Average Hours per Response: 5 hours.

Total Estimated Burdens: 1907 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

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

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

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

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: December 9, 2016.

Merrie Nichols-Dixon,

Deputy Director, Office of Policy, Programs and Legislative Initiatives.

[FR Doc. 2016–30617 Filed 12–19–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5916–N–19]

60-Day Notice of Proposed Information Collection: Exigent Health and Safety Deficiency Correction Certification

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, PIH, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date: February 21, 2017.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–5564 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION, CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW., (L'Enfant Plaza, Room 2206), Washington, DC 20410; telephone 202–402–4109, (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Mussington.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is

seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Exigent Health and Safety Deficiency Correction Certification.

OMB Approval Number: 2577–0241.

Type of Request: Extension of currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: HUD's Uniform Physical Condition Standards (UPCS) regulation (24 CFR part 5, subpart G) provides that HUD housing must be decent, safe, sanitary, and in good repair. The UPCS regulation also provides that all area and components of the housing must be free of health and safety hazards. HUD conducts physical inspections of the HUD-funded housing to determine if the UPCS standards are being met. Pursuant to the UPCS inspection protocol, at the end of the inspection (or at the end of each day of a multi-day inspection) the inspector provides the property representative with a copy of the ''Notification of Exigent and Fire Safety Hazards Observed'' form. Each exigent health and safety (EHS) deficiency that the inspector observed that day is listed on the form. The property representative signs the form acknowledging receipt. PHAs are to correct/remedy/act to abate all EHS deficiencies within 24 hours. Using the electronic format, PHAs are to notify HUD within three business days of the date of inspection, which is the date the PHA was provided notice of these deficiencies, that the deficiencies were corrected/remedied/acted on to abate within the prescribed time frames (24 CFR part 902).

Respondents (*i.e.,* affected public): Public Housing Agencies.

Estimated Number of Respondents: 971.

Estimated Number of Responses: 971.

Frequency of Response: Once per year.

Average Hours per Response: .28 hours (approximately 17 minutes).

Total Estimated Burdens: Hourly cost per response is $8.36 or $8,5151.48 per year.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

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

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

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

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: *December 9, 2016.*

Merrie Nichols-Dixon,

Deputy Director, Office of Policy, Programs and Legislative Initiatives.

[FR Doc. 2016–30609 Filed 12–19–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2016–0146; FXIA16710900000–178–FF09A30000]

Endangered Species; Marine Mammals; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species, marine mammals, or both. With some exceptions, the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) prohibit activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before January 19, 2017. We must receive requests for marine mammal permit public hearings, in writing, at the address shown in the **ADDRESSES** section by January 19, 2017.

ADDRESSES: *Submitting Comments:* You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–HQ–IA–2016–0146.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2016–0146; U.S. Fish and Wildlife Service Headquarters, MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

When submitting comments, please indicate the name of the applicant and the PRT# you are commenting on. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

Viewing Comments: Comments and materials we receive will be available for public inspection on *http://www.regulations.gov,* or by appointment, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays, at the U.S. Fish and Wildlife Service, Division of Management Authority, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703–358–2095.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2281 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments

delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken. Under the MMPA, you may request a hearing on any MMPA application received. If you request a hearing, give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Service Director.

III. Permit Applications

A. Endangered Species

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Ian Brimhall, Lakeside, AZ; PRT–12330C

Applicant: Robert Behrend, Wyalusing, PA; PRT–12499C

Applicant: Clyde Crawford, Baker, MT; PRT–11873C

Applicant: Andy Albright, Burlington, NC; PRT–10491C

Applicant: Christopher Olsen, Bend, OR; PRT–06371C

B. Endangered Marine Mammals and Marine Mammals

Applicant: British Broadcasting Corporation—Natural World-Otters, Bristol, UK; PRT–11556C

The applicant requests a permit to film up to 40 sea otters (*Enhydra lutris nereis*) within a 2-day period from a boat at between Santa Cruz and Pt. Lobos, including Elkhorn Slough Estuary, California, for the purpose of education. This notification covers activities to be conducted by the applicant over a 1-year period.

Concurrent with publishing this notice in the **Federal Register**, we are forwarding copies of the above applications to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2016–30514 Filed 12–19–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2016–N121; FXES11130200000C2–XXX–FF02ENEH00]

Endangered and Threatened Wildlife and Plants; Jaguar Draft Recovery Plan

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comment.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of our draft recovery plan for the jaguar, which is listed as endangered under the Endangered Species Act of 1973, as amended (Act). This species is currently found in 19 countries ranging from the United States to Argentina. The draft recovery plan includes specific recovery objectives and criteria to be met to enable us to remove this species from the list of endangered and threatened wildlife and plants. We request review and comment on this plan from local, State, and Federal agencies; Tribes; and the public. We will also accept any new information on the status of the jaguar throughout its range to assist in finalizing the recovery plan.

DATES: To ensure consideration, we must receive written comments on or before March 20, 2017. However, we will accept information about any species at any time.

ADDRESSES: If you wish to review the draft recovery plan, you may obtain a copy by any one of the following methods:

Internet: Access the file at either web address below *http://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=A040* (scroll down to Recovery) *https://www.fws.gov/southwest/es/arizona/Jaguar.htm* (click Recovery Planning)

U.S. mail: U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517; or

Telephone: (602) 242–0210.

If you wish to comment on the draft recovery plan, you may submit your comments in writing by any one of the following methods:

- *U.S. mail:* Jaguar Recovery Coordinator, at the Phoenix, AZ, address;
- *Hand-delivery:* Arizona Ecological Services Office, at the Phoenix, AZ, address;
- *Fax:* (602) 242–2513; or
- *Email: Jaguar_Recovery@fws.gov.*

For additional information about submitting comments, see the ''Request for Public Comments'' section below.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Project Leader Arizona Ecological Services, at the above address and phone number, or by email at *incomingazcorr@fws.gov.*

SUPPLEMENTARY INFORMATION:

Background

Recovery of endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of our endangered species program and the Act (16 U.S.C. 1531 *et seq.*). Recovery means improving the listed species' status to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act. The Act requires developing recovery plans for listed species, unless such a plan would not promote the conservation of a particular species. The jaguar was addressed in ''Listed Cats of Texas and Arizona Recovery Plan (with Emphasis on the Ocelot)'' (1990), but only general information and recommendations to assess jaguar status in the United States

and Mexico, and protect and manage occupied and potential habitat in the United States, were presented. No specific recovery recommendations or objectives for the jaguar were provided. In 2007, the USFWS made a determination under section 4(f)(1) of the Act that developing a formal recovery plan at this time would not promote jaguar conservation. The rationale for this determination was that for the purposes of formal recovery planning, the jaguar qualifies as an exclusively foreign species (see Memorandum for details at *http://www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/Jaguar/Exclusion%20from%20Recovery%20Planning.pdf*). The Service was subsequently litigated on this determination and the presiding judge remanded the decision regarding recovery planning back to the Service. Subsequently, in 2010, the Service made a new determination that developing a recovery plan would contribute to jaguar conservation and, therefore, the Service should prepare a recovery plan (*http://www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/Jaguar/JaguarRPmemo1-12-10.pdf*).

Species History

The jaguar is fully protected at the national level across most of its range and is recognized by a number of Federal, State, and international lists of protected species. The species was listed as endangered on March 30, 1972 (37 FR 6476), in accordance with the Endangered Species Conservation Act of 1969, a precursor to the Act. The jaguar is currently listed as an endangered species throughout its range under the Act, with critical habitat designated in the southwestern U.S. The species' current recovery priority number is 5C, indicating it has a high degree of threat due to habitat loss, a low potential for recovery, a taxonomic classification as a species, and a state of conflict between it and humans.

In addition to the listing under the Act, the jaguar is fully protected at the national level across most of its range, and in Mexico is listed as endangered by the Secretaría de Medio Ambiente y Recursos Naturales, or Federal Ministry of the Environment and Natural Resource (SEMARNAT 2010). Jaguars in Arizona are also on the Arizona Game and Fish Department's list of ''Species of Greatest Conservation Need.''

The jaguar is the largest felid in the New World (Seymour 1989). Rangewide, jaguars measure about 1.5–2.4 meters (5–8 feet) from nose to tip of tail and weigh from 36–158 kilograms (80–348 pounds) (Seymour 1989, Nowak 1999). Males are typically larger than females (Seymour 1989). The overall coat of a jaguar is typically pale yellow, tan, or reddish yellow above, and generally whitish on the throat, belly, insides of the limbs, and underside of the tail, with prominent dark rosettes or blotches throughout (Seymour 1989).

Jaguars historically ranged from the southern United States to central Argentina (Swank and Teer 1989, Caso *et al.* 2008). Currently, they range from the southwestern United States to northern Argentina, and are found in all countries historically occupied except for El Salvador and Uruguay (Zeller 2007). Tobler *et al.* (2013) estimate that more than 80 percent of the currently occupied range lies in the Amazon. The jaguar is thought to be extant (based on expert opinion) in about 11,700,000 km^2 (4,517,395 mi^2), which represents 61 percent of its historical range (Zeller 2007).

The jaguar, as a large carnivore, is more vulnerable to extinction than many other land mammals. Loss of habitat, direct killing of jaguars, and depletion of prey are the primary factors contributing to its current status; the jaguar is considered to have a decreasing population trend according to the International Union for Conservation of Nature (IUCN) (Caso et al. 2008). The legal protected status in countries throughout its range does not appear to have secured jaguars in their core or corridor areas. Small and isolated jaguar populations do not appear to be highly persistent (Haag *et al.* 2010, Rabinowitz and Zeller 2010). Additionally, jaguars require sufficient prey, and when prey is overharvested, jaguars may turn to livestock to meet their dietary needs, resulting in retaliatory killing of jaguars by humans.

While the recovery plan and strategy consider the jaguar throughout its range, the Service and Jaguar Recovery Team (JRT) focus the details of this recovery plan on the Northwestern Recovery Unit (NRU). The United States contains only a small proportion of the jaguar's range and habitat, and the Service has limited resources and little authority to address the major threats (killing and habitat destruction) to the jaguar's recovery outside its own borders. Also, our knowledge regarding the status of the species in much of its range is very limited, and we lack the resources and authority to coordinate large-scale international research and recovery for the entire species. The management and recovery of listed species outside of United States borders, including the jaguar, are primarily the responsibility of the countries in which the species occur, with the help, as appropriate, of available technical and monetary assistance from the United States. However, we have an established relationship with Mexico to address a number of issues of mutual concern, including managing cross-border populations of rare and endangered species. Thus, it is appropriate to focus our efforts and resources on conservation of the jaguar in the northwestern part of its range (the NRU) as our contribution toward an international effort to conserve and recover the jaguar rangewide. We therefore focused this plan primarily on the NRU, which covers portions of the United States and Mexico, but also include recommendations for the Pan-American Recovery Unit (PARU), which includes the rest of the species' range.

Recovery Plan Goals

The recovery goal is to ultimately delist the jaguar. To achieve that goal, viable jaguar populations should be secured throughout their range by removing, reducing, and mitigating the primary threats to the jaguar (habitat loss and fragmentation, illegal killing, and unsustainable depletion of jaguar prey resources). This will require protecting jaguar habitat quantity, quality, and connectivity; providing incentives to protect jaguars and their habitat; reducing human-caused mortality of jaguars, particularly retaliatory killing due to livestock depredation; improving, enacting, and/or enforcing effective laws that regulate illegal killing of jaguars, jaguar prey, and habitat loss; securing adequate funding to implement recovery actions; and maintaining and developing partnerships in the Americas, particularly in Mexico. These protections are needed and must remain in place after delisting to ensure the long-term viability of the species. Due to past habitat loss, it is unlikely that jaguars will be fully self-sustaining throughout their historical range; however, conservation of key jaguar habitat (including core and connective areas) and populations will be critical to the recovery of jaguars.

To achieve that goal, the recovery plan for the jaguar identifies the following Recovery Objectives:

(1) Ascertain the status and conservation needs of the jaguar.

(2) Assess and maintain or improve genetic fitness, demographic conditions, and the health condition of the jaguar.

(3) Assess and maintain or improve the status of native prey populations.

(4) Assess, protect, and restore quantity, quality, and connectivity of

habitat to support viable populations of jaguars.

(5) Assess, minimize, and mitigate the effects of expanding human development on jaguar survival and mortality where possible.

(6) Minimize direct human-caused mortality of jaguars.

(7) Ensure long-term jaguar conservation through adequate funding, public education and outreach, and partnerships.

(8) Practice adaptive management in which recovery is monitored and recovery tasks are revised by the USFWS in coordination with the JRT as new information becomes available.

The draft recovery plan contains recovery criteria based on stabilizing or improving current populations, protecting habitat, and reducing threats to the species. To achieve recovery criteria, various management actions are needed. When the status of the jaguar meets these criteria, the species will no longer meet the conditions of being endangered throughout a significant portion of its range and will no longer warrant listing.

Request for Public Comments

Section 4(f) of the Act requires us to provide public notice and an opportunity for public review and comment during recovery plan development. It is also our policy to request peer review of recovery plans (July 1, 1994; 59 FR 34270). We will summarize and respond to the issues raised by the public and peer reviewers and post our responses on our Web site. Substantive comments may or may not result in changes to the recovery plan; comments regarding recovery plan implementation will be forwarded as appropriate to Federal or other entities so they can be taken into account during the course of implementing recovery actions. Responses to individual commenters will not be provided, but we will provide a summary of how we addressed substantive comments on our Web site (*https://www.fws.gov/southwest/es/arizona/Jaguar.htm*).

We invite written comments on the draft recovery plan. In particular, we are interested in additional information regarding the current threats to the species and the costs associated with implementing the recommended recovery actions.

Before we approve our final recovery plan, we will consider all comments we receive by the date specified in **DATES**. Methods of submitting comments are in the **ADDRESSES** section.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments and materials we receive will be available, by appointment, for public inspection during normal business hours at our office (see **ADDRESSES**).

References Cited

A complete list of all references cited herein is available upon request from the U.S. Fish and Wildlife Service, Branch of Recovery (see **FOR FURTHER INFORMATION CONTACT** section).

Authority

We developed our draft recovery plan under the authority of section 4(f) of the Act, 16 U.S.C. 1533(f). We publish this notice under section 4(f) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 15, 2016.

Benjamin N. Tuggle,

Regional Director, Southwest Region, Fish and Wildlife Service.

[FR Doc. 2016–30584 Filed 12–19–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM004000 L18300000.XG0000 14XL1109AF]

Notice of Relocation: Consolidation and Change of Address for Oklahoma Field Office-Tulsa and Moore Field Station

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management, Oklahoma Field Office, located at 7906 East 33rd Street, Suite 101, Tulsa, Oklahoma 74145, and the Moore Field Station, located at 200 Northwest 4th Street, Room 2401, Oklahoma City, Oklahoma 73102, will combine and relocate to 201 Stephenson Parkway, Suite 1200, Norman, Oklahoma 73072.

DATES: The combined offices moved October 20–23, 2016, and were open for business on Monday, October 24, 2016.

FOR FURTHER INFORMATION CONTACT: Paul McGuire, Administrative Officer, at (405) 826–3036, BLM Oklahoma Field Office. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The service is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM will meet its goals of improving overall efficiency and reducing costs by co-locating with the University of Oklahoma, other Federal agencies, and the research community. The main office telephone number will be (405) 579–7100.

Aden L. Seidlitz,

Associate State Director.

[FR Doc. 2016–30530 Filed 12–19–16; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLES961000 L19100000 BK0000 XXX LRCSM1502100, MA–ES–058244, Group No. 3, Massachusetts]

Eastern States: Filing of Plat of Survey

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plat of survey; Massachusetts.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM-Eastern States, Washington, DC at least 30 calendar days from the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Eastern States Office, 20 M Street SE., Washington DC, 20003. Attn: Cadastral Survey. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This survey was requested by the General Services Administration.

Middlesex County, Massachusetts

The plat of survey represents the dependent resurvey of Hanscom Air

Force Base Middlesex County, in the State of Massachusetts, and was accepted September 29, 2016. We will place a copy of the plat we described in the open files. It will be available to the public as a matter of information.

If BLM receives a protest against this survey, as shown on the plat, prior to the date of the official filing, we will stay the filing pending our consideration of the protest. We will not officially file the plat until the day after we have accepted or dismissed all protests and they have become final, including decisions on appeals.

Dominica VanKoten,

Chief Cadastral Surveyor.

[FR Doc. 2016–30583 Filed 12–19–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF INTERIOR

National Park Service

[PPSESEROC3, PPMPSAS1Y.YP0000; NPS–SERO–BISO–021991]

Assessment of Eligible and Ineligible Lands for Consideration as Wilderness Areas: Big South Fork National River and Recreation Area and Obed Wild and Scenic River

AGENCY: National Park Service, Interior.

ACTION: Notice of Intent.

SUMMARY: The National Park Service (NPS) intends to assess lands within the authorized boundaries of Big South Fork National River and Recreation Area and Obed Wild and Scenic River for wilderness eligibility.

DATES: It is anticipated that the assessments for both parks will be completed by October 1, 2017.

ADDRESSES: Interested individuals, organizations, and agencies are encouraged to provide written comments or suggestions to assist the NPS in determining the scope of issues related to the eligibility of land considered as wilderness at Big South Fork National River Recreational Area and Obed Wild and Scenic River. Written comments may be sent to: Superintendent, 4564 Leatherwood Road, Oneida, Tennessee 37841.

FOR FURTHER INFORMATION CONTACT: Suggestions, comments, and requests for further information should be directed to Big South Fork National River and Recreation Area Superintendent Niki Stephanie Nicholas, by phone at 423–569–9778, via email at *BISO_Superintendent@nps.gov,* or by mail at Big South Fork National River and Recreation Area, 4564 Leatherwood Road, Oneida, Tennessee 37841.

SUPPLEMENTARY INFORMATION: Pursuant to the Wilderness Act of 1964, and in accordance with NPS *Management Policies* (2006), Section 6.2.1, the NPS intends to assess all lands within the authorized boundaries of Big South Fork National River and Recreation Area and Obed Wild & Scenic River for wilderness eligibility. A determination of eligibility and subsequent future actions will be announced in the **Federal Register** upon completion of the assessment.

Dated: December 7, 2016.

Barclay C. Trimble,

Deputy Regional Director, Southeast Region.

[FR Doc. 2016–30635 Filed 12–19–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR08100000, 17XR0680A1, RY.1541CH20.WA01701]

Announcement of Requirements and Registration for a Prize Competition Titled: Sub-Seasonal Climate Forecast Rodeo

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Reclamation is announcing the following prize competition, Sub-Seasonal Climate Forecast Rodeo. This Challenge seeks to improve on existing sub-seasonal forecasts and asks Solvers (*i.e.,* competitors in the Challenge) to develop systems that perform demonstratively better than existing baseline forecasts for temperature and precipitation over a 15–42-day time frame. Solvers will have approximately 3 months to develop their system, at which point they are asked to provide forecasts every 2 weeks over a 13-month period, with the first month being a ''pre-season'' to become familiar with the submission and evaluation processes.

DATES: Listed below are the specific dates pertaining to this prize competition. Please note that times in meteorology are based upon a world-wide 24-hour clock called Zulu time (Z). Additional detail on Zulu time is available in the **SUPPLEMENTARY INFORMATION** section of this notice.

1. First forecast due on or before 0Z (Zulu) March 21, 2017 (pre-season), and 0Z April 18, 2017 (actual competition).

2. Final forecast and hind-cast due on or before 0Z April 3, 2018.

3. Final submission due on or before 11:59 p.m. (U.S. Eastern Time) May 3, 2018.

4. Judging period ends on August 3, 2018.

5. Winners announced on or before September 5, 2018.

ADDRESSES: The *Sub-Seasonal Climate Forecast Rodeo* Prize Competition will be posted on the following crowd-sourcing platforms where Solvers can register for this prize competition:

1. The Water Pavilion located at the InnoCentive Challenge Center: *www.innocentive.com/water-pavilion/.*

2. U.S. Federal Government Challenge Platform: *www.Challenge.gov.* InnoCentive, Inc. is administering this challenge under a challenge support services contract with the Bureau of Reclamation. *Challenge.gov* will re-direct the Solver community to the InnoCentive Challenge Center as the administrator for this prize competition. Additional details for this prize competition, including background information, templates, and the Challenge Agreement specific for this prize competition, can be accessed through either of these prize competition web addresses. The Challenge Agreement contains more details of the prize competition rules and terms that Solvers must agree with to be eligible to compete.

Information pertaining to this competition will be posted to the Bureau of Reclamation's current prize competitions Web page at *www.usbr.gov/research/challenges/current/.*

FOR FURTHER INFORMATION CONTACT: Challenge Manager: Dr. David Raff, Science Advisor, Bureau of Reclamation, (202) 440–1284, *draff@usbr.gov;* Ken Nowak (303) 445–2197, *knowak@usbr.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Reclamation (Reclamation) is announcing the following prize competition in compliance with 15 U.S.C. 3719, Prize Competitions. The intent is to spur innovation toward improved forecasts of temperature and precipitation using a real-time competition and cash prizes as incentives.

Prize Competition Summary: Improved sub-seasonal forecasts for weather and climate conditions (lead-times ranging from 15 to 45 days and beyond) would allow water managers to better prepare for shifts in hydrologic regimes such as the onset of drought or occurrence of wet weather extremes. The challenge with sub-seasonal weather and climate forecasting is that it encompasses the time frame where initial state or condition information, such as coupled land-atmosphere processes becomes less important, and

slowly varying long term states, such as sea surface temperature, soil moisture, and snowpack, become more important to predictions. In addition, the relative importance of the initial state or condition, versus the longer term state, depends on the lead time, region of interest, and time of year.

Accurate sub-seasonal weather forecasting has proven to be particularly difficult to accomplish but is of great interest to water managers tasked with predicting sub-seasonal streamflow and water supply. Sub-seasonal forecasting, which spans approximately 15 to 45 days in the future, is difficult because it bridges short-term forecasting, where initial conditions primarily determine upcoming weather, and long-term forecasting in which slowly varying factors become more important.

This Challenge is asking Solvers to develop systems that improve upon existing sub-seasonal temperature and precipitation forecasts. Solvers are not required to develop entire systems from scratch. Methods could include, but are not limited to, approaches for improving the accuracy of existing sub-seasonal forecasts, techniques that leverage climate teleconnections, or statistical models. This Challenge will be active for approximately 17 months, starting with a 3-month development period followed by a 1-month ''pre-season'', and a 12-month competition period. Following the competition period, Solvers will have 1 month to prepare final submissions. During the competition period, Solvers will be required to upload sub-seasonal forecasts every 2 weeks. An online leaderboard hosted by the National Integrated Drought Information System at *drought.gov* will track and display Solvers' performance for the duration of the competition period. Please note that InnoCentive usernames will be shared with the National Oceanic and Atmospheric Administration (NOAA) as part of the forecast evaluation process and leaderboard tracking. At the conclusion of the competition period, a final submission is required.

Prizes total $800,000. Four categories are defined by two forecast outlook periods and two forecast variables (temperature and precipitation). In each category, prizes for eligible solvers are as follows:

1st place—$100,000

2nd place—$50,000

3rd place—$25,000

In addition, one $25,000 prize per category may be awarded to an eligible solver based solely on hind-cast performance, submission of which is a requirement to be eligible for the above listed prizes.

Final submissions to the Challenge should include the following:

1. The detailed description of the proposed Solution addressing the specific Technical Requirements that are presented in the Detailed Description of the Challenge. This description should be accompanied by a well-articulated rationale for the proposed Solution.

2. Locally executable application and corresponding source code to implement the proposed Solution that are documented.

3. Proof-of-concept data obtained as outlined in the Detailed Description of the Challenge.

The Challenge award is contingent upon theoretical evaluation and operational validation of the submitted Solutions by the Seeker (Reclamation).

To receive an award, the Solvers will grant to the Seeker a non-exclusive license to practice their solutions and make the solution available as open source software licensable under either Berkeley Software Distribution or General Public License Open Source license.

Technical Requirements. Water managers and other users have indicated that they want the existing forecasts to be better rather than wanting the development of new forecast systems. Therefore, this competition seeks new and novel forecast method(s) to improve the forecasting of precipitation and temperature that can be incorporated into existing frameworks relied upon for water management. Solvers may leverage existing forecasts or ensembles in their solution, but must be able to demonstrate appreciable value added by the solution relative to any input or foundational framework. Specifically, the competition desires solutions that can outperform current operational forecasts (including forecasts from operational centers outside the U.S.) and a damped persistence forecast at a 1x1 degree gridded resolution for the western United States at two forecast outlooks: 15–28 days (weeks 3–4) and 29–42 days (weeks 5–6) for temperature and precipitation. Overall skill-spatially and across a range of weather/climate conditions- is most important. The ability to skillfully forecast extreme conditions is also very desirable. Any system that meets these criteria is sought.

Evaluation criteria. Forecast skill will be evaluated for temperature and precipitation separately since the drivers responsible for prediction of these variables are different and the subsequent skill level is also expected to be different. Moreover, the 15–28-day and 29–42-day periods will be evaluated individually for similar reasons. Winning forecasts must outperform NOAA's sub-seasonal modeling system, the Climate Forecast System Version 2 (CFSv2) and damped persistence forecasts (see definitions below). Specifically, skill will be evaluated individually for temperature and precipitation for weeks 3–4 and weeks 5–6 as the highest skill over the competition's identified geographic area, averaged over the entire competition time period. To be prize eligible, Solvers must also demonstrate historical skill of statistical significance that is equal to or greater than that of the CFSv2 through submission of a hind-cast analysis described below.

Definitions.

- *Anomaly* is defined as the difference between a given value and climatology for a specific location (grid cell by grid cell) and time.
- *Climatology* is defined as average temperature and precipitation for a specific 2-week period as computed from the Climate Prediction Center's daily unified gauge data set for precipitation at *ftp://ftp.cpc.ncep.noaa.gov/precip/CPC_UNI_PRCP/GAUGE_GLB/,* and the Climate Prediction Center's global gridded temperature data set over the 30 year period of 1981–2010 at *ftp://ftp.cpc.ncep.noaa.gov/precip/wd52ws/global_temp/.*
- A *damped persistence forecast* will be represented using seasonally developed regression coefficients based on the historical climatology period of 1981–2010 that relate observations of the past 2 weeks to the forecast outlook periods on a grid cell by grid cell basis.
- *Skill* is defined as spatial anomaly correlation, averaged over time. Final competition standings will be the average spatial anomaly correlation of all 26 forecasts issued for the western U.S. geographic area, as defined by the forecast submission template.

The CFSv2 forecasts at *https://www.ncdc.noaa.gov/data-access/model-data/model-datasets/climate-forecast-system-version2-cfsv2* will be combined into a forecast baseline over the same time period as Solver submissions using an ensemble mean of the 32 ensemble-member forecasts leading up to each competition submission. The CFSv2 is run out to 45 days, 4 times daily, with four initial conditions per run for a total of 16 forecasts per day. For example, for a forecast due March 1st, the 16 CFSv2 ensemble-member forecasts issued on February 27 and the 16 CFSv2 ensemble-member forecasts issued on

February 28 will be averaged together for each grid and over the two forecast-periods to become the forecast baseline for the March 1st due date. Further, the ensemble mean will be bias corrected using the method employed by NOAA's Climate Prediction Center in developing their operational forecasts. Specifically, this process involves comparing the CFSv2 reforecasts for the period of 1999–2010 with observed data to establish and correct daily bias on a grid cell by grid cell basis. This is done for temperature and precipitation at both forecast outlook periods.

Forecast submission requirements and instructions. Over the course of this Challenge, Solvers will be required to submit 2 pre-season forecasts and 26 forecasts during the year-long competition, for each of the four categories detailed above and must meet the following requirements:

1. Beginning at the start of the competition period and every 2 weeks thereafter (see below for required submission deadlines) for the duration of the competition, Solvers will submit 1x1 degree gridded forecasts corresponding to western U.S. competition geographic area as defined by the forecast template available on Reclamation's current competitions Web page listed in the **ADDRESSES** section of this notice for:

a. Average temperature (degrees C) for days 15–28.

b. Cumulative precipitation (millimeters) for days 15–28.

c. Average temperature (degrees C) for days 29–42.

d. Cumulative precipitation (millimeters) for days 29–42.

2. To be eligible for an award, Solvers must submit all 26 forecasts on time. A grace of two missed forecast per category will be allowed. For the purpose of computing skill, climatology will be substituted for a missed forecast. More than two missed forecast in any category will result in disqualification.

3. Forecast submissions will be made through a portal hosted by NOAA and must utilize the supplied template, available on Reclamation's current prize competitions Web page.

4. The first month of the 13-month competition period (*i.e.* the first two forecasts) will be considered a 'pre-season' for Solvers to become familiar with the submission process and will not count toward their standing in the competition or against the two missed forecast grace described above.

Forecast submission deadlines. The forecast competition will run for 1 year following the 'pre-season' with new forecast submissions required every 2 weeks. All forecasts need to be received by 0Z on the day of the required forecast submission. All aspects of meteorology are based upon a world-wide 24-hour clock called Zulu time (Z), more commonly called Coordinated Universal Time (UTC). More information on this topic is available on the National Weather Service Web site at *http://www.srh.noaa.gov/jetstream/synoptic/time.html*, including conversion to common U.S. time zones. Specific forecast submission deadlines, including dates and times, will be available on Reclamation's current prize competitions Web page listed in the **ADDRESSES** section of this notice, the first of which is due approximately 3 months following the announcement of this challenge.

In addition to requirements listed above for the forecast submissions, proposed solutions must meet the following Technical Requirements:

1. For first, second or third place, systems must outperform, based on the formula described above, cumulatively over the competition time period, the CFSv2 baseline and damped persistence forecasts for at least one category: Week 3–4 temperature, week 5–6 temperature, week 3–4 precipitation, or week 5–6 precipitation.

2. Must demonstrate historical skill of statistical significance that is equal to or greater than that of the CFSv2 through submission of a hind-cast analysis. The CFSv2 reforecasts at *http://nomads.ncdc.noaa.gov/thredds/catalog/cfsr-hpr-ts45/catalog.html* will provide the baseline for the hind-cast, in the same way that the CFSv2 forecasts provide a baseline for the real-time competition. Two notable distinctions between the CFSv2 forecasts and reforecasts are (1) the reforecast baseline will be based on a mean of 8 ensemble members (only one set of initial conditions were used, thereby producing 4 reforecasts per day) and (2) bias correction to the reforecast will be developed and applied for each reforecast year independently, so as to not leverage knowledge of that year's reforecast performance toward bias correcting itself. Note that skill and prize eligibility will be evaluated for each category individually—*i.e.* to be prize eligible in a particular category, Solvers need only outperform the CFSv2 in that category. To do this, Solvers will submit, hind-casts for the four categories, issued every 2 weeks, for the period of 1999–2010, no later than the Challenge final forecast due date. The hind-cast should be performed as a ''leave one out cross validation.'' This is accomplished by removing one year of observed historical data from the period of 1999–2010, calibrating the model based on the remaining years of data, and forecasting that year. Hind-casts are to be issued at the month/day combinations specified in the forecast submission deadlines referenced above. Given the dates of the competition, each hind-cast will span 2 calendar years, thereby resulting in 11 1-year hind-cast periods for the ''leave one out cross validation.'' This process should be repeated until forecasts have been issued for all 11 years. Solvers will submit one historical hind-cast per category for the 11 years. For more information on this technique, see the discussion on cross-validation by Clarke et al. in *Principles and Theory for Data Mining and Machine Learning* (2009).

3. Solvers may utilize any available sub-seasonal forecast as the starting point for their system, but must demonstratively improve upon that forecast.

4. Must be written in C++, R, python, Fortran, or other widely recognized programming languages and be licensable under either Berkeley Software Distribution or General Public License Open Source license.

5. Solvers with winning solutions are required to provide all code, data, and other components of their forecast system necessary to run the system and reproduce the forecasts issued in the competition. Failure of code to reproduce performance during the competition or for the hind-cast may result in disqualification. Furthermore, the Solvers may be required to iterate with competition judges to ensure documentation is sufficient.

Project Deliverables: In addition to the hind-casts, 2 pre-season forecast submissions, and 26 forecast submissions during the year-long competition, Solvers must submit a final proposed Solution by the Challenge deadline. The submitted proposal should include the following:

1. Detailed description of a sub-seasonal forecasting system that meets the Technical Requirements listed in the Detailed Description and Requirements section of the Challenge.

2. A well-reasoned rationale supporting the methodology of the proposed system and addressing each of the Technical Requirements described in the Detailed Description.

3. Locally executable application and corresponding documented source code implementing the proposed Solution.

The Seeker may wish to partner with the Solver at the conclusion of the Challenge. Solver should describe their expertise and include a statement indicating their interest in this opportunity.

The proposal *should not* include any personal identifying information (name, username, company, address, phone, email, personal Web site, resume, *etc.*) or any information the Solvers may consider as their Intellectual Property they do not want to share.

Judging: An online leaderboard hosted by the National Integrated Drought Information System will track and display Solvers' performance for the duration of the competition period. The Challenge award is contingent upon theoretical evaluation and operational validation of the submitted Solutions by the Seeker. If multiple proposals meet all the Solution Requirements, the Seeker reserves the right to award only the top three solutions per category which they believe are of sound technical foundation. After the Challenge final submission deadline, submissions will be identified as potentially prize eligible, as determined by the quantitative forecast evaluation performed by NOAA and described above. Of those potentially prize eligible solutions, the Judging Panel will evaluate each with respect to the Solution Requirements and make a decision on winning solution(s). The Judging Panel may be composed of Federal and/or Non Federal scientists, engineers, and other technical experts, including subject matter experts from the listed collaborators for this Challenge. All Solvers that submit a proposal will be notified on the status of their submissions. Decisions by the Seeker cannot be contested.

Eligibility Rules: To be able to win a prize under this competition, an individual or entity must:

1. Agree to the rules of the competition (15 U.S.C. 3719(g)(1));

2. Be an entity that is incorporated in and maintains a primary place of business in the United States, or (b) in the case of an individual, a citizen or permanent resident of the United States (15 U.S.C. 3719(g)(3)).

However, submissions can be entertained from all Solvers regardless of whether they are U.S. citizens/entities. Meritorious submissions from non-eligible persons and entities, if any, will be recognized in publications issued by the Seeker announcing the results of the competition, such as press releases. Non-U.S citizens/permanent residents or non-U.S entities can also be included on U.S. teams. However, prizes—whether monetary or otherwise—will only be awarded to eligible persons and entities under the authority of the America COMPETES Reauthorization Act of 2010 (15 U.S.C. 3719).

3. Not be a Federal entity or Federal employee acting within the scope of their employment (15 U.S.C. 3719(g)(4)). A Federal entity is defined by 5 U.S.C. Appendix 8G with a list of current Federal entities periodically posted on the **Federal Register**.

4. Assume risks and waive claims against the Federal Government and its related entities (15 U.S.C. 3719(i)(1)(B)); and,

5. Not use Federal facilities, or consult with Federal employees during the competition unless the facilities and employees are made available to all individuals and entities participating in the competition on an equitable basis.

The following individuals or entities are not eligible regardless of whether they meet the criteria set forth above:

1. Any individual or organization who employs an evaluator on the Judging Panel or otherwise has a material business relationship or affiliation with any Judge.

2. Any individual who is a member of any Judge's immediate family or household.

3. The Seeker, participating organizations, and any advertising agency, contractor or other individual or organization involved with the design, production, promotion, execution, or distribution of the prize competition; and all employees, and all members of the immediate family or household of any such individual or organization.

4. Any individual or entity that uses Federal funds to develop the proposed solution now or any time in the past, unless such use is consistent with the grant award, or other applicable Federal funds awarding document. **Note:** Individuals or entities that have been funded by the Federal Government in the past to work within the technical domain of the competition are eligible provided their specific submission was not developed by them with Federal funds. Submissions that propose to improve or adapt existing federally funded technologies for the solution sought in this prize competition are also eligible. Individuals are also encouraged to consult with their employer Ethics Officer for additional guidance and considerations.

Consultation: Reclamation and collaborator scientists, engineers, and technical specialists were consulted in identifying and selecting the topic of this prize competition. Direct and indirect input from various stakeholders and the broader water resources community of practice were also considered.

Public Disclosure: InnoCentive, Inc. is administering this challenge under a challenge support services contract with Reclamation. Participation is conditioned on providing the data required on InnoCentive's online registration form. Personal data will be processed in accordance with InnoCentive's Privacy Policy which can be located at *http://www.innocentive.com/privacy.php.* Before including your address, phone number, email address, or other personal identifying information in your proposal, you should be aware that the Seeker is under no obligation to withhold such information from public disclosure, and it may be made publicly available at any time. Neither InnoCentive nor the Seeker is responsible for human error, theft, destruction, or damage to proposed solutions, or other factors beyond its reasonable control.

Liability and Indemnification: By participating in this Challenge, each Solver agrees to assume any and all risks and waive claims against the federal government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from participation in this Challenge, whether the injury, death, damage, or loss arises through negligence or otherwise. By participating in this Challenge, each Solver agrees to indemnify the federal government against third party claims for damages arising from or related to Challenge activities

No Insurance Required: Based on the subject matter of the Challenge, the type of work that it will possibly require, as well as an analysis of the likelihood of any claims for death, bodily injury, or property damage, or loss potentially resulting from competition participation, Solvers are not required to obtain liability insurance or demonstrate financial responsibility in order to participate in this Challenge.

Dated: December 7, 2016.

Levi Brekke,

Acting Science Advisor.

[FR Doc. 2016–30593 Filed 12–19–16; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–457–A–D (Fourth Review)]

Heavy Forged Hand Tools From China

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty orders on heavy forged hand tools from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission, pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)), instituted these reviews on July 1, 2016 (81 FR 43235) and determined on October 4, 2016, that it would conduct expedited reviews (81 FR 73417, October 25, 2016).

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on December 15, 2016. The views of the Commission are contained in USITC Publication 4654 (December 2016), entitled *Heavy Forged Hand Tools from China: Investigation Nos. 731–TA–457–A–D (Fourth Review).*

By order of the Commission.

Issued: December 15, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–30636 Filed 12–19–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–988]

Certain Pumping Bras Commission Determination To Review In-Part an Initial Determination Granting Complainant's Motion for Summary Determination of Section 337 Violation by Defaulted Respondents

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in-part an initial determination (''ID'') (Order No. 11) of the presiding administrative law judge (''ALJ'') granting Complainant's motion for summary determination of section 337 violation by Respondents found in default. On review, the Commission has determined to modify the ID to set aside the expenses relating to Complainant's patent and trademark prosecution and maintenance in the ID's domestic industry analysis. The Commission has determined not to review the remainder of the ID. The Commission's determination results in a determination of a violation of section 337. Accordingly, the Commission requests written submissions, under the schedule set forth below, on remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–4716. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted Investigation No. 337–TA–988 on March 14, 2016, based on a complaint filed by Complainant Simple Wishes, LLC (''Simple Wishes'') of Sacramento, California. *See* 81 FR 13419–20 (Mar. 14, 2016). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), based upon the importation into the United States, the sale for importation, and/or the sale within the United States after importation of certain pumping bras by reason of infringement of certain claims of U.S. Patent No. 8,323,070 (''the '070 patent'') and U.S. Patent No. 8,192,247 (''the '247 patent''). *Id.* The notice of investigation identified TANZKY of Luohugu, China; BabyPreg of Shenzhen Guangdong, China; Deal Perfect of Shenzhen Guangdong, China; and Buywish of Nanjing Jiangsu, China, as respondents in this investigation. *Id.* The Office of Unfair Import Investigations is also a party to this investigation. *Id.* Respondent Buywish was subsequently terminated from the investigation. *See Certain Pumping Bras,* USITC Inv. No. 337–TA–988, Comm'n Notice (Aug. 9, 2016). As a result, the '247 patent which was asserted against Respondent Buywish only, is no longer at issue in this investigation. *See* ID at 4 n.1.

On May 12, 2016, Complainant Simple Wishes filed a motion for an order to show cause and for entry of default against Respondents TANZKY, BabyPreg, and Deal Perfect (collectively, ''the Defaulting Respondents'') for failure to respond to the complaint and notice of investigation. On May 19, 2016, the Commission Investigative Attorney (''IA'') filed a response in support of Complainant's motion. On June 22, 2016, the ALJ issued an initial determination granting Complainant's motion and finding TANZKY, BabyPreg, and Deal Perfect in default (Order No. 8). On July 8, 2016, the Commission determined not to review Order No. 8. *See Certain Pumping Bras,* USITC Inv. No. 337–TA–988, Comm'n Notice (July 8, 2016).

On August 30, 2016, Complainant Simple Wishes filed a motion for summary determination on domestic industry and violation of section 337 by the Defaulting Respondents. In addition, Complainant Simple Wishes requested a recommended determination for the Commission to issue a general exclusion order and to set a bond at 100 percent. On September 9, 2016, the IA filed a response in support of Complainant's motion and requested remedy.

On October 31, 2016, the ALJ issued the subject ID (Order No. 11) granting Complainant's motion for summary determination on domestic industry and violation of section 337 by the Defaulting Respondents and recommending that the Commission issue a general exclusion order and set a bond at 100 percent. *See Certain Pumping Bras,* USITC Inv. No. 337–TA–988, Order No. 11 (Oct. 31, 2016).

On November 7, 2016, the IA filed a petition for a limited review of the ID with respect to the ID's consideration of Complainant's expenses relating to patent and trademark prosecution and maintenance in its domestic industry analysis under 19 U.S.C. 1337(a)(3)(C). Complainant did not file a response to the IA's petition.

The Commission has determined to review the ID and on review, to modify the ID in-part to set aside the expenses relating to Complainant's patent and

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

trademark prosecution and maintenance in the domestic industry analysis. As recognized in *Certain Video Game Systems and Controllers,* patent prosecution activities rarely qualify as investments under section 337(a)(3)(C). *See Certain Video Game Systems and Controllers,* Inv. No. 337–TA–743, Comm'n Op., 2011 WL 1523774, *5 (Apr. 14, 2011). Rather, such activities are typically a step towards patent ownership and are insufficient to constitute exploitation of the patent under section 337(a)(3)(C). *See id.;* 19 U.S.C. 1337(a)(3)(C). Complainant made no showing that its patent and trademark prosecution and maintenance expenses are related to engineering, research and development, or licensing, or that such expenses otherwise qualify under 19 U.S.C. 1337(a)(3)(C).

The Commission has determined not to review the remainder of the ID.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843 (Dec. 1994) (Comm'n Op.).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the HTSUS numbers under which the accused products are imported and the expiration date of the '070 patent. The Complainant is also requested to supply the names of all known importers of the products at issue in this investigation.

Written submissions must be filed no later than close of business on January 4, 2017. Reply submissions must be filed no later than the close of business on January 11, 2017. Such submissions should address the ALJ's recommended determinations on remedy and bonding which were made in Order No. 11. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (''Inv. No. 337–TA–988'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *https://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[1] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: December 14, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–30580 Filed 12–19–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–318 and 731–TA–538 and 561 (Fourth Review)]

Sulfanilic Acid From China and India; Scheduling of Expedited Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of expedited reviews pursuant to the Tariff Act of 1930 (''the Act'') to determine whether revocation of the countervailing duty order on sulfanilic acid from India and antidumping orders on sulfanilic acid from China and India would be likely to lead to continuation or recurrence of

[1] All contract personnel will sign appropriate nondisclosure agreements.

material injury within a reasonably foreseeable time.

DATES: *Effective Date:* December 5, 2016.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones (202–205–3358), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.— On December 5, 2016, the Commission determined that the domestic interested party group response to its notice of institution (81 FR 60386, September 1, 2016) of the subject five-year reviews was adequate. The Commission also determined that the respondent interested party group response with respect to the order on sulfanilic acid from China was adequate but that the respondent interested party group response with respect to the orders on sulfanilic acid from India was inadequate. However, on November 18, 2016, the sole participating respondent interested party, in the review on sulfanilic acid from China (Archroma), withdrew its position and statements that advocated for revocation of the order. The Commission therefore determined that it would not be appropriate to conduct a full review of the order concerning China. The Commission did not find any circumstances that warranted conducting full reviews with respect to the orders concerning India.[1] Accordingly, the Commission determined that it would conduct expedited reviews pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Staff report.—A staff report containing information concerning the subject matter of the reviews will be placed in the nonpublic record on December 15, 2016, and made available to persons on the Administrative Protective Order service list for these reviews. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the reviews and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the reviews may file written comments with the Secretary on what determinations the Commission should reach in the reviews. Comments are due on or before December 22, 2016 and may not contain new factual information. Any person that is neither a party to the five-year reviews nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by December 22, 2016. However, should the Department of Commerce extend the time limit for its completion of the final results of its reviews, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules with respect to filing were revised effective July 25, 2014. *See* 79 FR 35920 (June 25, 2014), and the revised Commission Handbook on E-filing, available from the Commission's Web site at *https://edis.usitc.gov.*

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determinations.—The Commission has determined these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: December 14, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–30534 Filed 12–19–16; 8:45 am]

BILLING CODE 7020–02–P

[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

[2] The Commission has found the responses submitted by Nation Ford Chemical Co. and Archroma U.S., Inc. to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On December 12, 2016, the Department of Justice lodged a proposed consent decree with the United States District Court for the Northern District of Indiana in the lawsuit entitled *United States and State of Indiana* v. *the City of Gary, Indiana, and Gary Sanitary District,* Civil Action No. 2:16–cv–512 (N.D. Ind.).

The United States and the State filed a complaint under the Clean Water Act, alleging violations of the Gary Sanitary District's wastewater discharge permit and duty to respond to an information request issued by the United States Environmental Protection Agency. The Settling Defendants are the Gary Sanitary District and the City of Gary. The proposed consent decree requires the Settling Defendants to: (1) Develop and implement a control plan addressing discharges from the Gary Sanitary District's combined sewer overflow outfalls into the local water bodies; (2) implement additional operational changes focused on improving the wastewater treatment system's efficiency; (3) repay an outstanding loan extended to the City by the District; (4) pay a civil penalty of $75,000; (5) perform a supplemental environmental project costing $175,000; and (6) provide schedules for the remaining remediation of the Ralston Street Lagoon and the remediation of sediment in the Grand Calumet River, which are outstanding Clean Water Act and Toxic Substances Control Act requirements from a consent decree entered into by the Parties in 2003 in Civil Action No. 2:78–cv–29 and 86–540 (N.D. Ind.). The settlement would resolve the Settling Defendants' civil liability for the violations alleged in the complaint that has been filed in the same action also on December 12, 2016. The United States and Indiana reached

a settlement in 2014 pertaining to the same set of violations with the former operator of Gary Sanitary District's wastewater treatment system, United Water, Inc., and several of its subsidiaries, in *United States of America and State of Indiana* v. *United Water, Inc. et al.,* Civil Action No. 2:14–cv–193 JD (N.D. Ind.)

The publication of this notice opens a period for public comment on the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division and should refer to *United States and State of Indiana* v. *the City of Gary, Indiana, and Gary Sanitary District,* D.J. Ref. No. 90–5–1–1–2601/2. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed consent decree may be examined and downloaded at this Justice Department Web site: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the proposed consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $36.50 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits and signature pages, the cost is $18.25.

Randall M. Stone,

Acting Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2016–30628 Filed 12–19–16; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Response, Compensation, and Liability Act and the Clean Water Act

On December 15, 2016, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Western District of Virginia in the lawsuit entitled *United States and Commonwealth of Virginia, Secretary of Natural Resources* v. *E.I. du Pont de Nemours and Company,* Civil Action No. 5:16–CV–00082.

The Consent Decree resolves claims against E.I. du Pont de Nemours and Company (''DuPont'') for natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act, the Clean Water Act, and the State Water Control Law relating to discharges of mercury from a former acetate fiber manufacturing facility in Waynesboro, Virginia. Under the Consent Decree, DuPont is required to pay certain unreimbursed government assessment costs, pay a total of $42,069,916.78 for natural resource restoration projects to be used by the natural resource Trustees for projects pursuant to the Restoration Plan for the site, and implement a fish hatchery project for modifications and improvements to the Front Royal Fish Hatchery.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and Commonwealth of Virginia, Secretary of Natural Resources* v. *E.I. du Pont de Nemours and Company,* D.J. Ref. No. 90–11–3–09419. All comments must be submitted no later than 45 days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department Web site: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $40.25 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits and signature pages, the cost is $10.50.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2016–30642 Filed 12–19–16; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Coal Mine Rescue Teams: Arrangements for Emergency Medical Assistance and Transportation for Injured Persons-Agreements, Reporting Requirements, and Posting Requirements

AGENCY: Office of the Secretary, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, ''Coal Mine Rescue Teams: Arrangements for Emergency Medical Assistance and Transportation for Injured Persons-Agreements, Reporting Requirements, and Posting Requirements,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 19, 2017.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-1219-002* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free

number); or by email: *OIRA_submission@omb.eop.gov*. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov*.

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov*.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Coal Mine Rescue Teams: Arrangements for Emergency Medical Assistance and Transportation for Injured Persons-Agreements, Reporting Requirements, and Posting Requirements information collection. More specifically, this ICR covers the following requirements for a coal mine: reporting to the MSHA how the mine will comply with mine rescue team requirements; reporting to the MSHA alternative mine rescue capability for a small and remote mine; providing an annual certification to the MSHA that each mine rescue team designated to provide mine rescue coverage meets applicable requirements; maintaining a record of mine rescue equipment testing, medical physical examinations of mine rescue team members, and mine rescue team training; posting a copy of the mine rescue notification plan and providing a written copy to a designated mine worker representative; and posting at appropriate places of an underground or surface mine the names, titles, addresses, and telephone numbers of all persons or services currently available under medical assistance and transportation arrangements. Coal mine operators, supervisors, and employees, as well as State and Federal mine inspectors use the records to provide assurance that each mine operator and mine rescue team is prepared for a mine emergency. Records also show that mine rescue team equipment has been examined and tested and is in good working order. Training records show that mine rescue team members and the responsible persons at the mine are competent to respond to a mine emergency involving a fire, an explosion, or a gas or water inundation. Federal Mine Safety and Health Act of 1977, as Amended sections 101(a) and 103(h) authorize this information collection. *See* 30 U.S.C. 811(a) and 813(h).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0144.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on December 31, 2016. The DOL seeks to extend PRA authorization for this information collection through May 31, 2019, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 31, 2016 (81 FR 50023).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0144. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–MSHA.

Title of Collection: Coal Mine Rescue Teams: Arrangements for Emergency Medical Assistance and Transportation for Injured Persons-Agreements, Reporting Requirements, and Posting Requirements.

OMB Control Number: 1219–0144.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 275.

Total Estimated Number of Responses: 15,280.

Total Estimated Annual Time Burden: 2,203 hours.

Total Estimated Annual Other Costs Burden: $617,070.

Dated: December 8, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–30515 Filed 12–19–16; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Attestation by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, ''Attestation by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 19, 2017.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-1205-005* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–

693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Attestation by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports information collection (*Employers' Attestation to Use Alien Crewmembers for Longshore Activities in U.S. Ports,* Form ETA–9033, and *Employers' Attestation to Use Alien Crewmembers for Longshore Activities in the State of Alaska,* Form ETA–9033A). The ETA collects attestations from shipping companies seeking to use foreign crewmembers for longshore work when no U.S. workers are available. The information employers provide on these forms permits the DOL to meet federal responsibilities for program administration, management, and oversight. Immigration and Nationality Act section 258 authorizes this information collection. *See* 8 U.S.C. 1288.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205–0309.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on December 31, 2016. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 30, 2016 (81 FR 42730).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0309. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–ETA.

Title of Collection: Attestation by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports.

OMB Control Number: 1205–0309.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 7.

Total Estimated Number of Responses: 7.

Total Estimated Annual Time Burden: 23 hours.

Total Estimated Annual Other Costs Burden: $0.

Dated: December 7, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–30524 Filed 12–19–16; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Advisory Board on Toxic Substances and Worker Health: Working Group on Presumptions

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Announcement of meeting of the Working Group on Presumptions of the Advisory Board on Toxic Substances and Worker Health (Advisory Board) for the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

SUMMARY: The working group will meet via teleconference on January 10, 2017, from 1:00 p.m. to 3:30 p.m. Eastern Time.

FOR PRESS INQUIRIES CONTACT: *For press inquiries:* Ms. Amanda McClure, Office of Public Affairs, U.S. Department of Labor, Room S–1028, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–4672; email *mcclure.amanda.c@dol.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Board is mandated by Section 3687 of EEOICPA. The Secretary of Labor established the Board under this authority and Executive Order 13699 (June 26, 2015). The purpose of the Advisory Board is to advise the Secretary with respect to: (1) The Site Exposure Matrices (SEM) of the Department of Labor; (2) medical guidance for claims examiners for claims with the EEOICPA program, with respect to the weighing of the medical evidence of claimants; (3) evidentiary requirements for claims under Part B of EEOICPA related to lung disease; and (4) the work of industrial hygienists and staff physicians and consulting physicians of the Department of Labor and reports of such hygienists and physicians to ensure quality, objectivity, and consistency. The Advisory Board sunsets on December 19, 2019. This working group is being assembled to gather and analyze data and continue working on providing EEOICP with updated presumptions.

The Advisory Board operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and its implementing regulations (41 CFR part 102–3).

Agenda: The tentative agenda for the meeting of the Working Group on Presumptions includes: general comments on use of disease and exposure presumptions in compensation programs; current use of presumptions in EEOICP; expanding/improving the use of presumptions in EEOICP; any new business as proposed by working group members.

OWCP will transcribe the Advisory Board working group meeting. OWCP will post the transcripts on the Advisory Board Web page, *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm,* along with written comments and other materials submitted to the working group or presented at the working group meeting.

Public Participation, Submissions, and Access to the Public Record

Working group meeting: The working group will meet via teleconference on Tuesday, January 10, 2017, from 1:00 p.m. to 3:30 p.m. Eastern Time. Advisory Board working group meetings are open to the public. The teleconference number and other details for listening to the meeting will be posted on the Advisory Board's Web site no later than 72 hours prior to the meeting. This information will be posted at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm.*

Requests for special accommodations: Please submit requests for special accommodations to participate in the working group meeting by email, telephone, or hard copy to Ms. Carrie Rhoads, OWCP, Room S–3524, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 343–5580; email *EnergyAdvisoryBoard@dol.gov.*

Submission of written comments for the record: You may submit written comments, identified by the working group name and the meeting date of January 10, 2017, by any of the following methods:

- *Electronically:* Send to: *EnergyAdvisoryBoard@dol.gov* (specify in the email subject line, ''Working Group on Presumptions'').
- *Mail, express delivery, hand delivery, messenger, or courier service:* Submit one copy to the following address: U.S. Department of Labor, Office of Workers' Compensation Programs, Advisory Board on Toxic Substances and Worker Health, Room S–3522, 200 Constitution Ave. NW., Washington, DC 20210. Due to security-related procedures, receipt of submissions by regular mail may experience significant delays.

Comments must be received by January 3, 2017. OWCP will make available publically, without change, any written comments, including any personal information that you provide. Therefore, OWCP cautions interested parties against submitting personal information such as Social Security numbers and birthdates.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available on the Advisory Board's Web page at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm.*

FOR FURTHER INFORMATION CONTACT: You may contact Antonio Rios, Designated Federal Officer, at *rios.antonio@dol.gov,* or Carrie Rhoads, Alternate Designated Federal Officer, at *rhoads.carrie@dol.gov,* U.S. Department of Labor, 200 Constitution Avenue NW., Suite S–3524, Washington, DC 20210, telephone (202) 343–5580. This is not a toll-free number.

Signed at Washington, DC, this 14th day of December, 2016.

Leonard J. Howie III,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2016–30516 Filed 12–19–16; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (16–089)]

Notice of Intent to Grant Partially Exclusive License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Intent to Grant Partially Exclusive License.

SUMMARY: This notice is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). NASA hereby gives notice of its intent to grant a partially exclusive, license in the United States to practice the inventions described and claimed in U.S. Patent No. 7,623,972 entitled ''Detection of Presence of Chemical Precursors''; U.S. Patent No. 7,801,687 entitled ''Chemical Sensors Using Coated Or Doped Carbon Nanotube Networks''; U.S. Patent No. 7,968,054 entitled ''Nanostructure Sensing and Transmission of Gas Data''; U.S. Patent No. 8,000,903 entitled ''Coated or Doped Carbon Nanotube Network Sensors as Affected by Environmental Parameters''; ARC–16292–1 entitled ''Nanosensor/Cell Phone Hybrid for Detecting Chemicals and Concentrations''; ARC–16902–1, entitled ''Nanosensor for Medical Diagnoses''; ARC–17110–1 entitled ''Detection of Gases and Vapors at Low Concentrations'' to ENDO Medical Inc., having its principal place of business at 2345 Yale Street, 1st Floor, Palo Alto, CA 94306. The patent rights in this invention have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective partially exclusive license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7.

DATES: The prospective partially exclusive license may be granted unless, within fifteen (15) days from the date of this published notice, NASA receives written objections including evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. Competing applications completed and received by NASA within fifteen (15) days of the date of this published notice will also be treated as objections to the grant of the contemplated partially exclusive license.

Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

ADDRESSES: Objections relating to the prospective license may be submitted to Patent Counsel, Office of Chief Counsel, NASA Ames Research Center, Mail Stop 202A–4, Moffett Field, CA 94035–1000. (650) 604–5104; Fax (650) 604–2767.

FOR FURTHER INFORMATION CONTACT: Robert M. Padilla, Chief Patent Counsel, Office of Chief Counsel, NASA Ames Research Center, Mail Stop 202A–4, Moffett Field, CA 94035–1000. (650) 604–5104; Fax (650) 604–2767. Information about other NASA inventions available for licensing can be found online at *http://technology.nasa.gov/.*

Mark P. Dvorscak,

Agency Counsel for Intellectual Property.

[FR Doc. 2016–30501 Filed 12–19–16; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–027 and 52–028; NRC–2008–0441]

South Carolina Electric & Gas Company; South Carolina Public Service Authority; Virgil C. Summer Nuclear Station, Units 2 and 3; Containment Hydrogen Igniter Changes

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption and combined license amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is granting an exemption to allow a departure from elements of the certification information in Tier 1 of the AP1000 generic Design Control Document (DCD), as specified in License Amendment Request 14–18, and is issuing License Amendment No. 54 to Combined Licenses (COLs), NPF–93 and NPF–94. The COLs were issued to South Carolina Electric & Gas Company and the South Carolina Public Service Authority, (both collectively referred to as the licensee); for construction and operation of the Virgil C. Summer Nuclear Station (VCSNS) Units 2 and 3, located in Fairfield County, South Carolina.

The granting of the exemption allows the changes to plant-specific Tier 1 information, and the associated COL Appendix C, requested in the amendment. Because the acceptability of the exemption was determined in part by the acceptability of the amendment, the exemption and amendment are being issued concurrently.

DATES: The exemption was issued on November 21, 2016.

ADDRESSES: Please refer to Docket ID NRC–2008–0441 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0441. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. The request for the amendment and exemption was submitted by letter dated May 6, 2015 (ADAMS Accession No. ML15127A177) and supplemented by letter dated December 15, 2015 (ADAMS Accession No. ML15350A193).
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: William Gleaves, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–5848; email: *Bill.Gleaves@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is granting an exemption from Paragraph B of Section III, ''Scope and Contents,'' of Appendix d, ''Design Certification Rule for the AP1000,'' to part 52 of title 10 of the *Code of Federal Regulations* (10 CFR), and issuing License Amendment No. 54 to COLs, NPF–93 and NPF–94, to the licensee. The exemption is required by Paragraph A.4 of Section VIII, ''Processes for Changes and Departures,'' Appendix d, to 10 CFR part 52 to allow the licensee to depart from Tier 1 information. With the requested amendment, the licensee sought proposed changes to the Updated Final Safety Analysis Report (UFSAR) in the form of departures from the incorporated plant-specific Design Control Document (DCD) Tier 2 information. The proposed amendment also involves related changes to plant-specific Tier 1 information, with corresponding changes to the associated COL Appendix C information. Specifically, the licensee requested changes to plant-specific Tier 1 (and COL Appendix C) tables and UFSAR tables, text, and figures related to the addition of two hydrogen igniters above the in-containment refueling water storage tank roof vents. Part of the justification for granting the exemption was provided by the review of the amendment. Because the exemption is necessary in order to issue the requested license amendment, the NRC granted the exemption and issued the amendment concurrently, rather than in sequence. This included issuing a combined safety evaluation containing the NRC staff's review of both the exemption request and the license amendment. The exemption met all applicable regulatory criteria set forth in 10 CFR 50.12, 10 CFR 52.7, and Section VIII.A.4 of Appendix d to 10 CFR part 52. The license amendment was found to be acceptable as well. The combined safety evaluation is available in ADAMS under Accession No. ML16145A474.

Identical exemption documents (except for referenced unit numbers and license numbers) were issued to the licensee for VCSNS Units 2 and 3 (COLs NPF–93 and NPF–94). The exemption documents for VCSNS Units 2 and 3 can be found in ADAMS under Accession Nos. ML16145A455 and ML16281A132, respectively. The exemption is reproduced (with the exception of abbreviated titles and additional citations) in Section II of this document. The amendment documents for COLs NPF–93 and NPF–94 are available in ADAMS under Accession Nos. ML16145A408 and ML16145A423, respectively. A summary of the amendment documents is provided in Section III of this document.

II. Exemption

Reproduced below is the exemption document issued to VCSNS Units 2 and Unit 3. It makes reference to the combined safety evaluation that provides the reasoning for the findings made by the NRC (and listed under Item 1) in order to grant the exemption:

1. In a letter dated May 6, 2015, as supplemented by letter dated December 15, 2015, the licensee requested from the Commission an exemption to allow departures to plant-specific Tier 1, and the associated COL Appendix C, information from the certified AP1000 DCD that was incorporated by reference to 10 CFR part 52, Appendix d, as part of License Amendment Request 14–18, ''Containment Hydrogen Igniter Changes.''

For the reasons set forth in Section 3.1, of the NRC staff's Safety Evaluation that supports this license amendment, which can be found at ADAMS Accession No. ML16145A474, the Commission finds that:

A. The exemption is authorized by law;

B. the exemption presents no undue risk to public health and safety;

C. the exemption is consistent with the common defense and security;

D. special circumstances are present in that the application of the rule in this circumstance is not necessary to serve the underlying purpose of the rule;

E. the special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; and

F. the exemption will not result in a significant decrease in the level of safety otherwise provided by the design.

2. Accordingly, the licensee is granted an exemption from the certified AP1000 DCD plant-specific Tier 1 information, with corresponding changes to Appendix C of the Facility Combined License as described in the licensee's request dated May 6, 2015, as supplemented by letter dated December 15, 2015. This exemption is related to, and necessary for, the granting of License Amendment No. 54, which is being issued concurrently with this exemption.

3. As explained in Section 5 of the NRC staff's Safety Evaluation that supports this license amendment, this exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment needs to be prepared in connection with the issuance of the exemption.

4. This exemption is effective as of the date of its issuance.

III. License Amendment Request

By letter dated May 6, 2015, as supplemented by letter dated December 15, 2015, the licensee requested that the NRC amend the COLs for VCSNS, Units 2 and 3, COLs NPF–93 and NPF–94. The proposed amendment is described in Section I of this **Federal Register** Notice.

The Commission has determined for these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or COL, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** on September 29, 2015 (80 FR 58519). No comments were received during the 30-day comment period. The supplement contained no information that would change the original proposed no significant hazards consideration determination.

The Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments.

IV. Conclusion

Using the reasons set forth in the combined safety evaluation, the staff granted the exemption and issued the amendment that the licensee requested by letter dated May 6, 2015 and supplemented on December 15, 2015.

The exemption and amendment were issued on November 21, 2016 as part of a combined package to the licensee (ADAMS Accession No. ML16145A391).

Dated at Rockville, Maryland, this 12th day of December 2016.

For the Nuclear Regulatory Commission.

Jennifer Dixon-Herrity,

Chief, Licensing Branch 4, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2016–30608 Filed 12–19–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–025 and 52–026; NRC–2008–0252]

Southern Nuclear Operating Company, Inc., Vogtle Electric Generating Plant, Units 3 and 4; Initial Test Program Changes

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption and combined license amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is granting an exemption to allow a departure from the certification information of Tier 1 of the generic design control document (DCD) and is issuing License Amendment No. 34 to Combined Licenses (COL), NPF–91 and NPF–92. The COLs were issued to Southern Nuclear Operating Company, Inc., and Georgia Power Company, Oglethorpe Power Corporation, MEAG Power SPVM, LLC, MEAG Power SPVJ, LLC, MEAG Power SPVP, LLC, Authority of Georgia, and the City of Dalton, Georgia (the licensee); for construction and operation of the Vogtle Electric Generating Plant (VEGP) Units 3 and 4, located in Burke County, Georgia.

The granting of the exemption allows the changes to Tier 1 information asked for in the amendment. Because the acceptability of the exemption was determined in part by the acceptability of the amendment, the exemption and amendment are being issued concurrently.

DATES: The Exemption was issued on June 4, 2015.

ADDRESSES: Please refer to Docket ID *NRC–2008–0252* when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID *NRC–2008–0252.* Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. The request for the amendment and exemption was submitted by letter dated November 21, 2014, and available in ADAMS under Accession No. ML14325A835.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Chandu Patel, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3025; email: *Chandu.Patel@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is granting an exemption from Paragraph B of Section III, ''Scope and Contents,'' of Appendix d, ''Design Certification Rule for the AP1000,'' to part 52 of title 10 of the *Code of Federal Regulations* (10 CFR), and issuing

License Amendment No. 34 to COLs, NPF–91 and NPF–92, to the licensee. The exemption is required by Paragraph A.4 of Section VIII, ''Processes for Changes and Departures,'' Appendix d, to 10 CFR part 52 to allow the licensee to depart from Tier 1 information. With the requested amendment, the licensee sought proposed changes that would revise the Updated Final Safety Analysis Report by making changes to the Initial Test Program (ITP), and making changes to the corresponding Tier 1 information. Specifically, the licensee redefined certain ''construction and installation tests'' as ''component tests'' and moved them to the first phase of the ITP. Part of the justification for granting the exemption was provided by the review of the amendment. Because the exemption is necessary in order to issue the requested license amendment, the NRC granted the exemption and issued the amendment concurrently, rather than in sequence. This included issuing a combined safety evaluation containing the NRC staff's review of both the exemption request and the license amendment. The exemption met all applicable regulatory criteria set forth in 10 CFR 50.12, 10 CFR 52.7, and Section VIII.A.4 of Appendix d to 10 CFR part 52. The license amendment was found to be acceptable as well. The combined safety evaluation is available in ADAMS under Accession No. ML15138A140.

Identical exemption documents (except for referenced unit numbers and license numbers) were issued to the licensee for VEGP Units 3 and 4 (COLs NPF–91 and NPF–92). The exemption documents for VEGP Units 3 and 4 can be found in ADAMS under Accession Nos. ML15138A127 and ML15138A132, respectively. The exemption is reproduced (with the exception of abbreviated titles and additional citations) in Section II of this document. The amendment documents for COLs NPF–91 and NPF–92 are available in ADAMS under Accession Nos. ML15138A116 and ML15138A120, respectively. A summary of the amendment documents is provided in Section III of this document.

II. Exemption

Reproduced below is the exemption document issued to VEGP Units 3 and Unit 4. It makes reference to the combined safety evaluation that provides the reasoning for the findings made by the NRC (and listed under Item 1) in order to grant the exemption:

1. In a letter dated November 21, 2014, the licensee requested from the Commission an exemption to allow departures from Tier 1 information in the certified DCD incorporated by reference in 10 CFR part 52, Appendix d, as part of license amendment request 14–010, ''Initial Test Program Changes.''

For the reasons set forth in Section 3.1 of the NRC staff's Safety Evaluation that supports this license amendment, which can be found in ADAMS under Accession No. ML15138A140, the Commission finds that:

A. The exemption is authorized by law;

B. the exemption presents no undue risk to public health and safety;

C. the exemption is consistent with the common defense and security;

D. special circumstances are present in that the application of the rule in this circumstance is not necessary to serve the underlying purpose of the rule;

E. the special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; and

F. the exemption will not result in a significant decrease in the level of safety otherwise provided by the design.

2. Accordingly, the licensee is granted an exemption from the certified DCD Tier 1 Section 3.4, as described in the licensee's request dated November 21, 2014. This exemption is related to, and necessary for, the granting of License Amendment No. 34, which is being issued concurrently with this exemption.

3. As explained in Section 5 of the NRC staff's Safety Evaluation that supports this license amendment (ADAMS Accession No. ML15138A140), this exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment needs to be prepared in connection with the issuance of the exemption.

4. This exemption is effective as of the date of its issuance.

III. License Amendment Request

By letter dated November 21, 2014, the licensee requested that the NRC amend the COLs for VEGP, Units 3 and 4, COLs NPF–91 and NPF–92. The proposed amendment is described in Section I of this **Federal Register** notice.

The Commission has determined for these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or COL, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** on January 6, 2015 (80 FR 520). No comments were received during the 30-day comment period.

The Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments.

IV. Conclusion

Using the reasons set forth in the combined safety evaluation, the staff granted the exemption and issued the amendment that the licensee requested on November 21, 2014.

The exemption and amendment were issued on June 4, 2015, as part of a combined package to the licensee (ADAMS Accession No. ML15138A052).

Dated at Rockville, Maryland, this 13th day of December 2016.

For the Nuclear Regulatory Commission.

Jennifer Dixon-Herrity,

Chief, Licensing Branch 4, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2016–30631 Filed 12–19–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–025 and 52–026; NRC–2008–0252]

Southern Nuclear Operating Company, Inc., Vogtle Electric Generating Plant, Units 3 and 4; Compressed and Instrument Air System High Pressure Air Subsystem Changes

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption and combined license amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is granting an exemption to allow a departure from the certification information of Tier 1 of the generic design control document (DCD) and is issuing License Amendment No. 46 to Combined Licenses (COL), NPF–91 and NPF–92. The COLs were issued to Southern Nuclear Operating Company, Inc., and Georgia Power Company, Oglethorpe Power Corporation, MEAG Power SPVM, LLC, MEAG Power SPVJ, LLC, MEAG Power SPVP, LLC, Authority of Georgia, and

the City of Dalton, Georgia (the licensee); for construction and operation of the Vogtle Electric Generating Plant (VEGP) Units 3 and 4, located in Burke County, Georgia.

The granting of the exemption allows the changes to Tier 1 information asked for in the amendment. Because the acceptability of the exemption was determined in part by the acceptability of the amendment, the exemption and amendment are being issued concurrently.

DATES: The Exemption was issued on February 25, 2016.

ADDRESSES: Please refer to Docket ID NRC–2008–0252 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using any of the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0252. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. The request for the amendment and exemption was submitted by letter dated August 14, 2014 (ADAMS Accession No. ML14227A707), and supplemented by letter dated January 16, 2015 (ADAMS Accession No. ML15016A416).

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Chandu Patel, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3025; email: *Chandu.Patel@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is granting an exemption from paragraph B of Section III, ''Scope and Contents,'' of Appendix d, ''Design Certification Rule for the AP1000,'' to part 52 of title 10 of the *Code of Federal Regulations* (10 CFR), and issuing License Amendment No. 46 to COLs, NPF–91 and NPF–92, to the licensee. The exemption is required by Paragraph A.4 of Section VIII, ''Processes for Changes and Departures,'' Appendix d, to 10 CFR part 52 to allow the licensee to depart from Tier 1 information. With the requested amendment, the licensee sought proposed changes that would revise the Updated Final Safety Analysis Report in the form of departures from the plant-specific licensing basis documents, with regard to removing an air supply line from the compressed and instrument air system to the generator breaker package as a result of the change from an air-blast type generator circuit breaker (GCB) to a sulfur hexafluoride gas type GCB. Part of the justification for granting the exemption was provided by the review of the amendment. Because the exemption is necessary in order to issue the requested license amendment, the NRC granted the exemption and issued the amendment concurrently, rather than in sequence. This included issuing a combined safety evaluation containing the NRC staff's review of both the exemption request and the license amendment. The exemption met all applicable regulatory criteria set forth in 10 CFR 50.12, 10 CFR 52.7, and Section VIII.A.4 of Appendix d to 10 CFR part 52. The license amendment was found to be acceptable as well. The combined safety evaluation is available in ADAMS under Accession No. ML16019A419.

Identical exemption documents (except for referenced unit numbers and license numbers) were issued to the licensee for VEGP Units 3 and 4 (COLs NPF–91 and NPF–92). The exemption documents for VEGP Units 3 and 4 can be found in ADAMS under Accession Nos. ML16019A400 and ML16019A402, respectively. The exemption is reproduced (with the exception of abbreviated titles and additional citations) in Section II of this document. The amendment documents for COLs NPF–91 and NPF–92 are available in ADAMS under Accession Nos. ML16019A390 and ML16019A393, respectively. A summary of the amendment documents is provided in Section III of this document.

II. Exemption

Reproduced below is the exemption document issued to VEGP Units 3 and Unit 4. It makes reference to the combined safety evaluation that provides the reasoning for the findings made by the NRC (and listed under Item 1) in order to grant the exemption:

1. In a letter dated August 14, 2014, and supplemented by letter dated January 16, 2015, the licensee requested from the Commission an exemption to allow departures from Tier 1 information in the certified DCD incorporated by reference in 10 CFR part 52, Appendix d, as part of license amendment request 14–009, ''Compressed and Instrument Air System High Pressure Air Subsystem Changes.''

For the reasons set forth in Section 3.1 of the NRC staff's Safety Evaluation that supports this license amendment, which can be found in ADAMS under Accession No. ML16019A419, the Commission finds that:

A. The exemption is authorized by law;

B. the exemption presents no undue risk to public health and safety;

C. the exemption is consistent with the common defense and security;

D. special circumstances are present in that the application of the rule in this circumstance is not necessary to serve the underlying purpose of the rule;

E. the special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; and

F. the exemption will not result in a significant decrease in the level of safety otherwise provided by the design.

2. Accordingly, the licensee is granted an exemption from the certified DCD Tier 1 information, as described in the licensee's request dated August 14, 2014, and supplemented by letter dated January 16, 2015. This exemption is related to, and necessary for the granting of License Amendment No. 46, which is being issued concurrently with this exemption.

3. As explained in Section 5.0 of the NRC staff's Safety Evaluation (ADAMS Accession No. ML16019A419), this exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment needs to be prepared in connection with the issuance of the exemption.

4. This exemption is effective as of the date of its issuance.

III. License Amendment Request

By letter dated August 14, 2014, and supplemented by letter dated January 16, 2015, the licensee requested that the NRC amend the COLs for VEGP, Units 3 and 4, COLs NPF–91 and NPF–92. The proposed amendment is described in Section I of this **Federal Register** notice.

The Commission has determined for these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or COL, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** on November 12, 2014 (79 FR 67204). No comments were received during the 30-day comment period.

The Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments.

IV. Conclusion

Using the reasons set forth in the combined safety evaluation, the staff granted the exemption and issued the amendment that the licensee requested on August 14, 2014, and supplemented by letter dated January 16, 2015.

The exemption and amendment were issued on February 25, 2016, as part of a combined package to the licensee (ADAMS Accession No. ML16019A374).

Dated at Rockville, Maryland, this 13th day of December 2016.

For the Nuclear Regulatory Commission.

Jennifer Dixon-Herrity,

Chief, Licensing Branch 4, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2016–30607 Filed 12–19–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0256]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

AGENCY: Nuclear Regulatory Commission.

ACTION: Biweekly notice.

SUMMARY: Pursuant to Section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular biweekly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued, from November 22, 2016, to December 5, 2016. The last biweekly notice was published on December 6, 2016.

DATES: Comments must be filed by January 19, 2017. A request for a hearing must be filed by February 21, 2017.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID: NRC–2016–0256. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Cindy Bladey, Office of Administration, Mail Stop: OWFN–12–H08, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Shirley Rohrer, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–5411, email: *Shirley.Rohrer@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2016–0256, facility name, unit number(s), plant docket number, application date, and subject when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID: NRC–2016–0256.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2016–0256, facility name, unit number(s), plant docket number, application date, and subject in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission.

Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Proposed No Significant Hazards Consideration Determination

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in § 50.92 of title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and a petition to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC's regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a petition is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest. The petition must also set forth the specific contentions which the petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions consistent with the NRC's regulations, policies, and procedures.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1).

The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by February 21, 2017. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may also have the opportunity to participate under 10 CFR 2.315(c).

If a hearing is granted, any person who does not wish, or is not qualified, to become a party to the proceeding may, in the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene (hereinafter ''petition''), and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562, August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov*, or by telephone at 301–415–1677, to request: (1) A digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/getting-started.html.* System requirements for accessing the E-Submittal server are available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/adjudicatory-sub.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Electronic Filing Help Desk will not be able to offer assistance in using unlisted software.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a petition. Submissions should be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public Web site at *http://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by email to *MSHD.Resource@nrc.gov*, or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 7 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. However, in some instances, a petition will require including information on local residence in order to demonstrate a

proximity assertion of interest in the proceeding. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

For further details with respect to these license amendment applications, see the application for amendment which is available for public inspection in ADAMS and at the NRC's PDR. For additional direction on accessing information related to this document, see the ''Obtaining Information and Submitting Comments'' section of this document.

Duke Energy Progress, LLC, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendment request: September 26, 2016. A publicly-available version is in ADAMS under Accession No. ML16287A421.

Description of amendment request: The amendment would revise the Safety Limit Minimum Critical Power Ratio (SLMCPR) values contained in the Technical Specifications (TSs) for two recirculation loop operation and for single loop recirculation operation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed SLMCPR values have been determined using NRC-approved methods discussed in AREVA Topical Report ANP–10307PA, Revision 0, *AREVA MCPR Safety Limit Methodology for Boiling Water Reactors,* June 2011, as augmented by the associated TS Appendix B Additional Condition related to channel bow model uncertainty. Establishing a two recirculation loop SLMCPR value of ≥1.07 and a single recirculation loop SLMCPR value of ≥1.09 ensures that the acceptance criteria continues to be met (*i.e.,* at least 99.9 percent of all fuel rods in the core do not experience transition boiling).

The probability of an evaluated accident is derived from the probabilities of the individual precursors to that accident. The proposed license amendments do not involve any plant modifications or operational changes that could affect system reliability or performance, or that could affect the probability of operator error. As such, the proposed changes do not affect any postulated accident precursors. Since no individual precursors of an accident are affected, the proposed license amendments do not involve a significant increase in the probability of a previously analyzed event.

The consequences of an evaluated accident are determined by the operability of plant systems designed to mitigate those consequences. The basis for the SLMCPR calculation is to ensure that during normal operation and during anticipated operational occurrences, at least 99.9 percent of all fuel rods in the core do not experience transition boiling if the safety limit is not exceeded.

Based on these considerations, the proposed changes do not involve a significant increase in the probability or consequences of previously analyzed accident.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Creation of the possibility of a new or different kind of accident requires creating one or more new accident precursors. New accident precursors may be created by modifications of plant configuration, including changes in allowable modes of operation. The SLMCPR is a TS numerical value calculated for two recirculation loop operation and single recirculation loop operation to ensure at least 99.9 percent of all fuel rods in the core do not experience transition boiling if the safety limit is not exceeded. SLMCPR values are calculated using NRC-approved methodology identified in the TS. The proposed SLMCPR values do not involve any new modes of plant operation or any plant modifications and do not directly or indirectly affect the failure modes of any plant systems or components. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The SLMCPR provides a margin of safety by ensuring that at least 99.9 percent of the fuel rods do not experience transition boiling during normal operation and anticipated operational occurrences if the MCPR Safety Limit is not exceeded. Revision of the SLMCPR values in Technical Specification 2.1.1.2, using NRC-approved methodology, will ensure that the current level of fuel protection is maintained by continuing to ensure that the fuel design safety criterion is met (*i.e.,* that no more than 0.1 percent of the rods are expected to be in boiling transition if the MCPR Safety Limit is not exceeded). Therefore, the proposed amendments do not result in a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Kathryn B. Nolan, Deputy General Counsel, 550 South Tryon St., M/C DEC45A, Charlotte, NC 28202.

NRC Acting Branch Chief: Jeanne A. Dion.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: October 26, 2016. A publicly-available version is in ADAMS, under Accession No. ML16301A150.

Description of amendment request: The proposed amendment would change the Technical Specifications (TS) to revise requirements for unavailable barriers by adding new Limiting Condition for Operation (LCO) 3.0.9. This LCO establishes conditions under which systems would remain operable when required physical barriers are not capable of providing their related support function. This proposed amendment is consistent with NRC-approved Technical Specification Task Force (TSTF) Improved Standard Technical Specifications Change Traveler, TSTF–427, Revision 2, ''Allowance for Non-Technical Specification Barrier Degradation on Supported System OPERABILITLY.'' The Notice of Availability of this TS improvement and the model application was published in the **Federal Register** on October 3, 2006 (71 FR 58444), as part of the consolidated line item improvement process.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee provided an analysis of the issue of no significant hazards consideration (NSHC) by citing the proposed NSHC determination published by the NRC staff in the **Federal Register** notice referenced above. The proposed NSHC is reproduced below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated.

The proposed change allows a delay time for entering a supported system technical specification (TS) when the inoperability is due solely to an unavailable barrier if risk is

assessed and managed. The postulated initiating events which may require a functional barrier are limited to those with low frequencies of occurrence, and the overall TS system safety function would still be available for the majority of anticipated challenges. Therefore, the probability of an accident previously evaluated is not significantly increased, if at all. The consequences of an accident while relying on the allowance provided by proposed LCO 3.0.9 are no different than the consequences of an accident while relying on the TS required actions in effect without the allowance provided by proposed LCO 3.0.9. Therefore, the consequences of an accident previously evaluated are not significantly affected by this change. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident from any Accident Previously Evaluated.

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed). Allowing delay times for entering supported system TS when inoperability is due solely to an unavailable barrier, if risk is assessed and managed, will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously evaluated. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns. Thus, this change does not create the possibility of a new or different kind of accident from an accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety.

The proposed change allows a delay time for entering a supported system TS when the inoperability is due solely to an unavailable barrier, if risk is assessed and managed. The postulated initiating events which may require a functional barrier are limited to those with low frequencies of occurrence, and the overall TS system safety function would still be available for the majority of anticipated challenges. The risk impact of the proposed TS changes was assessed following the three-tiered approach recommended in RG [Regulatory Guide] 1.177. A bounding risk assessment was performed to justify the proposed TS changes. This application of LCO 3.0.9 is predicated upon the licensee's performance of a risk assessment and the management of plant risk. The net change to the margin of safety is insignificant as indicated by the anticipated low levels of associated risk (ICCDP [incremental conditional core damage probability] and ICLERP [incremental conditional large early release probability]) as shown in Table 1 of Section 3.1.1 in the Safety Evaluation. Therefore, this change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: William B. Glew, Jr., Associate General Counsel—Entergy Services, Inc., 440 Hamilton Avenue, White Plains, New York 10601.

NRC Acting Branch Chief: Douglas A. Broaddus.

Exelon Generation Company, LLC, Docket Nos. 50–254 and 50–265, Quad Cities Nuclear Power Station, Units 1 and 2, Rock Island County, Illinois

Date of amendment request: September 12, 2016. A publicly-available version is in ADAMS under Accession No. ML16258A146.

Description of amendment request: The proposed amendment would revise the setpoint for detecting a loss of voltage on the 4.16 kilovolt essential service system (ESS) buses.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change to the 4.16 kV Essential Service System (ESS) bus loss of voltage allowable values allows the protection scheme to function as originally designed. This change will involve alteration of nominal trip setpoints in the field and will also be reflected in revisions to the calibration procedures. The proposed change does not affect the probability or consequences of any accident. Analysis was conducted and demonstrates that the proposed allowable values will allow the normally operating safety related motors to continue to operate without sustaining damage or tripping during the worst-case, non-accident degraded voltage condition for the maximum possible time-delay of 332.3 seconds. Thus, these safety related loads will be available to perform their safety function if a loss-of-coolant accident (LOCA) concurrent with a loss-of offsite power (LOOP) occurs following the degraded voltage condition.

The proposed change does not adversely affect accident initiators or precursors, and do not alter the design assumptions, conditions, or configuration or the plant or the manner in which the plant is operated or maintained. The proposed allowable values ensure that the 4.16 kV distribution system remains connected to the offsite power system when adequate offsite voltage is available and motor starting transients are considered. The emergency diesel generator (EDG) start due to a LOCA signal is not adversely affected by this change. During an actual loss of voltage condition, the loss of voltage time delay will continue to isolate the 4.16 kV distribution system from offsite power before the EDG is ready to assume the emergency loads, which is the limiting time basis for mitigating system responses to the accident. For this reason, the existing loss of power LOCA analysis continues to be valid.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change involves the revision of 4.16 kV ESS bus loss of voltage allowable values to satisfy existing design requirements. The proposed change does not introduce any changes or mechanisms that create the possibility of a new or different kind of accident. The proposed change does not install any new or different type of equipment, and installed equipment is not being operated in a new or different manner. No new effects on existing equipment are created nor are any new malfunctions introduced.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed protection voltage allowable values are low enough to prevent inadvertent power supply transfer, but high enough to ensure that sufficient power is available to the required equipment. The EDG start due to a LOCA signal is not adversely affected by this change. During an actual loss of voltage condition, the loss of voltage time delays will continue to isolate the 4.16 kV distribution system from offsite power before the EDG is ready to assume the emergency loads.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: Tamra Domeyer, Associate General Counsel, Exelon Nuclear, 4300 Winfield Road, Warrenville, IL 60555.

NRC Acting Branch Chief: G. Edward Miller.

FirstEnergy Nuclear Operating Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2 (BVPS–1 and BVPS–2), Beaver County, Pennsylvania

Date of amendment request: September 28, 2016. A publicly-available version is in ADAMS under Package Accession No. ML16277A194.

Description of amendment request: The amendments would revise the BVPS–1 and BVPS–2 Emergency Plan by revising the emergency action level (EAL) schemes to one based on Nuclear Energy Institute (NEI) 99–01, Revision 6, ''Development of Emergency Action Levels for Non-Passive Reactors,'' November 2012 (ADAMS Accession No. ML12326A805). NEI 99–01, Revision 6, was endorsed by the NRC by letter dated March 28, 2013 (ADAMS Accession No. ML12346A463).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes to BVPS's EAL scheme to adopt the NRC-endorsed guidance of NEI 99–01, Revision 6, do not involve any physical changes to plant systems or equipment. The proposed changes do not alter any of the requirements of the technical specifications. The proposed changes do not modify any plant equipment and do not impact any failure modes that could lead to an accident. Additionally, the proposed changes do not impact the ability of structures, systems, or components (SSCs) to perform their intended safety functions in mitigating the consequences of an initiating event within the assumed acceptance limits.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to BVPS's EAL scheme to adopt the NRC-endorsed guidance of NEI 99–01, Revision 6, do not involve any physical changes to plant systems or equipment. The proposed changes do not involve the addition of any new plant equipment. The proposed changes will not alter the design configuration, or method of operation of plant equipment beyond its normal functional capabilities. BVPS functions will continue to be performed as required. The proposed changes do not create any new credible failure mechanisms, malfunctions, or accident initiators.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed changes to BVPS's EAL scheme to adopt the NRC-endorsed guidance of NEI 99–01, Revision 6, do not involve any physical changes to plant systems or equipment. Margins of safety are unaffected by the proposed changes. There are no changes being made to safety analysis assumptions, safety limits, or limiting safety system settings that would adversely affect plant safety as a result of the proposed EAL scheme change. The proposed change does not affect the technical specifications. There are no changes to environmental conditions of any of the SSC or the manner in which any SSC is operated. The applicable requirements of 10 CFR 50.47 and 10 CFR 50, Appendix E will continue to be met.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David W. Jenkins, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Mail Stop A–GO–15, Akron, OH 44308.

NRC Acting Branch Chief: Stephen S. Koenick.

FirstEnergy Nuclear Operating Company, Docket No. 50–440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio

Date of amendment request: November 1, 2016. A publicly-available version is in ADAMS under Accession No. ML16307A029.

Description of amendment request: The proposed amendment would revise Technical Specification 2.1.1, ''Reactor Core [Safety Limits] SLs,'' to reduce the reactor steam dome pressure value.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Decreasing the reactor steam dome pressure limit in Technical Specification Safety Limits 2.1.1 expands the range of use of the GEXL14 and GEXL17 correlations (applicable to GE14 and GNF2 fuel respectively) and the calculation of the minimum critical power ratio (CPR). The CPR increases during the pressure reduction that occurs during the [Pressure Regulator Failure-Maximum Demand (Open)] PRFO event, so that the initial CPR is the limiting CPR condition during the entire transient. CPR increases during the event relative to the initial CPR value, so fuel cladding integrity is not threatened. Since the change does not involve a modification of any plant hardware, the probability and consequence of the PRFO transient are essentially unchanged.

The proposed change will continue to support the application range of the GEXL correlations applied at PNPP and the calculation of the minimum CPR. The proposed TS revision involves no significant changes to the operation of any systems or components in normal, accident or transient operating conditions.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed reduction in the reactor steam dome pressure limit in Technical Specification Safety Limits 2.1.1 from 785 psig to 686 psig is a change based on NRC approved documents that permit a wider range of applicability for the GEXL critical power correlations for both GE14 and GNF2 fuel types in the reactor core. This change does not involve changes to the plant hardware or its operating characteristics. There are no changes in the method by which any plant systems perform a safety function, nor are there any changes in the methods governing normal plant operation. No new accident scenarios, failure mechanisms, or limiting single failures are introduced as a result of the proposed changes. As a result, no new failure modes are being introduced.

Therefore, the change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The margin of safety is established through the design of the plant structures, systems, and components, and through the parameters for safe operation and setpoints for the actuation of equipment relied upon to respond to transients and design basis accidents. Evaluation of the 10 CFR part 21 condition by GE determined that, since the critical power ratio improves during the PRFO transient, there is no impact on the fuel safety margin, and there is no challenge to fuel cladding integrity. The proposed changes do not change the requirements governing operation or the availability of safety equipment assumed to operate to preserve the margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David W. Jenkins, Senior Attorney, FirstEnergy Corporation, Mail Stop A–GO–15, 76 South Main Street, Akron, OH 44308.

NRC Branch Chief: David J. Wrona.

FirstEnergy Nuclear Operating Company, Docket No. 50–440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio

Date of amendment request: October 27, 2016. A publicly-available version is in ADAMS under Accession No. ML16302A055.

Description of amendment request: The proposed amendment would revise Technical Specification (TS) 3.8.3, ''Diesel Fuel Oil, Lube Oil, and Starting Air,'' by relocating the current stored diesel fuel oil and lube oil numerical volume requirements from the TS to the TS Bases. The proposed changes are consistent with Technical Specifications Task Force Traveler TSTF–501, Revision 1, ''Relocate Stored Fuel Oil and Lube Oil Volume Values to Licensee Control.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No

The proposed change relocates the volume of diesel fuel oil and lube oil required to support 7-day operation of each onsite diesel generator, and the volume equivalent to a 6-day supply, to licensee control. The specific volume of fuel oil equivalent to a 7 and 6-day supply is calculated using the NRC-approved methodology described in Regulatory Guide 1.137, Revision 1, ''Fuel-Oil Systems for Standby Diesel Generators'' and ANSI–N195 1976, ''Fuel Oil Systems for Standby Diesel-Generators.'' The specific volume of lube oil equivalent to a 7-day and 6-day supply is based on the diesel generator manufacturer's consumption values for the run time of the diesel generator. Because the requirement to maintain a 7-day supply of diesel fuel oil and lube oil is not changed and is consistent with the assumptions in the accident analyses, and the actions taken when the volume of fuel oil and lube oil are less than a 6-day supply have not changed, neither the probability nor the consequences of any accident previously evaluated will be affected.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No

The proposed change does not involve a physical alteration of the plant (*i.e.,* no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The change does not alter assumptions made in the safety analysis but ensures that the diesel generator operates as assumed in the accident analysis. The proposed change is consistent with the safety analysis assumptions. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No

The proposed change relocates the volume of diesel fuel oil and lube oil required to support 7-day operation of each onsite diesel generator, and the volume equivalent to a 6-day supply, to licensee control. As the bases for the existing limits on diesel fuel oil, and lube oil are not changed, no change is made to the accident analysis assumptions and no margin of safety is reduced as part of this change. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David W. Jenkins, Senior Attorney, FirstEnergy Corporation, Mail Stop A–GO–15, 76 South Main Street, Akron, OH 44308.

NRC Branch Chief: David J. Wrona.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek (Hope Creek) Generating Station, Salem County, New Jersey

Date of amendment request: October 7, 2016. A publicly-available version is in ADAMS under Accession No. ML16281A139.

Description of amendment request: The amendment would revise the Hope Creek Technical Specifications by incorporating Nuclear Energy Institute (NEI) topical report 94–01, Revision 3–A, and the conditions and limitations specified in NEI topical report 94–01, Revision 2–A, as the implementation document for the Hope Creek performance-based containment leakage rate testing program. Based on guidance in NEI 94–01, Revision 3–A, the proposed change would allow the Hope Creek Type A Test (Integrated Leak Rate Test, or ILRT) frequency to be extended from 10 to 15 years, and the Type C Tests (Local Leak Rate Tests, or LLRTs) frequency to be extended from 60 to 75 months. In addition, the amendment would delete a one-time extension of the test frequencies previously granted in License Amendment No. 147.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed activity involves revision of the Hope Creek Generating Station (HCGS) Technical Specification (TS) 6.8.4.f, Primary Containment Leakage Rate Testing Program, to allow the extension of the HCGS Type A containment integrated leakage rate test interval to 15 years, and the extension of the Type C local leakage rate test interval to 75 months. The current Type A test interval of 120 months (10 years) would be extended on a permanent basis to no longer than 15 years from the last Type A test. The existing Type C test interval of 60 months for selected components would be extended on a performance basis to no longer than 75 months. Extensions of up to nine months (total maximum interval of 84 months for Type C tests) are permissible only for non-routine emergent conditions.

The proposed extension does not involve either a physical change to the plant or a change in the manner in which the plant is operated or controlled. The containment is designed to provide an essentially leak tight barrier against the uncontrolled release of radioactivity to the environment for postulated accidents. As such, the containment and the testing requirements invoked to periodically demonstrate the integrity of the containment exist to ensure the plant's ability to mitigate the consequences of an accident, and do not involve the prevention or identification of any precursors of an accident.

The change in dose risk for changing the Type A Integrated Leak Rate Test (ILRT) interval from three-per-ten years to once-per-fifteen-years, measured as an increase to the total integrated dose risk for all internal events accident sequences, is 5.15E–03 person-rem/yr (0.01%) using the Electric Power Research Institute (EPRI) guidance with the base case corrosion included. This change meets both of the related acceptance criteria for change in population dose. The change in dose risk drops to 1.38E–03 person-rem/yr (<0.01%) when using the EPRI Expert Elicitation methodology. Therefore, this proposed extension does not involve a significant increase in the probability of an accident previously evaluated.

As documented in NUREG–1493, ''Performance-Based Containment Leak-Test

Program,'' dated January 1995, Types B and C tests have identified a very large percentage of containment leakage paths, and the percentage of containment leakage paths that are detected only by Type A testing is very small. The HCGS Type A test history supports this conclusion.

The integrity of the containment is subject to two types of failure mechanisms that can be categorized as: (1) activity based, and, (2) time based. Activity based failure mechanisms are defined as degradation due to system and/or component modifications or maintenance. Local leak rate test requirements and administrative controls such as configuration management and procedural requirements for system restoration ensure that containment integrity is not degraded by plant modifications or maintenance activities. The design and construction requirements of the containment combined with the containment inspections performed in accordance with American Society of Mechanical Engineers (ASME) Section XI, and TS requirements serve to provide a high degree of assurance that the containment would not degrade in a manner that is detectable only by a Type A test. Based on the above, the proposed test interval extensions do not significantly increase the consequences of an accident previously evaluated.

The proposed amendment also deletes an exception previously granted in amendment 147 to allow a one-time extension of the ILRT test frequency for HCGS. This exception was for an activity that has already taken place; therefore, this deletion is solely an administrative action that does not result in any change in how HCGS is operated.

Therefore, the proposed change does not result in a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed amendment to TS 6.8.4.f, ''Primary Containment Leakage Rate Testing Program,'' involves the extension of the HCGS Type A containment test interval to 15 years and the extension of the Type C test interval to 75 months. The containment and the testing requirements to periodically demonstrate the integrity of the containment exist to ensure the plant's ability to mitigate the consequences of an accident.

The proposed change does not involve a physical modification to the plant (*i.e.,* no new or different type of equipment will be installed), nor does it alter the design, configuration, or change the manner in which the plant is operated or controlled beyond the standard functional capabilities of the equipment.

The proposed amendment also deletes an exception previously granted in amendment 147 to allow a one-time extension of the ILRT test frequency for HCGS. This exception was for an activity that has already taken place; therefore, this deletion is solely an administrative action that does not result in any change in how HCGS is operated.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated for HCGS.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed amendment to TS 6.8.4.f involves the extension of the HCGS Type A containment test interval to 15 years and the extension of the Type C test interval to 75 months for selected components. This amendment does not alter the manner in which safety limits, limiting safety system set points, or limiting conditions for operation are determined. The specific requirements and conditions of the TS Containment Leak Rate Testing Program exist to ensure that the degree of containment structural integrity and leak-tightness that is considered in the plant safety analysis is maintained. The overall containment leak rate limit specified by TS is maintained.

The proposed change involves the extension of the interval between Type A containment leak rate tests and Type C tests for HCGS. The proposed surveillance interval extension is bounded by the 15-year ILRT interval and the 75-month Type C test interval currently authorized within NEI 94–01, Revision 3–A. Industry experience supports the conclusion that Type B and C testing detects a large percentage of containment leakage paths and that the percentage of containment leakage paths that are detected only by Type A testing is small. The containment inspections performed in accordance with ASME Section Xl and TS serve to provide a high degree of assurance that the containment would not degrade in a manner that is detectable only by Type A testing. The combination of these factors ensures that the margin of safety in the plant safety analysis is maintained. The design, operation, testing methods and acceptance criteria for Types A, B, and C containment leakage tests specified in applicable codes and standards would continue to be met, with the acceptance of this proposed change, since these are not affected by changes to the Type A and Type C test intervals.

The proposed amendment also deletes an exception previously granted in amendment 147 to allow a one-time extension of the ILRT test frequency for HCGS. This exception was for an activity that has taken place; therefore, the deletion is solely an administrative action and does not change how HCGS is operated and maintained. Thus, there is no reduction in any margin of safety.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jeffrie J. Keenan, PSEG Nuclear LLC—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Acting Branch Chief: Stephen S. Koenick.

South Carolina Electric & Gas Company and South Carolina Public Service Authority, Docket Nos. 52–027 and 52–028, Virgil C. Summer Nuclear Station (VCSNS), Units 2 and 3, Fairfield, South Carolina

Date of amendment request: September 29, 2016. A publicly-available version is in ADAMS under Accession No. ML16273A557.

Description of amendment request: The changes would amend Combined License Nos. NPF–93 and NPF–94 for the VCSNS, Units 2 and 3, respectively. The amendments propose changes to the Updated Final Safety Analysis Report (UFSAR) in the form of departures from a plant-specific Design Control Document Tier 2 figure and a Combined Operating License (COL) Appendix C table. Specifically, the proposed departures consist of changes to plant-specific UFSAR Figure 9.3.6–1, Sheet 2 of 2, and COL Appendix C, Table 2.3.2–4, related to the configuration of the boric acid storage tank (BAST) suction point. The change also aligns the Tier 1 Chemical and Volume Control System (CVS) makeup flow rate with previously approved Tier 2 information.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes alter the BAST suction point by relocating the common inlet/outlet line from the bottom of the tank to the side of the tank and to align the Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) for the maximum CVS flow to the Reactor Coolant System (RCS) with the previously approved Tier 2 descriptions and analyses. No change is made to the minimum required volume of the BAST, the included concentrations, or the overall operation of the system. The proposed changes do not alter any safety related functions, and the analyses previously performed on the potential for an inadvertent dilution event are not affected. Consequently, there is no change to an accident initiator in the UFSAR and accordingly, there is no change to the probabilities of accident previously evaluated. The radioactive source terms and release paths are unchanged, thus the radiological releases in the UFSAR accident analyses are not affected.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of

accident from any accident previously evaluated?

Response: No.

The proposed change to alter the BAST suction point affects only nonsafety-related equipment, reducing the possibility for leaks in the BAST. The basic requirements, including the applicable codes and standards, for the configuration of the BAST are unchanged. In addition, the change to the ITAAC verified CVS makeup flow does not alter the design of the CVS, which is currently limited in the design to 175 gallons per minute of flow. The change to the ITAAC aligns the test with the Tier 2 requirement. Consequently, because the BAST codes and standards are unchanged and the CVS is otherwise unchanged, there is no effect on accidents previously evaluated in the UFSAR.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change to the BAST piping configuration and to the CVS makeup flow ITAAC does not alter any safety-related equipment, applicable design codes, code compliance, design function, or safety analysis. Consequently, no safety analysis or design basis acceptance limit is challenged or exceeded by the proposed changes, and thus, the margin of safety is not reduced.

Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Kathryn M. Sutton, Morgan, Lewis & Bockius, LLC, 1111 Pennsylvania Avenue NW., Washington, DC 20004–2514.

NRC Branch Chief: Michael T. Markley.

South Carolina Electric & Gas Company, Docket Nos. 52–027 and 52–028, Virgil C. Summer Nuclear Station, Units 2 and 3, Fairfield, South Carolina

Date of amendment request: September 2, 2016. A publicly-available version is in ADAMS under Accession No. ML16246A214.

Description of amendment request: The amendment request proposes changes to a plant-specific Tier 1 (and combined license Appendix C) table and the Updated Final Safety Analysis Report (UFSAR) tables to clarify the flow area for the Automatic Depressurization System (ADS) fourth stage squib valves and to reduce the minimum effective flow area for the second and third stage ADS control valves. Pursuant to the provisions of 10 CFR 52.63(b)(1), an exemption from elements of the design as certified in the 10 CFR part 52, Appendix D, design certification rule is also requested for the plant-specific Design Control Document Tier 1 material departures.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes do not adversely affect the operation of any systems or equipment that initiate an analyzed accident or alter any structures, systems, and components (SSC) accident initiator or initiating sequence of events. The proposed changes do not adversely affect the physical design and operation of the second and third stage ADS control valves and fourth stage ADS squib valves, including as-installed inspections, testing, and maintenance requirements, as described in the UFSAR. Therefore, the operation of the second and third stage ADS control valves and fourth stage ADS squib valves is not adversely affected. Inadvertent operation or failure of the second and third stage ADS control valves and fourth stage ADS squib valves are considered as accident initiators or part of an initiating sequence of events for an accident previously evaluated. However, the proposed changes do not adversely affect the probability of inadvertent operation or failure, nor the consequences of such accident precursor sequences. Therefore, the probabilities of the accidents previously evaluated in the UFSAR are not affected.

The proposed changes do not adversely affect the ability of the second and third stage ADS control valves and fourth stage ADS squib valves to perform their design functions. The designs of the second and third stage ADS control valves and fourth stage ADS squib valves continue to meet the same regulatory acceptance criteria, codes, and standards as required by the UFSAR. In addition, the proposed changes maintain the capabilities of the second and third stage ADS control valves and fourth stage ADS squib valves to mitigate the consequences of an accident and to meet the applicable regulatory acceptance criteria. The proposed changes do not adversely affect the prevention and mitigation of other abnormal events, *e.g.,* anticipated operational occurrences, earthquakes, floods and turbine missiles, or their safety or design analyses. Therefore, the consequences of the accidents evaluated in the UFSAR are not affected.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not affect the operation of any systems or equipment that may initiate a new or different kind of accident, or alter any SSC such that a new accident initiator or initiating sequence of events is created. The proposed changes do not adversely affect the physical design and operation of the second and third stage ADS control valves and fourth stage ADS squib valves, including as-installed inspections, testing, and maintenance requirements, as described in the UFSAR. Therefore, the operation of the second and third stage ADS control valves and fourth stage ADS squib valves is not adversely affected. These proposed changes do not adversely affect any other SSC design functions or methods of operation in a manner that results in a new failure mode, malfunction, or sequence of events that affect safety-related or nonsafety-related equipment. Therefore, this activity does not allow for a new fission product release path, result in a new fission product barrier failure mode, or create a new sequence of events that results in significant fuel cladding failures.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed changes maintain existing safety margins. The proposed changes maintain the capabilities of the second and third stage ADS control valves and fourth stage ADS squib valves to perform their design functions. The proposed changes maintain existing safety margin through continued application of the existing requirements of the UFSAR, while updating the acceptance criteria for verifying the design features necessary to confirm the second and third stage ADS control valves and fourth stage ADS squib valves perform the design functions required to meet the existing safety margins in the safety analyses. Therefore, the proposed changes satisfy the same design functions in accordance with the same codes and standards as stated in the UFSAR. These changes do not adversely affect any design code, function, design analysis, safety analysis input or result, or design/safety margin.

No safety analysis or design basis acceptance limit/criterion is challenged or exceeded by the proposed changes, and no margin of safety is reduced. Therefore, the requested amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Kathryn M. Sutton, Morgan, Lewis & Bockius, LLC,

1111. Pennsylvania NW., Washington, DC 20004–2514.

NRC Branch Chief: Jennifer Dixon-Herrity.

Southern Nuclear Operating Company, Inc., (SNC) Docket Nos. 50–348 and 50–364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendment request: October 11, 2016. A publicly-available version is in ADAMS under Accession No. ML16285A354.

Description of amendment request: SNC stated that the current Technical Specification (TS) 3.8.9, ''Distribution Systems—Operating,'' contains a conservative Completion Time of 8 hours for an inoperable 600 Volt alternating current (AC) load center (LC) 1–2R. The proposed change would add new Action Conditions to TS 3.8.9 and include appropriate Required Actions and associated Completion Times for LC 1–2R.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff has reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). The licensee's analysis is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendment revises the TS requirements to include an appropriate Condition, Required Actions and associated Completion Times to address an inoperable 600 Volt AC LC 1–2R that is required to be operable by TS 3.8.9 ''Distribution Systems—Operating.''

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed). The 600V LC are not a precursor to any accident previously evaluated. The proposed changes do not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, and configuration of the facility or the manner in which the plant is operated and maintained. The proposed changes do not adversely affect the ability of structures, systems and components (SSCs) to perform their intended safety function to mitigate the consequences of an initiating event within the assumed acceptance limits. The LC 1–2R provides power to equipment that may be used to mitigate the consequences of accidents previously evaluated. The proposed change to TS 3.8.9, ''Distribution Systems—Operating'' provides assurance that the requirements of the TS appropriately address all the equipment that is required to be operable by TS 3.8.9. Thus, the proposed change does not affect the probability or the consequences of any accident previously evaluated.

Therefore, it is concluded that the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed amendment revises the TS to include an appropriate Condition, Required Actions, and associated Completion Times to address inoperable 600 Volt AC LC 1–2R that is required to be operable by TS 3.8.9 ''Distribution Systems- Operating.''

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The proposed change to the TS assures that the TS appropriately addresses all the equipment required to be operable to support the electrical distribution system. Thus, the proposed change does not adversely affect the design function or operation of any structures, systems, and components important to safety.

Therefore, it is concluded that the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed amendment revises the TS requirements to include an appropriate Condition, Required Actions, and associated Completion Times to address inoperable 600 Volt AC LC 1–2R that is required to be operable by TS 3.8.9 ''Distribution Systems—Operating.''

The proposed change to TS 3.8.9 ''Distribution Systems—Operating'' provides assurance that all the requirements of the TS are appropriately addressed in the Action Conditions. The proposed change serves to make the TS more complete and appropriate for all the equipment required to be operable to support the electrical distribution system. Thus, the proposed change does not involve a change in the margin of safety.

Therefore, it is concluded that the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jennifer M. Buettner, Associate General Counsel, Southern Nuclear Operating Company, 40 Inverness Center Parkway, Birmingham, AL 35201.

NRC Branch Chief: Michael T. Markley.

Southern Nuclear Operating Company, Inc., Docket Nos. 52–025 and 52–026, Vogtle Electric Generating Plant (VEGP), Units 3 and 4, Burke County, Georgia

Date of amendment request: October 26, 2016. A publicly-available version is in ADAMS under Accession No. ML16300A325.

Description of amendment request: The proposed changes would amend Combined License Nos. NPF–91 and NPF–92 for the VEGP, Units 3 and 4, respectively. The amendments propose changes to the Updated Final Safety Analysis Report (UFSAR) in the form of departures from a plant-specific Design Control Document Tier 2 figure and a Combined Operating License (COL) Appendix C table. Specifically, the proposed departures consist of changes to plant-specific UFSAR Figure 9.3.6–1, Sheet 2 of 2, and COL Appendix C, Table 2.3.2–4, related to the configuration of the boric acid storage tank (BAST) suction point. The changes also align the Tier 1 chemical and volume control system (CVS) makeup flow rate with previously approved Tier 2 information.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes alter the BAST suction point by relocating the common inlet/outlet line from the bottom of the tank to the side of the tank and aligns the Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) for the maximum CVS flow to the reactor coolant system (RCS) with the previously approved Tier 2 descriptions and analyses. No change is made to the minimum required volume of the BAST, the included concentrations, or the overall operation of the system. The proposed changes do not alter any safety-related functions, and the analyses previously performed on the potential for an inadvertent dilution event are not affected. Consequently, there is no change to an accident initiator in the UFSAR and accordingly, there is no change to the probabilities of accident previously evaluated. The radioactive source terms and release paths are unchanged, thus the radiological releases in the UFSAR accident analyses are not affected.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change to alter the BAST suction point affects only nonsafety-related equipment, reducing the possibility for leaks in the BAST. The basic requirements, including the applicable codes and standards, for the configuration of the BAST are unchanged. In addition, the change to the ITAAC verified CVS makeup flow does not alter the design of the CVS, which is currently limited in the design to 175 gallons per minute of flow. The change to the ITAAC aligns the test with the Tier 2 requirement. Consequently, because the BAST codes and standards are unchanged and the CVS is otherwise unchanged, there is no effect on accidents previously evaluated in the UFSAR.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change to the BAST piping configuration and to the CVS makeup flow ITAAC does not alter any safety-related equipment, applicable design codes, code compliance, design function, or safety analysis. Consequently, no safety analysis or design basis acceptance limit is challenged or exceeded by the proposed changes, and thus, the margin of safety is not reduced.

Therefore, the proposed amendment does not involve a significant reduction in a margin of safety from any accident previously evaluated.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M. Stanford Blanton, Balch & Bingham LLP, 1710 Sixth Avenue North, Birmingham, AL 35203–2015.

NRC Branch Chief: Michael T. Markley.

Southern Nuclear Operating Company, Docket Nos. 52–025 and 52–026, Vogtle Electric Generating Plant, Units 3 and 4, Burke County, Georgia

Date of amendment request: August 31, 2016. A publicly-available version is in ADAMS under Accession No. ML16244A253.

Description of amendment request: The amendment request proposes changes to the Updated Final Safety Analysis Report (UFSAR) in the form of departures from the incorporated plant-specific Design Control Document Tier 2 information and a combined license (COL) License Condition which references one of the proposed changes. Additionally, the proposed changes to the UFSAR eliminate pressurizer spray line monitoring during pressurizer surge line first plant only testing. In addition, these proposed changes correct inconsistencies in testing purpose, testing duration, and the ability to leave equipment in place following the data collection period. These changes involve material which is specifically referenced in Section 2.D.(2) of the COLs. This submittal requests approval of the license amendment necessary to implement these changes.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below with Nuclear Regulatory Commission (NRC) staff edits in square brackets:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The design functions of the [reactor coolant system (RCS)] include providing an effective reactor coolant pressure boundary. The proposed changes for removing the requirement to install temporary instrumentation on the pressurizer spray line during the monitoring of the pressurizer surge line for thermal stratification and thermal cycling during hot functional testing and during the first fuel cycle for the first plant only, proposed changes to parameter retention requirements, and proposed change to remove the pressurizer spray and surge l ine valve leakage requirement do not impact the existing design requirements for the RCS. These changes are acceptable as they are consistent with the commitments made for the pressurizer surge line monitoring program for the first plant only, and do not adversely affect the capability of the pressurizer surge line and pressurizer spray lines to perform the required reactor coolant pressure boundary design functions.

These proposed changes to the monitoring of the pressurizer surge line for thermal stratification and thermal cycling during hot functional testing and during the first fuel cycle for the first plant only, proposed changes to parameter retention requirements, and proposed change to remove the pressurizer spray and surge line valve leakage requirement as described in the current licensing basis do not have an adverse effect on any of the design functions of the systems. The proposed changes do not affect the support, design, or operation of mechanical and fluid systems required to mitigate the consequences of an accident. There is no change to plant systems or the response of systems to postulated accident conditions. There is no change to the predicted radioactive releases due to postulated accident conditions. The plant response to previously evaluated accidents or external events is not adversely affected, nor do the proposed changes create any new accident precursors.

Therefore, the requested amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes for removing the requirement to install temporary instrumentation on the pressurizer spray line during the monitoring of the pressurizer surge line for thermal stratification and thermal cycling during hot functional testing and during the first fuel cycle for the first plant only, proposed changes to parameter retention requirements, and proposed change to remove the pressurizer spray and surge line valve leakage requirement as described in the current licensing basis maintain the required design functions, and are consistent with other Updated Final Safety Analysis Report (UFSAR) information. The proposed changes do not adversely affect the design requirements for the RCS, including the pressurizer surge line and pressurizer spray lines. The proposed changes do not adversely affect the design function, support, design, or operation of mechanical and fluid systems. The proposed changes do not result in a new failure mechanism or introduce any new accident precursors. No design function described in the UFSAR is adversely affected by the proposed changes.

Therefore, the requested amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

No safety analysis or design basis acceptance limit/criterion is challenged or exceeded by the proposed changes, and no margin of safety is reduced. Therefore, the requested amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M. Stanford Blanton, Balch & Bingham LLP, 1710 Sixth Avenue North, Birmingham, AL 35203–2015.

NRC Branch Chief: Jennifer Dixon-Herrity.

Southern Nuclear Operating Company, Docket Nos. 52–025 and 52–026, Vogtle Electric Generating Plant, Units 3 and 4, Burke County, Georgia

Date of amendment request: October 14, 2016. Publicly-available version is in ADAMS under Accession No. ML16288A810.

Description of amendment request: The requested amendment requires a change to the Combined License (COL) Appendix A, as well as plant-specific

Tier 2, Tier 2 *, and COL Appendix C (and corresponding plant-specific Tier 1). The proposed changes would revise the licenses basis documents to add design detail to the automatic depressurization system (ADS) blocking device and to add the blocking device to the design of the in-containment refueling water storage tank injection squib valves actuation logic. An exemption request relating to the proposed changes to the AP1000 Design Control Document Tier 1 is included with the request.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below with Nuclear Regulatory Commission (NRC) staff edits in square brackets:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The AP1000 accident analysis previously evaluated a loss of coolant accident caused by an inadvertent ADS valve actuation. Adding design detail to the ADS blocking device, and applying the blocking device to the [in-containment refueling water storage tank (IRWST)] injection valves, does not impact this analysis. Using a blocking device on the ADS and IRWST injection valves is a design feature which further minimizes the probability of a loss of coolant accident caused by a spurious valve actuation. Furthermore, because the blocking device is designed to prevent a spurious valve actuation due to a software [common cause failure (CCF)] and does not adversely impact any existing design feature, it does not involve a significant increase in the probability of an accident previously evaluated.

The proposed amendment does not affect the prevention and mitigation of abnormal events, *e.g.,* accidents, anticipated operation occurrences, earthquakes, floods, turbine missiles, and fires or their safety or design analyses. This change does not involve containment of radioactive isotopes or any adverse effect on a fission product barrier. There is no impact on previously evaluated accidents source terms. The [protection and safety monitoring system (PMS)] is still able to actuate ADS and IRWST injection valves for plant conditions which require their actuation. Therefore, the proposed amendment does not involve a significant increase in the consequences of an accident previously evaluated

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not involve a new failure mechanism or malfunction, which affects an SSC accident initiator, or interface with any [structure, system, or component (SSC)] accident initiator or initiating sequence of events considered in the design and licensing bases. There is no adverse effect on radioisotope barriers or the release of radioactive materials. The proposed amendment does not adversely affect any accident, including the possibility of creating a new or different kind of accident from any accident previously evaluated. Therefore, the proposed changes do not create the possibility of a new or different type of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The blocking device is independent of PMS processor hardware and software. It is designed to allow for ADS and IRWST injection actuations when the plant parameters indicate an actual [loss of coolant accident (LOCA)] event. Therefore, the ADS and IRWST are still able to perform their safety functions when required. A postulated failure of a blocking device which would prevent necessary ADS and IRWST injection valve opening would be detected by the proposed periodic surveillance testing within the [Technical Specifications (TS)]. Failure of the ADS actuation or IRWST injection valve opening in a division could also result from concurrent failure of the two Core Makeup Tanks (CMTs) level sensors in one division, with both sensors reading above the blocking setpoint. Failures of the level sensors would be immediately detected due to the deviations in redundant measurements. Furthermore, the proposed TS actions require that the four divisions of blocking devices be capable of automatically unblocking for each CMT. In addition, the TS require that the blocking devices be unblocked in plant modes which allow for the operability of less than two CMTs.

The blocking device will continue to comply with the existing [Updated Final Safety Analysis Report (UFSAR)] regulatory requirements and industry standards. The proposed changes would not affect any safety-related design code, function, design analysis, safety analysis input or result, or existing design/safety margin. No safety analysis or design basis acceptance limit/criterion is challenged or exceeded by the requested changes. Therefore the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M. Stanford Blanton, Balch & Bingham LLP, 1710 Sixth Avenue North, Birmingham, AL 35203–2015.

NRC Branch Chief: Jennifer Dixon-Herrity.

III. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

Dominion Nuclear Connecticut, Inc., Docket No. 50–336, Millstone Power Station, Unit No. 2 (MPS2), New London County, Connecticut

Date of amendment request: January 26, 2016, as supplemented by letter dated July 14, 2016.

Brief description of amendment: The amendment revised the MPS2 licensing basis to change the spent fuel pool heat load analysis description contained in the Final Safety Analysis Report.

Date of issuance: November 29, 2016.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment No.: 330. A publicly-available version is in ADAMS under Accession No. ML16277A680; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Renewed Facility Operating License No. DPR–65: Amendment revised the Renewed Operating License.

Date of initial notice in ***Federal Register:*** May 24, 2016 (81 FR 32804). The supplemental letter dated July 14, 2016, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 29, 2016.

No significant hazards consideration comments received: No.

Duke Energy Florida, Inc. (DEF), et al., Docket No. 50–302, Crystal River Nuclear Generating Plant, Unit 3 (CR–3), Citrus County, Florida

Date of application for amendment: August 27, 2015, as supplemented by letters dated March 2, 2016, and July 14, 2016.

Brief description of amendment: The amendment approves the CR–3 Permanently Defueled Emergency Plan, and Permanently Defueled Emergency Action Level Bases Manual, for the Independent Spent Fuel Storage Installation.

Date of issuance: December 5, 2016.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment No.: 252. A publicly-available version is in ADAMS under Accession No. ML16244A102; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Facility Operating License No. DPR–72: This amendment revises the License.

Date of initial notice in ***Federal Register:*** November 10, 2015 (80 FR 69711).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 5, 2016.

No significant hazards consideration comments received: No.

Duke Energy Progress, LLC, Docket No. 50–261, H. B. Robinson Steam Electric Plant, Unit No. 2, Darlington County, South Carolina

Date of amendment request: November 2, 2015, as supplemented by letters dated December 22, 2015; and March 31, May 9, and September 14, 2016.

Brief description of amendment: The amendment revised the reactor coolant system (RCS) pressure and temperature limits by replacing Technical Specification (TS) Section 3.4.3, ''RCS Pressure and Temperature (P/T) Limits,'' Figures 3.4.3–1 and 3.4.3–2, with figures that are applicable up to 50 effective full power years (EFPYs).

Date of issuance: November 22, 2016.

Effective date: As of the date of issuance and shall be implemented within 120 days of issuance.

Amendment No.: 248. A publicly-available version is in ADAMS under Accession No. ML16285A404; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Renewed Facility Operating License No. DPR–23: Amendment revised the Renewed Facility Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** March 1, 2016 (81 FR 10678). The supplemental letters dated March 31, May 9, and September 14, 2016, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 22, 2016.

No significant hazards consideration comments received: No.

Duke Energy Progress, LLC, Docket No. 50–400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina

Date of amendment request: August 18, 2015, as supplemented by letters dated September 29, 2015, February 5, 2016, April 28, 2016, and May 19, 2016.

Brief description of amendment: The amendment revised the Technical Specifications (TSs) by relocating specific surveillance frequencies to a licensee-controlled program with the implementation of Nuclear Energy Institute (NEI) 04–10, ''Risk-Informed Technical Specifications Initiative 5b, Risk-Informed Method for Control of Surveillance Frequencies.'' Additionally, the change added a new program, the Surveillance Frequency Control Program, to TS Section 6, ''Administrative Controls.''

Date of issuance: November 29, 2016.

Effective date: As of the date of issuance and shall be implemented within 120 days of issuance.

Amendment No.: 154. A publicly-available version is in ADAMS under Accession No. ML16200A285; documents related to this amendment are listed in the Safety Evaluation (SE) enclosed with the amendment.

Renewed Facility Operating License No. NPF–63: Amendment revised the Facility Operating License and TSs.

Date of initial notice in ***Federal Register:*** The NRC staff initially made a proposed determination that the amendment request dated August 18, 2015, as supplemented by letter dated September 29, 2015, involved no significant hazards consideration (NSHC) (December 8, 2015, 80 FR 76319). By letters dated February 5, 2016, and April 28, 2016, the licensee provided clarifying information that did not expand the scope of the application and did not change the NRC staff's original proposed NSHC determination, as published in the **Federal Register** (FR) on December 8, 2015 (80 FR 76319). Subsequently, by letter dated May 19, 2016, the licensee supplemented its amendment request with a proposed change that expanded the scope of the request. Therefore, the NRC published a second proposed NSHC determination in the FR on July 15, 2016 (81 FR 46118), which superseded the notice dated December 8, 2015 (80 FR 76319).

The Commission's related evaluation of the amendment is contained in an SE dated November 29, 2016.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket No. STN 50–457, Braidwood Station, Unit No. 2, Will County, Illinois

Date of application for amendment: September 30, 2016 (ADAMS Accession No. ML16274A474), as supplemented by letters dated October 26 and 28, 2016, and November 14, 2016 (ADAMS Accession Nos. ML16301A073, ML16302A468, and ML16319A397).

Brief description of amendment: The amendment allows a one-time extension from 72 hours to 200 hours of the technical specification completion time associated with the 2A service water (SX) pump in support of maintenance activities.

Date of issuance: November 23, 2016.

Effective date: As of the date of issuance and shall be implemented prior to the 2A SX pump work window.

Amendment No.: 191. A publicly-available version is in ADAMS under Accession No. ML16315A302; documents related to this amendment

are listed in the Safety Evaluation enclosed with the amendment.

Renewed Facility Operating License No NPF–77: The amendment revises the Technical Specifications and License

Date of initial notice in ***Federal Register:*** October 21, 2016 (81 FR 72838).

The October 26 and 28, 2016 supplements, contained clarifying information and did not change the NRC staff's initial proposed finding of no significant hazards consideration.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 23, 2016.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. 50–237 and 50–249. Dresden Nuclear Power Station (DNPS), Unit Nos. 2 and 3, Grundy County, Illinois

Date of application for amendment: December 14, 2015, as supplemented by letter dated

June 30, 2016.

Brief description of amendments: The amendment revises the technical specification (TS) for DNPS, Units 2 and 3, standby or emergency diesel generator (EDG) fuel oil day tank volume as described in TS 3.81, ''AC Sources—Operating,'' surveillance requirement (SR) 3.8.1.4, from the current value of greater than or equal to (>) 205 gallons to >245 gallons. Raising the EDG fuel oil day tank volume requirement will assure that each EDG can operate for one hour at the maximum allowable operating conditions. The licensee has identified this issue as a non-conservative Technical Specification and administrative controls are currently in-place to assure sufficient fuel oil is available in each fuel oil day tank.

Date of issuance: November 30, 2016.

Effective date: As of the date of issuance and shall be implemented no later than 60 days from the date of issuance.

Amendment Nos.: 252 and 245. A publicly-available version is in ADAMS under Accession No. ML16305A212; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Renewed Facility Operating License Nos. DPR–19 and DPR–25: Amendment revises the Renewed Facility Operating Licenses and Technical Specification.

Date of initial notice in ***Federal Register:*** March 1, 2016 (81 FR 10680). The supplemental letter dated June 30, 2016, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety evaluation dated November 30, 2016.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. 50–352 and 50–353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania

Date of amendment request: January 15, 2016, as supplemented by letters dated April 19, 2016; May 9, 2016; and June 21, 2016.

Brief description of amendments: The amendments reduce the reactor vessel steam dome pressure specified in the technical specifications (TSs) for the reactor core safety limits. The amendments also revise the setpoint and allowable value for the main steam line low pressure isolation function in the TSs.

Date of issuance: November 21, 2016.

Effective date: As of the date of issuance and shall be implemented within 120 days of issuance.

Amendment Nos.: 222 and 183. A publicly-available version is in ADAMS under Accession No. ML16272A319; documents related to these amendments are listed in the Safety Evaluation enclosed with the amendments.

Renewed Facility Operating License Nos. NPF–39 and NPF–85: Amendments revised the Renewed Facility Operating Licenses and TSs.

Date of initial notice in ***Federal Register:*** March 15, 2016 (81 FR 13842). The supplemental letters dated April 19, 2016; May 9, 2016; and June 21, 2016, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 21, 2016.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket No. 50–410, Nine Mile Point Nuclear Station, Unit 2, Oswego County, New York

Date of amendment request: February 23, 2016.

Brief description of amendment: The amendment revised the Technical Specifications.

Date of issuance: November 22, 2016.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 159. A publicly-available version is in ADAMS under Accession No. ML16281A596; documents related to this amendment is listed in the Safety Evaluation enclosed with this amendment.

Renewed Facility Operating License No. NPF–69: Amendment revised the Renewed Facility Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** May 10, 2016, (81 FR 28897).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 22, 2016.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket No. 50–219, Oyster Creek Nuclear Generating Station (OCNGS), Ocean County, New Jersey

Exelon Generation Company, LLC, Docket No. 50–220, Nine Mile Point Nuclear Station, Unit 1 (NMP1), Oswego County, New York

Date amendment request: August 1, 2016.

Brief description of amendments: The amendments would revise OCNGS's Technical

Specification (TS) Section 2.1, ''Safety Limit—Fuel Cladding Integrity,'' and NMP1's TS Section 2.1.1, ''Fuel Cladding Integrity,'' to reduce the steam dome pressure.

Date of issuance: November 29, 2016.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment Nos.: 289 for OCNGS and 225 for NMP1. A publicly-available version is in ADAMS under Accession No. ML16256A567; documents related to these amendments are listed in the Safety Evaluation enclosed with the amendments.

Renewed Facility Operating License Nos. DPR–16 and DPR–63: Amendments revised the Licenses and Technical Specifications.

Date of initial notice in ***Federal Register:*** September 27, 2016 (81 FR 66307).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 29, 2016.

No significant hazards consideration comments received: No.

Florida Power & Light Company, et al., Docket Nos. 50–335 and 50–389, St. Lucie Plant, Unit Nos. 1 and 2, St. Lucie County, Florida

Date of amendment request: April 31, 2016, as supplemented by a letter dated August 11, 2016.

Brief description of amendments: The amendments revised Appendix B (Environmental Protection Plan, Section 4.2) of the renewed operating licenses to reflect the ''currently applicable'' Biological Opinion issued by the National Marine Fisheries Service March 24, 2016.

Date of issuance: December 5, 2016.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment Nos.: 236 and 186. A publicly-available version is in ADAMS under Accession No. ML16251A128; documents related to these amendments are listed in the safety evaluation enclosed with the amendments.

Renewed Facility Operating License Nos. DPR–67 and NPF–16: Amendments revised the Renewed Facility Operating Licenses and Appendix B.

Date of initial notice in ***Federal Register***: June 7, 2016 (81 FR 36621). The supplemental letter dated August 11, 2016, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a safety evaluation dated December 5, 2016.

No significant hazards consideration comments received: No.

South Carolina Electric & Gas Company and South Carolina Public Service Authority, Docket Nos. 52–027 and 52–028, Virgil C. Summer Nuclear Station (VCSNS), Units 2 and 3, Fairfield County, South Carolina

Date of amendment request: December 17, 2015 as supplemented January 11, 2016 and March 16, 2016.

Description of amendment: The amendment authorizes changes to the VCSNS, Units 2 and 3, Updated Final Safety Analysis Report Tier 2* information as well as a change to a license condition to, in part, revise the Wall 11 structure by modifying openings, changing reinforcement detailing, clarifying the classification of building structures for high-energy line break events, crediting the north wall of the Turbine Building first bay wall as a high energy line break barrier and associated missile barriers for protection of Wall 11 from tornado missiles.

Date of issuance: May 31, 2016.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment No.: 48. A publicly-available version is in ADAMS under Accession No. ML16109A298; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Facility Combined Licenses Nos. NPF–93 and NPF–94: Amendment revised the Facility Combined Licenses.

Date of initial notice in ***Federal Register***: February 2, 2016 (81 FR 5499). The supplemental letters dated January 11, 2016, and March 16, 2016, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in the Safety Evaluation dated May 31, 2016.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Docket Nos. 52–025 and 52–026, Vogtle Electric Generating Plant (VEGP), Units 3 and 4, Burke County, Georgia

Date of amendment request: May 18, 2016.

Description of amendment: The amendment authorizes changes to the VEGP Units 3 and 4 listed minimum volume of the passive core cooling system core makeup tanks (CMT) reflected in Appendix A, Technical Specifications and the Updated Final Safety Analysis Report of the VEGP Units 3 and 4 Combined Licenses. Specifically, the changes reflect a correction to align licensing documents to reflect the CMT volume given in the VEGP Combined License Tier 1 as 2487 cubic feet is based on and supported by a small-break loss-of-coolant accident safety analysis.

Date of issuance: September 15, 2016.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment No.: 53. A publicly-available version is in ADAMS under Accession No. ML16216A394; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Facility Combined Licenses No. NPF–91 and NPF–92: Amendment revised the Facility Combined Licenses.

Date of initial notice in ***Federal Register***: July 5, 2016 (81 FR 43646).

The Commission's related evaluation of the amendment is contained in the Safety Evaluation dated September 15, 2016.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Docket Nos. 52–025 and 52–026, Vogtle Electric Generating Plant (VEGP), Units 3 and 4, Burke County, Georgia

Date of amendment request: January 29, 2016, and supplemented by letter dated April 8, 2016.

Description of amendment: The amendment authorizes changes to the VEGP, Units 3 and 4, Updated Final Safety Analysis Report in the form of departures from the incorporated plant specific Design Control Document Tier 2* and Tier 2 information. The changes are also approved in plant-specific technical specifications. The changes incorporate information in WCAP–17524–P–A, Revision 1, ''AP1000 Core Reference Report,'' which was approved by the U.S. Nuclear Regulatory Commission on February 19, 2015.

Date of issuance: August 19, 2016.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment No.: 52. A publicly-available version is in ADAMS under Accession No. ML16201A435; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Facility Combined Licenses Nos. NPF–91 and NPF–92: Amendment revised the Facility Combined Licenses.

Date of initial notice in ***Federal Register***: March 29, 2016 (81 FR 17501). The supplemental letter dated April 8, 2016, provided additional information that clarified the application, did not expand the scope of the application request as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in the Safety Evaluation dated August 19, 2016.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Docket Nos. 52–025 and 52–026, Vogtle Electric Generating Plant (VEGP), Units 3 and 4, Burke County, Georgia

Date of amendment request: December 22, 2015, and supplemented by letters dated May 9, 2016, and May 27, 2016.

Description of amendment: The amendment authorizes changes to the VEGP, Units 3 and 4, Updated Final Safety Analysis Report in the form of departures from the incorporated plant-specific Design Control Document Tier 2* and Tier 2 information with respect to proposed changes to the design of auxiliary building Wall 11, and other changes to the licensing basis for use of seismic Category II structures. It also involves a change to a license condition.

Date of issuance: August 3, 2016.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment No.: 51. A publicly-available version is in ADAMS under Accession No. ML16201A298; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Facility Combined Licenses No. NPF–91 and NPF–92: Amendment revised the Facility Combined Licenses.

Date of initial notice in ***Federal Register***: February 16, 2016 (81 FR 7835). The supplemental letters dated May 9, 2016, and May 27, 2016, provided additional information that clarified the application, did not expand the scope of the application request as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in the Safety Evaluation dated August 3, 2016.

No significant hazards consideration comments received: No.

III. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Public Announcement or Emergency Circumstances)

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Because of exigent or emergency circumstances associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual notice of consideration of issuance of amendment, proposed no significant hazards consideration determination, and opportunity for a hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of no significant hazards consideration. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its no significant hazards consideration determination. In such case, the license amendment has been issued without opportunity for comment. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards consideration. The basis for this determination is contained in the documents related to this action. Accordingly, the amendments have been issued and made effective as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the application for amendment, (2) the amendment to Facility Operating License or Combined License, as applicable, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment, as indicated. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

The Commission is also offering an opportunity for a hearing with respect to the issuance of the amendment.

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and a petition to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC's regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a petition is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest. The petition must also set forth the specific contentions which the petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions consistent with the NRC's regulations, policies, and procedures.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1).

The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by February 21, 2017. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may also have the opportunity to participate under 10 CFR 2.315(c).

If a hearing is granted, any person who does not wish, or is not qualified, to become a party to the proceeding may, in the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene (hereinafter ''petition''), and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562, August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/getting-started.html.* System requirements for accessing the E-Submittal server are available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/adjudicatory-sub.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Electronic Filing Help Desk will not be

able to offer assistance in using unlisted software.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a petition. Submissions should be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public Web site at *http://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 7 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. However, in some instances, a petition will require including information on local residence in order to demonstrate a proximity assertion of interest in the proceeding. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

Exelon Generation Company, LLC, Docket No. 50–410, Nine Mile Point Nuclear Station, Unit 2, Oswego County, New York

Date of amendment request: November 26, 2016.

Brief description of amendment: The amendment revised the High Pressure Core Spray system and Reactor Core Isolation Cooling system actuation instrumentation technical specifications by adding a footnote indicating that the injection functions of Drywell Pressure-High and Manual Initiation are not required to be operable under low reactor pressure conditions.

Date of issuance: November 29, 2016.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment No.: 160. A publicly-available version is in ADAMS under Accession No. ML16333A000; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Renewed Facility Operating License No. NPF–69: Amendment revised the Renewed Facility Operating License and Technical Specifications.

Public comments requested as to proposed no significant hazards consideration (NSHC): No.

The Commission's related evaluation of the amendment, finding of emergency circumstances, state consultation, and final NSHC determination are contained in a Safety Evaluation dated November 29, 2016.

Attorney for licensee: Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Acting Branch Chief: Douglas Pickett.

Dated at Rockville, Maryland, this 8 day of December, 2016.

For the Nuclear Regulatory Commission.

George A. Wilson, Deputy,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2016–30438 Filed 12–19–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0001]

Sunshine Act Meeting Notice

DATES: December 19, 26, 2016, January 2, 9, 16, 23, 2017.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of December 19, 2016

There are no meetings scheduled for the week of December 19, 2016.

Week of December 26, 2016—Tentative

There are no meetings scheduled for the week of December 26, 2016.

Week of January 2, 2017—Tentative

There are no meetings scheduled for the week of January 2, 2017.

Week of January 9, 2017—Tentative

Friday, January 13, 2017

9:00 a.m. Briefing on Operator Licensing Program (Public Meeting)

(Contact: Nancy Salgado: 301–415–1324).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Week of January 16, 2017—Tentative

There are no meetings scheduled for the week of January 16, 2017.

Week of January 23, 2017—Tentative

Monday, January 23, 2017

10:00 a.m. Discussion of Management and Personnel Issues (Closed Ex. 2 & 6).

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The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0981 or via email at *Denise.McGovern@nrc.gov.*

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The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0739, by videophone at 240–428–3217, or by email at *Kimberly.Meyer-Chambers@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or email *Brenda.Akstulewicz@nrc.gov* or *Patricia.Jimenez@nrc.gov.*

Dated: December 16, 2016.

Denise L. McGovern,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2016–30747 Filed 12–16–16; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–025 and 52–026; NRC–2008–0252]

Southern Nuclear Operating Company, Inc., Vogtle Electric Generating Plant, Units 3 and 4; Reconciliation of Tier 1 Valve Differences

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption and combined license amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is granting an exemption to allow a departure from the certification information of Tier 1 of the generic design control document (DCD) and is issuing License Amendment No. 39 to Combined Licenses (COL), NPF–91 and NPF–92. The COLs were issued to Southern Nuclear Operating Company, Inc., and Georgia Power Company, Oglethorpe Power Corporation, MEAG Power SPVM, LLC, MEAG Power SPVJ, LLC, MEAG Power SPVP, LLC, Authority of Georgia, and the City of Dalton, Georgia (the licensee); for construction and operation of the Vogtle Electric Generating Plant (VEGP) Units 3 and 4, located in Burke County, Georgia.

The granting of the exemption allows the changes to Tier 1 information asked for in the amendment. Because the acceptability of the exemption was determined in part by the acceptability of the amendment, the exemption and amendment are being issued concurrently.

DATES: The Exemption was issued on September 15, 2015.

ADDRESSES: Please refer to Docket ID NRC–2008–0252 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using any of the following methods:

- *Federal Rulemaking Web site: Go to http://www.regulations.gov* and search for Docket ID NRC–2008–0252. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. The request for the amendment and exemption was submitted by letter dated June 4, 2014 (ADAMS Accession No. ML14156A477), and supplemented by letter dated December 5, 2014 (ADAMS Accession No. ML14339A633).
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Chandu Patel, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3025; email: *Chandu.Patel@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is granting an exemption from Paragraph B of Section III, ''Scope and Contents,'' of Appendix d, ''Design Certification Rule for the AP1000,'' to part 52 of title 10 of the *Code of Federal Regulations* (10 CFR), and issuing License Amendment No. 39 to COLs, NPF–91 and NPF–92, to the licensee. The exemption is required by Paragraph A.4 of Section VIII, ''Processes for Changes and Departures,'' Appendix d, to 10 CFR part 52 to allow the licensee to depart from Tier 1 information. With the requested amendment, the licensee sought proposed changes that would allow changes in Appendix C to reconcile various valve descriptions and definitions in Updated Final Safety Analysis Report Tier 1 and associated Tier 2 information. Part of the justification for granting the exemption was provided by the review of the amendment. Because the exemption is necessary in order to issue the requested license amendment, the NRC granted the exemption and issued the amendment concurrently, rather than in sequence. This included issuing a combined safety evaluation containing the NRC staff's review of both the exemption request and the license amendment. The exemption met all applicable regulatory criteria set forth in 10 CFR 50.12, 10 CFR 52.7, and Section VIII.A.4 of Appendix d to 10 CFR part 52. The license amendment was found

to be acceptable as well. The combined safety evaluation is available in ADAMS under Accession No. ML15232A176.

Identical exemption documents (except for referenced unit numbers and license numbers) were issued to the licensee for VEGP Units 3 and 4 (COLs NPF–91 and NPF–92). The exemption documents for VEGP Units 3 and 4 can be found in ADAMS under Accession Nos. ML15232A179 and ML15232A181, respectively. The exemption is reproduced (with the exception of abbreviated titles and additional citations) in Section II of this document. The amendment documents for COLs NPF–91 and NPF–92 are available in ADAMS under Accession Nos. ML15232A171 and ML15232A172, respectively. A summary of the amendment documents is provided in Section III of this document.

II. Exemption

Reproduced below is the exemption document issued to VEGP Units 3 and Unit 4. It makes reference to the combined safety evaluation that provides the reasoning for the findings made by the NRC (and listed under Item 1) in order to grant the exemption:

1. In a letter dated June 4, 2014, and supplemented by the letter dated December 5, 2014, the licensee requested from the Commission an exemption to allow departures from Tier 1 information in the certified DCD incorporated by reference in 10 CFR part 52, Appendix d, as part of license amendment request 13–021, ''Reconciliation of Tier 1 Valve Differences.''

For the reasons set forth in Section 3.1 of the NRC staff's Safety Evaluation, which can be found at ADAMS Accession No. ML15232A176, the Commission finds that:

A. The exemption is authorized by law;

B. the exemption presents no undue risk to public health and safety;

C. the exemption is consistent with the common defense and security;

D. special circumstances are present in that the application of the rule in this circumstance is not necessary to serve the underlying purpose of the rule;

E. the special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; and

F. the exemption will not result in a significant decrease in the level of safety otherwise provided by the design.

2. Accordingly, the licensee is granted an exemption from the certified DCD Tier 1, Combined License Appendix C, Tables 2.1.2–1, 2.2.1–1, 2.2.2–1, 2.2.3–1, 2.2.3–3, 2.2.5–1, 2.3.2–1, 2.3.2–3, and 2.3.6–1, as described in the licensee's request dated June 4, 2014, and supplemented by the letter dated December 5, 2014. This exemption is related to, and necessary for the granting of License Amendment No. 39, which is being issued concurrently with this exemption.

3. As explained in Section 5.0 of the NRC staff's Safety Evaluation (ADAMS Accession No. ML15232A176), this exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment needs to be prepared in connection with the issuance of the exemption.

4. This exemption is effective as of the date of its issuance.

III. License Amendment Request

By letter dated June 4, 2014, and supplemented by the letter dated December 5, 2014, the licensee requested that the NRC amend the COLs for VEGP, Units 3 and 4, COLs NPF–91 and NPF–92. The proposed amendment is described in Section I of this **Federal Register** notice.

The Commission has determined for these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or COL, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** on September 16, 2014 (79 FR 55514). No comments were received during the 30-day comment period.

The Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments.

IV. Conclusion

Using the reasons set forth in the combined safety evaluation, the staff granted the exemption and issued the amendment that the licensee requested on June 4, 2014, and supplemented by the letter dated December 5, 2014.

The exemption and amendment were issued on September 15, 2015, as part of a combined package to the licensee (ADAMS Accession No. ML15232A150).

Dated at Rockville, Maryland, this 13th day of December 2016.

For the Nuclear Regulatory Commission.

Jennifer Dixon-Herrity,

Chief, Licensing Branch 4, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2016–30630 Filed 12–19–16; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 13, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 41 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–48, CP2017–74.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30517 Filed 12–19–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 13, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 270 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–45, CP2017–71.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30531 Filed 12–19–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 13, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 272 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–47, CP2017–73.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30526 Filed 12–19–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 13, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 271 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–46, CP2017–72.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30529 Filed 12–19–16; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79548; File No. SR–CBOE–2016–085]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

December 14, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2016, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule. The text of the proposed rule change is also available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule. Specifically, the Exchange proposes to increase the transaction fee for electronic executions by broker-dealers, non-Trading Permit Holder (''non-TPH'') Market-Makers, Professionals/Voluntary Professionals and Joint Back-Offices (''JBOs'') in Penny Pilot equity, ETF, ETN and index options (excluding Underlying Symbol List A) classes from $0.45 per contract to $0.47 per contract. The Exchange notes that this increase is in line with the amount assessed by another exchange for similar transactions.[3]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[5] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See e.g.,* NASDAQ PHLX Pricing Schedule, Section II, Multiply Listed Options Fees.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[6] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

Increasing the fee for electronic executions by broker-dealers, non-TPH Market-Makers, Professionals/Voluntary Professionals and JBOs in Penny Pilot equity, ETF, ETN and index options (excluding Underlying Symbol List A) classes is reasonable because the proposed fee amount is in line with the amount assessed by another exchange for similar transactions.[7] The Exchange believes that this proposed change is also equitable and not unfairly discriminatory because the Exchange will assess broker-dealers, non-TPH Market-Makers, Professionals/Voluntary Professionals and JBOs the same electronic options transaction fees in Penny Pilot options classes. The Exchange notes that it does not assess Customers the electronic options transaction fees in Penny Pilot options because Customer order flow enhances liquidity on the Exchange for the benefit of all market participants. Specifically, Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market-Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange notes that Market-Makers are assessed lower electronic options transaction fees in Penny Pilot options as compared to Professionals, JBOs, Broker Dealers and non-Trading Permit Holder Market-Makers because they have obligations to the market and regulatory requirements, which normally do not apply to other market participants (*e.g.,* obligations to make continuous markets). Clearing Trading Permit Holder Proprietary orders are assessed lower options transaction fees in Penny Pilot options because they also have obligations, which normally do not apply to other market participants (*e.g.,* must have higher capital requirements, clear trades for other market participants, must be members of OCC). Accordingly, the differentiation between electronic transaction fees for Customers, Market-Makers, Clearing Trading Permit Holders and other market participants recognizes the differing obligations and contributions made to the liquidity and trading environment on the Exchange by these market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that are [sic] not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because, while the proposed fee increase applies only to certain market participants, the other market participants have different obligations and different circumstances (as described in the ''Statutory Basis'' section above). For example, Clearing TPHs have clearing obligations that other market participants do not have. Market-Makers have quoting obligations that other market participants do not have. There is also a history in the options markets of providing preferential treatment to Customers. The Exchange does not believe that the proposed change will cause any unnecessary burden on intermarket competition because the proposed change only affects trading on CBOE. To the extent that the proposed changes make CBOE a more attractive marketplace for market participants at other exchanges, such market participants are welcome to become CBOE market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and paragraph (f) of Rule 19b–4[9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2016–085 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2016–085. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2016–085, and should be submitted on or before January 10, 2017.

[6] 15 U.S.C. 78f(b)(4).

[7] *See* NASDAQ PHLX Pricing Schedule, Section II, Multiply Listed Options Fees.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f).

[10] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30554 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79551; File No. SR–NASDAQ–2016–131]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Enhance the Reopening Auction Process Following a Trading Halt Declared Pursuant to the Plan To Address Extraordinary Market Volatility

December 14, 2016.

On October 13, 2016, The Nasdaq Stock Market LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change related to the reopening auction process following a trading halt declared pursuant to the Plan to Address Extraordinary Market Volatility. The proposed rule change was published for comment in the **Federal Register** on November 1, 2016.[3] On December 5, 2016, the Exchange filed Amendment No. 1 to its proposed rule change.[4] The Commission received no comments on the proposed rule change.

Section 19(b)(2) of the Act [5] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 16, 2016. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates January 30, 2017 as the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR–NASDAQ–2016–131).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30557 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Securities Act of 1933 Release No. 10266/December 14, 2016; Securities Exchange Act of 1934 Release No. 79544/December 14, 2016]

Order Approving Public Company Accounting Oversight Board Budget and Annual Accounting Support Fee for Calendar Year 2017

The Sarbanes-Oxley Act of 2002, as amended (the ''Sarbanes-Oxley Act''),[1] established the Public Company Accounting Oversight Board (''PCAOB'') to oversee the audits of companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate and independent audit reports. Section 982 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') [2] amended the Sarbanes-Oxley Act to provide the PCAOB with explicit authority to oversee auditors of broker-dealers registered with the Commission. The PCAOB is to accomplish these goals through registration of public accounting firms and standard setting, inspection, and disciplinary programs. The PCAOB is subject to the comprehensive oversight of the Securities and Exchange Commission (the ''Commission'').

Section 109 of the Sarbanes-Oxley Act provides that the PCAOB shall establish a reasonable annual accounting support fee, as may be necessary or appropriate to establish and maintain the PCAOB. Under Section 109(f) of the Sarbanes-Oxley Act, the aggregate annual accounting support fee shall not exceed the PCAOB's aggregate ''recoverable budget expenses,'' which may include operating, capital and accrued items. The PCAOB's annual budget and accounting support fee are subject to approval by the Commission. In addition, the PCAOB must allocate the annual accounting support fee among issuers and among brokers and dealers.

Section 109(b) of the Sarbanes-Oxley Act directs the PCAOB to establish a budget for each fiscal year in accordance with the PCAOB's internal procedures, subject to approval by the Commission. Rule 190 of Regulation P governs the Commission's review and approval of PCAOB budgets and annual accounting support fees.[3] This budget rule provides, among other things, a timetable for the preparation and submission of the PCAOB budget and for Commission actions related to each budget, a description of the information that should be included in each budget submission, limits on the PCAOB's ability to incur expenses and obligations except as provided in the approved budget, procedures relating to supplemental budget requests, requirements for the PCAOB to furnish on a quarterly basis certain budget-related information, and a list of definitions that apply to the rule and to general discussions of PCAOB budget matters.

In accordance with the budget rule, in March 2016 the PCAOB provided the Commission with a narrative description of its program issues and outlook for the 2017 budget year. In response, the Commission provided the PCAOB with economic assumptions and budgetary guidance for the 2017 budget year. The PCAOB subsequently delivered a preliminary budget and budget justification to the Commission. Staff from the Commission's Office of the Chief Accountant and Office of Financial Management dedicated a substantial amount of time to the review and analysis of the PCAOB's programs, projects and budget estimates; reviewed the PCAOB's estimates of 2016 actual spending; and attended several meetings with management and staff of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 79158 (October 26, 2016), 81 FR 75879.

[4] In Amendment No. 1, the Exchange proposed to use the Auction Reference Price in determining whether or not a security was priced at $3 or less for purposes of calculating the Auction Collar. In addition, the Exchange proposed to amend Rule 4754(b)(6) to make a conforming change to state that the rule applies to Trading Pauses in existence at or after 3:50 p.m. and before 4:00 p.m. Amendment No. 1 is available at *https://www.sec.gov/comments/sr-nasdaq-2016-131/nasdaq2016131-1.pdf.*

[5] 15 U.S.C. 78s(b)(2).

[6] *Id.*

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 7201 *et seq.*

[2] Public Law 111–203, 124 Stat. 1376 (2010).

[3] 17 CFR 202.190.

PCAOB to further develop their understanding of the PCAOB's budget and operations. During the course of this review, Commission staff relied upon representations and supporting documentation from the PCAOB. Based on this review, the Commission issued a ''pass back'' letter to the PCAOB. On November 17, 2016, the PCAOB approved its 2017 budget during an open meeting, and subsequently submitted that budget to the Commission for approval.

After considering the above, the Commission did not identify any proposed disbursements in the 2017 budget adopted by the PCAOB that are not properly recoverable through the annual accounting support fee, and the Commission believes that the aggregate proposed 2017 annual accounting support fee does not exceed the PCAOB's aggregate recoverable budget expenses for 2017. The Commission also acknowledges the PCAOB's updated strategic plan and encourages the PCAOB to continue keeping the Commission and its staff apprised of significant new developments. The Commission looks forward to providing views to the PCAOB as future updates are made to the plan. In addition, the PCAOB should submit its 2016 annual report to the Commission by April 1, 2017.

We understand that the Board continues to take steps to implement improvements to the performance and management of the PCAOB's standard-setting process. The Commission directs the PCAOB to continue to provide timely updates throughout the year on the progress of this initiative as well as on any significant recommended or anticipated changes to processes or funding.

The Commission emphasizes the importance of the PCAOB's identifying efficiencies, process improvements, and cost savings wherever possible. Accordingly, the Commission directs the Board to conduct a study assessing its operational efficiency and budgetary needs and submit a supplemental report to the Commission of the Board's assessment in connection with the start of the 2018 budget cycle. The report should identify any areas where specific savings may be achieved while continuing to enable the PCAOB to fully perform its mission. The PCAOB should submit the report to the Commission along with its 2018 budgetary outlook letter.

As part of its review of the 2017 budget, the Commission notes that the Board's management of the Center for Economic Analysis (''Center'') should continue to advance the PCAOB's mission. The Commission directs the PCAOB during 2017 to continue providing quarterly updates to the Commission on the Center's activities and progress towards its stated goals.

The Commission directs the Board during 2017 to continue to provide in its quarterly reports to the Commission detailed information about the state of the PCAOB's information technology (''IT'') program, including planned, estimated, and actual costs for IT projects, and the level of involvement of consultants. These reports also should continue to include: (a) A discussion of the Board's assessment of the IT program; and (b) the quarterly IT report that is prepared by PCAOB staff and submitted to the Board.

The Commission also directs the Board during 2017 to continue to include in its quarterly reports to the Commission information about the PCAOB's inspections program. Such information is to include: (a) Statistics relative to the numbers and types of firms budgeted and expected to be inspected in 2017, including by location and by year the inspections are required to be conducted in accordance with the Sarbanes-Oxley Act and PCAOB rules; (b) information about the timing of the issuance of inspections reports for domestic and non-U.S. inspections; and (c) updates on the PCAOB's efforts to establish cooperative arrangements with respective non-U.S. authorities for inspections required in those countries.

The Commission understands that the Office of Management and Budget (''OMB'') has determined the 2017 budget of the PCAOB to be sequestrable under the Budget Control Act of 2011.[4] For 2016, the PCAOB sequestered $16 million. That amount will become available in 2017. For 2017, the sequestration amount will be $17 million. Accordingly, the PCAOB should submit a revised spending plan for 2017 reflecting a $1 million reduction to budgeted expenditures as a result of the increase in sequestration amount from 2016 to 2017.

The Commission has determined that the PCAOB's 2017 budget and annual accounting support fee are consistent with Section 109 of the Sarbanes-Oxley Act. Accordingly,

It is ordered, pursuant to Section 109 of the Sarbanes-Oxley Act, that the PCAOB budget and annual accounting support fee for calendar year 2017 are approved.

[4] See ''OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2017'', Appendix page 15 of 16 at: *https://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/sequestration/jc_sequestration_report_2017_house.pdf.*

By the Commission.

Brent J. Fields,

Secretary.

[FR Doc. 2016–30537 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79549; File No. SR–BX–2016–067]

Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 4770 (Compliance With Regulation NMS Plan To Implement a Tick Size Pilot)

December 14, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2016, NASDAQ BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend BX Rule 4770 to modify the Web site data publication requirements relating to the Regulation NMS Plan to Implement a Tick Size Pilot Program (''Plan'') and to clarify the timing and format of publishing Market Maker registration statistics.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqbx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 25, 2014, BX, and several other self-regulatory organizations (the ''Participants'') filed with the Commission, pursuant to Section 11A of the Act [3] and Rule 608 of Regulation NMS thereunder,[4] the Plan to Implement a Tick Size Pilot Program.[5] The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.[6] The Plan was published for comment in the **Federal Register** on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.[7] The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.[8] On November 6, 2015, the SEC exempted the Participants from implementing the Pilot until October 3, 2016.[9] Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the SEC exempted the Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Participants to implement the pilot on a phased-in basis, as described in the Participants' exemptive request.[10]

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan.

BX adopted rule amendments to implement the requirements of the Plan, including relating to the Plan's data collection requirements and requirements relating to Web site data publication.[11] Specifically, with respect to the Web site data publication requirements pursuant to Section VII and Appendices B and C to the Plan, BX Rule 4770(b)(2)(B) provides, among other things, that BX shall make the data required by Items I and II of Appendix B to the Plan, and collected pursuant to paragraph (b)(2) of Rule 4770, publicly available on the BX Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. BX Rule 4770(b)(3)(C), provides, among other things, that BX shall make the data required by Item IV of Appendix B to the Plan, and collected pursuant to paragraph (b)(3) of Rule 4770, publicly available on the BX Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Commentary .08 to Rule 4770 provides, among other things, that the requirement that BX make certain data publicly available on the BX Web site pursuant to Appendix B and C to the Plan shall commence at the beginning of the Pilot Period.

BX is proposing amendments to Rule 4770(b)(2)(B) (regarding Appendix B.I and B.II data) and Rule 4770(b)(3)(C) (regarding Appendix B.IV data) to provide that data required to be made available on BX's Web site be published within 120 calendar days following month end. In addition, the proposed amendments to Commentary .08 to Rule 4770 would provide that, notwithstanding the provisions of paragraphs (b)(2)(B), (b)(3)(C) and (b)(5), BX shall make data for the Pre-Pilot period publicly available on the BX Web site pursuant to Appendix B and C to the Plan by February 28, 2017.[12]

The purpose of delaying the publication of the Web site data is to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information.

BX also proposes to amend Rule 4770(b)(5), which relates to the collection and transmission of Market Maker registration statistics. Currently, Rule 4770(b)(5) provides that the Exchange shall collect and transmit to the SEC the data described in Item III of Appendix B of the Plan relating to daily Market Maker registration statistics in a pipe delimited format within 30 calendar days following month end for (1) transactions in each Pre-Pilot Data Collection Security for the period beginning six months prior to the Pilot Period through the trading day immediately preceding the Pilot Period; and (2) transactions in each Pilot Security for the period beginning on the first day of the Pilot Period through six months after the end of the Pilot Period. Although the Plan requires that such data be made publicly available,[13] Rule 4770(b)(5) does not currently include a provision requiring the Exchange to publish such data to its Web site. The Exchange therefore proposes to amend Rule 4770(b)(5) to provide that the Exchange shall make Market Maker registration data publicly available on the Exchange Web site within 120 calendar days following month end at no charge.

BX has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the 30-day operative delay. If the Commission waives the 30-day operative delay, the operative date of the proposed rule change will be the date of filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(5) of the Act,[15] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, because it is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan and is in furtherance of the objectives of the Plan, as identified by the SEC.

In approving the Plan, the Commission recognized that requiring the publication of Market Maker data may raise confidentiality concerns, especially for Pilot Securities that may

[3] 15 U.S.C. 78k–1.

[4] 17 CFR 242.608.

[5] *See* Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

[6] *See* Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

[7] *See* Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (''Approval Order'').

[8] *See* Approval Order at 27533 and 27545.

[9] *See* Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

[10] *See* Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General Counsel and Secretary, Bats Global Markets, Inc., dated September 13, 2016; *see also* Letter from Eric Swanson, EVP, General Counsel and Secretary, Bats Global Markets, Inc., to Brent J. Fields, Secretary, Commission, dated September 9, 2016.

[11] *See, e.g.,* Securities Exchange Act Release No. 77457 (March 28, 2016), 81 FR 18913 (April 1, 2016) (SR–BX–2016–019); *see also* Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 17, 2016.

[12] With respect to data for the Pilot Period, the requirement that BX make data publicly available on the BX Web site pursuant to Appendix B and C to the Plan shall continue to commence at the beginning of the Pilot Period. Thus, the first Web site publication date for Pilot Period data (covering October 2016) would be published on the BX Web site by February 28, 2017, which is 120 days following the end of October 2016.

[13] *See* Section VII.A. 4 of the Plan.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

have a relatively small number of designated Market Makers.[16] For this reason, the Commission modified the Plan so that the data that would be made publicly available would not contain profitability measures for each security, but would be aggregated by the Control Group and each Test Group. BX believes that this proposal is consistent with the Act in that it is designed to address confidentiality concerns by permitting BX to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. With respect to the change to Rule 4770(b)(5), BX believes this change will clarify the timing and format of publishing Market Maker registration statistics.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. BX notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan.

The proposal is intended to address confidentiality concerns that may adversely impact competition, especially for Pilot Securities that may have a relatively small number of designated Market Makers, by permitting BX to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal also does not alter the information required to be submitted to the SEC.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.[17]

[16] *See* Approval Order at 27543–27544.

[17] BX notes that Financial Information Forum (FIF) submitted a letter to the staff of the Commission raising concerns regarding the publication of certain Appendix B statistics on a disaggregated basis using a unique masked market participant identifier. *See* Letter from Mary Lou Von Kaenel, Managing Director, FIF, to David S. Shillman, Associate Director, Division of Trading and Markets, Commission, dated August 16, 2016, available at *https://www.fif.com/comment-letters.*

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [18] and subparagraph (f)(6) of Rule 19b–4 thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) [20] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[21] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. In this filing, the Exchange has asked that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing.

The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. The proposal is intended to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and public availability of such information. The proposal does not alter the information required to be submitted to the Commission.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement these proposed changes that are intended to address confidentiality concerns. The Commission notes that some Pilot data was scheduled to be published on November 30, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative on November 30, 2016.[22]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[18] 15 U.S.C. 78s(b)(3)(A)(iii).

[19] 17 CFR 240.19b–4(f)(6).

[20] *Id.*

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BX–2016–067 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2016–067. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions

should refer to File Number SR–BX–2016–067 and should be submitted on or before January 10, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30555 Filed 12–19–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79558; File No. SR–NYSEMKT–2016–114]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Modifying the NYSE Amex Options Fee Schedule

December 14, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 1, 2016, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Amex Options Fee Schedule (''Fee Schedule''). The Exchange proposes to implement the fee change effective December 1, 2016. The proposed change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend Section I. E. of the Fee Schedule,[4] effective December 1, 2016.

Section I. E. of the Fee Schedule describes the Exchange's ACE Program. The ACE Program features five tiers, expressed as a percentage of total industry Customer equity and Exchange Traded Fund (''ETF'') option average daily volume (''CADV'')[5] and provides two alternative methods through which Order Flow Providers (each an ''OFP'') may receive per contract credits for Electronic Customer volume that the OFP, as agent, submits to the Exchange.

The Exchange proposes to make the following changes to the ACE Program:

- First, the Exchange proposes to add a credit tier and re-designate current Tier 1 as the ''Base Tier.''[6] Currently, to achieve any credit under the ACE Program, an OFP must achieve Tier 2 (which offers an $0.18 per contract credit). To qualify for Tier 2, an OFP must execute at least 0.75% to 1.00% of CADV or 0.35% over October 2015 CADV. The Exchange proposes a new Tier 1, for which an OFP to qualify would have to execute at least 0.20% over October 2015 CADV.
- Second, OFPs that qualify for proposed new Tier 1 would be eligible to receive a $0.14 per contract credit. As with all other current tiers of the ACE Program, the take liquidity multiplier would also apply to proposed new Tier 1.[7]
- Third, the Exchange proposes that OFPs qualifying for new Tier 1 would also be eligible for the ACE Initiating Participant Rebate, which is currently available to OFPs that achieve Tiers 2–5 of the ACE Program.[8]
- Fourth, the Exchange proposes that OFPs that achieve Tier 2 would receive a $0.19 per contract credit on electronic Customer Complex Orders. In this regard, the Exchange proposes to define Complex Order in the Key Terms and Definitions section of the Fee Schedule, as ''. . . any order involving the simultaneous purchase and/or sale of two or more different option series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy, per Rule 900.3NY(e).'' OFPs that achieve Tier 2 would continue to receive a $0.18 per contract credit on electronic Customer volume (*i.e.,* non-Complex Customer order flow).

The Exchange is not proposing any other changes to the alternative ACE Program Credit Tiers at this time.[9]

The proposed additional Tier would not impact the Firm Monthly Fee Cap of $100,000 per month per Firm, but the Exchange proposes to add reference to the Base Tier in Section I of the Fee Schedule to add clarity and transparency to Exchange fees.[10]

The proposed modifications to the tiers of the ACE Program as well as the additional rebate for electronic Customer Complex Orders are designed to further encourage OFPs to direct additional order flow to the Exchange, which additional volume and liquidity would benefit all Exchange participants through increased opportunities to trade as well as enhancing price discovery.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Fee Schedule, Section I. E. (Amex Customer Engagement (''ACE'') Program—Standard Options), *available here, https://www.nyse.com/publicdocs/nyse/markets/amex-options/NYSE_Amex_Options_Fee_Schedule.pdf.*

[5] The volume thresholds are based on an OFP's Customer volume transacted Electronically as a percentage of total industry CADV as reported by the Options Clearing Corporation (the ''OCC''). *See* OCC Monthly Statistics Reports, *available here, http://www.theocc.com/webapps/monthly-volume-reports.*

[6] The Exchange notes that that the qualification basis for the proposed Base Tier remains the same as it is under current Tier 1 (*i.e.,* an OFP must execute at least 0.00% to 0.75% of CADV) and there are still no credits available under this tier.

[7] *See* Fee Schedule, Section I. E., *supra* note 4 (''In calculating an OFP's Electronic volume, each Customer order that takes liquidity will be weighted as 50% greater (*i.e.,* 1.5 times the contract volume) for determining Customer Electronic ADV and Total Electronic ADV'').

[8] *See* proposed Fee Schedule, Section I. G. at n.2 (''The ACE Initiating Participant Rebate is applied to each of the first 5,000 Customer contracts of a CUBE Order executed in a CUBE Auction. This Rebate is in addition to any additional credits set forth above. Only ATP Holders who qualify for Tiers 1, 2, 3, 4 or 5 of the ACE Program are eligible to receive the Rebate'').

[9] OFPs that achieve a qualification level in one tier, and achieve an alternative qualification level in another tier, will continue to be paid a credit based on the highest achieved tier. *See* Fee Schedule, Section I.E., *supra* note 4.

[10] *See* Fee Schedule, Section I. I. (Firm Monthly Fee Cap), *supra* note 4. The Monthly Firm Fee Cap decreases if Firms achieve Tiers 2–5 of the ACE Program (*i.e.,* greater than the Base Tier or Tier 1).

[11] 15 U.S.C. 78f(b).

furthers the objectives of Sections 6(b)(4) and (5) of the Act,[12] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed addition of new Tier 1 is reasonable, equitable, and not unfairly discriminatory because it provides an alternative means of achieving a rebate, which should attract more volume and liquidity to the Exchange to the benefit of market participants through increased opportunities to trade as well as enhancing price discovery.

The Exchange also believes the additional credit on Complex Orders is reasonable, equitable, and not unfairly discriminatory, as it provides an additional incentive to achieve the ACE Program Tier 2, which should attract more volume and liquidity to the Exchange to the benefit of market participants through increased opportunities to trade as well as enhancing price discovery.

The Exchange believes that the proposed amendments to the ACE Program are reasonable, equitable and not unfairly discriminatory because they would enhance the incentives to OFPs to transact Customer orders, including Complex Orders, on the Exchange, which would benefit all market participants by providing more trading opportunities and tighter spreads, even to those market participants that do not participate in the ACE Program. Additionally, the Exchange believes the proposed changes to the ACE Program are consistent with the Act because they may attract greater volume and liquidity to the Exchange, which would benefit all market participants by providing tighter quoting and better prices, all of which perfects the mechanism for a free and open market and national market system.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[13] the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes the proposed amendments to the ACE Program are pro-competitive as the proposed new qualification tier and incentive may encourage OFPs to direct Customer order flow to the Exchange and any resulting increase in volume and liquidity to the Exchange would benefit all Exchange participants through increased opportunities to trade as well as enhancing price discovery.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the degree to which fee changes in this market may impose any burden on competition is extremely limited. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[14] of the Act and subparagraph (f)(2) of Rule 19b–4[15] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[16] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2016–114 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–114. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2016–114, and should be submitted on or before January 10, 2017

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30563 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78f(b)(4) and (5).

[13] 15 U.S.C. 78f(b)(8).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(2).

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32393; 812–14606]

Minnesota Life Insurance Company, et al; Notice of Application

December 14, 2016.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of Application.

SUMMARY: Notice of Application for an order pursuant to section 11(a) of the Investment Company Act of 1940, as amended (the ''Act''), approving the terms of a proposed offer of exchange. Applicants request an order approving the terms of a proposed offer of exchange of a new flexible variable universal life insurance policy for certain outstanding flexible variable universal life insurance policies.

APPLICANTS: Minnesota Life Insurance Company (''Minnesota Life''), a stock life insurance company organized under the laws of Minnesota, Minnesota Life Variable Account (''Variable Life Account'') and Minnesota Life Individual Variable Universal Life Account (''Individual VUL Account,'' and together with the Variable Life Account, the ''Accounts''), each organized and registered under the Act as a unit investment trust and each a ''separate account'' as defined in section 2(a)(37) of the Act, and Securian Financial Services, Inc. (''Securian Financial''), a broker dealer registered under the Securities Exchange Act of 1934 (collectively, the ''Applicants'').

DATES: *Filing Dates:* The application was filed on January 29, 2016 and amended on September 7, 2016, and November 30, 2016.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 9, 2017, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants, 400 Robert Street North, St. Paul, Minnesota 55101–2098.

FOR FURTHER INFORMATION CONTACT: Bruce R. MacNeil, Senior Counsel, at (202) 551–6817, or Daniele Marchesani, Assistant Chief Counsel, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. Minnesota Life issues variable life insurance policies that are made available through the Variable Life Account (the ''Old Policies'') and the Individual VUL Account (the ''New Policy,'' together with the Old Policies, the ''Policies''). The New Policy and the Old Policies are each offered pursuant to a registration statement under the Securities Act of 1933. Securian Financial serves as principal underwriter for the Policies.

2. The Old Policies are variable adjustable life insurance policies that call for level scheduled premium payments for a specified time or until the policy becomes paid up. The New Policy is a flexible premium variable universal life insurance policy. A New Policy owner may elect to pay a planned premium, and may change the amount and frequency of such planned premium payments at any time. Applicants propose to offer eligible owners of the Old Policies the opportunity to exchange their Old Policy for the New Policy by means of an offer of exchange (the ''Exchange Offer'').[1] The differences between the New Policy and the Old Policies are described in detail in the application.

3. Applicants request that the Commission issue an order pursuant to section 11(a) of the Act approving the terms of the Exchange Offer. Any order approving the Exchange Offer would be subject to the terms and conditions stated in the application.

4. Applicants state that the Exchange Offer will remain open indefinitely until terminated upon two months' notice. Applicants further represent that the Exchange Offer will be made by providing eligible owners of Old Policies with a prospectus for the New Policy, accompanied by a letter explaining the offer and sales literature that compares the two Policies (''Offering Communication''). Each Old Policy owner who expresses an interest in the Exchange Offer will be informed of new charges, differences in rates of charges, and differences in the calculation and assessment of charges under the New Policy. The effect on Old Policy owners of certain of these differences can only be ascertained by personalized illustrations, which will be provided to an Old Policy owner at the time the Exchange Offer is made.

5. Applicants represent that no surrender charge will be deducted upon the surrender of an Old Policy in connection with an exchange, and no premium loads will be deducted from the proceeds of that surrender when applied to the purchase of the New Policy as part of the exchange. Upon acceptance of the Exchange Offer, a New Policy will be issued with the same face amount as the Old Policy surrendered in the exchange, and the cash value (of the Old Policy) will be applied without the deduction of any charges, as the initial premium for the New Policy that commences on the date of the exchange. Applicants state that each New Policy issued in the exchange will provide a 30-day free look period that commences on the date of the exchange.

6. Applicants represent that the terms of the proposed Exchange Offer do not present the abuses against which section 11 was intended to protect. Because the Exchange Offer involves a unit investment trust, Section 11(c) of the Act makes Section 11(a) inapplicable so that the requested relief is necessary to make the Exchange Offer, regardless of the basis of the exchange. As the Exchange Offer will be based on the relative net asset values or unit values of the interests being exchanged, however, it has not been proposed for the purpose of exacting additional selling charges and profits from investors by switching them from one security to another.

[1] Applicants will make the Exchange Offer available to approximately 47,100 owners of Old Policies (i) who have held their Old Policy for at least ten years, (ii) whose Old Policy was not subject to a premium increase during the three years prior to the date of the exchange, (iii) whose Old Policy has a current face amount of at least $10,000, and (iv) whose insured age is 75 or younger. Applicants state that the exchange is available only to Old Policies that do not have any outstanding loans and those loans can be repaid either in cash or by means of a partial surrender. Applicants indicate that new evidence of insurability will not be required as a condition of the exchange unless (i) the policy owner requests a face amount increase; or (ii) to add a rider that requires underwriting on the New Policy.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2016–30540 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79550; File No. SR–NYSEArca-2016–120]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade Shares of the ForceShares Daily 4X US Market Futures Long Fund and ForceShares Daily 4X US Market Futures Short Fund Under Commentary .02 to NYSE Arca Equities Rule 8.200

December 14, 2016.

On October 17, 2016, NYSE Arca, Inc. filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the ForceShares Daily 4X US Market Futures Long Fund and ForceShares Daily 4X US Market Futures Short Fund under Commentary .02 to NYSE Arca Equities Rule 8.200. The proposed rule change was published for comment in the **Federal Register** on November 4, 2016.[3] The Commission received no comments on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 19, 2016. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates February 2, 2017, as the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR–NYSEArca–2016–120).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30556 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79547; File No. SR–NYSEARCA–2016–161]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15

December 14, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 8, 2016, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15 governing the release of disciplinary information based on rules of the Exchange's affiliates New York Stock Exchange, LLC and NYSE MKT LLC. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Rule 10.17 (Release of Disciplinary Information through the Public Disclosure Program) and NYSE Arca Equities Rule 10.15 (Release of Disciplinary Information through the Public Disclosure Program) based on Rule 8313 (Release of Disciplinary Complaints, Decisions and Other Information) of the Exchange's affiliates New York Stock Exchange, LLC (''NYSE'') and NYSE MKT LLC (''NYSE MKT'').

Background

In 2013, the NYSE adopted disciplinary rules that are, with certain exceptions, substantially the same as the Financial Industry Regulatory Authority, Inc. (''FINRA'') Rule 8000 Series and Rule 9000 Series, and which set forth rules for conducting investigations and enforcement actions.[4] The NYSE disciplinary rules were implemented on July 1, 2013.[5] In 2016, NYSE MKT also adopted the Rule 8000 Series and Rule 9000 Series, which rules are, with certain exceptions, substantially the same as those of NYSE and FINRA.[6] The NYSE MKT

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 79201 (October 31, 2016), 81 FR 76977.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release Nos. 68678 (January 16, 2013), 78 FR 5213 (January 24, 2013) (SR–NYSE–2013–02) (''2013 Notice''), 69045 (March 5, 2013), 78 FR 15394 (March 11, 2013) (SR–NYSE–2013–02) (''2013 NYSE Approval Order''), and 69963 (July 10, 2013), 78 FR 42573 (July 16, 2013) (SR–NYSE–2013–49).

[5] *See* NYSE Information Memorandum 13–8 (May 24, 2013).

[6] *See* Securities Exchange Act Release Nos. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016) (SR–NYSEMKT–2016–30) (''2016 MKT Notice'').

disciplinary rules were implemented on April 15, 2016.[7]

In August 2016, the NYSE amended its Rule 8313 based on the text of FINRA Rule 8313, which provides that disciplinary complaints and decisions that meet certain criteria will be either published or made available upon request.[8] In September 2016, NYSE MKT also amended its version of Rule 8313 to adopt the text of FINRA Rule 8313.[9]

Current NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15 provide for the release to the public of certain disciplinary information concerning OTP Holders and ETP Holders and associated persons, respectively. Specifically, current NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15 provide for release of any identified disciplinary decision in response to a request. Rule 10.17(b)(1) provides for release of information to the public with respect to disciplinary decisions that: (i) Impose a suspension, cancellation or expulsion upon an OTP Holder or OTP Firm; (ii) impose the suspension or revocation of the registration of an associated person of an OTP Holder or OTP Firm; (iii) impose the suspension or barring of an OTP Holder, OTP Firm, or associated person from association with all OTP Holders or OTP Firms; (iv) impose monetary sanctions of $10,000 or more upon an OTP Holder, OTP Firm, or associated person; or (v) contain an allegation of a violation of a Designated Rule, defined as (i) Commission Rule 10b–5 under the Act, (ii) NYSE Arca Rule 11.5 (Manipulation), or (iii) NYSE Arca Rule 11.2 (Prohibited Acts). *See* NYSE Arca Rule 10.17(b)(1).

Similarly, under NYSE Arca Equities Rule 10.15, NYSE Arca Equities releases information to the public with respect to disciplinary decisions that: (i) Impose a suspension, cancellation or expulsion upon an ETP Holder; (ii) impose the suspension or revocation of the registration of an associated person of an ETP Holder; (iii) impose the suspension or barring of an ETP Holder or associated person from association with all ETP Holders; (iv) impose monetary sanctions of $10,000 or more upon an ETP Holder or associated person; or (v) contain an allegation of a violation of a Designated Rule, defined as (i) Commission Rule 10b–5 under the Act, (ii) NYSE Arca Equities Rule 6.5 (Manipulation), or (iii) NYSE Arca Equities Rule 6.2 (Prohibited Acts). *See* NYSE Arca Equities Rule 10.15(b)(1).

Current NYSE Arca and NYSE Arca Equities Rules also permit release of information to the public concerning disciplinary decisions that involve significant policy or enforcement determinations where the release of such information is deemed by the President of the Exchange to be in the public interest.[10] Further, the current Rules permit waiving the requirement to release information with respect to a disciplinary decision under extraordinary circumstances where the release of the information would violate fundamental notions of fairness or work as an injustice. Finally, the current Rules permit release to the public of information concerning any disciplinary or other decision issued pursuant to NYSE Arca Rule 10 and NYSE Arca Equities Rule 10 that is not specifically enumerated in NYSE Arca Rule 10.17(b)(1) or NYSE Arca Equities Rule 10.15(b)(1), respectively, regardless of the sanctions imposed, so long as the names of the parties and other identifying information is redacted.[11]

NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15 seek to further the same goals of transparency and disclosure as NYSE and NYSE MKT Rule 8313 (''Rule 8313'').[12]

As described below, the Exchange proposes to adopt Rule 8313 in substantially the same form as approved by the Securities and Exchange Commission (''SEC'' or ''Commission'') for NYSE and as published for immediate effectiveness by NYSE MKT. By adopting the proposed amendments to NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15, the Exchange would have uniform options and equities rules that require public release of disciplinary complaints as well as disciplinary decisions, and that are otherwise consistent with the counterpart rules of its NYSE and NYSE MKT affiliates.

Proposed Rule Change

Amendments to NYSE Arca Rule 10.17 Governing Release of Disciplinary Complaints, Decisions and Other Information Based on Rule 8313

The Exchange proposes to delete subsections (a) through (h) of current NYSE Arca Rule 10.17 in order to adopt the requirements of Rule 8313 as proposed new subsections (a) through (e).

The Exchange proposes to amend the heading to delete the clause ''Information Through the Public Disclosure Program'' and replace it with ''Complaints, Decisions and Other Information.'' As proposed, NYSE Arca Rule 10.17 would have the same title as Rule 8313.

General Standards

The Exchange proposes to add the title ''General Standards'' to subsection (a) of NYSE Arca Rule 10.17 and delete the current text of subsection (a). The text of subsections (a)(1)–(3) would also be deleted and replaced as follows.

First, proposed NYSE Arca Rule 10.17(a)(1) would provide that the Exchange shall release to the public a copy of and, at the Exchange's discretion, information with respect to, any disciplinary complaint or disciplinary decision issued by the Exchange, as defined in subsection (e) of the proposed Rule, other than minor rule violations, on its Web site. Proposed NYSE Arca Rule 10.17(a)(1) would also provide that, in response to a request, the Exchange shall release to the requesting party a copy of any identified disciplinary complaint or disciplinary decision issued by the Exchange, as defined in proposed NYSE Arca Rule 10.17(e). These proposed amendments are modeled on Rule 8313(a)(1) and, except for an inapplicable reference to the Rule 9000 Series, would be the same as the NYSE and NYSE MKT Rule.

Second, proposed NYSE Arca Rule 10.17(a)(2) would provide that the Exchange shall release to the public a copy of, and at the Exchange's discretion information with respect to, any statutory disqualification decision, notification, or notice issued by the Exchange pursuant to NYSE Arca Rules 10 or 13 that will be filed with the SEC. Proposed NYSE Arca Rule 10.17(a)(2) is modeled on Rule 8313(a)(2) but substitutes references to NYSE Arca Rules 10 and 13 for references to the NYSE and NYSE MKT Rule 9520 Series, and omits reference to the NYSE and NYSE MKT Rule 9800 Series. NYSE Arca does not have rules governing temporary cease and desist proceedings

[7] *See* NYSE MKT Information Memorandum 16–02 (March 14, 2016).

[8] *See* Securities Exchange Act Release Nos. 78664 (August 24, 2016), 81 FR 59678 (August 30, 2016) (SR–NYSE–2016–40). In adopting the FINRA disciplinary rules in 2013, the NYSE retained its long-standing practice of publishing all final disciplinary decisions, other than minor rule violations, on its Web site and did not adopt the text of FINRA Rule 8313. *See* 2013 NYSE Approval Order, 78 FR at 15395.

[9] *See* Securities Exchange Act Release Nos. 78959 (September 28, 2016), 81 FR 68481 (October 4, 2016) (SR–NYSEMKT–2016–71). In adopting its disciplinary rules in 2016, NYSE MKT also did not adopt the text of FINRA Rule 8313. *See* 2016 MKT Notice, 81 FR at 11321.

[10] *See* NYSE Arca Rule 10.17(b)(1); NYSE Arca Equities Rule 10.15(b)(1).

[11] *See id.*

[12] *See* Securities Exchange Act Release No. 53878 (May 26, 2006), 71 FR 32622, 32624 (June 6, 2006) (SR–NYSEArca–2006–02).

comparable to the Rule 9800 Series. The proposed Rule is otherwise the same as the NYSE and NYSE MKT Rule.

Third, proposed NYSE Arca Rule 10.17(a)(3) would provide that the Exchange shall release to the public information with respect to any suspension, cancellation, expulsion, or bar that constitutes final Exchange action imposed pursuant to NYSE Arca Rule 13, which governs cancellation, suspension and reinstatement and is the Exchange's analogue to the various provisions of the NYSE and NYSE MKT Rule 9550 Series referenced in Rule 8313(a)(3) governing suspensions, cancellations, expulsions and bars, with the exception of NYSE and NYSE MKT Rule 9556, which governs failure to comply with a temporary or permanent cease and desist order issued under the Rule 9200, 9300 or 9800 Series. NYSE Arca does not have rules governing temporary cease and desist proceedings comparable to Rule 9200, 9300 or 9800 Series. Like Rule 8313(a)(3), proposed NYSE Arca Rule 10.17(a)(3) would also encompass proceedings for failure to pay fines, other monetary sanctions, or costs.[13] The proposed Rule is otherwise the same as Rule 8313(a)(3).

To further conform proposed NYSE Arca Rule 10.17 to Rule 8313, the Exchange proposes to add a new subsection (a)(4) modeled on Rule 8313(a)(4) that provides that the Exchange may release to the public a copy of, and information with respect to, any decision or notice appealable to the SEC under Exchange Act Section 19(d). The proposed Rule is the same as Rule 8313(a)(4) but omits reference to any decision or notice issued pursuant to the NYSE and NYSE MKT Rule 9600 Series, which NYSE Arca has not adopted.[14]

Release Specifications

The Exchange proposes to add the title ''Release Specifications'' to subsection (b) of NYSE Arca Rule 10.17 and delete the current text of subsection (b).

The Exchange also proposes to delete the entire text of current Rule 10.17(b)(1) and 10.17(b)(2). The Exchange proposes new subsections (b)(1) and (b)(2) modeled on Rule 8313(b)(1) and (b)(2), as follows.

Proposed NYSE Arca Rule 10.17(b)(1) would provide that copies of, and information with respect to, any disciplinary complaint released to the public pursuant to paragraph (a) of the proposed Rule shall indicate that a disciplinary complaint represents the initiation of a formal proceeding by the Exchange in which findings as to the allegations in the complaint have not been made and does not represent a decision as to any of the allegations contained in the complaint. The proposed Rule would be the same as Rule 8313(b)(1).

Proposed NYSE Arca Rule 10.17(b)(2) provides that copies of, and information with respect to, any disciplinary decision or other decision, order, notification, or notice released to the public pursuant to paragraph (a) of the proposed Rule prior to the expiration of the time period provided for an appeal or call for review as permitted under Exchange rules or the Exchange Act, or while such an appeal or call for review is pending, shall indicate that the findings and sanctions imposed therein are subject to review and modification by the Exchange or the SEC. The proposed Rule would be the same as Rule 8313(b)(2).

Discretion To Redact Certain Information or Waive Publication

The Exchange has determined that, subject to limited exceptions, disciplinary information should be released to the public in unredacted form. The Exchange proposes to add a new subsection (c) to NYSE Arca Rule 10.17 entitled ''Discretion to Redact Certain Information or Waive Publication,'' modeled on Rule 8313(c)(1) and (2). With respect to the limited exceptions, proposed NYSE Arca Rule 10.17(c)(1) would provide that the Exchange reserves the right to redact, on a case-by-case basis, information that contains confidential customer information, including customer identities, or information that raises significant identity theft, personal safety, or privacy concerns that are not outweighed by investor protection concerns. The proposed Rule would be the same as Rule 8313(c)(1).

Similarly, proposed NYSE Arca Rule 10.17(c)(2) provides that, notwithstanding paragraph (a) of the proposed rule, the Exchange may determine, in its discretion, to waive the requirement to release a copy of, or information with respect to, any disciplinary complaint, disciplinary decision or other decision, order, notification, or notice under those extraordinary circumstances where the release of such information would violate fundamental notions of fairness or work an injustice. The proposed Rule would be the same as Rule 8313(c)(2).

Notice of Appeals of Exchange Decisions

The Exchange proposes to add a new subsection (d) to NYSE Arca Rule 10.17 entitled ''Notice of Appeals of Exchange Decisions to the SEC'' modeled on Rule 8313(d). Proposed NYSE Arca Rule 10.17(d) provides that the Exchange must provide notice to the public when a disciplinary decision of the Exchange is appealed to the SEC and that the notice shall state whether the effectiveness of the decision has been stayed pending the outcome of proceedings before the Commission. The proposed Rule would be the same as Rule 8313(d).

Definitions

Finally, the Exchange proposes to add a new subsection (e) to Rule 10.17 entitled ''Definitions.'' Proposed NYSE Arca Rule 10.17(e) would set forth definitions of the terms ''disciplinary complaint'' and ''disciplinary decision'' as used in the Rule, modeled on the definitions contained in Rule 8313(e).

First, Rule 10.17(e)(1) would define the term ''disciplinary complaint'' to mean any complaint issued pursuant to NYSE Arca Rule 10.4, which governs complaints. The proposed text is identical to Rule 8313(e)(1) except that the proposed Rule would substitute ''Rule 10.4'' for ''the Rule 9200 Series.''

Second, proposed NYSE Arca Rule 10.17(e)(2) would define the term ''disciplinary decision'' to mean any decision issued pursuant to NYSE Arca Rules 10.4(c) (Summary Determinations), 10.6 (Offers of Settlement), 10.7 (Decision) or 10.8 (Review), including, decisions issued by the Ethics and Business Conduct Committee (''EBCC''), a Conduct Panel, the Committee for Review (''CFR'') or the Board of Directors, and orders accepting offers of settlement. Under proposed subsection (e)(2), the term would not include decisions, notifications, or notices issued pursuant to paragraphs (a)(2), (a)(3) and (a)(4) of the proposed Rule. Proposed NYSE Arca Rule 10.17(e)(2) provides that minor rule violation plan letters issued pursuant to NYSE Arca Rule 10.12 are not subject to the proposed Rule. The proposed Rule would be the same as Rule 8313(e)(2) except that the proposed Rule would substitute references to the relevant NYSE Arca Rules for references to the NYSE and NYSE MKT Rule 9000 Series, Rule 9550 Series, Rule 9600 Series, Rule 9800 Series, Rule 9520 Series, and Rules 9216 and 9217.

[13] In that regard, Rule 8313(a)(3) references summary proceedings under NYSE and NYSE MKT Rule 8320. Unlike a proceeding under NYSE or NYSE MKT Rule 8320, a proceeding under NYSE Arca Rule 13 for failure to pay fines, other monetary sanctions, or costs could not be a summary proceeding.

[14] The NYSE and NYSE MKT Rule 9600 Series set forth procedures for seeking exemptive relief from the requirements of certain enumerated rules.

Amendments to NYSE Arca Equities Rule 10.15 Governing Release of Disciplinary Complaints, Decisions and Other Information Based on Rule 8313

The Exchange proposes parallel changes to NYSE Arca Equities Rule 10.15, which has the same structure as NYSE Arca Rule 10.17, in order to adopt the requirements of Rule 8313.

The Exchange proposes to amend the heading to delete the clause ''Information Through the Public Disclosure Program'' and replace it with ''Complaints, Decisions and Other Information.'' As proposed, NYSE Arca Equities Rule 10.15 would have the same title as Rule 8313.

General Standards

The Exchange proposes to add the title ''General Standards'' to subsection (a) of NYSE Arca Equities Rule 10.15 and delete the current text of subsection (a). The text of subsections (a)(1)–(3) would also be deleted and replaced as follows.

First, proposed NYSE Arca Equities Rule 10.15(a)(1) would provide that the Exchange shall release to the public a copy of and, at the Exchange's discretion, information with respect to, any disciplinary complaint or disciplinary decision issued by the Exchange, as defined in subsection (e) of the proposed Rule, other than minor rule violations, on its Web site. Proposed NYSE Arca Equities Rule 10.15(a)(1) would also provide that, in response to a request, the Exchange shall release to the requesting party a copy of any identified disciplinary complaint or disciplinary decision issued by the Exchange, as defined in proposed NYSE Arca Equities Rule 10.15(e). These proposed amendments are modeled on Rule 8313(a)(1) and, except for an inapplicable reference to the Rule 9000 Series, would be the same as the NYSE and NYSE MKT Rule.

Second, proposed NYSE Arca Equities Rule 10.15(a)(2) would provide that the Exchange shall release to the public a copy of, and at the Exchange's discretion information with respect to, any statutory disqualification decision, notification, or notice issued by the Exchange pursuant to NYSE Arca Equities Rules 10 or 11 that will be filed with the SEC. Proposed NYSE Arca Equities Rule 10.15(a)(2) is modeled on Rule 8313(a)(2) but substitutes references to NYSE Arca Equities Rules 10 and 11 for references to the NYSE and NYSE MKT Rule 9520 Series, and omits reference to the NYSE and NYSE MKT Rule 9800 Series. NYSE Arca Equities does not have rules governing temporary cease and desist proceedings comparable to the Rule 9800 Series. The proposed Rule is otherwise the same as the NYSE and NYSE MKT Rule.

Third, proposed NYSE Arca Equities Rule 10.15(a)(3) would provide that the Exchange shall release to the public information with respect to any suspension, cancellation, expulsion, or bar that constitutes final Exchange action imposed pursuant to NYSE Arca Equities Rule 11, which governs cancellation, suspension and reinstatement and is the Exchange's analogue to the various provisions of the NYSE and NYSE MKT Rule 9550 Series referenced in Rule 8313(a)(3) governing suspensions, cancellations, expulsions and bars, with the exception of NYSE and NYSE MKT Rule 9556, which governs failure to comply with a temporary or permanent cease and desist order issued under the Rule 9200, 9300 or 9800 Series. NYSE Arca Equities does not have rules governing temporary cease and desist proceedings comparable to Rule 9200, 9300 or 9800 Series. Like Rule 8313(a), proposed NYSE Arca Equities Rule 10.15(a)(3) would also encompass proceedings for failure to pay fines, other monetary sanctions, or costs.[15] The proposed Rule is otherwise the same as Rule 8313(a)(3).

To further conform proposed NYSE Arca Equities Rule 10.15 to Rule 8313, the Exchange proposes to add a new subsection (a)(4) modeled on Rule 8313(a)(4) that provides that the Exchange may release to the public a copy of, and information with respect to, any decision or notice appealable to the SEC under Exchange Act Section 19(d). The proposed Rule is the same as Rule 8313(a)(4) but omits reference to any decision or notice issued pursuant to the NYSE and NYSE MKT Rule 9600 Series, which NYSE Arca Equities has not adopted.[16]

Release Specifications

The Exchange proposes to add the title ''Release Specifications'' to subsection (b) of NYSE Arca Equities Rule 10.15 and delete the current text of subsection (b).

The Exchange also proposes to delete the entire text of current Rule 10.15(b)(1) and 10.15(b)(2). The Exchange proposes new subsections (b)(1) and (b)(2) modeled on Rule 8313(b)(1) and (b)(2), as follows.

Proposed NYSE Arca Equities Rule 10.15(b)(1) would provide that copies of, and information with respect to, any disciplinary complaint released to the public pursuant to paragraph (a) of the proposed Rule shall indicate that a disciplinary complaint represents the initiation of a formal proceeding by the Exchange in which findings as to the allegations in the complaint have not been made and does not represent a decision as to any of the allegations contained in the complaint. The proposed Rule would be the same as Rule 8313(b)(1).

Proposed NYSE Arca Equities Rule 10.15(b)(2) provides that copies of, and information with respect to, any disciplinary decision or other decision, order, notification, or notice released to the public pursuant to paragraph (a) of the proposed Rule prior to the expiration of the time period provided for an appeal or call for review as permitted under Exchange rules or the Exchange Act, or while such an appeal or call for review is pending, shall indicate that the findings and sanctions imposed therein are subject to review and modification by the Exchange or the SEC. The proposed Rule would be the same as Rule 8313(b)(2).

Discretion To Redact Certain Information or Waive Publication

The Exchange has determined that, subject to limited exceptions, disciplinary information should be released to the public in unredacted form. The Exchange proposes to add a new subsection (c) to NYSE Arca Equities Rule 10.15 entitled ''Discretion to Redact Certain Information or Waive Publication,'' modeled on Rule 8313(c)(1) and (2). With respect to the limited exceptions, proposed NYSE Arca Equities Rule 10.15(c)(1) would provide that the Exchange reserves the right to redact, on a case-by-case basis, information that contains confidential customer information, including customer identities, or information that raises significant identity theft, personal safety, or privacy concerns that are not outweighed by investor protection concerns. The proposed Rule would be the same as Rule 8313(c)(1).

Similarly, proposed NYSE Arca Equities Rule 10.15(c)(2) provides that, notwithstanding paragraph (a) of the proposed rule, the Exchange may determine, in its discretion, to waive the requirement to release a copy of, or information with respect to, any disciplinary complaint, disciplinary decision or other decision, order, notification, or notice under those extraordinary circumstances where the release of such information would

[15] In that regard, Rule 8313(a) references summary proceedings under NYSE and NYSE MKT Rule 8320. Unlike a proceeding under NYSE or NYSE MKT Rule 8320, a proceeding under NYSE Arca Equities Rule 11 for failure to pay fines, other monetary sanctions, or costs could not be a summary proceeding.

[16] *See* note 14, *supra.*

violate fundamental notions of fairness or work an injustice. The proposed Rule would be the same as Rule 8313(c)(2).

Notice of Appeals of Corporation Decisions

The Exchange proposes to add a new subsection (d) to NYSE Arca Equities Rule 10.15 entitled ''Notice of Appeals of Corporation Decisions to the SEC'' modeled on Rule 8313(d). Proposed NYSE Arca Equities Rule 10.15(d) provides that the Exchange must provide notice to the public when a disciplinary decision of the Exchange is appealed to the SEC and that the notice shall state whether the effectiveness of the decision has been stayed pending the outcome of proceedings before the Commission. The proposed Rule would be the same as Rule 8313(d).

Definitions

Finally, the Exchange proposes to add a new subsection (e) to NYSE Arca Equities Rule 10.15 entitled ''Definitions.'' Proposed NYSE Arca Equities Rule 10.15(e) would set forth definitions of the terms ''disciplinary complaint'' and ''disciplinary decision'' as used in the Rule, modeled on the definitions contained in Rule 8313(e).

First, Rule NYSE Arca Equities 10.15(e)(1) would define the term ''disciplinary complaint'' to mean any complaint issued pursuant to NYSE Arca Rule 10.4, which governs complaints. The proposed text is identical to Rule 8313(e)(1) except that the proposed Rule would substitute ''Rule 10.4'' for ''the Rule 9200 Series.''

Second, proposed NYSE Arca Equities Rule 10.15(e)(2) would define the term ''disciplinary decision'' to mean any decision issued pursuant to NYSE Arca Equities Rules 10.4 (c) (Summary Proceedings), 10.6 (Offers of Settlement), 10.7 (Decision), or 10.8 (Review), including, decisions issued by the Business Conduct Committee (''BCC''), a Conduct Panel, the CFR or the Board of Directors,[17] and orders accepting offers of settlement. Under proposed subsection (e)(2), the term would not include decisions, notifications, or notices issued pursuant to paragraphs (a)(2), (a)(3) and (a)(4) of the proposed Rule. Finally, proposed NYSE Arca Equities Rule 10.15(e)(2) provides that minor rule violation plan letters issued pursuant to NYSE Arca Equities Rule 10.12 are not subject to the proposed Rule. The proposed Rule would be the same as Rule 8313(e)(2) except that the proposed Rule would substitute references to the relevant NYSE Arca Equities Rules for references to the NYSE and NYSE MKT Rule 9000 Series, Rule 9550 Series, Rule 9600 Series, Rule 9800 Series, Rule 9520 Series, and Rules 9216 and 9217.

* * * * *

The Exchange believes that greater access to information regarding disciplinary actions provides valuable guidance and information to permit holders, associated persons, other regulators, and investors. Further, releasing detailed disciplinary information to the public can serve to deter and prevent future misconduct and improve overall business standards in the securities industry as well as allowing investors to consider firms' and representatives' disciplinary histories when considering whether to engage in business with them.

Publishing more detailed information than the Exchange currently does would also allow permit holders to utilize that information to educate associated persons as to compliance matters, highlight potential violations and related sanctions, as well as inform the firms' compliance procedures involving similar business lines, products, or industry practices. Finally, the Exchange believes that any member organization or individual facing allegations of rule violations would also have access to more information to gain greater insight on related facts and sanctions.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[18] in general, and furthers the objectives of Section 6(b)(5) of the Act,[19] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of NYSE Arc [sic] and NYSE Arca Equities. In particular, the Exchange believes that the proposed changes to NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15 regarding release of disciplinary complaints, decisions and other information are consistent with Section 6(b) of the Act because they would establish general standards for the release of disciplinary information to the public in line with those in effect with its affiliates and would provide greater access to information regarding the Exchange's disciplinary actions by enabling the Exchange to also release disciplinary complaints, which current NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15 do not provide for.

For the same reasons, the Exchange believes that the proposed changes to NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15 further the objectives of Section 6(b)(5) of the Act[20] because the changes are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

In particular, the proposed amendments to NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15 further the objectives of Section 6(b)(5) of the Act by providing greater clarity, consistency, and transparency regarding the release of disciplinary complaints, decisions and other information to the public. By adopting the proposed amendments to NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15 modeled on the NYSE's and NYSE MKT's rules, the Exchange would establish standards for the release of disciplinary information to the public in line with those in effect with its affiliates that provide greater access to information regarding the Exchange's disciplinary actions. The Exchange would also describe the scope of information subject to proposed NYSE Arca Rule 10.17 and NYSE Arca Equities Rule 10.15. The Exchange believes that this proposed rule change promotes greater transparency with respect to the Exchange's disciplinary process, and that the proposed rule change provides greater access to information regarding its disciplinary actions because, as noted, it would require the Exchange to release copies of disciplinary complaints, and also provides valuable guidance and information to permit holders, associated persons, other regulators, and the investing public.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change is not intended to address competitive issues, but rather it is designed to (1) enhance the Exchange's rules governing the release of disciplinary complaints,

[17] NYSE Arca Equities Rule 10.8(c) and (d) refer to the ''NYSE Arca Board of Governors,'' an outdated reference that has been changed to ''NYSE Arca Board of Directors'' elsewhere in the rules. *See* Securities Exchange Act Release No. 77898 (May 24, 2016), 81 FR 34404 (May 31, 2016) (SR–NYSEArca–2016–11).

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78f(b)(5).

decisions and other information to the public, thereby providing greater clarity and consistency and resulting in less burdensome and more efficient regulatory compliance and facilitating performance of regulatory functions, and (2) provide greater harmonization among NYSE Arca, NYSE Arca Equities, NYSE and NYSE MKT rules of similar purpose.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[21] and Rule 19b–4(f)(6) thereunder.[22]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2016–161 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–NYSEARCA–2016–161. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2016–161 and should be submitted on or before January 10, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30553 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

[21] 15 U.S.C. 78s(b)(3)(A)(iii).

[22] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32392; 812–14653]

Equus Total Return, Inc.; Notice of Application

December 14, 2016.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 23(a), 23(b) and 63 of the Act; under section 61(a)(3)(B) of the Act permitting awards of common stock purchase options to non-employee directors; under section 57(i) of the Act and rule 17d–1 under the Act permitting certain joint transactions otherwise prohibited by section 57(a)(4) of the Act; and under section 23(c)(3) of the Act for an exemption from section 23(c) of the Act.

Summary of the Application: Equus Total Return, Inc. (''Applicant'' or the ''Fund'') requests an order that would permit Applicant to (a) issue restricted shares of its common stock from treasury (''Restricted Stock'') or common stock purchase options (''Options'') as part of the compensation package for certain participants in its 2016 Equity Incentive Plan (the ''Plan''), (b) grant Options to directors who are not also employees or officers of the Applicant (''Non-Employee Directors'') under the Plan, (c) withhold shares of the Applicant's common stock or purchase shares of Applicant's common stock from participants to satisfy tax withholding obligations relating to the vesting of Restricted Stock or the exercise of Options that will be granted pursuant to the Plan, and (d) permit participants to pay the exercise price of Options with shares of Applicant's common stock.

Filing Dates: The application was filed on May 26, 2016, and amended on August 25, 2016, September 29, 2016 and November 23, 2016.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 9, 2017, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the

Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicant, 700 Louisiana Street, 48th Floor, Houston, TX 77002.

FOR FURTHER INFORMATION CONTACT: Robert Shapiro, Senior Counsel, at (202) 551–7758, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicant's Representations

1. Applicant is an internally managed closed-end investment company that has elected to be regulated as a business development company (''BDC'') under the Act.[1] Applicant represents that it has a total return investment strategy that seeks to provide the highest total return, consisting of capital appreciation and current income. The Fund attempts to maximize the return to shareholders in the form of current investment income and long-term capital gains by investing in the debt and equity securities of companies with a total enterprise value of between $5.0 million and $75.0 million, although the Fund may engage in transactions with smaller or larger investee companies from time to time. Shares of Applicant's common stock are traded on the New York Stock Exchange under the symbol ''EQS.'' As of November 23, 2016, there were 12,673,646 shares of Applicant's common stock outstanding.

2. Applicant is governed by a seven-member board of directors (the ''Board'') of whom five are not ''interested persons'' of Applicant within the meaning of section 2(a)(19) of the Act.

3. Applicant believes that, because the market for superior investment professionals is highly competitive, Applicant's successful performance depends on its ability to offer fair compensation packages to its professionals that are competitive with those offered by other investment management businesses. Applicant states that the ability to offer equity-based compensation to its employees and Non-Employee Directors, which both aligns employee and Board behavior with stockholder interests and provides a retention tool, is vital to Applicant's future growth and success.

4. On April 15, 2016, by unanimous vote, the Board adopted the Plan and recommended the same for approval by the Fund's shareholders, which approval was granted at the annual meeting of the Fund's shareholders held on June 13, 2016. The Plan became effective as of the date of such approval. The Plan authorizes the issuance of Options and Restricted Stock to the Applicant's directors, including Non-Employee Directors, officers and other employees (''Participants'').

5. The Plan will be administered by the Board or the Compensation Committee of the Board (the Board or the Compensation Committee discharged to administer the Plan is referred to as the ''Plan Administrator''). The Plan Administrator has full power to select, from among the individuals eligible for awards, the individuals to whom awards will be granted, to make any combination of awards to Participants, and to determine the specific terms and conditions of each award, subject to the provisions of the Plan. Each issuance of Restricted Stock under the Plan will be approved by the required majority, as defined in section 57(o) of the Act, of the Fund's directors (the ''Required Majority'')[2] on the basis that the issuance is in the best interests of the Fund and its shareholders. The date on which the Required Majority approves an issuance of Restricted Stock will be deemed the date on which the subject Restricted Stock is granted.

6. As described in more detail in the application, under the Plan, upon issuance of the requested order, each Non-Employee Director will receive a one-time grant of up to 21,000 shares of Restricted Stock and 42,000 Options. One fourth of the Restricted Stock and one fourth of the Options will vest immediately upon their grant. If a Non-Employee Director remains in service on the Board, the remainder of his or her Restricted Stock and Options will vest upon the earliest to occur of (i) a change in control of the Fund, or (ii) ratably over a three-year period from the date of grant. The awards of Restricted Stock and Options to Non-Employee Directors contemplated by the Plan are intended to be on a one-time basis. Future awards of Restricted Stock and/or Options under the Plan to the Non-Employee Directors are not contemplated, and any such future awards or changes to the amounts set forth in the application may not be made without Commission approval.

7. The Plan will authorize the issuance of Options and Restricted Stock subject to certain forfeiture restrictions. The Restricted Stock will be subject to restrictions on transferability and other restrictions as required by the Plan Administrator from time to time. Except to the extent restricted by the Plan Administrator, a Participant granted an award of Restricted Stock will have all the rights of any other shareholder, including the right to vote the Restricted Stock and the right to receive dividends. During the restriction period (*i.e.,* prior to the lapse of applicable forfeiture provisions), the Restricted Stock generally may not be sold, transferred, pledged, hypothecated, margined, or otherwise encumbered by the Participant. Except as the Plan Administrator otherwise determines, upon termination of a Participant's service as a director, officer, and employee of the Fund during the applicable restriction period, Restricted Stock, for which forfeiture provisions have not lapsed at the time of such termination, shall be forfeited.

8. Applicant has reserved 2,534,728 shares for issuance under the Plan, whether as awards of Restricted Stock or as Options. If all of the shares of Restricted Stock under the Plan were issued and all Options issued under the Plan were issued and subsequently exercised, the total amount of additional common stock issued from treasury would equal 20% of the Fund's shares of common stock presently outstanding. Any shares withheld from an award, either to satisfy tax withholding requirements, or pursuant to the delivery of shares of common stock or Restricted Stock upon the exercise of Options, will not be returned to the Plan reserve. The combined maximum amount of Restricted Stock that may be issued under the Plan to all Participants will be 10% of the outstanding common shares of the Fund on the effective date of the Plan, plus 10% of the number of shares issued or delivered by the Fund

[1] Section 2(a)(48) of the Act defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

[2] Section 57(o) of the Act provides that the term ''required majority,'' when used with respect to the approval of a proposed transaction, plan, or arrangement, means both a majority of a BDC's directors or general partners who have no financial interest in such transaction, plan, or arrangement and a majority of such directors or general partners who are not interested persons of such company.

(other than pursuant to compensation plans) during the term of the Plan.[3] The maximum award of Options granted to any one individual will not exceed 1,000,000 shares of common stock (subject to adjustment for stock splits and similar events) for any calendar year period, net of any shares canceled or redeemed in connection with any tax withholding. The maximum award of shares of Restricted Stock issued to any one individual will not exceed 500,000 shares of common stock (subject to adjustment for stock splits and similar events) for any calendar year period, net of any shares canceled or redeemed in connection with any tax withholding.

9. The Plan permits the granting of (1) Options to purchase common stock intended to qualify as incentive stock options under Section 422 of the Code and (2) Options that do not so qualify. Options granted under the Plan will be non-qualified options if they fail to qualify as incentive options or exceed the annual limit on incentive stock options. Incentive stock options may only be granted to employees of the Fund and its subsidiaries. Non-qualified options may be granted to any persons eligible to receive incentive options, officers of the Fund and, subject to the requested order, to Non-Employee Directors. The option exercise price of each Option will be determined by the Plan Administrator but may not be less than 100% of the fair market value of the common stock on the date of grant, or if required under the Act, not less than the net asset value of the common stock on the date of grant. Fair market value for this purpose will be the last reported sale price of the shares of common stock on the New York Stock Exchange on the date of grant. The term of each Option will be fixed by the Plan Administrator and may not exceed ten years from the date of grant. The Plan Administrator will determine at what time or times each Option may be exercised.

10. The Plan provides that the Fund is authorized to withhold stock (in whole or in part) from any award of Restricted Stock granted in satisfaction of a Participant's tax obligations. In addition, as discussed more fully in the application, the exercise of Options will result in the recipient being deemed to have received compensation in the amount by which the fair market value of the shares of the Fund's common stock, determined as of the date of exercise, exceeds the exercise price. Accordingly, Applicant requests relief to withhold shares of its common stock or purchase shares of its common stock from Participants to satisfy tax withholding obligations related to the vesting of Restricted Stock or exercise of Options that will be granted pursuant to the Plan. Applicant also requests an exemption to permit Participants to pay the exercise price of Options with shares of the Fund's common stock.

Applicant's Legal Analysis

Sections 23(a) and (b), Section 63

1. Section 63 of the Act makes applicable to BDCs the provisions of section 23(a) of the Act, which generally prohibit a registered closed-end investment company from issuing securities for services or for property other than cash or securities. These provisions would prohibit the issuance of Restricted Stock as a part of the Plan.

2. Section 23(b) of the Act generally prohibits a registered closed-end investment company from selling any common stock of which it is the issuer at a price below its current net asset value. Section 63(2) of the Act makes section 23(b) applicable to BDCs unless certain conditions are met. Because Restricted Stock that would be granted under the Plan would not meet the terms of section 63(2), sections 23(b) and 63 would prevent the issuance of Restricted Stock.

3. Section 6(c) provides, in part, that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes thereof, from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicant requests an order pursuant to section 6(c) of the Act granting an exemption from the provisions of sections 23(a), 23(b) and 63 of the Act. Applicant states that the Plan would not violate the concerns underlying these sections, which include: (a) Preferential treatment of investment company insiders and the use of options and other rights by insiders to obtain control of the investment company; (b) complication of the investment company's structure that made it difficult to determine the value of the company's shares; and (c) dilution of shareholders' equity in the investment company. Applicant asserts that the Plan does not raise concerns about preferential treatment of Applicant's insiders because the Plan is a bona fide compensation plan of the type that is common among corporations generally. In addition, Applicants state that investors in the Fund will be protected to at least the same extent that they are currently protected under section 61(a)(3) of the Act. Applicant also asserts that the issuance of Restricted Stock would not become a means for insiders to obtain control of Applicant because the maximum amount of Restricted Stock that may be issued under the Plan at any one time will be ten percent of the outstanding shares of common stock of Applicant.

5. Applicant further states that the Plan will not unduly complicate Applicant's capital structure because equity-based incentive compensation arrangements are widely used among corporations and commonly known to investors. Applicant notes that the Plan has been submitted to and approved by the Fund's stockholders. Applicant represents that the proxy materials submitted to Applicant's stockholders contain a concise ''plain English'' description of the Plan and its potential dilutive effect. Applicant also states that on an ongoing basis it will comply with the proxy disclosure requirements in Item 10 of Schedule 14A under the Securities Exchange Act of 1934. Applicant further notes that the Plan will be disclosed to investors in accordance with the requirements of the Form N–2 registration statement for closed-end investment companies and pursuant to the standards and guidelines adopted by the Financial Accounting Standards Board for operating companies. Applicant also will comply with the disclosure requirements for executive compensation plans applicable to BDCs.[4] Applicant thus concludes that the Plan will be adequately disclosed to investors and appropriately reflected in the market value of Applicant's shares.

6. Applicant acknowledges that awards granted under the Plan may have a dilutive effect on the stockholders' equity per share in Applicant, but believes that effect would be outweighed by the anticipated benefits of the Plan to Applicant and its stockholders. Applicant asserts that availability of Restricted Stock and

[3] For purposes of calculating compliance with this limit, the Fund will count as Restricted Stock all shares of the Fund's common stock that are issued pursuant to the Plan less any shares that are forfeited back to the Fund and cancelled as a result of forfeiture restrictions not lapsing.

[4] See Executive Compensation and Related Party Disclosure, Securities Act Release No. 8655 (Jan. 27, 2006) (proposed rule); Executive Compensation and Related Party Disclosure, Securities Act Release No. 8732A (Aug. 29, 2006) (final rule and proposed rule), as amended by Executive Compensation Disclosure, Securities Act Release No. 8756 (Dec. 22, 2006) (adopted as interim final rules with request for comments).

Options would enable the Fund to substitute or augment the overall cash compensation to directors, officers, and employees, and compensate its management for the loss of the carried interest that the Fund's investment professionals would receive at a private equity firm, among other things. Applicant further asserts that the Plan will enhance the Fund's ability to compensate its personnel competitively, while also aligning the interests of its personnel with the success of the Fund and the interests of its shareholders and preserving cash for further investment. In addition, Applicant states that its stockholders will be further protected by the conditions to the requested order that assure continuing oversight of the operation of the Plan by the Plan Administrator.

Section 61(a)(3)(B)

7. Section 63(3) of the Act permits a BDC to sell its common stock at a price below current net asset value upon the exercise of any option issued in accordance with section 61(a)(3). Section 61(a)(3)(B) provides, in pertinent part, that a BDC may issue common stock purchase options to non-employee directors pursuant to an executive compensation plan if: (i) The options expire by their terms within ten years; (ii) the exercise price of such options is not less than the current market value at the date of issuance or, if no such market value exists, the then current net asset value of such underlying voting securities; (iii) the proposal to issue such options is authorized by the company's stockholders, and is approved by order of the Commission, upon application, on the basis that the terms of the proposal are fair and reasonable and do not involve overreaching of the company or its stockholders; (iv) the options are not transferable except for disposition by gift, will or intestacy; (v) no investment adviser of the company receives any compensation described in section 205(a)(1) of the Investment Advisers Act of 1940 (*e.g.,* ''performance-based'' compensation), except to the extent permitted by section 205(b)(1) or (2) thereunder; and (vi) that the company does not have a profit-sharing plan described in section 57(n) of the Act.

8. In addition, section 61(a)(3) provides that the amount of the BDC's voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance may not exceed 25% of the BDC's outstanding voting securities, except that if the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights issued to the BDC's directors, officers and employees pursuant to any executive compensation plan would exceed 15% of the BDC's outstanding voting securities, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options and rights at the time of issuance will not exceed 20% of the outstanding voting securities of the BDC.

9. Applicant represents that its proposal to grant Options to Non-Employee Directors meets all of the requirements of section 61(a)(3) of the Act. Applicant believes that the Options to be granted to Non-Employee Directors under the Plan will provide significant at-risk incentives to the Fund's Non-Employee Directors to remain on the Board and to devote their best efforts to the success of the Fund's business and the enhancement of stockholder value in the future. Applicant state that the Options will also provide a means for Non-Employee Directors to increase their ownership interests in the Fund, thereby ensuring close alignment of their interests with those of the Fund and its stockholders. Applicant asserts that by providing incentives in the form of such Options to its Non-Employee Directors, the Fund will be better able to maintain continuity in the membership of its Board and to attract, when necessary, and to retain as Non-Employee Directors the highly experienced, successful and motivated business and professional people that are critical to the Fund's success as a BDC.

10. As noted above, Applicant states that the maximum number of voting securities of the Fund that would result from the exercise of all Options issuable under the Plan, combined with all shares of Restricted Stock that would be possible to award under the Plan is not more than 20% of the Fund's outstanding shares of common stock, or 2,534,728 shares, which amount is below the percentage limitations in the Act. Applicant asserts that, given the relatively small number of Restricted Shares and Options that are proposed to be issued to Non-Employee Directors under the Plan, even if all Options granted thereunder were to vest and become immediately exercisable, the issuance of these securities under the Plan should not have a substantial dilutive effect on the net asset value of the common stock of the Fund.

Section 57(a)(4), Rule 17d–1

11. Section 57(a) proscribes certain transactions between a BDC and persons related to the BDC in the manner described in section 57(b) (''57(b) persons''), absent a Commission order. Section 57(a)(4) generally prohibits a 57(b) person from effecting a transaction in which the BDC is a joint participant absent such an order. Rule l7d–1, made applicable to BDCs by section 57(i) to the extent the Commission has not adopted a rule under section 57(a)(4), generally proscribes participation in a ''joint enterprise or other joint arrangement or profit-sharing plan,'' which includes a stock option or purchase plan. Officers, employees and directors of a BDC are 57(b) persons. Thus, the issuance of shares of Restricted Stock or Options could be deemed to involve a joint transaction involving a BDC and a 57(b) person in contravention of section 57(a)(4). Rule 17d–1(b) provides that, in considering relief pursuant to the rule, the Commission will consider (a) whether the participation of the BDC in a joint enterprise is consistent with the policies and purposes of the Act and (b) the extent to which such participation is on a basis different from or less advantageous than that of other participants.

12. Applicant requests an order pursuant to section 57(i) of the Act and rule 17d–1 under the Act to permit Applicant to issue Restricted Stock and Options under the Plan. Applicant acknowledges that its role is necessarily different from the other Participants because the other Participants are its directors, officers, and employees. Applicant asserts, however, that the Fund's participation with respect to the Plan will not be ''less advantageous'' than that of the Participants. Applicant states that the Fund, either directly or indirectly, is responsible for the compensation of the Participants; the Plan is simply the Fund's chosen method of providing such compensation. Moreover, Applicant believes that the Plan will benefit the Fund by enhancing its ability to attract and retain highly qualified personnel. Applicant further asserts that the Plan, although benefiting the Participants and the Fund in different ways, is in the interest of the Fund's stockholders, because it will help align the interests of its directors, officers, and employees with those of its stockholders, which will encourage conduct on the part of these individuals to produce a better return for the Fund's stockholders. Applicant also states that section 57(j)(1) of the Act expressly permits any director, officer or employee of a BDC to acquire warrants, options and rights to purchase voting securities of such BDC, and the securities issued upon the

exercise or conversion thereof, pursuant to an executive compensation plan which meets the requirements of section 61(a)(3)(B) of the Act. Applicant submits that the issuance of Restricted Stock pursuant to the Plan poses no greater risk to stockholders than the issuances permitted by section 57(j)(1) of the Act.

Section 23(c)

13. Section 23(c) of the Act, which is made applicable to BDCs by section 63 of the Act, generally prohibits a BDC from purchasing any securities of which it is the issuer except in the open market pursuant to tenders, or under other circumstances as the Commission may permit to ensure that the purchases are made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant states that the withholding or purchase of shares of Restricted Stock and common stock in payment of applicable withholding tax obligations or of common stock in payment for the exercise price of an Option might be deemed to be purchases by the Fund of its own securities within the meaning of section 23(c) and therefore prohibited by the Act.

14. Section 23(c)(3) of the Act permits a BDC to purchase securities of which it is the issuer in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant believes that the requested relief meets the standards of section 23(c)(3).

15. Applicant submits that these purchases will be made in a manner that does not unfairly discriminate against Applicant's stockholders because Applicant will use the closing sales price of its shares of common stock on the New York Stock Exchange (or any primary exchange on which its shares of common stock may be traded in the future) as the ''fair market value'' of its common stock under the Plan (*i.e.,* the public market price on the date of grant of Restricted Stock and the date of grant of Options). Applicant submits that because all transactions with respect to the Plan will take place at the public market price for the Fund's common stock, these transactions will not be significantly different than could be achieved by any stockholder selling in a transaction on the New York Stock Exchange. Applicant represents that no transactions will be conducted pursuant to the requested order on days where there are no reported market transactions involving Applicant's shares.

16. Applicant represents that the withholding provisions in the Plan do not raise concerns about preferential treatment of Applicant's insiders because the Plan is a bona fide compensation plan of the type that is common among corporations generally. Furthermore, the vesting schedule is determined at the time of the initial grant of the Restricted Stock and the option exercise price is determined at the time of the initial grant of the Options. Applicant represents that all purchases may be made only as permitted by the Plan, which has been approved by the Fund's stockholders. Applicant believes that granting the requested relief would be consistent with the policies underlying the provisions of the Act permitting the use of equity compensation as well as prior exemptive relief granted by the Commission under section 23(c) of the Act.

Applicant's Conditions

Applicant agrees that the order granting the requested relief will be subject to the following conditions:

1. The Plan will be authorized by the Fund's shareholders.

2. Each issuance of Restricted Stock to a Participant will be approved by the Required Majority on the basis that such grant is in the best interest of the Fund and its shareholders.

3. The amount of voting securities that would result from the exercise of all of the Fund's outstanding warrants, Options and rights, together with any Restricted Stock issued pursuant to the Plan, at the time of issuance shall not exceed 25% of the outstanding voting securities of the Fund, except that if the amount of voting securities that would result from the exercise of all of the Fund's outstanding warrants, Options and rights issued to the Fund's directors, officers and employees, together with any Restricted Stock issued pursuant to the Plan, would exceed 15% of the outstanding voting securities of the Fund, then the total amount of voting securities that would result from the exercise of all outstanding warrants, Options and rights, together with any Restricted Stock issued pursuant to the Plan, at the time of issuance shall not exceed 20% of the outstanding voting securities of the Fund.

4. The maximum amount of shares of Restricted Stock that may be issued under the Plan will be 10% of the outstanding shares of common stock of the Fund on the effective date of the Plan plus 10% of the number of shares of the Fund's common stock issued or delivered by the Fund (other than pursuant to compensation plans) during the term of the Plan.

5. The Board will review the Plan at least annually. In addition, the Board will review periodically the potential impact that the issuance of Restricted Stock under the Plan could have on the Fund's earnings and net asset value per share, such review to take place prior to any decisions to grant Restricted Stock under the Plan, but in no event less frequently than annually. Adequate procedures and records will be maintained to permit such review. The Board will be authorized to take appropriate steps to ensure that the issuance of Restricted Stock under the Plan will be in the best interest of the Fund and its shareholders. This authority will include the authority to prevent or limit the granting of additional Restricted Stock under the Plan. All records maintained pursuant to this condition will be subject to examination by the Commission and its staff.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2016–30539 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79543; File No. 10–227]

In the Matter of the Application of MIAX PEARL, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission

December 13, 2016.

I. Introduction

On August 12, 2016, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange'') submitted to the Securities and Exchange Commission (''Commission'') an application for Registration as a National Securities Exchange (''Form 1 Application'') under Section 6 of the Securities Exchange Act of 1934 (''Exchange Act''), seeking registration as a national securities exchange under Section 6 of the Exchange Act.[1] Notice of the Form 1 Application was published for comment in the **Federal Register** on September 14, 2016,[2] and the Commission received no comments.

[1] 15 U.S.C. 78f.

[2] *See* Securities Exchange Act Release No. 78793 (September 8, 2016), 81 FR 63238 (''Notice'').

II. Statutory Standards

Under Sections 6(b) and 19(a) of the Act,[3] the Commission shall by order grant an application for registration as a national securities exchange if the Commission finds, among other things, that the proposed exchange is so organized and has the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

As discussed in greater detail below, the Commission finds that MIAX PEARL's application for exchange registration meets the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of MIAX PEARL are consistent with Section 6 of the Act in that, among other things, they assure a fair representation of the Exchange's members in the selection of its directors and administration of its affairs and provide that one or more directors will be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer;[4] and that they are designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, or broker-dealers.[5] Finally, the Commission finds that MIAX PEARL's proposed rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[6]

III. Discussion

A. Governance of MIAX PEARL

1. MIAX PEARL Board of Directors

The board of directors of MIAX PEARL (''Exchange Board'' or ''MIAX PEARL Board'') will be its governing body and will possess all of the powers necessary for the management of its business and affairs, including governance of MIAX PEARL as a self-regulatory organization (''SRO'').[7]

Under the By-Laws of MIAX PEARL (''MIAX PEARL By-Laws''):[8]

- The Exchange Board will be composed of not less than ten directors;[9]
- One director will be the Chief Executive Officer of MIAX PEARL;[10]
- The number of Non-Industry Directors,[11] including at least one Independent Director,[12] will equal or exceed the sum of the number of Industry Directors[13] and Member Representative Directors;[14] and
- At least 20% of the directors on the Exchange Board will be Member Representative Directors.[15]

For the interim board (discussed below), and subsequently at the first annual meeting and each annual meeting thereafter, Miami International Holdings, Inc. (''Miami Holdings''), as the sole LLC Member of MIAX PEARL, will elect the MIAX PEARL Board pursuant to the MIAX PEARL By-Laws.[16] In addition, Miami Holdings will appoint the initial Nominating Committee[17] and Member Nominating Committee,[18] consistent with each committee's compositional requirements,[19] to nominate candidates for election to the Exchange Board. Each of the Nominating Committee and Member Nominating Committee, after completion of its respective duties for nominating directors for election to the Board for that year, shall nominate candidates to serve on the succeeding year's Nominating Committee or Member Nominating Committee, as applicable. Additional candidates for the Member Nominating Committee may be nominated and elected by MIAX PEARL members pursuant to a petition process.[20]

The Nominating Committee will nominate candidates for each director position, and Miami Holdings, as the sole LLC Member, will elect those directors. For Member Representative Director positions, the Nominating Committee will nominate those candidates submitted to it, and approved, by the Member Nominating Committee.[21] Additional candidates,

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[3] 15 U.S.C. 78f(b) and 15 U.S.C. 78s(a), respectively.

[4] *See* 15 U.S.C. 78f(b)(3).

[5] *See* 15 U.S.C. 78f(b)(5).

[6] *See* 15 U.S.C. 78f(b)(8).

[7] *See* MIAX PEARL By-Laws, Section 2.1. *See also* MIAX PEARL LLC Agreement, Section 8(b).

[8] The MIAX PEARL By-Laws are included in the Amended and Restated Limited Liability Company Agreement of MIAX PEARL (''MIAX PEARL LLC Agreement'').

[9] *See* MIAX PEARL By-Laws, Article II, Section 2.2(a).

[10] *See* MIAX PEARL By-Laws, Article II, Section 2.2(b).

[11] ''Non-Industry Director'' means a Director who is an Independent Director or any other individual who would not be an Industry Director. *See* MIAX PEARL By-Laws, Article I(aa).

[12] ''Independent Director'' means a ''Director who has no material relationship with [MIAX PEARL] or any affiliate of [MIAX PEARL], or any [MIAX PEARL member] or any affiliate of any such [MIAX PEARL member]; *provided,* however, that an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of [MIAX PEARL] or [Miami Holdings].'' *See* MIAX PEARL By-Laws, Article I(p).

[13] An ''Industry Director'' is, among other things, a Director that is or has served within the prior three years as an officer, director, employee, or owner of a broker or dealer, as well as any Director who has, or has had, a consulting or employment relationship with MIAX PEARL or any affiliate of MIAX PEARL within the prior three years. *See* MIAX PEARL By-Laws, Article I(r). This definition is consistent with what the Commission has approved for other exchanges. *See* Securities Exchange Act Release Nos. 68341 (December 3, 2012), 77 FR 73065 (December 7, 2012) (File No. 10–207) (order granting the registration of MIAX Exchange) (''MIAX Order''); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10–182) (order granting the registration of BATS Exchange, Inc.) (''BATS Order''); and 66871 (April 27, 2012), 77 FR 26323 (May 3, 2012) (File No. 10–206) (order granting the registration of BOX Options Exchange LLC) (''BOX Order'').

[14] *See* MIAX PEARL By-Laws, Article II, Section 2.2 (b)(i). ''Member Representative Director'' means a Director who has been appointed by Miami International Holdings, Inc. as an initial Director pursuant to Section 2.5 of the MIAX PEARL By-Laws to serve until the first annual meeting or who ''has been elected by the Miami International Holdings, Inc. after having been nominated by the Member Nominating Committee or by an Exchange Member pursuant to [the] By-Laws and confirmed as the nominee of Exchange Members after majority vote of Exchange Members, if applicable. A Member Representative Director may, but is not required to be, an officer, director, employee, or agent of an Exchange Member.'' *See* MIAX PEARL By-Laws, Article I(x). *See also* MIAX PEARL By-Laws Article II, Section 2.5.

[15] *See* MIAX PEARL By-Laws, Article II, Section 2.2(b)(ii).

[16] *See* MIAX PEARL By-Laws, Article II, Section 2.4. *See also* MIAX PEARL LLC Agreement, Section 9(a).

[17] The Nominating Committee will be comprised of at least three directors, and the number of Non-Industry members on the Nominating Committee must equal or exceed the number of Industry members. *See* MIAX PEARL By-Laws, Article V, Section 5.2. *See also* MIAX PEARL By-Laws, Article IV, Section 4.2(a).

[18] The Member Nominating Committee will be comprised of at least three directors, and each member of the Member Nominating Committee shall be a Member Representative member and shall not be required to be a Director of the Exchange. *See* MIAX PEARL By-Laws, Article V, Section 5.3. *See also* MIAX PEARL By-Laws, Article IV, Section 4.2(a). Pursuant to MIAX PEARL By-Laws, Article I(y), a ''Member Representative member'' is a member of any committee or hearing panel appointed by the Exchange Board who has been elected or appointed after having been nominated by the Member Nominating Committee pursuant to the By-Laws and who is an officer, director, employee, or agent of an Exchange Member.

[19] *See* MIAX PEARL By-Laws, Article V, Section 5.1.

[20] *See id.*

[21] The Member Nominating Committee will solicit comments from MIAX PEARL members for

however, may be nominated for the Member Representative Director positions by MIAX PEARL members pursuant to a petition process.[22] If no candidates are nominated pursuant to a petition process, then the initial nominees submitted by the Member Nominating Committee will be nominated as Member Representative Directors by the Nominating Committee. If a petition process produces additional candidates, then the candidates nominated pursuant to the petition process, together with those nominated by the Member Nominating Committee, will be presented to MIAX PEARL members for a run-off election to determine the final slate of candidates for the vacant Member Representative Director positions.[23] In the event of a contested run-off election, the candidates who receive the most votes will be nominated as the final slate of Member Representative Director candidates by the Nominating Committee.[24] Miami Holdings, as the sole LLC Member, is obligated to elect the final slate of the Member Representative Director candidates that are nominated by the Nominating Committee.[25]

The Commission believes that the requirement in the MIAX PEARL By-Laws that 20% of the directors be Member Representative Directors and the means by which they will be chosen by MIAX PEARL members provide for the fair representation of members in the selection of directors and the administration of MIAX PEARL and therefore is consistent with Section 6(b)(3) of the Act.[26] The Commission notes that this requirement helps to ensure that members have a voice in the use of self-regulatory authority by MIAX PEARL.[27]

In addition, with respect to the requirement that the number of Non-Industry Directors, including at least one Independent Director, will equal or exceed the sum of the number of Industry Directors and Member Representative Directors, the Commission believes that the proposed composition of the Exchange Board satisfies the requirements in Section 6(b)(3) of the Act,[28] which requires in part that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer. The Commission notes that the inclusion of public, non-industry representatives on exchange oversight bodies is an important mechanism to support an exchange's ability to protect the public interest.[29] Further, the presence of public, non-industry representatives can help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public, non-industry directors can provide unique, unbiased perspectives, which are designed to enhance the ability of the Exchange Board to address issues in a non-discriminatory fashion and foster the integrity of the Exchange.[30]

2. Interim Exchange Board

Prior to commencing operations, Miami Holdings will appoint an interim Exchange board of directors (''Interim Exchange Board''), which will include interim Member Representative Directors.[31] With respect to the selection of the interim Member Representative Directors for the Interim Exchange Board, prior to the commencement of operations as an exchange, Miami Holdings will submit the names of its nominees for the interim Member Representative Directors positions to persons that have begun the process of becoming members in the new Exchange.[32] Such persons and firms will be allowed 14 days to submit the names of alternative candidates.[33] Voting will occur no sooner than 5 days after the interim election notice is delivered to confirm the final slate of candidates to become an interim Member Representative Director.[34] All other interim directors, except for the interim Member Representative Directors, will be appointed and elected by Miami Holdings, and must meet the MIAX PEARL board composition requirements as set forth in the MIAX PEARL By-Laws.[35] Once these interim Member Representative Directors are seated on the Interim Exchange Board, then the Interim Exchange Board will meet the board composition requirements set forth in the governing documents of MIAX PEARL.

The Interim Exchange Board will serve until the first initial Exchange Board is elected pursuant to the full nomination, petition, and voting process set forth in the MIAX PEARL By-Laws.[36] MIAX PEARL will complete such process within 90 days after its application for registration as a national securities exchange is granted by the Commission.[37]

The Commission believes that the process for electing the Interim Exchange Board, as proposed, is consistent with the requirements of the Act, including that the rules of the exchange assure fair representation of the exchange's members in the selection of its directors and administration of its affairs.[38] As noted above, MIAX PEARL represents that the initial members of MIAX PEARL will consist substantially of the current group of persons and firms that have begun the membership

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the purpose of approving and submitting names of candidates for election to the position of Member Representative Director. *See* MIAX PEARL By-Laws, Article II, Section 2.4(b).

[22] *See* MIAX PEARL By-Laws, Article II, Section 2.4(c). The petition must be signed by executive representatives of 10% or more of the MIAX PEARL members. No MIAX PEARL member, together with its affiliates, may account for more than 50% of the signatures endorsing a particular candidate. *See id.*

[23] *See* MIAX PEARL By-Laws, Article II, Sections 2.4(e) and (f). Each MIAX PEARL Member shall have the right to cast one vote for each available Member Representative Director nomination, provided that any such vote must be cast for a person on the List of Candidates and that no MIAX PEARL member, together with its affiliates, may account for more than 20% of the votes cast for a candidate. *See* MIAX PEARL By-Laws, Article II, Section 2.4(f).

[24] *See* MIAX PEARL By-Laws, Article II, Section 2.4(f).

[25] *See id.*

[26] 15 U.S.C. 78f(b)(3).

[27] *See, e.g.,* MIAX Order, *supra* note 13, at 73067; Securities Exchange Act Release Nos. 76998 (January 29, 2016), 81 FR 6066, 6068 (February 4, 2016) (File No. 10–221) (order granting exchange registration of ISE Mercury, LLC) (''ISE Mercury Order''); 70050 (July 26, 2013), 78 FR 46622, 46624 (August 1, 2013) (File No. 10–209) (order granting the exchange registration of ISE Gemini, LLC) (''ISE Gemini Order''); 53128 (January 13, 2006), 71 FR 3550, 3553 (January 23, 2006) (granting the exchange registration of Nasdaq Stock Market, Inc.) (''Nasdaq Order''); and BATS Order, *supra* note 13.

[28] 15 U.S.C. 78f(b)(3).

[29] *See, e.g.,* Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70882 (December 22, 1998) (''Regulation ATS Release'').

[30] *See* MIAX Order, *supra* note 13, at 73067; BATS Order, *supra* note 13, at 49501; and Nasdaq Order, *supra* note 27, at 3553.

[31] *See* MIAX PEARL By-Laws, Section 2.5.

[32] *See* MIAX PEARL By-Laws, Section 2.5(b). Specifically, Miami Holdings will submit the names of its nominees for the interim Member Representative Director positions to persons who have submitted the initial documents for membership in the Exchange who would meet the qualifications for membership. *See* MIAX PEARL By-Laws, Section 2.5(b). MIAX PEARL additionally represents that the initial members of MIAX PEARL will consist substantially of the current group of persons and firms that have begun the membership application process with MIAX PEARL. *See* MIAX PEARL Form 1 Application, Exhibit J.

[33] *See* MIAX PEARL By-Laws, Section 2.5(b).

[34] *See* MIAX PEARL By-Laws, Section 2.5(d).

[35] *See* MIAX PEARL By-Laws, Section 2.5(a).

[36] *See* MIAX PEARL By-Laws, Sections 2.2(e) and 2.5(a).

[37] *See* MIAX PEARL By-Laws, Sections 2.5(a). The 90-day period is consistent with what the Commission recently approved for ISE Mercury, LLC. *See* ISE Mercury Order, *supra* note 27, at 6068 (allowing ISE Mercury, LLC to appoint an initial interim board to enable it to commence operations as a registered exchange). *See also* MIAX Order, *supra* note 13, at 73067; and BOX Order, *supra* note 13, at 26325.

[38] *See* 15 U.S.C. 78f(b)(3).

application process with MIAX PEARL.[39] MIAX PEARL will engage these persons and firms in the interim board election process by, prior to the commencement of operations as an exchange, providing each of them with the opportunity to participate in the selection of interim Member Representative Directors consistent with the MIAX PEARL By-Laws. Further, MIAX PEARL represents that it will complete the full nomination, petition, and voting process as set forth in the MIAX PEARL By-Laws, which will provide persons that are approved as members after the effective date of this Order with the opportunity to participate in the selection of the Member Representative Directors, within 90 days of when MIAX PEARL's application for registration as a national securities exchange is granted.[40] Therefore, the Commission believes that MIAX PEARL's initial interim board process is consistent with the Act, including Section 6(b)(3), in that it is designed to provide representation among the persons and firms likely to become members when MIAX PEARL commences operations and is sufficient to allow MIAX PEARL to commence operations for an interim period prior to going through the process to elect a new Exchange Board pursuant to the full nomination, petition, and voting process set forth in the MIAX PEARL By-Laws.

3. Exchange Committees

In the MIAX PEARL By-Laws, the Exchange proposed to establish several standing committees, which would be divided into two categories: Committees of the Board (composed of MIAX PEARL directors) and Committees of the Exchange (composed of a mixture of MIAX PEARL directors and persons that are not MIAX PEARL directors).[41] The standing Committees of the Board would be the Audit, Compensation, Appeals, and Regulatory Oversight Committees.[42] In addition, the Exchange Chairman, with approval of the Exchange Board, may appoint an Executive Committee and a Finance Committee, which also would be Committees of the Board.[43]

The Audit Committee will consist of three or more directors, a majority of which will be Non-Industry Directors.[44] Each of the Compensation and Regulatory Oversight Committees will consist of three or more directors, all of which will be required to be Non-Industry Directors.[45] The Appeals Committee will consist of one Independent Director, one Industry Director, and one Member Representative Director.[46] If established, the Finance Committee will consist of at least three persons (who may, but are not required to, be directors) a majority of whom will be Non-Industry Directors.[47] The Executive Committee, if established, will consist of at least three directors. Because the Executive Committee will have the powers and authority of the Exchange Board in the management of the business and affairs of the Exchange between meetings of the Exchange Board, its composition must reflect that of the Exchange Board. Accordingly, the number of Non-Industry Directors on the Executive Committee must equal or exceed the number of Industry Directors and the percentages of Independent Directors and Member Representative Directors must be at least as great as the corresponding percentages on the Exchange Board as a whole.[48]

With respect to Committees of MIAX PEARL, the Exchange has proposed to establish a Nominating Committee [49] and a Member Nominating Committee.[50] As discussed above, these committees will have responsibility for, among other things, nominating candidates for election to the Exchange Board. On an annual basis, the members of these committees will nominate candidates for the succeeding year's respective committees to be elected by Miami Holdings, as the sole LLC Member.[51] In addition, MIAX PEARL has proposed to establish a Quality of Markets Committee,[52] which will provide advice and guidance to the Exchange Board on issues related to the fairness, integrity, efficiency and competiveness of the information, order handling and execution mechanisms of the Exchange from the perspective of individual and institutional investors, retail and market making firms, and other market participants. The Quality of Markets Committee will include a broad representation of participants in the Exchange. Additionally, at least 20% of the members of the committee will be Member Representative members, and the number of Non-Industry members must equal or exceed the total number of Industry and Member Representative members. MIAX PEARL also has proposed to establish a Business Conduct Committee, which shall be appointed by the Chairman of the Exchange Board.[53] Specifically, the Business Conduct Committee, which will not be a Board committee, will have a minimum of three members and will be composed of a number of individuals as determined by the Exchange Chairman, none of whom shall be Directors of MIAX PEARL. In addition, at least one member of the Business Conduct Committee and any panel thereof must be an officer, director or employee of a MIAX PEARL member.

The Commission believes that MIAX PEARL's proposed committees, which are similar to the committees maintained by other exchanges,[54] are designed to help enable MIAX PEARL to carry out its responsibilities under the Act and are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.[55]

B. Regulation of MIAX PEARL

When MIAX PEARL commences operations as a national securities exchange, the Exchange will have all the attendant regulatory obligations under the Act. In particular, MIAX PEARL will be responsible for the operation and regulation of its trading system and the regulation of its members. Certain provisions in the MIAX PEARL and Miami Holdings governance documents are designed to facilitate the ability of MIAX PEARL and the Commission to fulfill their regulatory obligations. The

[39] *See supra* note 32.

[40] MIAX PEARL's proposed timeline for the interim board process follows a process identical to what the Commission recently approved for ISE Mercury, LLC. *See* ISE Mercury Order, *supra* note 27, at 6068.

[41] *See* MIAX PEARL By-Laws, Section 4.1.

[42] *See* MIAX PEARL By-Laws, Section 4.1(a).

[43] *See* MIAX PEARL By-Laws, Section 4.5(e) and (f), respectively.

[44] *See* MIAX PEARL By-Laws, Section 4.5(b). A Non-Industry Director shall serve as Chairman of the Committee. *See id. See also* MIAX PEARL By-Laws, Section 4.2(a) (requiring that each committee be comprised of at least three people).

[45] *See* MIAX PEARL By-Laws, Section 4.5(a) and 4.5(c).

[46] *See* MIAX PEARL By-Laws, Section 4.5(d).

[47] *See* MIAX PEARL By-Laws, Section 4.5(f). *See also* MIAX PEARL By-Laws, Section 4.2(a) (providing that except as otherwise provided in the MIAX PEARL By-Laws, committees may include persons who are not members of the Board).

[48] *See* MIAX PEARL By-Laws, Section 4.5(e).

[49] *See* MIAX PEARL By-Laws, Article V, Section 5.2, and *supra* note 17.

[50] *See* MIAX PEARL By-Laws, Article V, Section 5.3, and *supra* note 18.

[51] *See* MIAX PEARL By-Laws, Article V, Section 5.1, and *supra* note 20. Additional candidates for the Member Nominating Committee may be nominated and elected by MIAX PEARL members pursuant to a petition process. *See supra* note 22 and accompanying text.

[52] *See* MIAX PEARL By-Laws, Article IV, Section 4.6.

[53] *See* MIAX PEARL By-Laws, Article IV, Section 4.7.

[54] *See, e.g.,* MIAX Order and BATS Order, *supra* note 13, and ISE Mercury Order, ISE Gemini Order, Nasdaq Order, *supra* note 27.

[55] 15 U.S.C. 78f(b)(1).

discussion below summarizes some of these key provisions.

1. Ownership Structure: Ownership and Voting Limitations

MIAX PEARL will be structured as a Delaware limited liability company, which will be wholly owned by the sole member of the LLC, Miami Holdings. The Miami Holdings' proposed Amended and Restated Certificate of Incorporation (''Miami Holdings Certificate'') includes restrictions on the ability to own and vote shares of capital stock of Miami Holdings.[56] These limitations are designed to prevent any Miami Holdings shareholder from exercising undue control over the operation of MIAX PEARL and to assure that MIAX PEARL and the Commission are able to carry out their regulatory obligations under the Act.

In particular, for so long as Miami Holdings (directly or indirectly) controls MIAX PEARL, no person, either alone or together with its related persons,[57] may beneficially own more than 40% of any class of capital stock of Miami Holdings.[58] There would be a more conservative restriction for MIAX PEARL members, wherein MIAX PEARL *members,* either alone or together with their related persons, are prohibited from beneficially owning more than 20% of shares of any class of capital stock of Miami Holdings.[59] If any stockholder violates these ownership limits, Miami Holdings would redeem the shares in excess of the applicable ownership limit at their par value.[60] In addition, no person, alone or together with its related persons, may vote or cause the voting of more than 20% of the voting power of the then issued and outstanding capital stock of Miami Holdings.[61] If any stockholder purports to vote, or cause the voting of, shares that would violate this voting limit, Miami Holdings would not honor such vote in excess of the voting limit.[62]

Any person that proposes to own shares of capital stock in excess of the 40% ownership limitation, or vote or grant proxies or consents with respect to shares of capital stock in excess of the 20% voting limitation, must deliver written notice to the Miami Holdings board to notify the Board of its intention.[63] The notice must be delivered to the Board not less than 45 days before the proposed ownership of such shares or proposed exercise of such voting rights or the granting of such proxies or consents.[64] The Miami Holdings board may waive the 40% ownership limitation and the 20% voting limitation, pursuant to a resolution duly adopted by the Board of Directors, if it makes certain findings,[65] except that the Miami Holdings board cannot waive the voting and ownership limits above 20% for MIAX PEARL members and their related persons.[66] Any such waiver would not be effective unless and until approved by the Commission pursuant to Section 19 of the Act.[67]

The Miami Holdings Certificate also contains provisions that are designed to further safeguard the ownership and voting limitation described above, or are otherwise related to direct and indirect changes in control. Specifically, any person that, either alone or together with its related persons owns, directly or indirectly, of record or beneficially, 5% or more of the capital stock of Miami Holdings will be required to immediately notify Miami Holdings in writing upon acquiring knowledge of such ownership.[68] Thereafter, such persons will be required to update Miami Holdings of any increase or decrease of 1% or more in their previously reported ownership percentage.[69]

The MIAX PEARL LLC Agreement does not include change of control provisions that are similar to those in the Miami Holdings Certificate; however the MIAX PEARL LLC Agreement explicitly provides that Miami Holdings is the sole LLC Member of MIAX PEARL.[70] Thus, if Miami Holdings ever proposes to no longer be the sole LLC Member of MIAX PEARL (and therefore no longer its sole owner), MIAX PEARL would be required to amend the MIAX PEARL LLC Agreement and the MIAX

[56] These provisions are consistent with ownership and voting limits approved by the Commission for other SROs. *See, e.g.,* ISE Mercury Order and ISE Gemini Order, *supra* note 27; MIAX Order and BATS Order, *supra* note 13. *See also* Securities Exchange Act Release Nos. 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010) (CBOE–2008–88) (''CBOE Demutualization Approval Order''); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR–NSX–2006–03) (''NSX Demutualization Order''); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR–CHX–2004–26) (''CHX Demutualization Order''); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR–Phlx–2003–73) (''Phlx Demutualization Order'').

[57] *See* Miami Holdings Certificate, Article NINTH (a)(ii) (defining ''related persons'').

[58] *See* Miami Holdings Certificate, Article NINTH (b)(i)(A).

[59] *See* Miami Holdings Certificate, Article NINTH (b)(i)(B).

[60] *See* Miami Holdings Certificate, Article NINTH (e). Any shares which have been called for redemption shall not be deemed outstanding shares for the purpose of voting or determining the total number of shares entitled to vote. Once redeemed by Miami Holdings, such shares shall become treasury shares and shall no longer be deemed to be outstanding. *See id.* Furthermore, if any redemption results in another stockholder owning shares in violation of the ownership limits described above, Miami Holdings shall redeem such shares. *See id.*

[61] *See* Miami Holdings Certificate, Article NINTH (b)(i)(C).

[62] *See* Miami Holdings Certificate, Article NINTH (d). The Miami Holdings Certificate also prohibits the payment of any stock dividends and conversions that would violate the ownership and voting limitations. *See* Miami Holdings Certificate, Article FOURTH A.(b) and (e), and D.7.

[63] *See* Miami Holdings Certificate, Article NINTH (b)(iv).

[64] *See id.*

[65] *See* Miami Holdings Certificate, Article NINTH (b)(ii)(B). The required findings include determinations that (A) such waiver will not impair the ability of MIAX PEARL to carry out its functions and responsibilities under the Act and the rules and regulations promulgated thereunder, (B) such waiver is otherwise in the best interests of MIAX PEARL and Miami Holdings, (C) such waiver will not impair the ability of the Commission to enforce the Act and (D) the transferee in such transfer and its related persons are not subject to any applicable ''statutory disqualification'' (within the meaning of Section 3(a)(39) of the Act). *See* Miami Holdings Certificate, Article NINTH (b)(ii)(B) and (b)(iii). The Commission has previously approved the rules of other exchanges that provide for the ability of the exchange to waive the ownership and voting limitations discussed above for non-members of the exchange. *See, e.g.,* ISE Mercury Order and ISE Gemini Order, *supra* note 27; MIAX Order, *supra* note 13; and Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (order approving DirectEdge exchanges) (''DirectEdge Exchanges Order'').

[66] *See* Miami Holdings Certificate, Article NINTH (b)(ii)(B). These provisions are generally consistent with waiver of ownership and voting limits approved by the Commission for other SROs. *See, e.g.,* ISE Mercury Order, *supra* note 27; MIAX Order, *supra* note 13; BATS Order, *supra* note 13; NSX Demutualization Order, *supra* note 56; CHX Demutualization Order, *supra* note 56; and Securities Exchange Act Release No. 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR–PCX–2004–08).

[67] *See* Miami Holdings Certificate, Article NINTH (b)(ii)(B).

[68] *See* Miami Holdings Certificate, Article NINTH(c)(i). The notice will require the person's full legal name; the person's title or status; the person's approximate ownership interest in Miami Holdings; and whether the person has power, directly or indirectly, to direct the management or policies of Miami Holdings. *See id.*

[69] *See* Miami Holdings Certificate, Article NINTH(c)(ii). Changes of less than 1% must also be reported to Miami Holdings if they result in such person crossing a 20% or 40% ownership threshold. *See id.* In addition, the MIAX PEARL rules also impose limits on affiliation between MIAX PEARL and a member of MIAX PEARL. *See* MIAX PEARL Rule 201(g) (''Without prior Commission approval, the Exchange or any entity with which it is affiliated shall not directly or indirectly through one or more intermediaries acquire or maintain an ownership interest in an Exchange Member. In addition, without prior Commission approval, no Member shall be or become affiliated with (1) the Exchange; or (2) any affiliate of the Exchange. Nothing herein shall prohibit a Member from acquiring or holding an equity interest in (i) Miami International Holdings, Inc. that is permitted by the Certificate of Incorporation of Miami International Holdings, Inc. or (ii) Miami International Securities Exchange, LLC that is permitted by the Amended and Restated Limited Liability Company Agreement of Miami International Securities Exchange, LLC.'').

[70] *See* MIAX PEARL LLC Agreement and MIAX PEARL By-Laws, Article I(v) (both of which define ''LLC Member'' to mean Miami Holdings, as the sole member of MIAX PEARL).

PEARL By-Laws. Any changes to the MIAX PEARL LLC Agreement or the MIAX PEARL By-Laws, including any change in the provisions that identify Miami Holdings as the sole owner of MIAX PEARL, must be filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Act, as the case may be.[71] Further, pursuant to the MIAX PEARL By-Laws, Miami Holdings may not transfer or assign, in whole or in part, its ownership interest in MIAX PEARL, unless such transfer is filed with and approved by the Commission pursuant to Section 19 of the Act.[72]

As described above, the provisions applicable to direct and indirect changes in control of Miami Holdings and MIAX PEARL, as well as the voting limitation imposed on owners of Miami Holdings who also are MIAX PEARL members, are designed to help prevent any owner of Miami Holdings from exercising undue influence or control over the operation of MIAX PEARL. In addition, these limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in the exchange. A member's interest in an exchange, including an entity that controls an exchange, could become so large as to cast doubts on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.[73] A member that is a controlling shareholder of an exchange could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions. As such, the Commission believes that these voting and ownership limitations are designed to minimize the potential that a person or entity can improperly interfere with or restrict the ability of MIAX PEARL to effectively carry out its regulatory oversight responsibilities under the Act.

The Commission believes that MIAX PEARL's and Miami Holding's proposed governance provisions are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.[74] In particular, these requirements are designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or MIAX PEARL to effectively carry out their regulatory oversight responsibilities under the Act.

2. Regulatory Independence and Oversight

Although Miami Holdings will not itself carry out regulatory functions, its activities with respect to the operation of MIAX PEARL must be consistent with, and must not interfere with, MIAX PEARL's self-regulatory obligations. In this regard, MIAX PEARL and Miami Holdings propose to adopt certain provisions in their respective governing documents that are designed to help maintain the independence of the regulatory functions of MIAX PEARL. These proposed provisions are substantially similar to those included in the governing documents of other exchanges that recently have been granted registration.[75] Specifically:

- The directors, officers, employees, and agents of Miami Holdings must give due regard to the preservation of the independence of the self-regulatory function of MIAX PEARL and must not take actions that would interfere with the effectuation of decisions by the MIAX PEARL Board relating to its regulatory functions or that would interfere with MIAX PEARL's ability to carry out its responsibilities under the Act.[76]
- Miami Holdings must comply with federal securities laws and the rules and regulations promulgated thereunder, and agrees to cooperate with the Commission and MIAX PEARL pursuant to, and to the extent of, their respective regulatory authority. In addition, Miami Holdings' officers, directors, employees, and agents must comply with federal securities laws and the rules and regulations promulgated thereunder and agree to cooperate with the Commission and MIAX PEARL in respect of the Commission's oversight responsibilities regarding MIAX PEARL and the self-regulatory functions and responsibilities of MIAX PEARL.[77]
- Miami Holdings, and its officers, directors, employees, and agents are deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and MIAX PEARL, for purposes of any action, suit, or proceeding pursuant to U.S. federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, MIAX PEARL activities.[78]
- All books and records of MIAX PEARL reflecting confidential information pertaining to the self-regulatory function of MIAX PEARL (including but not limited to disciplinary matters, trading data, trading practices, and audit information) shall be retained in confidence by MIAX PEARL and its personnel and will not be used by MIAX PEARL for any non-regulatory purpose and shall not be made available to persons (including, without limitation, any MIAX PEARL member) other than to personnel of the Commission, and those personnel of MIAX PEARL, members of committees of MIAX PEARL, members of the MIAX PEARL Board, or hearing officers and other agents of MIAX PEARL, to the extent necessary or appropriate to properly discharge the self-regulatory function of MIAX PEARL.[79]
- The books and records of MIAX PEARL and Miami Holdings must be

[71] *See* 15 U.S.C. 78s. *See also* MIAX PEARL LLC Agreement, Section 28(b).

[72] *See* MIAX PEARL By-Laws, Article III, Section 3.4.

[73] *See, e.g.,* ISE Mercury Order, *supra* note 27; MIAX Order, *supra* note 13; BATS Order, *supra* note 13; and DirectEdge Exchanges Order, *supra* note 65.

[74] 15 U.S.C. 78f(b)(1). *See also* ISE Mercury Order, *supra* note 27; MIAX Order, *supra* note 13; and BOX Order, *supra* note 13.

[75] *See, e.g.,* DirectEdge Exchanges Order, *supra* note 65, and BATS Order, *supra* note 13. *See also* Securities Exchange Act Release No. 61152 (December 10, 2009), 74 FR 66699 (December 16, 2009) (''C2 Order'').

[76] *See* Amended and Restated By-Laws of Miami Holdings (''Miami Holdings By-Laws''), Article VII, Section 1.

Similarly, Article II, Section 2.1(d) of the MIAX PEARL By-Laws requires the MIAX PEARL Board to, when managing the business and affairs of MIAX PEARL and evaluating any proposal, consider the requirements of Section 6(b) of the Act. Section 2.1(e) also requires the MIAX PEARL Board, when evaluating any proposal to take into account (among other things and to the extent relevant), the potential impact on the integrity, continuity and stability of the national securities exchange operated by MIAX PEARL and the other operations of MIAX PEARL, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and whether such would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. *See, e.g.,* Fourth Amended and Restated By-Laws of BATS, Article III, Section 1.

[77] *See* Miami Holdings By-Laws, Article VII, Section 4.

[78] *See* Miami Holdings By-Laws, Article VII, Section 5.

[79] *See* MIAX PEARL By-Laws Article X, Section 10.4. The Commission notes that the Miami Holdings By-Laws also provide that all books and records of MIAX PEARL reflecting confidential information pertaining to the self-regulatory function of MIAX PEARL will be subject to confidentiality restrictions. *See* Miami Holdings By-Laws Article VII, Section 2. The requirement to keep such information confidential shall not limit the Commission's ability to access and examine such information or limit the ability of officers, directors, employees, or agent of Miami Holdings to disclose such information to the Commission. *See id.*

maintained in the United States [80] and, to the extent they are related to the operation or administration of MIAX PEARL, Miami Holdings books and records will be subject at all times to inspection and copying by the Commission.[81]

• Furthermore, to the extent they relate to the activities of MIAX PEARL, the books, records, premises, officers, directors, employees, and agents of Miami Holdings will be deemed to be the books, records, premises, officers, directors, employees, and agents of MIAX PEARL, for purposes of, and subject to oversight pursuant to, the Act.[82]

• Miami Holdings will take necessary steps to cause its officers, directors, employees, and agents, prior to accepting a position as an officer, director, employee or agent (as applicable) to consent in writing to the applicability of provisions regarding books and records, confidentiality, jurisdiction, and regulatory obligations, with respect to their activities related to MIAX PEARL.[83]

• Miami Holdings Certificate and By-Laws require that, so long as Miami Holdings controls MIAX PEARL, any changes to those documents be submitted to the MIAX PEARL Board, and, if such change is required to be filed with the Commission pursuant to Section 19(b) of the Act and the rules and regulations thereunder, such change shall not be effective until filed with, or filed with and approved by, the Commission.[84]

The Commission believes that the provisions discussed in this section, which are designed to help maintain the independence of MIAX PEARL's regulatory function and help facilitate the ability of MIAX PEARL to carry out its regulatory responsibilities and operate in a manner consistent with the Act, are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.[85] Whether MIAX PEARL operates in compliance with the Act, however, depends on how it and Miami Holdings in practice implement the governance and other provisions that are the subject of this Order.

Further, Section 19(h)(1) of the Act [86] provides the Commission with the authority ''to suspend for a period not exceeding twelve months or revoke the registration of [an SRO], or to censure or impose limitations upon the activities, functions, and operations of [an SRO], if [the Commission] finds, on the record after notice and opportunity for hearing, that [the SRO] has violated or is unable to comply with any provision of the Act, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance'' with any such provision by its members (including associated persons thereof).[87] If Commission staff were to find, or become aware of, through staff review and inspection or otherwise, facts indicating any violations of the Act, including without limitation Sections 6(b)(1) and 19(g)(1), these matters could provide the basis for a disciplinary proceeding under Section 19(h)(1) of the Act.

The Commission also notes that, even in the absence of the governance provisions described above, under Section 20(a) of the Act, any person with a controlling interest in MIAX PEARL would be jointly and severally liable with and to the same extent that MIAX PEARL is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.[88] In addition, Section 20(e) of the Act creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder.[89] Further, Section 21C of the Act authorizes the Commission to enter a cease-and-desist order against any person who has been ''a cause of'' a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.[90] These provisions are applicable to all entities' dealings with MIAX PEARL, including Miami Holdings.

3. Regulation of MIAX PEARL

As a prerequisite to the Commission's granting of an exchange's application for registration, an exchange must be so organized and have the capacity to carry out the purposes of the Act.[91] Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the Act and the rules and regulations thereunder and the rules of the exchange.[92] The discussion below summarizes how MIAX PEARL proposes to structure and conduct its regulatory operations.

a. Regulatory Oversight Committee

The regulatory operations of MIAX PEARL will be monitored by the Regulatory Oversight Committee of the Exchange Board. The Regulatory Oversight Committee will consist of at least three directors, all of whom will be Non-Industry Directors. The Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of MIAX PEARL's regulatory and SRO responsibilities, assessing MIAX PEARL's regulatory performance, and assisting the Exchange Board (and committees of the Exchange Board) in reviewing MIAX PEARL's regulatory plan and the overall effectiveness of MIAX PEARL's regulatory functions.[93]

Further, a Chief Regulatory Officer (''CRO'') of MIAX PEARL will have general day-to-day supervision over MIAX PEARL's regulatory operations.[94] The Regulatory Oversight Committee also will be responsible for recommending compensation and personnel actions involving the CRO and senior regulatory personnel to the Compensation Committee of MIAX PEARL for action.[95] The CRO will report to the Regulatory Oversight Committee.[96]

b. Regulatory Funding

To help assure the Commission that it has and will continue to have adequate funding to be able to meet its responsibilities under the Act, MIAX PEARL represents in its Form 1 Application that, prior to beginning operations as a national securities exchange, Miami Holdings will provide sufficient funding to MIAX PEARL for the exchange to carry out its

[80] *See* MIAX PEARL By-Laws, Article X, Section 10.4; and Miami Holdings By-Laws, Article VII, Section 3.

[81] *See* Miami Holdings By-Laws, Article VII, Section 3.

[82] *See* Miami Holdings By-Laws, Article VII, Section 3.

[83] *See* Miami Holdings By-Laws, Article VII, Section 6.

[84] *See* Miami Holdings Certificate, Article VIII; and Miami Holdings By-Laws, Article XII, Section 1.

[85] 15 U.S.C. 78f(b)(1).

[86] *See* 15 U.S.C. 78s(h)(1).

[87] *See id.*

[88] 15 U.S.C. 78t(a).

[89] 15 U.S.C. 78t(e).

[90] 15 U.S.C. 78u–3.

[91] *See* Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

[92] *See id. See also* Section 19(g) of the Act, 15 U.S.C. 78s(g).

[93] *See* MIAX PEARL By-Laws, Article IV, Section 4.5(c). The Regulatory Oversight Committee is responsible for reviewing MIAX PEARL's regulatory budget, and also will meet regularly with the Chief Regulatory Officer. *See id.*

[94] *See* MIAX PEARL By-Laws, Article VI, Section 6.10.

[95] *See* MIAX PEARL By-Laws, Article IV, Section 4.5(c).

[96] *See* MIAX PEARL By-Laws, Article VI, Section 6.10.

responsibilities under the Act.[97] Specifically, MIAX PEARL represents that Miami Holdings has allocated sufficient operational assets to enable its operation and that prior to launching operations, Miami Holdings will make a capital contribution of not less than $5,000,000 into MIAX PEARL's capital account, in addition to any previously-provided in-kind contributions, such as legal, regulatory, and infrastructure-related services.[98] MIAX PEARL represents that such cash and in-kind contributions by Miami Holdings will be adequate to begin operation of the Exchange, including the regulation of the Exchange.

MIAX PEARL also represents in its Form 1 application that there is a written agreement between MIAX PEARL and Miami Holdings that requires Miami Holdings to provide adequate funding for MIAX PEARL's ongoing operations, including the regulation of MIAX PEARL. This agreement provides that MIAX PEARL will receive all fees, including regulatory fees and trading fees, payable by MIAX PEARL's members, as well as any funds received from any applicable market data fees and OPRA tape revenue. The agreement further provides that Miami Holdings will reimburse MIAX PEARL for its costs and expenses to the extent MIAX PEARL's assets are insufficient to meets its costs and expenses.[99]

Further, any revenues received by MIAX PEARL from fees derived from its regulatory function or regulatory penalties will not be used for non-regulatory purposes.[100] Any excess funds, as determined by MIAX PEARL, may be remitted to Miami Holdings, however ''Regulatory Funds'' will not be remitted to Miami Holdings.[101]

c. Rule 17d–2 Agreements; Regulatory Contract With FINRA

Unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act,[102] Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange, absent reasonable justification or excuse, to enforce compliance by its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules.[103] Section 17(d) of the Act and Rule 17d–2 thereunder permit SROs to propose joint plans to allocate regulatory responsibilities among themselves for their common rules with respect to their common members.[104] These agreements, which must be filed with and declared effective by the Commission, generally cover areas where each SRO's rules substantively overlap, including such regulatory functions as personnel registration and sales practices. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO.[105] Such regulatory duplication would add unnecessary expense for common members and their SROs. A 17d–2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.[106] Many SROs have entered into Rule 17d–2 agreements.[107]

A 17d–2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.[108] MIAX PEARL has represented to the Commission that it intends to become a party to the existing multiparty options Rule 17d–2 plans concerning sales practice regulation and market surveillance.[109] MIAX PEARL has also represented that it will enter into a bi-lateral 17d–2 agreement to allocate regulatory responsibility to FINRA for common rules of dual members between MIAX PEARL and FINRA. Under these agreements, the examining SROs will examine firms that are common members of MIAX PEARL and the particular examining SRO for compliance with certain provisions of the Act, certain rules and regulations adopted thereunder, and certain MIAX PEARL Rules.

In addition, MIAX PEARL has represented that it will enter into a Regulatory Services Agreement (''RSA'') with FINRA, under which FINRA will perform certain regulatory functions on behalf of MIAX PEARL.[110] Pursuant to the RSA, FINRA, in its capacity as service provider to MIAX PEARL, will perform various services on MIAX PEARL's behalf, including assisting MIAX PEARL with member registration and related administrative support services; certain cross-market surveillance services; certain options trading examinations; at MIAX PEARL's request, investigating potential violations of enumerated MIAX PEARL market rules, as well as federal securities laws, and rules and regulations thereunder, related to MIAX PEARL market activity; performing examinations of options, including routine and for cause examinations of

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[97] *See* MIAX PEARL Form 1 Application, Exhibit I.

[98] *See id.*

[99] *See id.*

[100] *See* MIAX PEARL By-Laws, Article IX, Section 9.4.

[101] *See* MIAX PEARL Form 1 Application, Exhibit I. *See also* MIAX PEARL LLC Agreement, Section 16; and MIAX PEARL By-Laws, Article IX, Section 9.4. MIAX PEARL By-Laws, Article 1(gg) defines ''Regulatory Funds'' as ''fees, fines, or penalties derived from the regulatory operations of [MIAX PEARL]'', but such term does not include ''revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of [MIAX PEARL], even if such revenues are used to pay costs associated with the regulatory operations of [MIAX PEARL].'' This definition is consistent with the rules of other SROs. *See, e.g.,* By-Laws of MIAX Exchange, Article I(ll); By-Laws of NASDAQ PHLX LLC, Article I(ii); and By-Laws of NASDAQ BX, Inc., Article I(ii).

[102] 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

[103] 15 U.S.C. 78s(g)(1).

[104] *See* Section 17(d)(1) of the Act and Rule 17d–2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d–2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) Receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

[105] Section 17(d) was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication with respect to Common Members. *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[106] *See id.*

[107] *See, e.g.,* Securities Exchange Act Release Nos. 77321 (March 8, 2016), 81 FR 13434 (March 14, 2016) (File No. 4–697) (Financial Industry Regulatory Authority, Inc. (''FINRA'')/ISE Mercury, LLC), 73641 (November 19, 2014), 79 FR 70230 (November 25, 2014) (File No. 4–678) (FINRA/MIAX Exchange); 70053 (July 26, 2013), 78 FR 46656 (August 1, 2013) (File No. 4–663) (FINRA/ISE Gemini, LLC); 59218 (January 8, 2009), 74 FR 2143 (January 14, 2009) (File No. 4–575) (FINRA/Boston Stock Exchange, Inc.); 58818 (October 20, 2008), 73 FR 63752 (October 27, 2008) (File No. 4–569) (FINRA/BATS Exchange, Inc.); 55755 (May 14, 2007), 72 FR 28087 (May 18, 2007) (File No. 4–536) (National Association of Securities Dealers, Inc. (''NASD'') (n/k/a FINRA) and Chicago Board of Options Exchange, Inc. concerning the CBOE Stock Exchange, LLC); 55367 (February 27, 2007), 72 FR 9983 (March 6, 2007) (File No. 4–529) (NASD/International Securities Exchange, LLC); and 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (File No. 4–517) (NASD/The Nasdaq Stock Market LLC).

[108] *See supra* notes 104–105.

[109] *See* MIAX PEARL Form 1 Application, Exhibit L. *See also* Securities Exchange Act Release No. 68363 (December 5, 2012), 77 FR 73711 (December 11, 2012) (File No. S7–966) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d–2 plan concerning options-related sales practice matters); and 68362 (December 5, 2012), 77 FR 73719 (December 11, 2012) (File No. 4–551) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d–2 plan concerning options-related market surveillance).

[110] *See* MIAX PEARL Form 1 Application, Exhibit L.

MIAX PEARL members under certain MIAX PEARL rules and federal securities laws; bringing formal disciplinary actions, including hearing officer services; and providing arbitration, mediation, and other dispute resolution services to MIAX PEARL member firms.[111] Notwithstanding the RSA, MIAX PEARL, as an SRO, has the ultimate legal responsibility for the regulation of its members and market.

The Commission believes that it is consistent with the Act for MIAX PEARL to contract with other SROs to perform certain examination, enforcement, and disciplinary functions.[112] This regulatory structure would be consistent with that of other SROs.[113] These functions are fundamental elements of a regulatory program, and constitute core self-regulatory functions. The Commission believes that FINRA, as an SRO that provides contractual services to other SROs, should have the capacity to perform these functions for MIAX PEARL.[114] However, MIAX PEARL, unless relieved by the Commission of its responsibility,[115] bears the ultimate responsibility for self-regulatory responsibilities and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on MIAX PEARL's behalf. In performing these regulatory functions, however, the SRO retained to perform regulatory functions may nonetheless bear liability for causing or aiding and abetting the failure of MIAX PEARL to perform its regulatory functions.[116] Accordingly, although FINRA will not act on its own behalf in carrying out these regulatory services for MIAX PEARL, as the SRO retained to perform certain regulatory functions, FINRA may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by MIAX PEARL.

C. Trading System

1. Access to MIAX PEARL

Access to MIAX PEARL will be granted to individuals or organizations who are approved to become Members.[117] Approved Members will be issued Trading Permits that grant the Member the ability to transact on MIAX PEARL through its electronic systems.[118] Trading Permits will not convey upon Members any ownership interest in MIAX PEARL, and they will not be transferable except in cases where a Member experiences a change in control or corporate reorganization.[119] Membership will be open to any broker-dealer that: (1) Is registered under Section 15 of the Act; [120] and (2) has and maintains membership in another registered options exchange (other than the MIAX Exchange) or FINRA.[121] As explained below, a holder of a MIAX Exchange trading permit will not be required to submit a full application for membership on MIAX PEARL.[122] There will be no limit to the number of Trading Permits that MIAX PEARL can issue, although MIAX PEARL could determine in the future a limit or decrease in the number of Trading Permits issued.[123] Members of MIAX PEARL may be Market Makers,[124] or they may be EEMs.[125]

A holder of a MIAX Exchange trading permit in good standing will be eligible to receive one MIAX PEARL Trading Permit.[126] MIAX Exchange member applicants will not be required to submit a full application for membership on MIAX PEARL, but rather will only need to complete selected MIAX PEARL forms concerning their election to trade on MIAX PEARL, consent to MIAX PEARL's jurisdiction, and other operational matters.[127] This waive-in application process is similar to arrangements in place at other exchanges.[128]

Non-MIAX Exchange members seeking to become members of MIAX PEARL would submit a full application in accordance with procedures established by the Exchange.[129] Entities that become members, and their associated persons, will be required to meet and maintain certain qualification and registration criteria similar to what is required by other options exchanges.[130] In addition, MIAX PEARL proposes further requirements on members that seek to do business with

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[111] *See id.*

[112] *See, e.g.,* Regulation ATS Release, *supra* note 29. *See also* Securities Exchange Act Release Nos. 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (SR–Amex–2004–32) (order approving rule that allowed Amex to contract with another SRO for regulatory services) (''Amex Regulatory Services Approval Order''); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004) (''NOM Approval Order''); Nasdaq Order, *supra* note 27; and BATS Order, *supra* note 13.

[113] For example, MIAX Exchange, ISE Mercury, EDGA Exchange, Inc., EDGX Exchange Inc., and BATS have entered into 17d–2 Plans and RSAs with FINRA.

[114] *See, e.g.,* Amex Regulatory Services Approval Order, *supra* note 112; NOM Approval Order, *supra* note 112; and Nasdaq Order, *supra* note 27. The Commission notes that the RSA is not before the Commission and, therefore, the Commission is not acting on them.

[115] *See supra* note 104.

[116] For example, if failings by the SRO retained to perform regulatory functions have the effect of leaving an exchange in violation of any aspect of the exchange's self-regulatory obligations, the exchange will bear direct liability for the violation, while the SRO retained to perform regulatory functions may bear liability for causing or aiding and abetting the violation. *See, e.g.,* Nasdaq Order, *supra* note 27; BATS Order, *supra* note 13; and Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10–127) (approval of registration of International Securities Exchange Act, LLC (''ISE'') as a national securities exchange).

[117] A ''Member'' is defined as an individual or organization that is registered with the Exchange pursuant to Chapter II of the MIAX PEARL Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' (''EEM'') or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* MIAX PEARL Rule 100.

[118] *See* MIAX PEARL Rule 200(a). MIAX PEARL represents that it has designed its systems to allow its Members to individually determine the best method for accessing the Exchange, whether by using customized front-end software using protocols determined by the Exchange or through third-party vendors who route orders to MIAX PEARL through a front-end or service bureau configuration. *See* MIAX PEARL Form 1 Application, Exhibit E.

[119] *See* MIAX PEARL Rule 200(e).

[120] *See* MIAX PEARL Rule 200(b).

[121] *See* MIAX PEARL Rule 200(d). If such other options exchange has not been designated by the Commission to examine Members for compliance with financial responsibility rules, then the broker-dealer must have and maintain a membership in FINRA. *Id.*

[122] *See* MIAX PEARL Rule 200(c) and *infra* notes 127–128 and accompanying text.

[123] *See* MIAX PEARL Rule 200(a). MIAX PEARL would announce in advance any limitation or decrease it plans to impose pursuant to Rule 200(a). *See id.* In the event that MIAX PEARL imposes a limitation or decrease, MIAX PEARL, in doing so, may not eliminate the ability of an existing member to trade on the Exchange unless MIAX PEARL is permitted to do so pursuant to a rule filing submitted to the Commission under Section 19(b) of the Act. *See id.* In addition, MIAX PEARL's exercise of authority under proposed Rule 200 would be subject to the provisions of Section 6(c)(4) of the Act. *See id. See also* Chicago Board Options Exchange, Incorporated (''CBOE'') Rule 3.1(a)(vi) and MIAX Exchange Rule 200(a) (concerning limiting or reducing the number of trading permits). Further, MIAX PEARL's exercise of authority under proposed Rule 200 would be subject to the provisions of Section 6(b)(2) of the Act, which requires the rules of an exchange to provide that any registered broker or dealer or any natural person associated with a registered broker or dealer may become a member of such exchange and any person may become associated with a member thereof. *See* 15 U.S.C. 78f(b)(2).

[124] *See* MIAX PEARL Rule 600. Market Maker registration is discussed in greater detail below, *infra* Section III.C.3.

[125] *See supra* note 117.

[126] *See* MIAX PEARL Rule 200(c)(1).

[127] *See id.*

[128] *See, e.g.,* C2 Options Exchange, Inc. Rule 3.1(c)(1) (containing similar expedited waive-in membership process for members of CBOE) and ISE Mercury, LLC Rule 302(a) (containing similar expedited waive-in membership process for members of the ISE and ISE Gemini, LLC).

[129] *See* MIAX PEARL Rule 200(c)(2).

[130] *See* MIAX PEARL Rules Chapter II. Such criteria include, but are not limited to, capital maintenance requirements. *See, e.g.,* MIAX Exchange Rule 200 Series and C2 Options Exchange, Inc. Rules 3.1 and 3.2 (containing similar criteria).

the public.[131] Applicants who are denied membership may appeal MIAX PEARL's decision pursuant to MIAX PEARL's rules governing Hearings, Review, and Arbitration.[132] Every Member will be subject to MIAX PEARL's regulatory jurisdiction, including MIAX PEARL's disciplinary jurisdiction.[133]

The Commission finds that MIAX PEARL's proposed membership rules are consistent with the Act, including Section 6(b)(2) of the Act, which requires the rules of an exchange to provide that any registered broker or dealer or natural person associated with a broker or dealer may become a member of such exchange or associated with a member thereof.[134] MIAX PEARL's proposed rules with respect to exchange membership are substantively similar to the rules of other exchanges.

The Commission notes that pursuant to Section 6(c) of the Act,[135] an exchange must deny membership to any person, other than a natural person, that is not a registered broker or dealer, any natural person that is not, or is not associated with, a registered broker or dealer, and registered broker-dealers that do not satisfy certain standards, such as financial responsibility or operational capacity. As a registered exchange, MIAX PEARL must independently determine if an applicant satisfies the standards set forth in the Act, regardless of whether an applicant is a member of another SRO.[136]

In addition, Members may enter into arrangements with other parties, including non-Members and other Members, to provide ''Sponsored Access'' to trading on MIAX PEARL.[137] Members who provide such Sponsored Access will be responsible for all trading conducted pursuant to the access agreement, and to the same extent as if the Member were trading directly.[138] Accordingly, Members that provide Sponsored Access must maintain and implement policies and procedures to supervise and monitor sponsored trading activity.[139] Additionally, non-Members who seek to trade on MIAX PEARL through Sponsored Access agreements will need to agree to comply with all applicable federal securities laws and rules and Exchange rules.[140] MIAX PEARL's rules governing Sponsored Access arrangements are similar to the rules of other exchanges.[141]

2. Linkage

MIAX PEARL intends to become a participant in the Plan Relating to Options Order Protection and Locked/Crossed Markets or any successor plan (''Linkage Plan'').[142] If admitted as a participant to the Linkage Plan, other plan participants would be able to send orders to MIAX PEARL in accordance with the terms of the plan as applied to the Exchange. The MIAX PEARL Rules include relevant definitions, establish the conditions pursuant to which members may enter orders in accordance with the Linkage Plan, impose obligations on the Exchange regarding how it must process incoming orders, establish a general standard that members and MIAX PEARL should avoid trade-throughs, establish potential regulatory liability for members that engage in a pattern or practice of trading through other exchanges, and establish obligations with respect to locked and crossed markets.

The Commission believes that MIAX PEARL has proposed rules that are designed to comply with the requirements of the Linkage Plan.[143] Further, as provided below, before MIAX PEARL can commence operations as a national securities exchange, it must become a participant in the Linkage Plan.

3. Market Makers

a. Registration of Market Makers

MIAX PEARL Members may register as Market Makers for the purpose of making markets in options contracts traded on the Exchange.[144] Market Makers are entitled to receive certain benefits and privileges in exchange for fulfilling certain affirmative and negative market-making obligations. To begin the process of registering as a Market Maker, a Member will be required to file a written application with MIAX PEARL.[145] MIAX PEARL will consider an applicant's market making ability and other factors it deems appropriate in determining whether to approve an applicant's registration.[146] All Market Makers will be designated as specialists on MIAX PEARL for all purposes under the Act and rules thereunder.[147] The Exchange will not place any limit on the number of entities that may become Market Makers.[148] The good standing of a Market Maker may be suspended, terminated or otherwise withdrawn if the conditions for approval cease to be maintained or the Market Maker violates any of its agreements with MIAX PEARL or any provisions of the MIAX PEARL Rules.[149] A Member that has qualified as a Market Maker may register to make markets in individual series of options.[150]

The Commission finds that the MIAX PEARL qualification requirements are consistent with the Act. MIAX PEARL's rules provide an objective process by which a Member could become a Market Maker on MIAX PEARL. The Commission notes that MIAX PEARL's proposed Market Maker qualification requirements are similar to those of other options exchanges.[151]

b. Market Maker Obligations

Pursuant to MIAX PEARL rules, there will be one class of Market Makers. All Market Makers will be subject to a number of general obligations. In particular, the transactions of a Market Maker must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market.[152] Among other things, a Market Maker must: (1)

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[131] *See* MIAX PEARL Rules Chapter XIII (incorporating by reference Chapter XIII of the MIAX Exchange Rules). Chapter XIII of the MIAX Exchange Rules also are similar to the rules of other exchanges. *See, e.g.,* ISE Rules Chapter 6.

[132] *See* MIAX PEARL Rules Chapter XI (incorporating by reference Chapter XI of the MIAX Exchange Rules).

[133] *See* MIAX PEARL Rule 200(g). For MIAX PEARL's rules concerning discipline, *see* Chapter X of the MIAX PEARL Rules.

[134] 15 U.S.C. 78f(b)(2).

[135] 15 U.S.C. 78f(c).

[136] *See, e.g.,* ISE Mercury Order, *supra* note 27, at 6076; ISE Gemini Order, supra note 27, at 46633; MIAX Order, *supra* note 13, at 73074; BOX Order, *supra* note 14, at 26337; BATS Order, *supra* note 13, at 49502; and Nasdaq Order, *supra* note 27, at 3555.

[137] *See* MIAX PEARL Rule 210.

[138] *See* MIAX PEARL Rule 210(b).

[139] *See* MIAX PEARL Rule 210(b)–(c).

[140] *See* MIAX PEARL Rule 210(b). *See also, e.g.,* 17 CFR 240.15c3–5.

[141] *See, e.g.,* MIAX Exchange Rule 210 and NASDAQ Stock Market LLC Rule 4615.

[142] *See* MIAX PEARL Form 1 Application, Exhibit E. *See also* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4–546) (order approving the national market system Plan Relating to Options Order Protection and Locked/Crossed Markets Submitted by the Chicago Board Options Exchange, Incorporated, ISE, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., NYSE Amex LLC, and NYSE Arca, Inc.).

[143] *See* Chapter XIV of the MIAX PEARL Rules (incorporating by reference Chapter XIV of the MIAX Exchange Rules).

[144] *See* MIAX PEARL Rule 600.

[145] *See* MIAX PEARL Rule 600(a).

[146] *See id.* The provision permitting MIAX PEARL to consider ''such other factors as [it] deems appropriate'' must be applied in a manner that is consistent with the Act, including provisions that prohibit an exchange from acting in an unfairly discriminatory manner. *See* 15 U.S.C. 78f(b)(5); *see also* C2 Order, *supra* note 75.

[147] *See* MIAX PEARL Rule 600.

[148] *See* MIAX PEARL Rule 600(c).

[149] *See* MIAX PEARL Rule 603(b).

[150] *See* MIAX PEARL Rule 602(a).

[151] *See, e.g.,* Bats BZX Exchange, Inc. (''Bats BZX'') Rules 22.2, 22.3 and 22.4, and NASDAQ Options Market Rules, Chapter VII, Sections 2, 3, and 4.

[152] *See* MIAX PEARL Rule 604(a).

Maintain a two-sided market during trading hours, in a manner that enhances the depth, liquidity, and competitiveness of the market; (2) engage in dealings for its own account when there is a lack of price continuity, a temporary disparity between the supply of (or demand for) a particular option contract, or a temporary distortion of the price relationships between option contracts of the same series; (3) compete with other market makers; (4) make markets that will be honored for the number of contracts entered; (5) update quotations in response to changed market conditions; and (6) maintain active markets.[153] Market Makers must provide continuous two-sided quotes throughout the trading day 90% of the time in 75% of the series in which the Market Maker is registered.[154] Further, a Market Maker may be called upon by MIAX PEARL to submit a single bid or offer or maintain continuous bid and offers in one or more series to which it is registered whenever, in the judgment of the Exchange, it is necessary to do so in the interest of fair and orderly markets.[155] In addition, Market Makers must maintain minimum net capital in accordance with the federal securities laws.[156] In options classes other than to which it is registered, the total number of contracts executed during a quarter by a Market Maker in series in which it is not registered may not exceed 25% of the total number of all contracts executed by such Market Maker.[157] If MIAX PEARL finds any failure by a Market Maker to properly perform as a Market Maker, such Market Maker may be subject to suspension or termination of registration.[158]

Market Makers will receive certain benefits in return for satisfying their responsibilities.[159] For example, a broker-dealer or other lender may extend ''good faith'' credit to a member of a national securities exchange or registered broker-dealer to finance its activities as a market maker or specialist.[160] In addition, market makers are excepted from the prohibition in Section 11(a) of the Act.[161] The Commission believes that a market maker must be subject to sufficient and commensurate affirmative obligations, including the obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis, to justify favorable treatment.[162] The Commission further believes that the rules of all U.S. options markets need not provide the same standards for market maker participation, so long as they impose affirmative obligations that are consistent with the Act.[163] Market Makers on MIAX PEARL will not receive special trading allocations or similar rights vis-à-vis other Members.[164] The Commission believes that MIAX PEARL's Market Maker participation requirements impose sufficient affirmative obligations on MIAX PEARL's Market Makers and, accordingly, that MIAX PEARL's requirements are consistent with the Act. The Commission believes that while Market Makers may become an important source of liquidity on MIAX PEARL, they will likely not be the only source as MIAX PEARL is designed to match buying and selling interest of all MIAX PEARL participants. Therefore, the Commission believes that MIAX PEARL's proposed structure is consistent with the Exchange Act.

4. Order Display, Execution, and Priority

MIAX PEARL will operate a fully automated electronic options marketplace. Liquidity will be derived from orders to buy and orders to sell, including orders from Market Makers,[165] submitted to MIAX PEARL electronically by its members from remote locations. There will be no physical trading floor. Options traded on the Exchange will be subject to Minimum Price Variations (''MPV'') that will begin at $0.05 for option contracts trading at less than $3.00 per option, and $.10 for option contracts trading at $3.00 per option or higher.[166] In addition, MIAX PEARL will participate in the penny pilot program pursuant to which it will permit certain options with premiums under $3 (as well as heavily traded options on certain indices) to be quoted and traded in increments as low as $.01.[167]

Orders submitted to MIAX PEARL will be displayed unless the order is an immediately marketable order or is a contingent order, such as an immediate or cancel order. Additionally, orders may have a non-displayed price that is different than the displayed price, as further described below. Displayed orders and quotes will be displayed on an anonymous basis at a specified price. Non-displayed prices associated with orders will not be displayed to any participant.

Members may submit the following types of orders: Market; Marketable Limit; Cancel-Replacement; Immediate-or-Cancel; Intermarket Sweep; Do Not Route; Day Limit; Good 'Til Cancelled; and Post-Only.[168] All of these order types are based on similar order types available on other options exchanges.[169] The Commission believes that these order types are substantially similar to order types approved by the Commission on other exchanges and thus raise no new regulatory issues.

After the opening, trades will execute on MIAX PEARL when a buy order and a sell order match one another on the MIAX PEARL order book (''MIAX PEARL Book'' or ''Book''). The MIAX PEARL system will continuously and automatically match orders pursuant to price-time priority.[170] The highest bid

[153] *See* MIAX PEARL Rule 604(a).

[154] *See* MIAX PEARL Rule 605(d)(1) and (d)(3). Immediate-or-Cancel Orders from Market Makers will not be counted for the continuous quoting obligations of Market Makers. *See* MIAX PEARL Rule 605, Interpretations and Policies .01.

[155] *See* MIAX PEARL Rule 605(d)(2).

[156] *See* MIAX PEARL Rule 608.

[157] *See* MIAX PEARL Rule 605(e). *See also* Bats BZX Rule 22.6(e) and NASDAQ Options Market Rules, Chapter VII, Section 6(e).

[158] *See* MIAX PEARL Rule 600(b).

[159] *See, e.g.,* NOM Approval Order, *supra* note 112, at 14526 and Securities Exchange Act Release No. 61419 (January 26, 2010), 75 FR 5157, 5159 (February 1, 2010) (''BATS Options Approval Order'') (discussing the benefits and obligations of market makers).

[160] *See* 12 CFR 221.5 and 12 CFR 220.7; *see also* 17 CFR 240.15c3–1(a)(6) (capital requirements for market makers).

[161] 15 U.S.C. 78k(a). *See also, infra* Section III.C.5.

[162] *See* NOM Approval Order, *supra* note 112, at 14526 and BATS Options Approval Order, *supra* note 159, at 5159.

[163] *See id.*

[164] *See* MIAX PEARL Rule 514; *see also* MIAX PEARL Form 1 Application, Exhibit E at 2.

[165] The definition of ''quote'' or ''quotation'' means a bid or offer entered by a Market Maker as a firm order that updates the Market Maker's previous bid or offer, if any. An order entered by the Market Maker in the options series to which such Market maker is registered shall, as applicable, constitute a quote or quotation on MIAX PEARL. *See* MIAX PEARL Rule 100.

[166] *See* MIAX PEARL Rule 510(a).

[167] *See* MIAX PEARL Rule 510, Interpretations and Policies .01. MIAX PEARL has established a scheduled expiration date of December 31, 2016. However, MIAX PEARL may not be operational before December 31, 2016, thus the Exchange may need to file a proposed rule change under Section 19(b) of the Exchange Act to update this proposed rule.

[168] *See* MIAX PEARL Rule 516 for a description of each of the order types. MIAX PEARL notes that some of these order types will be valid only during certain portions of the trading day (*e.g.,* after the opening). MIAX PEARL further notes that not all order types will be available for use on each of the MEO interface and the FIX interface, and that the Exchange will issue a Regulatory Circular listing which order types, among the order types listed above, are available for delivery via the MEO interface and which are available for delivery via the FIX interface.

[169] *See, e.g.,* Bats BZX Rule 21.1(d)(8) (Post Only Order); NASDAQ Options Market Rules, Chapter VI, Section 1(e)(8) (Intermarket Sweep Order) and (1)(e)(1) (Cancel-replacement Order); NASDAQ PHLX LLC Rule 1080(m)(iv)(A) (Do Not Route Order and Immediate or Cancel Order); NYSE MKT LLC Rule 900.3NY(m) (Day Order) and (n) (Good-Til-Cancelled Order).

[170] *See* MIAX PEARL Rule 514(b).

and lowest offer shall have priority on the Exchange. Within each price level, if there are two or more orders at the best price, trading interest will be executed in time priority.[171] MIAX PEARL proposes to make available order processing and matching features, which are based on those features available on MIAX Exchange.[172] MIAX PEARL's system will automatically execute incoming orders that are executable against orders in its system, provided that such incoming orders will not be executed at prices inferior to the NBBO.[173] MIAX PEARL Rule 515 sets forth how the MIAX PEARL system will handle incoming orders that cannot be executed in part or in full. In particular, MIAX PEARL Rule 515 specifies a ''price protection process,'' a Managed Interest Process, and a Post Only Process, each discussed more fully below.

The MIAX PEARL system offers a ''price protection'' process for all orders.[174] Price protection prevents an order from being executed beyond the price designated in the order's price protection instructions (''the price protection limit''). The price protection limit is expressed in units of MPV away from the national best bid and offer (''NBBO'') at the time of the order's receipt, or the MIAX PEARL Best Bid and Offer (''PBBO'') if the best bid or offer on away markets (''ABBO'') is crossing the PBBO.[175] When triggered, price protection will cancel an order or the remaining contracts of an order. The MIAX PEARL system will not execute such orders at prices inferior to the current NBBO.[176]

The MIAX PEARL price protection process is substantially similar to that adopted by MIAX Exchange.[177] The Commission believes that this price protection functionality can benefit all market participants.

The Exchange's rules also provide for a ''Managed Interest Process'' that would apply to non-routable orders [178] that would either lock or cross the current opposite side NBBO where the PBBO is inferior to the NBBO.[179] The MIAX PEARL system will not execute such orders at prices inferior to the current NBBO.[180] The managed order would be displayed at one MPV away from the current opposite side NBBO and placed on the MIAX PEARL Book at a price equal to the opposite side NBBO.[181] Should the NBBO price change to an inferior price level, the order's displayed price will continue to re-price so that it is displayed one MPV away from the new NBBO, and the order's Book price will continuously reprice to lock the new NBBO.[182] Such re-pricing will continue until the managed order is fully executed, reaches its limit price, reaches its price protection limit, or is cancelled.[183]

During the Managed Interest Process, if the Exchange receives a new order or quote on the opposite side of the market from the managed order that could be executed, the MIAX PEARL system will immediately execute the remaining contracts to the extent possible at the initiating order's current booked bid or offer price, provided that it does not trade through the current NBBO.[184]

The Commission believes that the MIAX PEARL's Managed Interest Process is consistent with the managed interest process that the Commission approved for MIAX Exchange.[185] With regard to the treatment of Post-Only Orders under MIAX PEARL's Managed Interest Process, the Commission believes that the rules are consistent with rules that have been adopted by other exchanges governing the execution of Post-Only Orders.[186]

MIAX PEARL will have a process for the handling of certain Post-Only Orders (''POP Process'').[187] The POP Process will apply to Post-Only Orders where the limit price of the Post-Only Order locks or crosses the current opposite side PBBO where the PBBO is the NBBO (*i.e.,* locks or crosses an order on the MIAX PEARL Book).[188] The MIAX PEARL system will display and book such Post-Only Orders one MPV away from the current opposite side PBBO.[189] Should the PBBO price change to an inferior price level, the Post-Only Order's Book price and displayed price would continuously re-price to one MPV away from new PBBO until Post-Only Order is fully executed, reaches its limit price, reaches its price protection limit, or is cancelled.[190]

Under the POP Process, if the Exchange receives a new order or quote on the opposite side of the market from the Post-Only Order that could be executed, the MIAX PEARL system will immediately execute the remaining contracts to the extent possible at the Post-Only Order's current booked bid or offer price, provided that it does not trade through the current NBBO.[191] If the Exchange receives a new Post-Only Order on the opposite side of the market from a Post-Only Order being managed under the POP Process, and the new Post-Only Order locks or crosses the book price of the resting Post-Only Order, the Exchange will book and display the new Post-Only Order one MPV away from the current opposite side PBBO.[192]

The POP Process under MIAX PEARL's rules is substantially similar to the Managed Interest Process described above for MIAX PEARL and that the Commission approved for the MIAX Exchange.[193] The primary difference is that, under the POP Process, Post-Only Orders are booked and displayed at the same price—one MPV away from the current opposite side PBBO. This aspect of the POP Process is consistent with the treatment of Post-Only Orders on other exchanges.[194]

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[171] *See id.*

[172] *See infra* discussion of MIAX PEARL's proposed price protection process and managed interest process, which are based on substantially similar order processing and matching features on MIAX Exchange.

[173] *See* MIAX PEARL Rule 515(a) and (b).

[174] *See* MIAX PEARL Rule 515(c).

[175] *See* MIAX PEARL Rule 515(c). The Exchange will publish a Regulatory Circular setting a minimum and maximum number of MPVs away from the NBBO (or PBBO if the ABBO is crossing the PBBO) that a market participant may designate for its price protection limit. The Exchange will also set, and announce by Regulatory Circular, a default price protection limit within 1 to 5 MPVs away from the NBBO (or PBBO if the ABBO is crossing the PBBO).

[176] *See* MIAX PEARL Rule 515(c).

[177] *See* MIAX Exchange Rule 515(c)(1). The MIAX Exchange price protection process applies only to non-market maker orders, whereas the MIAX PEARL price protection process applies to all market participants, including market makers. The Commission believes that this is consistent with the price protection rules of other exchanges. *See, e.g.,* NYSE Arca, Inc. Rules 6.60 (Price Protection—Orders) and 6.61 (Price Protection—Quotes).

[178] Non-routable orders would include, for example, orders marked ''Do Not Route'' or Post-Only orders being handled under the Managed Interest Process.

[179] *See* MIAX PEARL Rule 515(d)(2).

[180] *See* MIAX PEARL Rule 515(d)(2).

[181] *See* MIAX PEARL Rule 515(d)(2)(ii). *See also* MIAX Exchange Rule 515(c)(1)(ii) (providing for the same Managed Interest Process on MIAX Exchange).

[182] *See id.*

[183] *See id.*

[184] *See* MIAX PEARL Rule 515(d)(2)(iii)(A). *See also* MIAX Exchange Rule 515(c)(1)(ii).

[185] *See* MIAX Exchange Rule 515(c)(1)(ii).

[186] *See, e.g.,* Bats BZX Rule 21.1(h) and Securities Exchange Act Release No. 77818 (May 12, 2016), 81 FR 31283 (May 18, 2016) (SR–BatsBZX–2016–16).

[187] *See* MIAX PEARL Rule 515(g).

[188] Post-Only Orders that lock or cross the current opposite side NBBO and the PBBO is inferior to the NBBO would be handled through the Managed Interest Process under Rule 515(d)(2) as described above.

[189] *See* MIAX PEARL Rule 515(g)(ii).

[190] *Id.*

[191] *See* MIAX PEARL Rule 515(g)(iii)(A).

[192] *See* MIAX PEARL Rule 515(g)(iii)(B).

[193] *See* MIAX PEARL Rule 515(d)(2) and MIAX Exchange Rule 515(c)(1)(ii).

[194] *See, e.g.,* Bats BZX Rule 21.1(i) (Price Adjust) (providing that an order that, at the time of entry, would lock or cross a protected quotation of another options exchange or Bats BZX will be ranked and displayed by the Bats BZX system at one MPV below the current NBO (for bids) or to one MPV above the current NBB (for offers)); NASDAQ Options Market Rules, Chapter VI, Section 1(e)(11) (providing that if a Post-Only Order would lock or cross an order on the NASDAQ Options Market

The Commission believes that MIAX PEARL's proposed display, execution, and priority rules discussed above in this section are consistent with the Act. In particular, the Commission finds that the proposed rules are consistent with Section 6(b)(5) of the Act,[195] which, among other things, requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, or dealers. The Commission also finds that the proposed rules are consistent with Section 6(b)(8) of the Act,[196] which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The trading rules of MIAX PEARL are substantially similar to the current trading rules of MIAX Exchange and other exchanges, as noted above, which were filed with and approved by the Commission (or otherwise became effective) pursuant to Section 19(b) of the Act.[197] Therefore, the Commission believes that these rules raise no new regulatory issues and are consistent with the Act.

5. Section 11(a) of the Act

Section 11(a)(1) of the Act [198] prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises investment discretion (collectively, ''covered accounts''), unless an exception applies. The Exchange has represented that it has analyzed its rules proposed hereunder, and believes that they are consistent with Section 11(a) of the Act and rules thereunder.[199] For the reasons set forth below, based on MIAX PEARL's representations, the Commission believes that MIAX PEARL's order execution algorithm will allow members to meet the requirements of Rule 11a2–2(T) for executions on MIAX PEARL.

Rule 11a2–2(T) under the Act,[200] known as the ''effect versus execute'' rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with Rule 11a2–2(T)'s conditions, a member: (i) May not be associated with the executing member; (ii) must transmit the order from off the exchange floor; (iii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution; [201] and (iv) with respect to an account over which the member or an associated person has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission,[202] MIAX PEARL requested that the Commission concur with its conclusion that MIAX PEARL members that enter orders into the MIAX PEARL trading system satisfy the requirements of Rule 11a2–2(T). For the reasons set forth below, the Commission believes that MIAX PEARL members entering orders into the MIAX PEARL trading system will satisfy the conditions of Rule 11a2–2(T).

First, Rule 11a2–2(T) requires that orders for covered accounts be transmitted from off the exchange floor. MIAX PEARL will not have a physical trading floor, and like other automated systems, the MIAX PEARL trading system will receive orders from members electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.[203] Since the MIAX PEARL trading system receives all orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that the MIAX PEARL trading system satisfies the off-floor transmission requirement.

Second, Rule 11a2–2(T) requires that the member not participate in the execution of its order once it has been transmitted to the member performing the execution. MIAX PEARL has represented that the MIAX PEARL trading system will at no time following the submission of an order allow a member or an associated person of such member to acquire control or influence over the result or timing of an order's execution.[204] According to MIAX PEARL, the execution of a member's order is determined solely by what orders, bids, or offers are present in the MIAX PEARL trading system at the time the member submits the order and the order priority based on MIAX PEARL rules.[205] Accordingly, the Commission believes that a MIAX PEARL member will not participate in the execution of its order submitted into the trading system.

Rule 11a2–2(T)'s third condition is that the order be executed by an

system, the order will be re-priced to $.01 below the current low offer (for bids) or above the current best bid (for offers) and displayed at one MPV below the current low offer (for bids) or above the current best bid (for offers)).

[195] 15 U.S.C. 78f(b)(5).

[196] 15 U.S.C. 78f(b)(8).

[197] Many of MIAX Exchange's rules were approved at the time that MIAX Exchange's registration as a national securities exchanged was granted. *See* MIAX Order, *supra* note 13.

[198] 15 U.S.C. 78k(a)(1).

[199] *See* Letter from Barbara J. Comly, EVP, General Counsel and Corporate Secretary, Miami Holdings, to Brent J. Fields, Secretary, Commission, and John C. Roeser, Associate Director, Office of Market Supervision, Division of Trading and Markets, Commission, dated November 4, 2016 (''MIAX PEARL 11(a) Request Letter'').

[200] 17 CFR 240.11a2–2(T).

[201] This prohibition also applies to associated persons. *See* 15 U.S.C. 78f(b)(8). The member may, however, participate in clearing and settling the transaction. *See* Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) (regarding the NYSE's Designated Order Turnaround System) (''1978 Release'').

[202] *See* MIAX PEARL 11(a) Request Letter, *supra* note 199.

[203] *See, e.g.,* Securities Exchange Act Release Nos. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR–BSE–2008–48) (order approving proposed rules of BX); 49068, (January 13, 2004), 69 FR 2775 (January 20, 2004) (establishing, among other things, BOX as an options trading facility of BSE); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (approving the PCX's use of the Archipelago Exchange as its equity trading facility); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility). *See* 1978 Release, *supra* note 201. *See also* Securities Exchange Act Release No. 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (regarding the American Stock Exchange (''Amex'') Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX Communications and Execution System, and the Philadelphia Stock Exchange Automated Communications and Execution System) (''1979 Release'').

[204] *See* MIAX PEARL 11(a) Request Letter, *supra* note 199. Members may change or cancel an order or quote at any time before the order is executed on the Exchange. *See* MIAX PEARL Form 1 Application, Exhibit E. The Commission has stated that the non-participation requirement is satisfied under such circumstances, so long as such modifications or cancellations are also transmitted from off the floor. *See* 1978 Release, *supra* note 201 (stating that the ''non-participation requirement does not prevent initiating members from canceling of modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor'').

[205] *See* MIAX PEARL 11(a) Request Letter, *supra* note 199.

exchange member who is unaffiliated with the member initiating the order. The Commission has stated that the requirement is satisfied when automated exchange facilities, such as the MIAX PEARL trading system, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages over non-members in handling their orders after transmitting them to the Exchange.[206] MIAX PEARL has represented that the design of its trading system ensures that no member has any special or unique trading advantage over non-members in the handling of its orders after transmitting its orders to MIAX PEARL.[207] Based on MIAX PEARL's representation, the Commission believes that the MIAX PEARL trading system satisfies this requirement.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2–2(T).[208] MIAX PEARL members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.[209]

D. Discipline and Oversight of Members

As noted above, one prerequisite for the Commission's grant of an exchange's application for registration is that a proposed exchange must be so organized and have the capacity to be able to carry out the purposes of the Act.[210] Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with the Act and the rules and regulations thereunder and the rules of the exchange.[211]

MIAX PEARL's rules codify MIAX PEARL's disciplinary jurisdiction over its members, thereby facilitating its ability to enforce its members' compliance with its rules and the federal securities laws.[212] MIAX PEARL's rules permit it to sanction members for violations of its rules and violations of any provision of the Exchange Act or the rules and regulations promulgated thereunder, by, among other things, expelling or suspending members; limiting members' activities, functions, or operations; fining or censuring members; suspending or barring a person from being associated with a member; or any other fitting sanction in accordance with MIAX rules.[213]

MIAX PEARL's disciplinary and oversight functions will be administered in accordance with Chapter X of the MIAX PEARL rules, which governs disciplinary actions. Unless delegated to another SRO pursuant to the terms of any effective 17d–2 plan,[214] MIAX PEARL regulatory staff (including regulatory staff of another SRO that may be acting on MIAX PEARL's behalf pursuant to a regulatory services agreement) will, among other things, investigate potential securities laws violations and initiate charges pursuant to MIAX PEARL rules.[215]

Upon a finding of probable cause of a violation within the disciplinary jurisdiction of MIAX PEARL and where further proceedings are warranted,[216] MIAX PEARL will conduct a hearing on disciplinary matters before a professional hearing officer[217] and two members of the Business Conduct Committee[218] (the ''Panel'').[219] The MIAX PEARL member (or their associated person) or the MIAX PEARL regulatory staff may petition for review of the decision of the Panel by the MIAX PEARL Board.[220] Any review would be conducted by the MIAX PEARL Board or a committee thereof composed of at least three Directors of the MIAX PEARL Board[221] (whose decision must be ratified by the MIAX PEARL Board) and such decision will be final.[222] In addition, the MIAX PEARL Board on its own motion may order review of a disciplinary decision.[223]

Appeals from any determination that impacts access to MIAX PEARL, such as termination or suspension of membership, will be instituted under, and governed by, the provisions in the Chapter XI of the MIAX PEARL Rules which incorporates by reference Chapter XI of the MIAX Exchange Rules. MIAX PEARL's Chapter XI applies to persons economically aggrieved by any of the following actions of MIAX PEARL including, but not limited to: (a) Denial of an application to become a Member; (b) barring a person from becoming associated with a Member; (c) limiting or prohibiting services provided by MIAX PEARL or services of any exchange member.[224]

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[206] In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into each system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* 1979 Release, *supra* note 203.

[207] *See* MIAX PEARL 11(a) Request Letter, *supra* note 199.

[208] 17 CFR 240.11a2–2(T)(a)(2)(iv). In addition, Rule 11a2–2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated person thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. *See* 17 CFR 240.11a2–2(T)(d). *See also* 1978 Release, *supra* note 201 (stating ''[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests'').

[209] *See* MIAX PEARL 11(a) Request Letter, *supra* note 199.

[210] *See* 15 U.S.C. 78f(b)(1).

[211] *See id.*

[212] *See* MIAX PEARL Rule 1000.

[213] *See id. See also* MIAX Rule 1000, CBOE Rule 17.1(a), and ISE Rule 1600(a) (containing similar provisions).

[214] *See supra* Section III.B.3.c (concerning the 17d–2 plans to which MIAX PEARL has committed to join).

[215] *See* MIAX PEARL Rules 1002 and 1004. As noted above, MIAX PEARL has entered into an RSA with FINRA under which FINRA will perform certain regulatory functions on behalf of MIAX PEARL. *See* MIAX PEARL Rule 1015.

[216] *See* MIAX PEARL Rule 1004.

[217] *See* MIAX PEARL Rule 1015, Interpretation and Policy .01.

[218] *See* MIAX PEARL By-Laws, Article IV, Section 4.7.

[219] *See* MIAX PEARL Rule 1006.

[220] *See* MIAX PEARL Rule 1010.

[221] Specifically, the Chairman of the MIAX PEARL Board, with the approval of the Board, shall appoint an Appeals Committee to preside over all appeals related to disciplinary and adverse action determinations. *See* note 46 and accompanying text (detailing the composition of the Appeals Committee). If the Independent Director serving on the Appeals Committee recuses himself or herself from an appeal, due to conflict of interest or otherwise, the Independent Director may be replaced by a Non-Industry Director for purposes of the applicable appeal if there is no other Independent Director able to serve as the replacement. *See* MIAX PEARL By-Laws, Article IV, Section 4.5(d). *See also* MIAX Exchange Amended and Restated By-Laws, Article IV, Section 4.5(d).

[222] *See* MIAX PEARL Rule 1010.

[223] *See id.*

[224] *See* MIAX PEARL Rule 1100 (which incorporates by reference MIAX Exchange Rule 1100). As noted above, MIAX PEARL has entered into a RSA with FINRA under which FINRA will perform certain regulatory functions on behalf of MIAX PEARL. MIAX PEARL may perform some or all of the functions specified in the Chapter XI of the MIAX PEARL Rules, which incorporates by reference Chapter XI of the MIAX Exchange Rules. *See* supra note 110. *See also* MIAX PEARL Rule 1106 (which incorporates by reference MIAX Exchange Rule 1106).

Any person aggrieved by an action of MIAX PEARL within the scope of Chapter XI may file a written application to be heard within thirty days [225] after such action has been taken.[226] Applications for hearing and review will be referred to the Business Conduct Committee, which will appoint a hearing panel of no less than three members of such Committee.[227] The decision of the hearing panel made pursuant to Chapter XI of the MIAX PEARL rules is subject to review by the MIAX PEARL Board, either on its own motion within 30 days after issuance of the decision, or upon written request submitted by the applicant or the President of MIAX PEARL within 15 days after issuance of the decision.[228] The review would be conducted by the MIAX PEARL Board or a committee of the MIAX PEARL Board composed of at least three directors.[229]

The Commission finds that MIAX PEARL's proposed disciplinary and oversight rules and structure, as well as its proposed process for persons economically aggrieved by certain MIAX PEARL actions, are consistent with the requirements of Sections 6(b)(6) and 6(b)(7) of the Act [230] in that they provide fair procedures for the disciplining of members and persons associated with members. The Commission further finds that the proposed MIAX PEARL rules are designed to provide MIAX PEARL with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of MIAX PEARL.[231] The Commission notes that MIAX PEARL's proposed disciplinary and oversight rules and structures are similar to the rules of other exchanges.[232]

E. Listing Requirements

MIAX PEARL does not intend to initially list or trade common stock or non-option securities of operating companies but rather intends to initially only trade option contracts that meet the options listing standards of the Exchange.[233]

The Commission finds that MIAX PEARL's proposed initial and continued listing rules are consistent with the Act, including Section 6(b)(5),[234] in that they are designed to protect investors and the public interest, prevent fraudulent and manipulative acts and practices, and promote just and equitable principles of trade. Before beginning operation, MIAX PEARL will need to become a participant in the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934 (''OLPP'').[235] In addition, before beginning operation, MIAX PEARL will need to become a participant in the Options Clearing Corporation.

IV. Exemption From Section 19(b) of the Act With Regard to MIAX Exchange, CBOE, New York Stock Exchange (''NYSE'') and FINRA Rules Incorporated by Reference

MIAX PEARL proposes to incorporate by reference certain MIAX Exchange, CBOE, NYSE and FINRA rules.[236] Thus, for certain MIAX PEARL rules, MIAX PEARL members will comply with a MIAX PEARL rule by complying with the referenced MIAX Exchange, CBOE, NYSE and FINRA rules.

In connection with the proposal to incorporate MIAX Exchange, CBOE, NYSE and FINRA rules by reference, MIAX PEARL requests, pursuant to Rule 240.0–12 under the Act,[237] an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to the MIAX PEARL rules that are effected solely by virtue of a change to a cross-referenced MIAX Exchange, CBOE, NYSE or FINRA rule.[238] MIAX PEARL proposes to incorporate by reference categories of rules, rather than individual rules within a category, that are not trading rules. In addition, MIAX PEARL agrees to provide written notice to its members whenever MIAX Exchange, CBOE, NYSE or FINRA proposes a change to a cross-referenced rule [239] and whenever any such proposed changes are approved by the Commission or otherwise become effective.[240]

Using the authority under Section 36 of the Act, the Commission previously exempted certain SROs from the requirement to file proposed rule changes under Section 19(b) of the Act.[241] The Commission is hereby

[225] An applicant may file for an extension of time as allowed by the Chairman of the Business Conduct Committee within thirty days of MIAX PEARL's action. An application for an extension will be ruled upon by the Chairman of the Business Conduct Committee, and his ruling will be given in writing. Rulings on applications for extensions of time are not subject to appeal. *See* MIAX PEARL Rule 1101 (which incorporates by reference MIAX Exchange Rule 1101).

[226] The application must include: (1) The action for which review is sought; (2) the specific reasons for the applicant's exception to such action; (3) the relief sought; and (4) whether the applicant intends to submit any documents, statements, arguments or other material in support of the application, with a description of any such materials. *See* MIAX PEARL Rule 1101(a) (which incorporates by reference MIAX Exchange Rule 1101(a)).

[227] *See* MIAX PEARL Rule 1102 (which incorporates by reference MIAX Exchange Rule 1102). The decision of the hearing panel will be made in writing and sent to the parties to the proceedings. *See* MIAX PEARL Rule 1103(d) (which incorporates by reference MIAX Exchange Rule 1103(d)).

[228] *See* MIAX PEARL Rule 1104(a) (which incorporates by reference MIAX Exchange Rule 1104(a)). The MIAX PEARL Board, or a committee of the MIAX PEARL Board, will have sole discretion to grant or deny either request. *See id.*

[229] *See* MIAX PEARL Rule 1104(b) (which incorporates by reference MIAX Exchange Rule 1104(b)). The MIAX PEARL Board or its designated committee may affirm, reverse, or modify in whole or in part, the decision of the hearing panel. The decision of the MIAX PEARL Board or its designated committee would be final, and must be in writing and would be sent to the parties to the proceeding. *See* MIAX PEARL Rule 1104(c) (which incorporates by reference MIAX Exchange Rule 1104(c)).

[230] 15 U.S.C. 78f(b)(6) and (b)(7), respectively.

[231] *See* Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

[232] *See, e.g.,* ISE Mercury Order, *supra* note 27, ISE Gemini Order, *supra* note 27 and MIAX Order, *supra* note 13.

[233] *See* MIAX PEARL Form 1 Application, Exhibit H. MIAX PEARL's listing rules, including the criteria for the underlying securities of the options to be traded, are substantially similar to the listing rules of MIAX Exchange. *See* MIAX PEARL Rules Chapter IV (Option Contracts Traded on the Exchange); MIAX Exchange Rules Chapter IV. *See also* ISE Gemini LLC Rule 500 Series and BOX Options Exchange LLC Rule 5000 Series.

[234] 15 U.S.C. 78f(b)(5).

[235] 15 U.S.C. 78k–1(a)(3)(B).

[236] Specifically, MIAX PEARL proposes to incorporate by reference the following MIAX Exchange Rules: Chapter III (Business Conduct), Chapter VII (Exercises and Deliveries), Chapter VIII (Records, Reports and Audits), Chapter IX (Summary Suspension), Chapter XI (Hearings, Review and Arbitration), Chapter XIII (Doing Business With the Public), Chapter XIV (Order Protection, Locked and Crossed Markets), Chapter XV (Margins), Chapter XVI (Net Capital Requirements). The following rules are cross-referenced in the MIAX Exchange rules: MIAX Exchange Rule 1107 (Arbitration) incorporates by reference the Rule 12000 Series and Rule 13000 Series of the FINRA Manual and FINRA Rule 2268; MIAX Exchange Rule 1321 (Transfer of Accounts) cross-references FINRA Rule 11870; MIAX Exchange Rule 1502 (Margin Requirements) cross-references the CBOE and NYSE rules concerning initial and maintenance margin requirements that may be in effect from time to time.

[237] 17 CFR 240.0–12.

[238] *See* Letter from Barbara J. Comly, EVP, General Counsel and Corporate Secretary, Miami Holdings, to Brent J. Fields, Secretary, Commission, dated November 4, 2016.

[239] *See id.*

[240] MIAX PEARL will provide such notice through a posting on the same Web site location where MIAX PEARL posts its own rule filings pursuant to Rule 19b–4 under the Act, within the required time frame. The Web site posting will include a link to the location on the MIAX Exchange, CBOE, NYSE or FINRA Web site where MIAX Exchange, CBOE, NYSE or FINRA's proposed rule change is posted. *See id.*

[241] *See, e.g.,* Mercury Order, *supra* note 27, BATS Order, *supra* note 13, C2 Order, *supra* note 75,

Continued

granting MIAX PEARL's request for exemption, pursuant to Section 36 of the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that MIAX PEARL proposes to incorporate by reference. The exemption is conditioned upon MIAX PEARL providing written notice to MIAX PEARL members whenever MIAX Exchange, CBOE, NYSE or FINRA proposes to change an incorporated by reference rule and when the Commission approves any such changes. The Commission believes that the exemption is appropriate in the public interest and consistent with the protection of investors because it will promote more efficient use of Commission's and SROs' resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought to be implemented by more than one SRO.

V. Conclusion

It is ordered that the application of MIAX PEARL for registration as a national securities exchange be, and it hereby is, granted.

It is furthered ordered that operation of MIAX PEARL is conditioned on the satisfaction of the requirements below:

A. *Participation in National Market System Plans Relating to Options Trading.* MIAX PEARL must join: (1) The Plan for the Reporting of Consolidated Options Last Sale Reports and Quotation Information (Options Price Reporting Authority); (2) the OLPP; (3) the Linkage Plan; (4) the Plan of the Options Regulatory Surveillance Authority; and (5) the Plan Governing the Consolidated Audit Trail;

B. *Participation in Multiparty Rule 17d–2 Plans.* MIAX PEARL must become a party to the multiparty Rule 17d–2 agreements concerning options sales practice regulation and market surveillance, and covered Regulation NMS rules;

C. *Participation in the Options Clearing Corporation.* MIAX PEARL must become an Options Clearing Corporation participant exchange; and

D. *Participation in the Intermarket Surveillance Group.* MIAX PEARL must join the Intermarket Surveillance Group.

It is further ordered, pursuant to Section 36 of the Act,[242] that MIAX PEARL shall be exempted from the rule filing requirements of Section 19(b) of the Act with respect to the MIAX Exchange, CBOE, NYSE and FINRA rules that MIAX PEARL proposes to incorporate by reference, subject to the conditions specified in this order that MIAX PEARL provide written notice to MIAX PEARL members whenever MIAX Exchange, CBOE, NYSE or FINRA proposes to change an incorporated by reference rule and when the Commission approves any such changes.

By the Commission.

Brent J. Fields,

Secretary.

[FR Doc. 2016–30538 Filed 12–19–16; 8:45 am]

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Nasdaq Order, *supra* note 27, and NOM Approval Order, *supra* note 112.

[242] 15 U.S.C. 78mm.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79545; File No. SR–Phlx–2016–118]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 3317 (Compliance With Regulation NMS Plan To Implement a Tick Size Pilot)

December 14, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2016, NASDAQ PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Phlx Rule 3317 to modify the Web site data publication requirements relating to the Regulation NMS Plan to Implement a Tick Size Pilot Program (''Plan'') and to clarify a provision related to the reporting of certain Market Maker profitability data. Phlx also proposes to amend Rule 3317(b)(5) to clarify the timing and format of publication of data related to Market Maker registration.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 25, 2014, Phlx and several other self-regulatory organizations (the ''Participants'') filed with the Commission, pursuant to Section 11A of the Act [3] and Rule 608 of Regulation NMS thereunder,[4] the Plan to Implement a Tick Size Pilot Program.[5] The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.[6] The Plan was published for comment in the **Federal Register** on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.[7] The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.[8] On November 6, 2015, the SEC exempted the Participants from implementing the Pilot until October 3, 2016.[9] Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the SEC exempted the Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Participants to implement the pilot on a phased-in basis, as described in the Participants' exemptive request.[10]

[3] 15 U.S.C. 78k–1.

[4] 17 CFR 242.608.

[5] *See* Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

[6] *See* Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

[7] *See* Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (''Approval Order'').

[8] *See* Approval Order at 27533 and 27545.

[9] *See* Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

[10] *See* Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan.

Phlx adopted rule amendments to implement the requirements of the Plan, including relating to the Plan's data collection requirements and requirements relating to Web site data publication.[11] Specifically, with respect to the Web site data publication requirements pursuant to Section VII and Appendices B and C to the Plan, Phlx Rule 3317(b)(2)(B) provides, among other things, that Phlx shall make the data required by Items I and II of Appendix B to the Plan, and collected pursuant to paragraph (b)(2) of Rule 3317, publicly available on the Exchange Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Rule 3317(b)(3)(C), provides, among other things, that Phlx shall make the data required by Item IV of Appendix B to the Plan, and collected pursuant to paragraph (b)(3) of Rule 3317, publicly available on the Exchange Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Commentary .08 to Rule 3317 provides, among other things, that the requirement that Phlx make certain data publicly available on the Exchange Web site pursuant to Appendix B and C to the Plan shall commence at the beginning of the Pilot Period.

Phlx is proposing amendments to Rule 3317(b)(2)(B) (regarding Appendix B.I and B.II data) and Rule 3317(b)(3)(C) (regarding Appendix B.IV data) to provide that data required to be made available on Phlx's Web site be published within 120 calendar days following month end. In addition, the proposed amendments to Commentary .08 to Rule 3317 would provide that, notwithstanding the provisions of paragraphs (b)(2)(B), (b)(3)(C), and (b)(5), Phlx shall make data for the Pre-Pilot period publicly available on the Phlx Web site pursuant to Appendix B and C to the Plan by February 28, 2017.[12]

The purpose of delaying the publication of the Web site data is to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information.

Phlx also proposes to amend Rule 3317(b)(4), which relates to the reporting of Market Maker profitability data for members for the Exchange is the Designated Examining Authority (''DEA''). Currently, Rule 3317(b)(4)(A) states that a Member that is a Market Maker shall collect and transmit to their DEA the data described in Item I of Appendix C of the Plan with respect to executions on any Trading Center that have settled or reached settlement date. Information related to Market Maker profitability will be collected by FINRA and transmitted to the SEC and, on an aggregate basis, also be made publicly available.[13]

The Financial Industry Regulatory Authority, Inc. (''FINRA'') recently submitted a proposed rule change amending FINRA Rule 6191(b), which sets forth FINRA's obligations with respect to data collection and reporting under the Plan. With this rule change, FINRA proposes to publish (1) Market Maker profitability statistics for Market Makers for which FINRA is the DEA; (2) Market Maker profitability statistics collected from other Participants that are DEAs, and (iii) Market Maker profitability statistics for Market Makers whose DEA is not a Participant.[14] As part of its rule change, FINRA also stated that it would make this data publicly available on the FINRA Web site within 120 calendar days following month end at no charge. In its proposal, FINRA noted that the publication by FINRA of Market Maker profitability data on the FINRA Web site, including Market Makers for which FINRA is not the DEA, is intended to address confidentiality concerns with respect to the Appendix C data required to be made publicly available by the Participants. Although the Participants that are DEAs also would not have identified the Market Makers when publishing required Appendix C data, FINRA noted that some of the Participants are DEAs for a very small number of Market Makers, and the published data from these DEAs raised concerns regarding the potential for identifying the Market Makers that correspond to those statistics.[15]

Although the Exchange is currently a DEA for certain member firms, Rule 3317 does not currently require Phlx as DEA to report the information collected pursuant to paragraph (b)(4) to FINRA for publication. Given FINRA's recent proposed rule change, the Exchange is therefore proposing to adopt Rule 3317(b)(4)(C) to address the reporting of Market Maker profitability data for members for which Phlx is the DEA. Rule 3317(b)(4)(C) states that the Exchange, as DEA, shall collect the data required by Item I of Appendix C to the Plan and paragraph (b)(4)(A) for those Members that are Market Makers for which the Exchange is DEA, and on a monthly basis transmit such data, categorized by the Control Group and each Test Group, to the SEC in a pipe delimited format. Rule 3317(b)(4)(C) also provides that the Exchange, as DEA, shall make the data collected pursuant to subparagraph (4) of Rule 3317(b) available to FINRA for aggregation and publication, categorized by the Control Group and each Test Group, on the FINRA Web site pursuant to FINRA Rules. Rule 3317(b)(4)(C) does not alter the information required to be submitted to the SEC.

Finally, Phlx proposes to amend Rule 3317(b)(5), which relates to the collection and transmission of Market Maker registration statistics. Currently, Rule 3317(b)(5) provides that the Exchange shall collect and transmit to the SEC the data described in Item III of Appendix B of the Plan relating to daily Market Maker registration statistics in a pipe delimited format within 30 calendar days following month end for (1) transactions in each Pre-Pilot Data Collection Security for the period beginning six months prior to the Pilot Period through the trading day immediately preceding the Pilot Period; and (2) transactions in each Pilot Security for the period beginning on the first day of the Pilot Period through six months after the end of the Pilot Period. Although the Plan requires that such data be made publicly available,[16] Rule 3317(b)(5) does not currently include a provision requiring the Exchange to publish such data to its Web site. The Exchange therefore proposes to amend Rule 3317(b)(5) to provide that the Exchange shall make Market Maker

Counsel and Secretary, Bats Global Markets, Inc., dated September 13, 2016; *see also* Letter from Eric Swanson, EVP, General Counsel and Secretary, Bats Global Markets, Inc., to Brent J. Fields, Secretary, Commission, dated September 9, 2016.

[11] *See, e.g.,* Securities Exchange Act Release No. 77458 (March 28, 2016), 81 FR 18919 (April 1, 2016) (SR–Phlx–2016–39); *see also* Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 17, 2016.

[12] With respect to data for the Pilot Period, the requirement that Phlx make data publicly available on the Phlx Web site pursuant to Appendix B and C to the Plan shall continue to commence at the beginning of the Pilot Period. Thus, the first Web site publication date for Pilot Period data (covering October 2016) would be published on the Phlx Web site by February 28, 2017, which is 120 days following the end of October 2016.

[13] *See* FINRA Rule 6191(b)(4)(B).

[14] *See* SR–FINRA–2016–042.

[15] *Id.*

[16] *See* Section VII.A. 4 of the Plan.

registration data publicly available on the Exchange Web site within 120 calendar days following month end at no charge.

Phlx has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the 30-day operative delay. If the Commission waives the 30-day operative delay, the operative date of the proposed rule change will be the date of filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[17] in general, and furthers the objectives of Section 6(b)(5) of the Act,[18] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, because it is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan and is in furtherance of the objectives of the Plan, as identified by the SEC.

In approving the Plan, the Commission recognized that requiring the publication of Market Maker data may raise confidentiality concerns, especially for Pilot Securities that may have a relatively small number of designated Market Makers.[19] For this reason, the Commission modified the Plan so that the data that would be made publicly available would not contain profitability measures for each security, but would be aggregated by the Control Group and each Test Group. Phlx believes that this proposal is consistent with the Act in that it is designed to address confidentiality concerns by permitting Phlx to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. With respect to the change to Rule 3317(b)(5), the Exchange believes this change will clarify the timing and format of publication of data related to Market Maker registration.

Phlx believes that the addition of Rule 3317(b)(4)(C) relating to the reporting of Market Maker profitability data to FINRA is consistent with the Act because it effectuates FINRA's recent proposal, which itself is designed to further address confidentiality concerns by permitting FINRA to aggregate and publish Market Maker profitability data for all Participant DEAs, including Market Makers for which FINRA is not the DEA.[20] Phlx notes that this proposal also does not alter the information required to be submitted to the SEC.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Phlx notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan.

The proposal is intended to address confidentiality concerns that may adversely impact competition, especially for Pilot Securities that may have a relatively small number of designated Market Makers, by (1) permitting Phlx to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information; and (2) making Market Maker profitability statistics that Phlx has gathered as DEA available to FINRA for aggregation and publication. The proposal also does not alter the information required to be submitted to the SEC.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.[21]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[22] and subparagraph (f)(6) of Rule 19b–4 thereunder.[23]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing so that it may become operative immediately.

The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. The proposal is intended to address confidentiality concerns by permitting the Exchange to (i) Delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information; and (ii) allow for FINRA to aggregate and publish Market Maker profitability data for all Participant DEAs. The Exchange notes that the proposed change will not affect the data reporting requirements for members for which PHLX is the DEA. The proposal also does not alter the information required to be submitted to the Commission.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement these proposed changes that are intended to address confidentiality concerns. The Commission notes that some Pilot data was scheduled to be published on November 30, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative on November 30, 2016.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] *See* Approval Order at 27543—27544.

[20] *See* SR–FINRA–2016–042.

[21] Phlx notes that Financial Information Forum (FIF) submitted a letter to the staff of the Commission raising concerns regarding the publication of certain Appendix B statistics on a disaggregated basis using a unique masked market participant identifier. *See* Letter from Mary Lou Von Kaenel, Managing Director, FIF, to David S. Shillman, Associate Director, Division of Trading and Markets, Commission, dated August 16, 2016, available at *https://www.fif.com/comment-letters.*

[22] 15 U.S.C. 78s(b)(3)(A)(iii).

[23] 17 CFR 240.19b–4(f)(6).

[24] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2016–118 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number *SR–Phlx–2016–118.* This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *SR–Phlx–2016–118* and should be submitted on or before January 10, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30551 Filed 12–19–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79557; File No. SR–BOX–2016–57]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Detail How Complex Orders Will Execute Through the Solicitation Auction Mechanism

December 14, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 7, 2016, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to detail how Complex Orders will execute through the Solicitation Auction mechanism. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://boxexchange.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to detail how the Solicitation Auction mechanism will treat Complex Orders on the Exchange.[3] Pursuant to BOX Rule 7270, the Exchange has two block-sized auction mechanisms, the Solicitation Auction Mechanism and the Facilitation Auction Mechanism whereby Order Flow Providers (OFPs) can provide price improvement opportunities for a transaction where the OFP seeks to facilitate an order it represents as agent, and/or a transaction where the OFP solicited interest to execute against an order it represents as agent. Transactions executed through the Solicitation or Facilitation auction mechanisms are comprised of the order the OFP represents as agent (the ''Agency Order'') and the contra order for the full size of the Agency Order (either the ''Solicitation'' or ''Solicited'' Order).[4] The contra order may represent interest for the Participant's own account or interest the Participant has solicited from one or more other parties, or a combination of both.

This proposal only addresses how the Solicitation Auction mechanism will treat Complex Orders on the Exchange.[5] Similar to the ISE's Block-Trade rules,[6] Complex Orders [7] executed through the Solicitation auction mechanism on BOX function in substantially the same manner as single-leg orders executed through this mechanism. To detail how the Solicitation mechanism treats

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Complex Orders are not currently traded through the Solicitation Auction mechanism. Prior to implementation, BOX will issue an informational circular to inform Participants of the implementation date for Complex Orders to trade through the Solicitation Auction.

[4] The Exchange notes that it does not trade stock option orders.

[5] The Exchange recently adopted rules to allow Complex Orders to execute through the Facilitation Auction mechanism. *See* Securities Release No. 78444 (July 29, 2016), 81 FR 51533 (August 4, 2016)(Notice of Filing and Immediate Effectiveness of file Number SR–BOX–2016–37).

[6] *See* International Securities Exchange Rule 716 and Supplementary Material .08 to Rule 716.

[7] Under Rule 7240(a)(5) a ''Complex Order' is defined as ''any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy.) A Complex Order that does not meet this definition will be automatically rejected.

Complex Orders, the Exchange proposes to adopt IM–7270–8. IM–7270–8 will state that Participants may use the Solicitation Mechanism according to paragraph (b) of Rule 7270 to execute block-size Complex Orders at a net price. The OFP must be willing to execute the entire size of the Agency Order through the submission of a contra order; and block-size Complex Orders executed through the Solicitation Mechanism will continue to be limited to Complex Orders of five hundred (500) contracts per leg or more.[8] Each Complex Agency Order entered into the Solicitation Auction shall be all-or-none.

Upon the entry of a block-sized Complex Order into the Solicitation mechanism, a broadcast message will be sent to Options Participants, giving them one second to enter responses with the prices and sizes at which they would be willing to participate opposite the Agency Order (''Responses'').[9] Responses to a Complex Order within the Solicitation Auction mechanism may be submitted for any size up to the size of the entire Complex Order, however, the Responses must be for all Legs of the unique Complex Order.[10] Responses must be priced equal to or better than the Agency Order and cannot exceed the size of the Agency Order.[11] At the end of the one second period for the entry of Responses, the block-sized Solicitation Complex Order will be automatically executed in full or canceled.[12]

As is also the case for single-leg orders executed through the Solicitation mechanism, the Complex Agency Order will execute against the Complex Solicited Order at the proposed execution price if at the time of execution there is insufficient size to execute the entire Complex Agency Order at a better price (or prices) and (A) the execution price is equal to or greater than the NBBO and (B) there are no Book Priority Public Customer Complex Orders on the Complex Order Book. A Book Priority Public Customer Complex Order is a Complex Order (A) at a price equal to or better than the proposed execution price; and (B) on the BOX Complex Order Book within a depth of the BOX Complex Book so that it would otherwise trade with Agency Order if the Agency Order had been submitted to the BOX Complex Book.[13] Both the Solicited Complex Order and the Agency Complex Order will be canceled if an execution would take place at a price that is inferior to the BOX BBO or the NBBO, or if there is a Book Priority Public Customer order on the BOX Book and there is insufficient size to execute the Agency Order, except as provided in BOX Rule 7270(b)(2)(iv).[14]

If at the time of execution there is sufficient size to execute the entire Agency Complex Order at an improved price (or prices), the Agency Complex Order will be executed at the improved price(s) and the Solicited Order will be canceled.[15] The aggregate size of all bids (offers) on the BOX Book and the Complex Order Book and all Responses at each price will be used to determine whether the entire Agency Order can be executed at an improved price (or prices.)[16] For example, an OFP submits a Complex Order through the Solicitation Auction to buy 1000 A+B at $2.10. During the one second auction, BOX receives the following bids (offers) in time priority:

(1) Market Maker Complex Order Response to sell 400 of A+B at $2.08.

(2) Market Maker offer on the Complex Order Book to sell 300 A+B at $2.08.

(3) Public Customer Response to sell 200 A+B at $2.08.

(4) Public Customer Complex Order on the Complex Order Book to sell 300 A+B at $2.08.

Since there is sufficient size to execute the entire Agency Order at an improved price, the Agency Order will execute in time priority [17] against each of the bids (offers) and Responses at $2.08, and the Solicited Order will be canceled.[18] The Agency Order would execute 400 contracts against the Market Maker Response; 300 contracts against the Market Maker offer on the Complex Order Book; 200 contracts against the Public Customer Response and 100 contracts against the Public Customer Complex Order on the Complex Book. The remaining 200 contracts of the Public Customer Complex Order will remain unexecuted.

However, notwithstanding the execution provisions of Rule 7270(b)(2), the execution rules for Complex Orders detailed in BOX Rule 7240(b)(2) and (3) continue to apply for Complex Orders executed through the Solicitation Auction Mechanism.[19] For example, if there is sufficient interest on the BOX Book for the individual legs to be executed at a permissible ratio, this ''Implied Order''[20] will have priority over Responses and Complex Orders on the Complex Order Book. Although an Implied Order will be able to execute against an Agency Order in the Solicitation Auction mechanism, the Implied Order will not be considered a Book Priority Public Customer Order for purposes of Rule 7270(b).

Using the same scenario above, an OFP submits a Complex Order through the Solicitation Auction to buy 1000 A+B at $2.10 and during the one second auction, BOX receives the following bids (offers) in time priority:

(1) Market Maker Complex Order Response to sell 400 of A+B at $2.08.

(2) Market Maker offer on the Complex Order Book to sell 300 A+B at $2.08.

(3) Public Customer Response to sell 200 A+B at $2.08.

(4) Public Customer Complex Order on the Complex Order Book to sell 300 A+B at $2.08.

(5) Interest on the BOX Book (Implied Order):

- Market Maker Option A—Order to sell 300 at $1.04.
- Market Maker Option B—Order to sell 300 at $1.04.

There is sufficient size to execute the entire Agency Order at an improved price so the Solicited Order will be canceled. However, the Agency Order would execute first against the 300 Implied Order contracts and then in time priority against the remaining Complex Order bids (offers) and Responses. After the Implied Order contracts the Agency Order will execute 400 contracts against the Market Maker Response; and 300 contracts against the Market Maker offer on the Complex Order Book. Both the Public Customer Response and Complex Order will receive no trade allocation because the buy order has been exhausted.

[8] *See* proposed IM 7270–8. Complex Orders comprised of less than five hundred (500) contracts on each leg will automatically be rejected.

[9] *See* BOX Rule 7270(b)(1). The Exchange believes that 1 second is an adequate duration for the Solicitation Auction. Specifically, the Exchange believes customers are capable of responding within this duration and has not received any complaints regarding the duration of the Solicitation Auction broadcast since the mechanism was adopted in 2011.

[10] *See* proposed IM–7270–8.

[11] *See* proposed IM–7270–8.

[12] *See* BOX Rule 7270(b)(2).

[13] *See* BOX Rule 7270(b)(2)(i). If the execution price is inferior to the best bid or offer on BOX, the NBBO or if there is a Book Priority Public Customer Order on the BOX Complex Book the Solicited Complex Order and Agency Order will be cancelled.

[14] *See* BOX Rule 7270(b)(2)(i).

[15] *See* BOX Rule 7270(b)(2)(iii).

[16] *See* BOX Rule 7270 (b)(2)(iii) *and* proposed IM–7270–8.

[17] *See* BOX Rule 7270(b)(2)(v).

[18] *See* BOX Rule 7270(b)(2)(iii).

[19] *See* proposed IM–7270–8. The Exchange notes that this includes the Complex Order Filter outlined in BOX Rule 7240(b)(3)(iii).

[20] An ''Implied Order' is a Complex Order that is derived from the orders on the BOX Book for each component leg of a strategy. Each of the Implied Order component Legs must be equal to or better than its respective NBBO.

If at the time of execution, there are one or more Book Priority Public Customer Orders on the Complex Order Book, the Agency Order will execute against the Complex Order Book if there is sufficient size available to execute the entire Agency Order, and the Solicited Order will be cancelled.[21] In this instance, the aggregate size of all bids (offers) on the Complex Order Book at or better than the proposed execution price will be used to determine whether there is sufficient size available to execute the entire Agency Order.[22] BOX Book Interest and Responses [23] are excluded when determining whether sufficient size exists to execute the Agency Order at its proposed price under BOX Rule 7270(b)(2)(ii). However, if there is sufficient interest on the Complex Order Book, the execution rules for Complex Orders will continue to apply and any Implied Orders will have priority.[24] For example, if an OFP submits a Complex Order through the Solicitation Auction to buy1000 A+B at $2.10 and during the one second auction, BOX receives the following bids (offers) in time priority:

(1) Market Maker offer on the Complex Order Book to sell 300 A+B at $2.10.

(2) Public Customer Complex Order on the Complex Order Book to sell 500 A+B at $2.10.

(3) Interest on the BOX Book (Implied Order):

• Market Maker Option A—Order to sell 300 at $1.05.

• Market Maker Option B—Order to sell 300 at $1.05.

(4) Broker Dealer offer on the Complex Order Book to sell 300 A+B at $2.10.

There is a Book Priority Public Customer Order on the Complex Order Book (*i.e.,* the Public Customer Complex Order to sell 500 at $2.10) and there is sufficient size on the Complex Order Book to execute the entire Agency Order. As such, the Agency Order will be executed against the Implied Order and the orders on the Complex Order Book, and the Solicited Complex Order will be canceled. In this example, the Agency Order will execute 300 contracts against the Implied Order, then 300 contracts against the Market Maker and 400 contracts against the Book Priority Public Customer Complex Order. The remaining 100 contracts of the Book Priority Public Customer Complex Order and the Broker Dealer 300 contracts will remain unexecuted, based on price/time priority.

If however, there is a Book Priority Public Customer Order on the Complex Order Book, but there is insufficient size to execute the entire Agency Order at the proposed execution price, both the Agency and Solicited Orders will be canceled, except as provided in BOX Rule 7270(b)(2)(iv).[25] For example, if an OFP submits a Complex Order through the Solicitation Auction to buy1000 A+B at $2.10 and during the one second auction, BOX receives the following bids (offers) in time priority:

(1) Market Maker offer on the Complex Order Book to sell 300 A+B at $2.10.

(2) Public Customer Complex Order on the Complex Order Book to sell 300 A+B at $2.10.

(3) Interest on the BOX Book (Implied Order):

• Market Maker Option A—Order to sell 300 at $1.05.

• Market Maker Option B—Order to sell 300 at $1.05.

In this example, there is a Book Priority Public Customer Order on the Complex Order Book (*i.e.* the Public Customer Complex Order to sell 300 at $2.10) but there is insufficient size on the Complex Order Book to execute the entire Agency Order. As such, both the Solicited Order and the Agency Order will be cancelled [26], unless the OFP has designated a Surrender Quantity.[27]

When starting a Solicitation Auction the OFP may designate, for the Solicited Order, the quantity of contracts of the Agency Order that it is willing to surrender interest to on the Complex Order Book.[28] The Surrender Quantity only applies if at the time of execution there are (1) Book Priority Public Customer Orders on the Complex Order Book or (2) any bids (offers) on the Complex Order Book at any price better than the proposed execution price, but there is insufficient size to execute the entire Agency Complex Order at an improved price.[29]

If there is a Book Priority Public Customer Order on the Complex Order Book, and the aggregate size of the Book Priority Public Customer Order and all bids (offers) on the Complex Order Book at prices better than the proposed execution price, excluding Responses and BOX Book Interest, are equal to or less than the Surrender Quantity, the Agency Complex Order will first execute against all such Book Priority Public Customer Orders and such bids (offers) and then against the Solicited Order. For example, an OFP submits a Complex Order through the Solicitation Auction to buy1000 A+B at $2.10 and designates 200 contracts as the Surrender Quantity. During the one second auction, BOX receives the following bids (offers) in time priority:

(1) Public Customer Complex Order on the Complex Order Book to sell 200 A+B at $2.10.

(2) Market Maker offer on the Complex Order Book to sell 800 A+B at $2.10.

Without the Surrender Quantity, the Agency Order would execute against the Public Customer Order on the Complex Order Book for 200 Contracts and against the Market Maker on the Complex Order Book for 800 contracts. Using the Surrender Quantity, however, the Agency Order would still execute against the Public Customer Order on the Complex Order Book, but would then execute against the Solicited Order for 800 contracts.

As stated above, the Surrender Quantity can also be used to allow Solicitation auction trades which would otherwise be canceled. For example, if an OFP submits a Complex Order through the Solicitation Auction to buy 1000 A+B at $2.10 and designates 200 contracts as the Surrender Quantity. During the one second auction, BOX receives the following bids (offers) in time priority:

(1) Market Maker offer on the Complex Order Book to sell 300 A+B at $2.10.

(2) Public Customer Complex Order on the Complex Order Book to sell 100 A+B at $2.10.

There is a Book Priority Public Customer, but there is insufficient size to execute the entire Agency Order with interest on the Complex Order Book, and this auction would normally be canceled. However, since the OFP designated a Surrender Quantity of 200 that is greater than the total size of the Book Priority Public Customer Order, the Agency Order will execute 100 contracts against the Book Priority Public Customer Order and the remaining 900 contracts against the Solicited Order.

However, if the aggregate size of the Book Priority Public Customer Order and all bids (offers), excluding Responses and BOX Book Interest, on the Complex Order Book at prices better than the proposed execution price exceeds the Surrender Quantity, and there is insufficient size to execute the entire Agency Complex Order, then both the Solicited Complex Order and the

[21] *See* BOX Rule 7270(b)(2).

[22] *See* Rule 7270(b)(2)(ii) and proposed IM–7270–8.

[23] Responses are sent by Options Participants in response to a Facilitation or Solicitation Auction broadcast message.

[24] *See* BOX Rule 7240(b)(2) and (3).

[25] *See* BOX Rule 7270(b)(2)(iv).

[26] *See* BOX Rule 7270(b)(2)(i).

[27] *See* BOX Rule 7270(b)(2)(iv).

[28] *See* BOX Rule 7270(b)(2)(iv).

[29] *See* BOX Rule 7270(b)(2)(iv).

Agency Complex Order will be canceled.[30] For example, the OFP submits a Complex Order through the Solicitation Auction to buy1000 A+B at $2.10 and designates 200 contracts as the Surrender Quantity. During the one second auction, BOX receives the following bids (offers) in time priority:

(1) Market Maker offer on the Complex Order Book to sell 300 A+B at $2.10.

(2) Public Customer Complex Order on the Complex Order Book to sell 300 A+B at $2.10.

Even though the OFP has designated a Surrender Quantity of 200 contracts, the total size of the Book Priority Public Customer Order (300 contracts) is greater than the Surrender Quantity and there is insufficient size on the Complex Order Book to execute the entire Agency Complex Order. Therefore both the Solicited Complex Order and Agency Complex Order will be canceled.

The Surrender Quantity can also be used to allow Solicitation Auction trades when there are bids (offers) on the Complex Book on the opposite side of the Agency Complex Order at a price better than the proposed execution price, but there is insufficient size to execute the entire Agency Order at an improved price.[31] For example, an OFP submits a Complex Order through the Solicitation Auction to buy 1000 A+B at $2.10 and designates 200 contracts as the Surrender Quantity. During the one second auction, BOX receives the following bids (offers) in time priority:

(1) Market Maker offer on the Complex Order Book to sell 100 A+B at $2.09.

(2) Public Customer Complex Order on the Complex Order Book to sell 100 A+B at $2.08.

Since there is insufficient size to execute the entire Agency Complex Order at a better price, this auction would normally be canceled. However, since the OFP designated a Surrender Quantity of 200 that is equal to the aggregate size of these better priced orders, the Agency Order will execute 100 contracts against the Public Customer Order at $2.10, 100 contracts against the Market Maker Order at $2.09 and the remaining 800 contracts against the Solicited Order. Note that even though the Public Customer Order on the Complex Order Book was priced lower than the proposed execution price at $2.08, it is executed at the proposed execution price of $2.10. Public Customer bids (offers) on the Complex Order Book at the time of the Surrender Quantity execution that are priced higher (lower) that the proposed execution price will be executed at the proposed execution price.[32] Non-Public Customer and Market Maker bids (offers) that are priced lower (higher) than the proposed execution price will execute at their stated price.[33]

The Exchange intends to implement the proposed change no later than January 30, 2017. The Exchange will provide Participants with notice, via Information Circular, of the exact implementation date.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[34] in general, and Section 6(b)(5) of the Act,[35] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the Exchange believes that the proposed rule change to amend BOX Rule 7270 to provide for the execution of Complex Orders through the Solicitation Auction mechanism on BOX is designed to help BOX remain competitive among options exchanges and provide market participants additional opportunities to execute block-size crossing transactions in Complex Orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed change provides for the execution of Complex Orders through the Solicitation auction mechanism. As such, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposal will impose any burden on intermarket competition, as the proposed rule will allow BOX to compete with other options exchanges in the industry. Specifically, ISE has a similar mechanism in place.[36] Additionally, the Exchange does not believe the proposal will impose any burden on intramarket competition, as the Solicitation Auction mechanism is available to all Participants and all OFPs may submit orders through the mechanism.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [37] and Rule 19b–4(f)(6) thereunder.[38]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BOX–2016–57 on the subject line.

[30] *See* BOX Rule 7270(b)(2)(iv)(A)(1).

[31] *See* BOX Rule 7270(b)(2)(iv)(A)(2).

[32] *See* BOX Rule 7270(b)(2)(iv)(B).

[33] *See* BOX Rule 7270(b)(2)(iv)(B).

[34] 15 U.S.C. 78f(b).

[35] 15 U.S.C. 78f(b)(5).

[36] *See supra* note 6.

[37] 15 U.S.C. 78s(b)(3)(A).

[38] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

Paper Comments

• Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2016–57. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2016–57, and should be submitted on or before January 10, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30562 Filed 12–19–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79559; File No. SR–NYSEMKT–2016–115]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Modifying the NYSE Amex Options Fee Schedule

December 14, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 1, 2016, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Amex Options Fee Schedule (''Fee Schedule''). The Exchange proposes to implement the fee change effective December 1, 2016. The proposed change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend Section III. C. of the Fee Schedule to adjust the monthly Rights Fees assessed on Specialists, e-Specialists, Directed Order Market Markers (each a ''DOMM), and to provide alternative means to qualify for a discount on the Rights Fees. The Exchange proposes to implement these changes effective on December 1, 2016.

Currently, the Exchange charges a Rights Fee on each issue in the allocation of an e-Specialist, DOMM, and Specialist.[4] The monthly Rights Fee ranges from $75 to $1,500 and is based on the Average National Daily Customer Contracts (''CADV'') per issue. With one exception, the more active an issue, the higher the Rights Fee assessed. The exception is that the Exchange currently charges a higher rate for the lowest-volume issues (*i.e.,* less than 201 CADV) to offset the Exchange's revenue with the cost of listing and maintaining these low-volume issues.

Proposed Modification to the Rights Fees

The Exchange proposes to align the Rights Fees with the economic benefit of being the e-Specialist, DOMM, or Specialist in a given issue, based on trading activity in an issue. The Exchange therefore proposes that some rates would decrease (for lower-volume issues) and others would increase (for higher-volume issues). Using the same CADV levels currently in place, the Exchange proposes to amend the Rights Fees as follows:

E-SPECIALIST, DOMM, AND SPECIALIST RIGHTS FEE

Average national daily customer contracts per issue	Current fee	Proposed fee
0 to 200	$250	$50
201 to 2,000	75	60
2,001 to 5,000	200	150
5,001 to 15,000	375	375
15,001 to 100,000	750	1,250
Over 100,000	1,500	2,000

[39] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Fee Schedule, Section III. C. (e-Specialist, DOMM and Specialist Monthly Rights Fees) (describing how the Rights Fee is assessed and setting forth the current rates), *available here, https://www.nyse.com/publicdocs/nyse/markets/amex-options/NYSE_Amex_Options_Fee_Schedule.pdf.*

As shown in the chart above, the Exchange proposes to significantly decrease the Rights Fee for the lowest-volume issues (*i.e.,* between 0–200 contracts) to better account for the costs to each e-Specialist, DOMM, and Specialist, irrespective of costs and revenue to the Exchange associated with listing an issue. The Exchange also proposes to slightly decrease the Rights Fee for option issues trading between 201–2,000 CADV and trading between 2,001–5,000 CADV to better align with the cost to the Exchange associated with such issues. The Exchange believes the proposed reduction in the Rights Fee for issues trading under 5,001 CADV would create an incentive for Specialists and e-Specialists to request appointments in these lower-volume issues, which may result in increased liquidity to the benefit of market participants. Similarly, the Exchange believes the proposed reductions would encourage DOMMs to seek to transact more in these less active issues (*i.e.,* to make order flow arrangements with Customers to direct orders in these issues to them), which in turn should increase volume on the Exchange.

In addition, the Exchange proposes to increase the Rights Fees associated with the two most active CADV categories of issues to better reflect the economic benefits of being an e-Specialist, DOMM, or Specialist in more actively-traded issues (*i.e.,* option issues trading more than 5,000 CADV). The Exchange believes the proposed modifications to the Rights Fees are appropriate as an e-Specialist, DOMM, or Specialist would have an opportunity to interact with fewer than 201 contracts per day to cover the proposed $50 per month Rights Fees and would have the opportunity to interact with more than 100,000 contracts per day to cover the proposed $2,000 per month Rights Fee.

Proposed Discounts to the Rights Fees

The Exchange proposes two alternative methods for Specialists, e-Specialists, and DOMMs to qualify for a discount on the monthly Rights Fees. First, as proposed, any Specialist, e-Specialist, or DOMM that participates in the Prepayment Program (outlined in Section I.D. of the Fee Schedule) would be eligible for a 20% discount to their monthly Rights Fees. Alternatively, the Exchange proposes that any Specialist, e-Specialist, or DOMM that achieves one of the Tiers in the Amex Customer Engagement (''ACE'') Program (outlined in Section I.E. of the Fee Schedule) would be eligible for a discount on their Rights Fees, as set forth in the table below.

RIGHTS FEE DISCOUNT

ACE tier	Discount on rights fees %
Base [5]	0
1	0
2	0
3	20
4	30
5	40

In the event that an e-Specialist, DOMM, or Specialist qualified for both discounts in a given month, only the larger discount would be applied. For instance, a Specialist in one of the Prepayment Programs would be eligible to receive a 20% discount on the Rights Fees every month or, if that same Specialist also qualifies for ACE Tier 4, making it eligible for a 30% discount in a given month, the Specialist would receive a 30% discount to the Rights Fees for that month in lieu of the 20% discount.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[7] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed modifications to the Rights Fees are reasonable, equitable and not unfairly discriminatory for a number of reasons. First, the Rights Fees apply solely to e-Specialists, DOMMs, and Specialists (other Market Makers are not subject to this Fee) and are assessed to account for the enhanced allocation opportunities and economic benefits that inure to these market participants. Second, the monthly Rights Fees are directly related to the number of allocations in the appointment of each e-Specialist, DOMM, or Specialist, which appointments are completely voluntary. Any e-Specialist, DOMM, or Specialist can opt to relinquish any issue in its allocation to reduce its total Rights Fee. In addition, the proposed Rights Fees would be more closely aligned with the economic benefit of being e-Specialist, DOMM, or Specialist in a given issue. For example, an e-Specialist, DOMM, or Specialist would have an opportunity to interact with fewer than 201 contracts per day to cover the proposed $50 per month Rights Fee and would have the opportunity to interact with more than 100,000 contracts per day to cover the proposed $2,000 per month Rights Fee. Further, e-Specialists, DOMMs, and Specialists trading issues with similar activity levels would be subject to the same Rights Fees.

The Exchange believes the proposed reduction in the Rights Fee for issues trading under 5,001CADV is reasonable, equitable and not unfairly discriminatory because it would create an incentive for Specialists and e-Specialists to request appointments in these lower-volume issues, which may result in increased liquidity to the benefit of market participants. Similarly, the Exchange believes the proposed reductions would encourage DOMMs to seek to transact more in these less active issues (*i.e.,* to make order flow arrangements with Customers to direct orders in these issues to them), which in turn should increase volume on the Exchange.

The Exchange also believes the proposed discounts on the Rights Fees available to e-Specialists, DOMMs, and Specialists are reasonable, equitable and not unfairly discriminatory for a number of reasons. First, the proposed discounts would reduce the overhead costs of e-Specialists, DOMMs, and Specialists (by reducing the monthly Rights Fees), which would, in turn, enhance their ability to provide liquidity to the benefit of all market participants. Second, because Market Makers that are not e-Specialists, DOMMs, or Specialists are not subject to the Rights Fees (as such fees are assessed to account for the enhanced allocation opportunities and economic benefits that inure to these market participants), the proposed discount would not disadvantage Market Makers. In addition, all e-Specialists, DOMMs, and Specialists (as well as any other Market Makers) are eligible to participate in the Prepayment Program, which would enable them to qualify for the proposed 20% discount on the Rights Fees. Further, the proposed discounts available upon satisfying certain Tiers of the ACE Program are not discriminatory as they are open to all e-Specialists, DOMMS, and Specialists, as well as all other Market Makers who may arrange for ''appointment'' status with an Order Flow Provider (''OFP'').

[5] The Exchange notes that it is proposing to add a Base Tier to the ACE Program in a separate fee filing, also for December 1, 2016. Thus, reference to a Base Tier herein is designed to align with that proposed change. *See* File No. SR–NYSEMKT–2016–114.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

Finally, the Exchange is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[8] the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed modifications on the Rights Fees would not impose an unfair burden on competition because the proposed Rights Fees would more closely align with the economic benefit of being e-Specialist, DOMM, or Specialist in a given issue. Because other Market Makers are not subject to the Rights Fee, the proposed discount would not disadvantage Market Makers. Instead, the proposed ACE-related discounts would operate to incent each e-Specialist, DOMM, or Specialist to achieve higher ACE Tiers to reduce its own Rights Fee. The Exchange believes that the proposed discounts would encourage e-Specialists, DOMMs, or Specialists to quote and trade competitively in their issues and would reduce the burden on competition among e-Specialists, DOMMs, or Specialists in the most actively-traded issues because e-Specialists, DOMMs, or Specialists that achieve the discounts would have reduced overhead.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[8] 15 U.S.C. 78f(b)(8).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[9] of the Act and subparagraph (f)(2) of Rule 19b–4[10] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[11] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2016–115 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–115. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2016–115, and should be submitted on or before January 10, 2017.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

[11] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Robert W. Errett,

Deputy Secretary.

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[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79560; File No. SR–CBOE–2016–081]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Move the Web Site and Vendor Through Which It Sells and Disseminates Open and Close Volume Data on the CBOE

December 14, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2016, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange creates volume data for each Exchange-listed option that consists of opening buys and opening sells and closing buys and closing sells.[3] This opening and closing position data is subdivided by origin code (*i.e.* customer or firm), and the customer data is further subdivided by order size. The volume data is summarized by day and series (symbol, expiration date, strike price, call or put). This volume data is referred to herein as the ''Open/Close Data.'' A fee schedule for the sale of Open/Close data was codified pursuant to a filing noticed [sic] on January 8, 2007.[4]

Current Status

Currently, Open/Close Data is provided to the vendor Intelligent Financial Systems, LTD (''IFS''). IFS hosts and supports a Web site for Market Data Express, LLC (''MDX''), a wholly owned subsidiary of the Exchange. The MDX Web site (*MarketDataExpress.com*) offers the Open/Close Data for sale to CBOE Trading Permit Holders (''TPHs'') and non-TPHs. The fees that MDX assesses for the Open/Close Data are set forth in a price list on MDX's Web site. TPHs and non-TPHs (together, ''Customers'') are charged the same fees for the Open/Close Data.

Customers may purchase Open/Close Data on a subscription basis or by ad hoc request. Daily Open/Close Data covering all CBOE securities may be purchased by subscribing to the Daily Update service at a cost of $600 per month. Subscribers to the Daily Update service receive access to a daily data file via download from MDX's Web site.

Historical Open/Close Data covering all CBOE securities may be purchased on an ad hoc request basis. The charge for historical Open/Close Data covering all CBOE securities is $7,200 per year for requests for one to four years of data. Requests for five or more years of historical Open/Close Data receive a 50% discount beginning with the fifth year of data (*i.e.,* MDX charges $7,200 for each of the first four years of data and $3,600 for year five and each subsequent year of data).

Alternatively, a Customer may purchase historical Open/Close Data on an individual CBOE security at a cost of $4.50 per security per month. This data is received via download from MDX's Web site. A 50% discount is applied for requests for ten or more years of data, beginning with the tenth year of data.

Proposed Change

Development, Web site hosting, and customer support relating to the Open/Close data will be transferred to CBOE Livevol, LLC (''Livevol''), a wholly owned subsidiary of the Exchange's parent company, CBOE Holdings, Inc. CBOE will make Open/Close data available on the Livevol Data Shop Web site (*datashop.cboe.com*). Customer support will be transitioned from *Support@MarketDataExpress.com* to *support@livevol.com*.

Open/Close data (and customer support) will be available on both the MDX and Livevol Web sites during a transition period, which began on November 10, 2016 and is ending no later than January 31, 2017. At least two weeks prior to the end of the transition period, the Exchange will announce the end of the transition period via circular. At the end of the transition period, availability of the Open/Close data through the MDX Web site will be retired and the Open/Close data will only be available through the Livevol Web site. The fees related to the Open/Close Data, including all applicable discounts, will remain the same during the transition period and once Open/Close data is available only through the Livevol Web site. The Exchange is changing the vendor and web address through which the Open/Close Data is purchased and disseminated and adopting a substantively identical fee schedule for Open/Close data on Livevol. At the end of the transition period, Open/Close data will be removed from the MDX fee schedule.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[5] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Finally, as discussed below, the Exchange believes the proposed rule change is consistent with Section 6(b)(4)8 of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The proposed rule change addresses where and how Open/Close data is sold and disseminated. The Exchange believes the proposed rule change is equitable and does not permit unfair discrimination between customers, issuers, brokers or dealers, as the Open/Close Data will be available to all customers, including TPHs and other persons purchasing the data, at the same price and in the same manner. During and after the transition, the fees currently in place will continue to apply.

[3] An opening buy is a transaction to create or increase a long position, and an opening sell is a transaction to create or increase a short position. A closing buy is a transaction to close out a short position, and a closing sell is a transaction to reduce or eliminate a long position.

[4] *See* Securities and Exchange Act Release No. 55062 (January 8, 2007), 72 FR 2048 (January 17, 2007) (SR–CBOE–2006–088) [sic].

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] *Id.*

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule will have no impact on competition because there is no change to the fee. The proposed rule change is merely changing the Web site on which the data will be available for purchase and adopting a substantively identical fee schedule for the new Web site.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and paragraph (f) of Rule 19b–4 [10] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov. Please include File Number SR–CBOE–2016–081 on the subject line.*

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2016–081. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2016–081 and should be submitted on or before January 10, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30565 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79554; File No. SR–NASDAQ–2016–141]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Amend Rule 4702 To Adopt a New Retail Post-Only Order

December 14, 2016.

On October 13, 2016, The Nasdaq Stock Market LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Exchange Rule 4702 to adopt a new Retail Post-Only Order. The proposed rule change was published for comment in the **Federal Register** on November 1, 2016.[3] The Commission received one comment letter on the proposed rule change.[4]

Section 19(b)(2) of the Act [5] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 16, 2016. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates January 30, 2017, as the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR–NASDAQ–2016–141).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30559 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 79163 (October 26, 2016), 81 FR 75862.

[4] *See* Letter from Joseph Saluzzi and Sal Arnuk, Partners, Themis Trading LLC, to Brent J. Fields, Secretary, Commission, dated November 7, 2016.

[5] 15 U.S.C. 78s(b)(2).

[6] 15 U.S.C. 78s(b)(2).

[7] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79552; File No. SR–BatsBZX–2016–61]

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Amend Exchange Rule 11.23, Auctions, To Enhance the Reopening Auction Process Following a Trading Halt Declared Pursuant to the Plan To Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS

December 14, 2016.

On October 13, 2016, Bats BZX Exchange, Inc. filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change related to the reopening auction process following a trading halt declared pursuant to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS. The proposed rule change was published for comment in the **Federal Register** on November 1, 2016.[3] The Commission received no comments on the proposed rule change.

Section 19(b)(2) of the Act[4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 16, 2016. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 30, 2017 as the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR-BatsBZX–2016–61).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30558 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 79162 (October 26, 2016), 81 FR 75875.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79555; File No. SR–C2–2016–020]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Order Approving a Proposed Rule Change Relating to Price Protection Mechanisms and Risk Controls

December 14, 2016.

I. Introduction

On October 25, 2016, C2 Options Exchange, Incorporated (''C2'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend current and adopt new price protection mechanisms and risk controls for orders and quotes. The Commission published the proposed rule change for comment in the **Federal Register** on November 3, 2016.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change[4]

The Exchange currently has in place various price check mechanisms and risk controls that are designed to prevent incoming orders and quotes from automatically executing at potentially erroneous prices or to assist Trading Permit Holders (''TPHs'') with managing their risk.[5] The Exchange proposed to amend C2 Rules 6.17 and 8.12 to add new, as well as amend current, price protection mechanisms and risk controls to further assist brokers in their efforts to prevent errors and avoid trading activity that could potentially be unwanted or even disruptive to the market.[6]

A. Limit Order Price Parameter for Simple Orders

The Exchange proposed to amend the limit order price parameter for simple orders in C2 Rule 6.17(b). Currently, the Exchange will not accept for execution an eligible limit order if a limit order to buy (sell) is more than an acceptable tick distance (''ATD'')[7] above (below): (i) The Exchange's previous day's closing price prior to the opening of a series, or (ii) the disseminated Exchange offer (bid) once a series has opened.[8]

The Exchange has now proposed to amend C2 Rule 6.17(b) to reject a limit order to buy (sell) generally when it is more than an ATD above (below) the last disseminated national best offer (''NBO'') (national best bid (''NBB'')).[9] According to the Exchange, using the NBBO or NBO (NBB), if available, will more accurately reflect the then current market, rather than the previous day's closing price or Exchange BBO.[10] The Exchange, however, will continue to use the previous day's closing price or Exchange BBO in certain instances, such as when the NBBO is locked or crossed, or when there is no NBO (NBB) and the closing price does not cross the disseminated NBB (NBO).[11]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 79189 (October 28, 2016), 81 FR 76671 (November 3, 2016) (''Notice'').

[4] A more detailed description of the proposed rule change appears in the Notice. *See id.*

[5] *See, e.g.,* C2 Rules 6.13, Interpretation and Policy .04 (price check parameters for complex orders), 6.17(a) (market-width and drill through price check parameters), Rule 6.17(b) (simple limit order price parameters), 6.17(d) and (e) (price protections), and 8.12 (Quote Risk Monitor Mechanism (''QRM'')).

[6] The proposed rule change also made conforming changes to C2 Rules 6.11, 6.14, and 6.18. A full discussion of those changes may be found in the Notice. *See supra* note 3.

[7] Currently, the Exchange determines the ATD, which may be no less than 5 minimum increment ticks, on a series-by-series and premium basis. Under the proposed rule change, the ATD, which may be no less than two minimum increment ticks, will be determined on a class-by-class and premium basis. In addition, different ATDs may be applied to orders entered during the pre-opening, a trading rotation, or a trading halt. *See* proposed C2 Rule 6.17(b) and Notice, *supra* note 3, at 76673.

[8] *See* C2 Rule 6.17(b).

[9] Specifically, C2 will reject the order if it is more than the ATD above (below): (i) Prior to the opening of a series, (A) the last disseminated NBO (NBB), if a series is open on another exchange, or (B) the Exchange's previous day's closing price, if a series is not yet open on any other exchange; if the NBBO is locked, crossed, or unavailable; or if there is no NBO (NBB) and the previous day's closing price is greater (less) than or equal to the NBB (NBO); (ii) intraday, the last disseminated NBO (NBB), or the Exchange's best offer (bid) if the NBBO is locked, crossed or unavailable; or (iii) during a trading halt, the last disseminated NBO (NBB).

[10] *See* Notice, *supra* note 3 at 76672.

[11] *See id.*

C2 also proposed to apply the limit order price parameter to immediate-or-cancel orders. According to the Exchange, such orders also are at risk of execution at extreme and potentially erroneous prices and thus will benefit from applicability of these checks.[12] However, the limit order price parameter will not apply to orders with a stop contingency.[13] According to the Exchange, buy orders with a stop contingency are generally submitted at a triggering price that is above the NBO, and sell orders with a stop contingency are generally submitted at a triggering price that is below the NBB.[14] As a result, the Exchange believes these orders are expected to be priced outside the NBBO.[15]

B. Drill Through Price Check Parameter

The Exchange proposed to amend the drill through price check parameter in C2 Rule 6.17(a)(2). Currently, the Exchange's trading system (''System'') will not automatically execute a market or marketable limit order[16] if the execution would follow an initial partial execution on the Exchange at a price not within an ATD[17] from the initial execution. Instead, the System cancels the remaining unexecuted portion.[18]

The Exchange now has proposed to amend C2 Rule 6.17(a)(2) to add detail to the rule describing how the System will handle orders in the event that the Exchange activates HAL or SAL.[19] In particular, orders not previously exposed would be exposed via HAL and orders previously exposed via HAL or SAL would rest in the book for a period of time and thereafter be cancelled if they do not execute.[20]

Buy (sell) orders (or any unexecuted portion) that are not eligible for HAL or SAL and do not otherwise cancel by their terms will continue to be cancelled pursuant to proposed C2 Rule 6.17(a)(2)(D). In addition, the drill through price check parameter at the open will be handled pursuant to the separate process set forth in Rule 6.11(g)(2) and Interpretation and Policy .04.[21]

C. TPH-Designated Risk Settings

The Exchange proposed to amend C2 Rule 6.17 to authorize it to share TPH-designated risk settings with a TPH's Clearing TPH. The risk settings that the Exchange may share with Clearing TPHs include, but are not limited to, settings under Rule 8.12 (related to QRM) and proposed C2 Rule 6.17(g) (related to order entry and execution rate checks) and (h) (related to maximum contract size). The Exchange represented that other options exchanges have similar rules permitting them to share member-designated risk settings with other members that clear transactions on the member's behalf.[22]

D. Put Strike Price/Call Underlying Value Checks

The Exchange proposed to amend the put strike price and call underlying value checks in C2 Rule 6.17(d). Currently, the System rejects back to the TPH a quote or buy limit order for (i) a put if the price of the quote bid or order is greater than or equal to the strike price of the option, or (ii) a call if the price of the quote bid or order is greater than or equal to the consolidated last sale price of the underlying security, with respect to equity and exchange-traded fund options, or the last disseminated value of the underlying index, with respect to index options. The Exchange proposed to extend this check to apply to market orders (and any remaining size after a partial execution).[23]

E. Quote Inverting NBBO Check

The Exchange proposed to amend C2 Rule 6.17(e) regarding the quote inverting NBBO check. Currently, if the Exchange is at the NBO (NBB), the System rejects a quote back to a Market-Maker if the quote bid (offer) crosses the NBO (NBB) by more than a number of ticks specified by the Exchange. If C2 is not at the NBO (NBB), the System rejects a quote back to a Market-Maker if the quote bid (offer) locks or crosses the NBO (NBB). If the NBBO is unavailable, locked, or crossed, then this check compares the quote to the BBO (if available). The rule is currently silent on what happens if the BBO is unavailable.

The Exchange has now proposed to amend Rule 6.17(e) to not apply this check to incoming quotes when the BBO is unavailable. The Exchange also proposed to amend the rule to state that it will not apply the check to incoming quotes prior to the opening of a series if the series is not open on another exchange, as well as during a trading halt.[24]

F. Execution of Quotes that Lock or Cross NBBO

The Exchange further proposed to amend the provision concerning the execution of quotes that lock or cross

[12] *See id.* at 76673.

[13] *See* proposed C2 Rule 6.17(b). A stop contingency is triggered for a buy order if there is a last sale or bid at or above the stop price and for a sell order if there is a last sale or offer at or below the stop price.

[14] *See* Notice, *supra* note 3 at 76673.

[15] *See id.*

[16] Currently, the Exchange applies the market-width check to market orders and the drill through check to market and marketable limit orders. The Exchange proposed to codify this current practice into the rules. *See* Notice, *supra* note 3, at 76673 n.12.

[17] Currently, the ATD is determined by the Exchange on a series-by-series and premium basis for market orders and/or marketable limit orders and may be no less than two minimum increment ticks. Under the proposed rule change, the Exchange will determine the ATD on a class and premium basis (which may be no less than two minimum increment ticks), which the Exchange will announce via Regulatory Circular. *See* proposed C2 Rule 6.17(a)(2)(A).

[18] *See* C2 Rule 6.17(c).

[19] Currently, the Exchange has not activated HAL or SAL in any class. *See* Notice, *supra* note 3, at 76673 nn.13 and 15.

[20] Specifically, if a buy (sell) order not yet exposed via HAL partially executes, and the System determines the unexecuted portion would execute at a price higher (lower) than the price that is an ATD above (below) the NBO (NBB) (''drill through price''), the System will not automatically execute the remaining portion but will instead expose it via HAL at the better of the NBBO and the drill through price (if eligible for HAL). If a buy (sell) order exposed via HAL (other than pursuant to the previous sentence) or the Solicitation Auction Mechanism (''SAL'') would, following the exposure period, execute at a price higher (lower) than the drill through price, the System will not automatically execute the order (or unexecuted portion). These orders (or unexecuted portions) will rest in the book (based on the time at which they enter the book for priority purposes) for a time period in milliseconds with a price equal to the drill through price. The Exchange will determine the time period (not to exceed three seconds) and announce it via Regulatory Circular in the event the Exchange activates HAL or SAL. *See* Notice, *supra* note 3, at 76674. If the order (or any unexecuted portion) does not execute during that time period, the System cancels it. In classes in which the Exchange activated SAL, an order eligible for SAL would be exposed immediately and would not partially execute prior to being exposed via SAL. For this reason, SAL is not included in proposed C2 Rule 6.17(a)(2)(A). *See* Notice, *supra* note 3, at 76673 n. 15. Any order (or unexecuted portion) that by its terms cancels if it does not execute immediately (including immediate-or-cancel, fill-or-kill, intermarket sweep, and market-maker trade prevention orders) will be cancelled rather than rest in the book for this time period in accordance with the definition of those order types. *See* proposed C2 Rule 6.17(a)(2)(C).

[21] The proposed rule change also amended the market width price check parameter in C2 Rule 6.17(a)(1) to be determined on a class-by-class basis rather than series-by-series, as well as made additional non-substantive changes to Rule 6.17(a)(1), such as moving provisions regarding the market-width price check parameter from current paragraph (c) to proposed subparagraph (a)(1).

[22] *See* Notice, *supra* note 3 at 76675. *See also, e.g.,* Miami International Securities Exchange, LLC (''MIAX'') Rule 500; NASDAQ OMX BX, Inc. (''BX'') Chapter VI, Section 20; NYSE Arca, Inc. (''Arca'') Rule 6.2A(a); NYSE MKT LLC (''MKT'') Rule 902.1NY(a); and NASDAQ OMX PHLX LLC (''PHLX'') Rule 1016.

[23] The Exchange will not apply these checks to market orders that execute during the opening process, however, in order to avoid impacting the determination of the opening price. According to the Exchange, separate price protections apply during the opening process, including the drill through protection in C2 Rule 6.11. *See* Notice, *supra* note 3, at 76675.

[24] *See* proposed C2 Rule 6.17(e)(2) and (3).

the NBBO.[25] The rule currently states that if the System accepts a quote that locks or crosses the NBBO, it executes the quote and either (i) cancels any remainder or (ii) books any remainder if the price of the quote does not lock or cross the price of an away exchange.

The Exchange has now proposed to amend the rule to not apply the check when the NBBO is locked, crossed, or unavailable.[26] In addition, the Exchange proposed to authorize a senior official at the Exchange's Help Desk to determine not to apply this check in the interest of maintaining a fair and orderly market. For example, the Exchange believes it is appropriate to disable this check in response to a market event or market volatility to avoid inadvertently cancelling quotes not erroneously priced but rather priced to reflect potentially rapidly changing prices.[27]

G. Order Entry, Execution, and Price Parameter Checks

The Exchange proposed to adopt the following four mandatory activity-based risk protections under proposed C2 Rule 6.17(g): [28]

(i) the total number of orders (of all order types) and auction responses entered and accepted by the System (''orders entered'');

(ii) the total number of contracts (from orders and auction responses) executed on the System, which does not count stock contracts executed as part of stock-option orders (''contracts executed'');

(iii) the total number of orders the System books or cancels [29] pursuant to the drill through price check parameter (as amended by this proposed rule change) in proposed Rule 6.17(a)(2) (''drill through events''); and

(iv) the total number of orders the System cancels pursuant to the limit order price parameters in Rules 6.13, Interpretation and Policy .04(f) and (g), and 6.17(b) (''price reasonability events'').

When a TPH exceeds a parameter within one of the time intervals set by C2, the System will (i) reject all subsequent incoming orders and quotes, (ii) cancel all resting quotes, and (iii) for the orders entered and contracts executed checks, if the TPH requests, cancel resting orders in the manner specified by the TPH (either all orders, orders with time-in-force of day, or orders entered on that trading day).[30]

The System will not accept new orders or quotes from a restricted acronym or login until the Exchange receives the TPH's manual notification to reactivate its ability to send orders and quotes. While an acronym or login is restricted, a TPH may continue to interact with any resting orders (*i.e.,* orders not cancelled pursuant to this protection) entered prior to its acronym or login becoming restricted, including receiving trade execution reports and canceling resting orders.

H. Maximum Contract Size

The Exchange proposed to adopt a maximum contact size risk control pursuant to which the System will reject a TPH's incoming order or quote (including both sides of a two-sided quote) if its size exceeds the TPH's designated maximum contract size parameter.[31] Each TPH must provide a maximum contract size for each of simple orders, complex orders, and quotes applicable to an acronym or, if the TPH requests, a login.[32]

I. Kill Switch

The Exchange further proposed to adopt a kill switch, which will be on optional tool allowing a TPH to send a message to the System to, or contact the Exchange Help Desk to request that, the Exchange cancel all its resting quotes, resting orders (either all orders, orders with time-in-force of day, or orders entered on that trading day), or both, and thereafter reject all subsequent incoming quotes and/or orders.[33] The System will send a TPH an automated message when it has processed a kill switch request and thereafter will not accept new orders or quotes from a restricted acronym or login until the Exchange receives the TPH's manual notification to reactivate its ability to send orders and quotes.

According to the Exchange, the kill switch message will be accepted by the System in the order of receipt in the queue and will be processed in that order so that interest already in the System will be processed prior to the kill switch message.[34] Moreover, a Market-Maker's utilization of the kill switch, and subsequent removal of its quotes, will not diminish or relieve the Market-Maker of its obligation to provide continuous two-sided quotes. Market-Makers will continue to be required to provide continuous two-sided quotes on a daily basis, and a Market-Maker's utilization of the kill switch will not prohibit the Exchange from taking disciplinary action against the Market-Maker for failing to meet the continuing quoting obligation each trading day.[35]

J. Quote Risk Monitor Mechanism

Lastly, the Exchange proposed to amend the QRM Mechanism in C2 Rule 8.12. Pursuant to the QRM mechanism, a Market-Maker may establish a (i) maximum number of contracts, (ii) a maximum cumulative percentage of the original quoted size of each side of each series, and (iii) the maximum number of series for which either side of its quote is fully traded, that may trade within a rolling time period in milliseconds also established by the Market-Maker. When these parameters are exceeded within the time interval, the System cancels the Market-Maker's quotes in the class and other classes with the same underlying. In addition, C2 Rule 8.12 allows Market-Makers or TPH organizations to specify

[25] The Exchange proposed to move this provision from current C2 Rule 6.17(e)(iii) to proposed C2 Rule 6.17(f).

[26] *See* Notice, *supra* note 3, at 76676.

[27] *See id.* The Exchange represented that, pursuant to Exchange procedures, any decision to not apply the check and the reason for such decision will be documented, retained, and periodically reviewed. *See id.*

[28] Other exchanges maintain similar activity-based risk protections. *See, e.g.,* International Securities Exchange, LLC (''ISE'') Rule 714(d) and MIAX Rule 519A.

[29] As discussed above, orders (or unexecuted portions) that by their terms cancel if they do not execute immediately will be cancelled rather than rest in the book for a period of time (as proposed in this filing) pursuant to the drill through price check parameter if triggered. According to the Exchange, because these orders will not book or be cancelled pursuant to the drill through price check parameter (but rather because of their terms), these orders will not be included in the count for the drill through event check. *See* Notice, *supra* note 3, at 76676 n.32.

[30] The Exchange expects the initial time intervals for all these checks to be set at one and five minutes. The time intervals set by the Exchange will apply to all TPHs, who will not be able to change these time intervals. *See* Notice, *supra* note 3, at 76676 n.33.

[31] *See* proposed C2 Rule 6.17(h). The Exchange represented that other options exchanges have adopted similar functionality. *See* Notice, *supra* note 3, at 76678 n.40; MIAX Rule 519(b).

[32] For purposes of determining the contract size of an incoming order or quote, the proposed rule states the contract size of a complex order will equal the contract size of the largest option leg of the order (*i.e.,* if the order is a stock-option order, this check will not apply to the stock leg of the order). *See* proposed C2 Rule 6.17(h). If a TPH enters an order or quote to replace a resting order or update a resting quote, and the System rejects the incoming order or quote because it exceeds the applicable maximum contract size, the System also will cancel the resting order or any resting quote in the same series. In addition, the Exchange proposed to apply this check to paired orders submitted to AIM or SAM. Further, the Exchange proposed that for an A:AIR order, if the System rejects the agency order, then the System rejects the contra-side order; however, if the System rejects the contra-side order, the System still accepts the agency order. *See* proposed C2 Rule 6.17(h)(2).

[33] *See* proposed C2 Rule 6.17(i). The Exchange represented that other options exchanges have adopted similar kill switches. *See* Notice, *supra* note 3, at 76678; BOX Options Exchange LLC (''BOX'') Rule 7280 and PHLX Rule 1019(b).

[34] *See* Notice, *supra* note 3 at 76681.

[35] *See id.*

a maximum number of QRM incidents across all classes on an Exchange-wide basis. When the Exchange determines that a Market-Maker or TPH organization has reached its QRM incident limit during the rolling time interval, the System will cancel all of the Market-Maker's electronic quotes and Market-Maker orders resting in the book in all option classes on the Exchange and prevent the Market-Maker or TPH organization from sending additional quotes or orders to the Exchange until the Market-Maker reactivates its ability to send quotes or orders.

Currently, use of the QRM is optional. The Exchange proposed to amend C2 Rule 8.12 to make it mandatory for Market-Makers to enter values for each parameter for all classes in which they quote.[36]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act [37] and the rules and regulations thereunder applicable to the Exchange.[38] Specifically, the Commission finds that the proposed rule change is consistent with the Section 6(b)(5) [39] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change is designed to mitigate the likelihood of orders trading at potentially erroneous prices, clarify when certain price/risk controls will apply, and assist TPHs in managing their risk exposure to avoid potentially harmful and disruptive trading. Moreover, the Commission notes that it recently approved proposed rule changes to CBOE rules that are substantially similar to the C2 proposed rule changes that are the subject of this Order.[40]

As discussed above, C2 is proposing to amend its limit order price parameter for simple orders to use the NBBO when available in lieu of the Exchange's previous day's closing price or BBO. To the extent that the use of the NBBO, when available, rather than the Exchange's previous day's closing price or BBO, may better reflect the then current market, it should provide a suitable measure for purposes of determining the reasonability of the prices of orders. Moreover, the Commission believes that it is reasonable for C2 to exclude orders with a stop contingency from the limit order price check parameter, as application of the limit order price check parameter to such orders may interfere with the application of the stop contingency.

Further, the Commission believes that the proposed rule change to expand the applicability of the put strike price and call underlying value checks to market orders [41] may help TPHs mitigate risks associated with orders trading at prices that exceed a corresponding benchmark, which may indicate an execution at a price that is potentially erroneous.

The proposed changes to the drill through price checks provide additional detail to the rule regarding how the System will handle certain orders in the event that the Exchange activates HAL or SAL, such as orders that were not exposed prior to trading up to the drill through price and orders that traded up to the drill through price following exposure. In addition, allowing the remainder of orders to rest in the book for a brief time period at the drill through price may benefit investors by providing an additional opportunity for execution of their orders. Furthermore, clarifying that an order exposed via HAL pursuant to the drill through price check will not be exposed at a price worse than the NBBO is consistent with the current treatment of other orders exposed via HAL at the NBBO.[42]

The Commission also believes that the proposed amendments to the quote inverting NBBO check will provide market participants with greater clarity that C2 will not apply the check in the absence of an NBBO or BBO. In addition, the proposed rule change eliminates the Exchange's flexibility to apply the check prior to the opening of a series as well as during a trading halt. Removing this flexibility and clearly stating when C2 will not apply the check considerably enhances the transparency of the functionality.

With respect to C2's proposed changes regarding the execution of quotes that lock or cross the NBBO (Proposed Rule 6.17(f)), the Commission believes that the proposed rule change to not apply the check when the NBBO is locked, crossed or unavailable, and to allow the Exchange to disable this check in the interest of maintaining a fair and orderly market, will prevent the System from cancelling quotes when there is no reliable benchmark or when prices on quotes may not be erroneous but rather reflect a rapidly changing market. Moreover, to the extent the Exchange determines to temporarily deactivate the check in the interest of maintaining a fair and orderly market, C2 has represented that all such decisions by C2 will be adequately justified, documented, retained, and periodically reviewed.[43]

Further, the Commission believes that the Exchange's proposed risk protection parameters and mechanisms for orders and quotes are reasonably designed to provide TPHs with additional tools to assist them in managing their risk exposure. Specifically, the order entry, execution, and price parameter rate checks, maximum contract size risk control, and mandatory use of the QRM may help TPHs to mitigate the potential risks associated with entering too many orders or quotes, executing too many contracts, having too many orders cancelled because of price protection parameters, and entering orders or quotes with size that may be potentially erroneous that may result from, for example, technology issues with the broker's electronic trading system. To this extent, these TPH-customizable settings may help act as a backstop to the TPH's own controls and provide an additional layer of protection customized to the TPH's self-selected parameters. In addition to the CBOE filing mentioned above, the Commission notes that other exchanges have established similar risk protection mechanisms.[44] The Commission notes that the proposed functionality, including the cancellation of any resting interest, must be processed in sequence with other interest in the System and

[36] The Exchange represented that other options exchanges have made similar functionality mandatory for all Market-Makers. *See* Notice, *supra* note 3, at 76679; ISE Rule 804(g).

[37] 15 U.S.C. 78f(b).

[38] In approving these proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[39] 15 U.S.C. 78f(b)(5).

[40] *See* Securities Exchange Act Release No. 79244 (November 4, 2016), 81 FR 79063 (November 10, 2016) (approving CBOE proposed rule changes relating to price protection mechanisms and risk controls).

[41] The checks will not apply to market orders during an opening rotation since separate price protections will apply during the opening process. *See* Notice, *supra* note 3, at 76680.

[42] *See* current and proposed C2 Rule 6.18(b).

[43] *See supra* note 27 and accompanying text.

[44] *See* ISE Rules 714(d) & 804(g); MIAX Rules 519(b) & 519A.

comply with the firm quote obligations in Rule 602 of Regulation NMS.

C2 will require TPHs and Market-Makers to utilize these risk protection parameters and mechanisms. However, TPHs and Market-Makers will have discretion to customize the parameters in accordance with their respective risk management needs. In light of this flexibility, the Commission reminds TPHs to be mindful of their obligations, to among others, seek best execution of orders they handle on an agency basis and consider their best execution obligations when establishing parameters for the order entry, execution, price parameter rate checks, maximum contract size risk control, and QRM.[45] For example, an abnormally low order entry parameter should be carefully scrutinized, particularly if a TPH's order flow to the Exchange contains agency orders. To the extent that a TPH chooses sensitive parameters and those parameters apply to connections over which it transmits customer orders to the Exchange, a TPH should consider the effect of its chosen settings on its ability to receive a timely execution on marketable agency orders that it sends to the Exchange in various market conditions. The Commission cautions brokers considering their best execution obligations to be aware that an agency order they represent may be rejected as a result of these risk protections.

In addition, in light of the Exchange's decision not to set maximum or minimum values, or default values, the Commission expects C2 to periodically assess whether these risk protection measures are operating in a manner that is consistent with the promotion of fair and orderly markets, including whether not utilizing maximum and minimum parameters or default values continues to be appropriate and in accordance with the Act and the rules thereunder.

Further, the Commission believes that Proposed Rule 6.17(i), which creates an optional kill switch mechanism, is consistent with the Act as it may further enhance risk management capabilities of TPHs by providing them with the ability to manage their risk exposure if they experience a significant system failure. To the extent that the kill switch mechanism provides TPHs with an appropriate backstop in this manner, it may encourage firms to provide liquidity on C2 and thus contribute to fair and orderly markets in a manner that protects investors and the public interest. The Commission notes that the Exchange represented in its proposal that the kill switch will operate consistently with a broker-dealer's firm quote obligations pursuant to Rule 602 of Regulation NMS,[46] and that the kill switch does not diminish or relieve a Market-Maker of its obligation to provide continuous two-sided quotes.[47] The Exchange also represented that the kill switch message will be accepted by the System in the order of receipt in the queue and will be processed in such order. As such, the System will process interest already in the System prior to receipt of the kill switch message prior to processing the kill switch message.[48] Based on these representations, the Commission believes that the kill switch is reasonably designed to promote just and equitable principles of trade and perfect the mechanism of a free and open market. Lastly, the Commission notes that in addition to the CBOE filing mentioned above, other exchanges have established kill switches that operate in a manner similar to that proposed by C2.[49]

Finally, the Commission believes that the proposal to authorize C2 to share with Clearing TPHs the risk mitigation settings selected by a TPH for whom the Clearing TPH clears may assist Clearing TPHs manage their clearing risk exposure. In addition to the CBOE filing mentioned above, the Commission notes that other exchanges have adopted similar rules authorizing the sharing of similar risk settings with clearing members.[50]

IV. Conclusion

It Is therefore ordered, pursuant to Section 19(b)(2) of the Act,[51] that the proposed rule change (SR–C2–2016–020), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[52]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30560 Filed 12–19–16; 8:45 am]

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[45] *See, e.g.,* Securities Exchange Act Release Nos. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (Order Handling Rules adopting release); 51808 (June 9, 2005), 70 FR 37496, 37537–8 (June 29, 2005) (Regulation NMS adopting release).

[46] *See* Notice, *supra* note 3, at 76681.

[47] *See id.*

[48] *See id.*

[49] *See, e.g.,* BOX Rule 7280(b) and PHLX Rule 1019(b).

[50] *See, e.g.,* MIAX Rule 500; BX Chapter VI, Section 20; NYSE Arca Rule 6.2A(a); NYSE MKT Rule 902.1NY(a); and PHLX Rule 1016.

[51] *See id.*

[52] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79546; File No. SR–NASDAQ–2016–165]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 4770 (Compliance With Regulation NMS Plan To Implement a Tick Size Pilot)

December 14, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Nasdaq Rule 4770 to modify the Web site data publication requirements relating to the Regulation NMS Plan to Implement a Tick Size Pilot Program (''Plan'') and to clarify the timing and format of publishing Market Maker registration statistics.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 25, 2014, Nasdaq, and several other self-regulatory organizations (the ''Participants'') filed with the Commission, pursuant to Section 11A of the Act [3] and Rule 608 of Regulation NMS thereunder,[4] the Plan to Implement a Tick Size Pilot Program.[5] The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.[6] The Plan was published for comment in the **Federal Register** on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.[7] The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.[8] On November 6, 2015, the SEC exempted the Participants from implementing the Pilot until October 3, 2016.[9] Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the SEC exempted the Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Participants to implement the pilot on a phased-in basis, as described in the Participants' exemptive request.[10]

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan.

Nasdaq adopted rule amendments to implement the requirements of the Plan, including relating to the Plan's data collection requirements and requirements relating to Web site data publication.[11] Specifically, with respect to the Web site data publication requirements pursuant to Section VII and Appendices B and C to the Plan, Nasdaq Rule 4770(b)(2)(B) provides, among other things, that Nasdaq shall make the data required by Items I and II of Appendix B to the Plan, and collected pursuant to paragraph (b)(2) of Rule 4770, publicly available on the Nasdaq Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Nasdaq Rule 4770(b)(3)(C), provides, among other things, that Nasdaq shall make the data required by Item IV of Appendix B to the Plan, and collected pursuant to paragraph (b)(3) of Rule 4770, publicly available on the Nasdaq Web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Commentary .08 to Rule 4770 provides, among other things, that the requirement that Nasdaq make certain data publicly available on the Nasdaq Web site pursuant to Appendix B and C to the Plan shall commence at the beginning of the Pilot Period.

Nasdaq is proposing amendments to Rule 4770(b)(2)(B) (regarding Appendix B.I and B.II data) and Rule 4770(b)(3)(C) (regarding Appendix B.IV data) to provide that data required to be made available on Nasdaq's Web site be published within 120 calendar days following month end. In addition, the proposed amendments to Commentary .08 to Rule 4770 would provide that, notwithstanding the provisions of paragraphs (b)(2)(B), (b)(3)(C) and (b)(5), Nasdaq shall make data for the Pre-Pilot period publicly available on the Nasdaq Web site pursuant to Appendix B and C to the Plan by February 28, 2017.[12]

The purpose of delaying the publication of the Web site data is to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information.

Nasdaq also proposes to amend Rule 4770(b)(5), which relates to the collection and transmission of Market Maker registration statistics. Currently, Rule 4770(b)(5) provides that the Exchange shall collect and transmit to the SEC the data described in Item III of Appendix B of the Plan relating to daily Market Maker registration statistics in a pipe delimited format within 30 calendar days following month end for (1) transactions in each Pre-Pilot Data Collection Security for the period beginning six months prior to the Pilot Period through the trading day immediately preceding the Pilot Period; and (2) transactions in each Pilot Security for the period beginning on the first day of the Pilot Period through six months after the end of the Pilot Period. Although the Plan requires that such data be made publicly available,[13] Rule 4770(b)(5) does not currently include a provision requiring the Exchange to publish such data to its Web site. The Exchange therefore proposes to amend Rule 4770(b)(5) to provide that the Exchange shall make Market Maker registration data publicly available on the Exchange Web site within 120 calendar days following month end at no charge.

Nasdaq has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the 30-day operative delay. If the Commission waives the 30-day operative delay, the operative date of the proposed rule change will be the date of filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(5) of the Act,[15] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, because it is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan and is in furtherance of the objectives of the Plan, as identified by the SEC.

In approving the Plan, the Commission recognized that requiring the publication of Market Maker data may raise confidentiality concerns, especially for Pilot Securities that may

[3] 15 U.S.C. 78k–1.

[4] 17 CFR 242.608.

[5] *See* Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

[6] *See* Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

[7] *See* Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (''Approval Order'').

[8] *See* Approval Order at 27533 and 27545.

[9] *See* Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

[10] *See* Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General Counsel and Secretary, Bats Global Markets, Inc., dated September 13, 2016; *see also* Letter from Eric Swanson, EVP, General Counsel and Secretary, Bats Global Markets, Inc., to Brent J. Fields, Secretary, Commission, dated September 9, 2016.

[11] *See, e.g.,* Securities Exchange Act Release No. 77456 (March 28, 2016), 81 FR 18925 (April 1, 2016) (SR–NASDAQ–2016–043); *see also* Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 17, 2016.

[12] With respect to data for the Pilot Period, the requirement that Nasdaq make data publicly available on the Nasdaq Web site pursuant to Appendix B and C to the Plan shall continue to commence at the beginning of the Pilot Period. Thus, the first Web site publication date for Pilot Period data (covering October 2016) would be published on the Nasdaq Web site by February 28, 2017, which is 120 days following the end of October 2016.

[13] *See* Section VII.A. 4 of the Plan.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

have a relatively small number of designated Market Makers.[16] For this reason, the Commission modified the Plan so that the data that would be made publicly available would not contain profitability measures for each security, but would be aggregated by the Control Group and each Test Group. Nasdaq believes that this proposal is consistent with the Act in that it is designed to address confidentiality concerns by permitting Nasdaq to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. With respect to the change to Rule 4770(b)(5), Nasdaq believes this change will clarify the timing and format of publishing Market Maker registration statistics.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Nasdaq notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan.

The proposal is intended to address confidentiality concerns that may adversely impact competition, especially for Pilot Securities that may have a relatively small number of designated Market Makers, by permitting Nasdaq to delay Web site publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information. The proposal also does not alter the information required to be submitted to the SEC.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.[17]

[16] *See* Approval Order at 27543–27544.

[17] Nasdaq notes that Financial Information Forum (FIF) submitted a letter to the staff of the Commission raising concerns regarding the publication of certain Appendix B statistics on a disaggregated basis using a unique masked market participant identifier. *See* Letter from Mary Lou Von Kaenel, Managing Director, FIF, to David S. Shillman, Associate Director, Division of Trading and Markets, Commission, dated August 16, 2016, available at *https://www.fif.com/comment-letters.*

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [18] and subparagraph (f)(6) of Rule 19b–4 thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) [20] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[21] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. In this filing, the Exchange has asked that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing.

The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. The proposal is intended to address confidentiality concerns by permitting the Exchange to delay Web site publication to provide for passage of additional time between the market information reflected in the data and public availability of such information. The proposal does not alter the information required to be submitted to the Commission.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement these proposed changes that are intended to address confidentiality concerns. The Commission notes that some Pilot data was scheduled to be published on November 30, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative on November 30, 2016.[22]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[18] 15 U.S.C. 78s(b)(3)(A)(iii).

[19] 17 CFR 240.19b–4(f)(6).

[20] *Id.*

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2016–165 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–165. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions

should refer to File Number SR–NASDAQ–2016–165 and should be submitted on or before January 10, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30552 Filed 12–19–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79556; File No. SR–NASDAQ–2016–167]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Distributor Fees for ITTO and BONO Data Feeds

December 14, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on December 2, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter XV of the Options Rules for the Nasdaq Stock Market, entitled ''Options Pricing,'' at Section 4, which governs Nasdaq Options Market (''NOM'') data distributor fees. Specifically, the Exchange proposes to separate the distributor fees for the ITCH [3] to Trade Options (''ITTO'') and Best of Nasdaq Options (''BONO'') data feeds, which are now charged as a single fee, into two separate fees, and conforming language to clarify that there will be no change to the Monthly Non-Display Enterprise License for ITTO and BONO. The proposal is described further below.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to separate the distributor fees for the ITTO and BONO data feeds, which are now charged together as a single fee, into two separate fees.

ITTO and BONO are proprietary data feeds designed to facilitate trading in options markets. ITTO provides in-depth quote and order information, last sale information, and Net Order Imbalance (''NOI'') data for NOM. BONO provides top-of-market data for NOM, including best bid and offer and last sale information. The information provided in BONO can be derived from ITTO. Customers typically purchase either ITTO or BONO, but not both.

Nasdaq currently charges a monthly distributor fee of $1,500 for the internal distribution of either ITTO or BONO or both, and a monthly external distributor fee of $2,000 for the external distribution of either or both feeds. Nasdaq also offers an enterprise license for BONO and ITTO for a monthly fee of $10,000.

Proposed Changes

The Exchange proposes to separate the internal and external distributor fees for ITTO and BONO. After the proposed changes take effect, a firm that distributes either ITTO or BONO, but not both, will be charged the current fee. A firm that elects to distribute both ITTO and BONO, however, will be charged a fee for the distribution of ITTO and a separate fee for the distribution of BONO. The proposal will not affect the other fees associated with ITTO and BONO: the monthly external and internal per user fees and the monthly enterprise license fee will remain the same.

The proposed fee change is reasonable and necessary because of the increase in the value of ITTO and BONO to customers resulting from the growth in NOM listings and recent infrastructure upgrades. NOM listings have increased from 663 in June of 2011 to over 2,800 today—over a 300 percent increase—while NOM's market share has jumped more than 250 percent between July of 2011 and November of 2016, according to data from the Options Clearing Corporation. In addition, in August of 2016, NOM commenced a market-wide technology refresh for several options systems, including ITTO and BONO, to provide a more efficient and robust infrastructure for options trading. The increase in the value of ITTO and BONO to customers generated by the growth in NOM and infrastructure investments, together with Nasdaq's reasonable objective to recoup costs associated with the growth of NOM and infrastructure investments, justify the proposed price increase.

The impact of the proposed change on firms that use BONO and ITTO will be minimal. Because BONO data is a subset of ITTO, most firms buy either ITTO or BONO, but not both. To the extent that firms use both BONO and ITTO, the higher fee is reasonable in light of the higher demands placed on Nasdaq's infrastructure by those firms.

The proposed changes do not affect the enterprise license fee for BONO and ITTO. The Nasdaq Options Rules, Chapter XV, Section 4(a), currently present the Monthly Enterprise License (Non-Display) Fee of $10,000 in the same chart that sets forth the distributor fees for ITTO and BONO. To avoid implying that the enterprise license fee for ITTO and BONO will be separated as well, the Exchange proposes taking the enterprise license fee out of that chart, and placing it in a separate paragraph under Section 4(a).

The new paragraph will not change current fees: the $10,000 per month enterprise license fee will permit the distribution of BONO and ITTO as provided in Section 4(c), and the fee will be in addition to the monthly distributor fees set forth in Section 4(a). This is consistent with the current rule and practice.

The ITTO and BONO internal and external distributor fees are entirely optional in that they apply only to firms that opt to distribute ITTO and BONO. The proposed changes do not impact or raise the cost of any other Nasdaq product.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] ITCH is a direct data feed interface for NOM.

of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [6]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [7] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[8] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [9]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [10] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that the proposed separation of distributor fees for the ITTO and BONO data feeds is fair and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. As described above, the proposed change in fees is reasonable and necessary to reflect the growing value of these products to customers and to offset the cost of systems upgrades and greater data demands resulting from growing NOM listings.

The Exchange believes that the proposed changes are reasonable and will benefit the investing public by supporting the distribution of these products and encouraging investment in infrastructure. Moreover, the fees for ITTO and BONO, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow, and are subject to competition from other products and among distributors of ITTO and BONO data for customers.

The Exchange believes that the proposed change in fees is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly-situated distributors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes establish separate monthly internal and external distributor fees for BONO and ITTO, which are justified by the increasing value of the product and the greater data demands created by growing NOM listings and a technology refresh for the options market. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

Specifically, market forces constrain fees for ITTO and BONO in three respects. First, all fees related to ITTO and BONO are constrained by competition among exchanges and other entities attracting order flow. Firms make decisions regarding proprietary data based on the total cost of interacting with the Exchange, and order flow would be harmed by the supracompetitive pricing of any proprietary data product. Second, prices for ITTO and BONO are constrained by the existence of substitutes that are offered, or may be offered, by other entities. Third, competition among options market data distributors will further constrain the cost of ITTO and BONO.

Competition for Order Flow

Fees related to ITTO and BONO are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the ''life blood'' of the exchanges. For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade, as demonstrated by the proliferation of new options exchanges such as ISE Mercury, BATS EDGX, ISE Gemini and MIAX Options within the last four years. Each options exchange is permitted to produce proprietary data products.

The markets for order flow and proprietary data are inextricably linked: a trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with Nasdaq and other exchanges. Data fees are but one factor in a total platform analysis. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. A supracompetitive increase in the fees charged for either transactions or proprietary data has the potential to impair revenues from both products. In this manner, the competition for order flow will constrain prices for proprietary data products.

Substitute Products

The price of depth-of-book data is constrained by the existence of multiple substitutes offered by numerous entities, including both proprietary data offered by other SROs or other entities, and non-proprietary data disseminated by the Options Price Reporting Authority, LLC (''OPRA''). OPRA is a securities information processor that disseminates last sale reports and quotations, as well as the number of options contracts traded, open interest and end-of-day summaries. As noted above, ITTO provides in-depth quote and order information, last sale information, and NOI data, while BONO provides best bid and offer and last sale information.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[7] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[8] *See NetCoalition,* at 534—535.

[9] *Id.* at 537.

[10] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

Many customers that obtain information from OPRA do not also purchase ITTO and BONO, but in cases where customers buy both products, they may shift the extent to which they purchase one or the other based on price changes. OPRA constrains the price of ITTO and BONO because no purchaser would pay an excessive price for these products when similar data is also available from OPRA. It is not necessary that products be identical in order to be reasonable substitutes for each other.

Proprietary data sold by other exchanges also constrain the price of ITTO and BONO. NYSE, BATS and CBOE, like Nasdaq, sell proprietary data for options markets. Other proprietary data products constrain the price of ITTO and BONO because no customer would pay an excessive price for these products when substitute data is available from other proprietary sources.

Competition Among Distributors

Distributors provide another form of price discipline for proprietary data products because they control the primary means of access to users. Distributors are in competition for users, and can simply refuse to purchase any proprietary data product that fails to provide sufficient value for the price. Nasdaq and other producers of proprietary data products must understand and respond to the needs of distributors to market such products successfully.

In summary, market forces constrain the price of depth-of-book data such as ITTO and BONO through competition for order flow, competition from similar products, and in the competition among distributors for customers. For these reasons, the Exchange has provided a substantial basis demonstrating that the fee is equitable, fair, reasonable, and not unreasonably discriminatory, and therefore consistent with and in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2016–167 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–167. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2016–167, and should be submitted on or before January 10, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–30561 Filed 12–19–16; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

[12] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Notice of Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration (''SBA'') under Section 309 of the Small Business Investment Act of 1958, as amended, and Section 107.1900 of the Small Business Administration Rules and Regulations, SBA by this notice declares null and void the license to function as a small business investment company under the Small Business Investment Company License No. 02/02–0629 issued to DeltaPoint Capital III, LP.

United States Small Business Administration.

Dated: December 14, 2016.

Mark L. Walsh,

Associate Administrator, Office of Investment and Innovation.

[FR Doc. 2016–30503 Filed 12–19–16; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

Notice of Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration (''SBA'') under Section 309 of the Small Business Investment Act of 1958, as amended, and Section 107.1900 of the Small Business Administration Rules and Regulations, SBA by this notice declares null and void the license to function as a small business investment company under the Small Business Investment Company License No. 02/02–0662 issued to DeltaPoint Capital IV, LP.

United States Small Business Administration.

Dated: December 14, 2016.

Mark L. Walsh,

Associate Administrator, Office of Investment and Innovation.

[FR Doc. 2016–30513 Filed 12–19–16; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of 30 day Reporting Requirements Submitted for OMB Review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before January 19, 2017. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

ADDRESSES: Address all comments concerning this notice to: *Agency Clearance Officer,* Curtis Rich, Small Business Administration, 409 3rd Street SW., 5th Floor, Washington, DC 20416; and *OMB Reviewer,* Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Curtis Rich, Agency Clearance Officer, (202) 205–7030 *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION:

Copies: Request for clearance (OMB 83–1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

Abstract: The information collected on SBA Form 480, ''Size Status Declaration'' is a certification of small business size status. This information collection is used to determine whether SBDC financial assistance is provided only to small business concerns as defined in the Small Business Investment Act and SBA size regulations. Without this certification, businesses that exceed SBA's size standards could benefit from program resources meant for small businesses.

Title: Size Status Declaration.

Frequency: On Occasion.

SBA Form Number: 480.

Description of Respondents: Investment Companies.

Responses: 1,705.

Annual Burden: 417.

Curtis Rich,

Management Analyst.

[FR Doc. 2016–30569 Filed 12–19–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice 9820]

Overseas Schools Advisory Council Notice of Meeting

The Overseas Schools Advisory Council, Department of State, will hold its Executive Committee Meeting on Thursday, January 26, 2017, at 9:30 a.m. in conference room 1482, Marshall Center, Department of State Building, 2201 C Street NW., Washington, DC. The meeting is open to the public and will last until approximately 12:00 p.m.

The Overseas Schools Advisory Council works closely with the U.S. business community to improve American-sponsored schools overseas that are assisted by the Department of State and attended by dependents of U.S. government employees, and children of employees of U.S. corporations and foundations abroad.

This meeting will deal with issues related to the work and support provided by the Overseas Schools Advisory Council to the American-sponsored overseas schools. There will be a report and discussion about the status of the Council-sponsored projects such as The World Virtual School and The Child Protection Project. The Regional Education Officers in the Office of Overseas Schools will make presentations on the activities and initiatives in the American-sponsored overseas schools.

Members of the public may attend the meeting and join in the discussion, subject to the instructions of the Chair. Admittance of public members will be limited to the seating available. Access to the State Department is controlled, and individual building passes are required for all attendees. Persons who plan to attend should advise the office of Dr. Keith D. Miller, Department of State, Office of Overseas Schools, telephone 202–261–8200, prior to January 15, 2017. Each visitor will be asked to provide his/her date of birth and either a driver's license or passport number at the time of registration and attendance, and must carry a valid photo ID to the meeting.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at *http://foia.state.gov/_docs/SORN/State-36.pdf* for additional information.

Any requests for reasonable accommodation should be made at the time of registration. All such requests will be considered, however, requests made after January 15, 2017, might not be possible to fill. All attendees must use the 21st Street entrance to the building.

Keith D. Miller,

Executive Secretary, Overseas Schools Advisory Council.

[FR Doc. 2016–30624 Filed 12–19–16; 8:45 am]

BILLING CODE 4710–24–P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21074]

Monarch Ventures Inc.—Acquisition of Control—Quick Coach Lines Ltd. and Vancouver Tours and Transit Ltd. D/B/A Charter Bus Lines of British Columbia

AGENCY: Surface Transportation Board.

ACTION: Notice Tentatively Approving and Authorizing Finance Transaction.

SUMMARY: On November 21, 2016, Monarch Ventures Inc. (Monarch), a noncarrier, filed an application under 49 U.S.C. 14303 for Monarch to acquire from Royal City Charter Coach Lines Ltd. (Royal), a noncarrier, control of the assets and business operations of Quick Coach Lines Ltd. (QCL) and Vancouver Tours and Transit Ltd. d/b/a Charter Bus Lines of British Columbia (VTT). The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action. Persons wishing to oppose the application must follow the rules at 49 CFR 1182.5 and 1182.8.

DATES: Comments must be filed by February 6, 2017. Monarch may file a reply by February 20, 2017. If no opposing comments are filed by February 6, 2017, this notice shall be effective February 7, 2017.

ADDRESSES: Send an original and 10 copies of any comments referring to Docket No. MCF 21074 to: Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, send one copy of comments to Monarch's representative: Stephen P. Flott, Flott & Co. PC, P.O. Box 17655, Arlington, VA 22216.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm (202) 245–0391. Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Monarch, a noncarrier, owns and controls 100% of

Traxx Transportation Ltd. (Traxx), a passenger carrier operating in Western Canada and the Western United States (MC–215048). Royal, a noncarrier, owns and controls 100% of QCL, a passenger carrier operating between various points in southern British Columbia, Seattle, and SeaTac Airport (MC–205116). Royal also owns and controls 100% of VTT, a passenger carrier operating in western Canada, as well as the western United States (MC–108204).[1]

Monarch states that, under the proposed transaction, QCL, VTT, and Traxx would be owned by 1997553 Alberta Ltd. (Alberta Ltd.), a noncarrier, of which Monarch would own 77.2% of the shares and Royal would own 22.8%. Monarch states that Alberta Ltd. would acquire 100% of the shares (including all of the assets, vehicles, and business operations) of QCL, VTT, and Traxx. Upon completion of the transaction, Monarch would (indirectly) control QCL and VTT and would continue to (indirectly) control Traxx through its control of Alberta Ltd. Under the transaction, Monarch states that the principals of Royal would be the principal managers of QCL, VTT, and Traxx, with the goals of increasing revenues through enhanced marketing, investment in new products, and selected strategic acquisitions and increasing profitability of all three carriers through operational improvements.

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) The effect of the proposed transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of affected carrier employees. Monarch has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b) and a statement that the aggregate gross operating revenues of QCL and VTT exceeded $2 million for the preceding 12-month period. *See* 49 U.S.C. 14303(g).[2]

Monarch asserts that the transaction would have no adverse impact on the adequacy of transportation services available to the public. Monarch states that Royal's management team would continue to run the operations of QCL and VTT and that Monarch intends to continue the businesses of QCL, VTT, and Traxx essentially in the same manner in which they are now being conducted. Monarch states that the proposed transaction would have no effect on total fixed charges. Further, Monarch states that no employees would be adversely affected by the proposed transaction, as there would be no change in the day-to-day operations of QCL and VTT.

On the basis of the application, the Board finds that the proposed acquisition is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6(c). If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available on our Web site at ''*WWW.STB.GOV*.''

It is ordered:

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed as having been vacated.

3. This notice will be effective February 7, 2017, unless opposing comments are filed by February 6, 2017.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW., Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE., Washington, DC 20590.

Decided: December 13, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–30489 Filed 12–19–16; 8:45 am]

BILLING CODE 4915–01–P

[1] Monarch states that VTT is a passenger carrier pursuant to MC–212649. (*See* Appl. 3.) However, the record indicates that VTT holds a federally issued operating authority under MC–108204. (*See* Appl., Ex. B, VTT Company Snapshot & Ex. C, VTT Licensing & Insurance.)

[2] Applicants with gross operating revenues exceeding $2 million are required to meet the requirements of 49 CFR 1182.2(a)(5).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Forty Sixth RTCA SC–224 Plenary

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

ACTION: Forty Sixth RTCA SC–224 Plenary.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of Forty Sixth RTCA SC–224 Plenary.

DATES: The meeting will be held February 02, 2017 10:00 a.m.–01:00 p.m.

ADDRESSES: The meeting will be held at: RTCA Headquarters, 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Karan Hofmann at *khofmann@rtca.org* or 202–330–0680, or The RTCA Secretariat, 1150 18th Street, NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of the Forty Sixth RTCA SC–224 Plenary. The agenda will include the following:

Thursday, February 2, 2017–10:00 a.m.–1:00 p.m.

1. Welcome/Introductions/ Administrative Remarks
2. Review/Approve Previous Meeting Summary
3. Report on TSA participation
4. Report on the New Guidelines and other Safe Skies Reports
5. Review of DO–230H Sections
6. Terms of Reference Revisions
7. Action Items for Next Meeting
8. Time and Place of Next Meeting
9. Any Other Business
10. Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC on December 14, 2016.

Mohannad Dawoud,

Management & Program Analyst, Partnership Contracts Branch, ANG–A17, NextGen, Procurement Services Division, Federal Aviation Administration.

[FR Doc. 2016–30511 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Pilot Records Improvement Act of 1996 (PRIA)/Pilot Records Database (PRD)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. Title 49 United States Code (49 U.S.C.) § 44703(h): Records of Employment of Pilot Applicants, which was established by the Pilot Records Improvement Act of 1996 (PRIA), mandates that air carriers who have been issued a part 119 air carrier certificate and are authorized to conduct operations under Title 14 of the Code of Federal Regulations (14 CFR) part 121 or part 135 as well as part 125 and 135 operators, request and receive FAA records, air carrier and other operator records, and the National Driver Register records before allowing an individual to begin service as a pilot.

DATES: Written comments should be submitted by January 19, 2017.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0607.

Title: Pilot Records Improvement Act (PRIA)/Pilot Records Database (PRD).

Form Numbers: FAA Forms 8060–10, 8060–10A, 8060–11, 8060–11A, 8060–12, 8060–13.

Type of Review: Renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 13, 2016 (81 FR 7073). There were no comments. Title 49 United States Code (49 U.S.C.) 44703(h): Records of Employment of Pilot Applicants, which was established by the Pilot Records Improvement Act of 1996 (PRIA), mandates that air carriers who have been issued a part 119 air carrier certificate and are authorized to conduct operations under Title 14 of the Code of Federal Regulations (14 CFR) part 121 or part 135 as well as part 125 and 135 operators, request and receive FAA records, air carrier and other operator records, and the National Driver Register records before allowing an individual to begin service as a pilot. Additionally, fractional ownerships operating in accordance with subpart K of part 91 are required to complete a pilot safety background check before allowing an individual to begin service as a pilot (reference § 91.1051). Furthermore, air tour operators operating in accordance with § 91.147 are required to obtain an individual's previous drug and/or alcohol testing records before allowing an individual to begin service as a pilot. All requestors are heretofore referred to as ''air carriers.'' The FAA is also deploying a web-based online application called the Pilot Records Database (PRD) in December 2016 that is expected to benefit hiring air carriers, operators, and pilots required to comply with PRIA. This application automates the current PRIA process and provides an air carrier with immediate access to a consenting pilot's FAA records. FAA's externally facing applications require access control through MyAccess. Members of the public will authenticate via an externally-facing registration Web page; MyAccess. The MyAccess externally-facing registration Web page allows a member of the public desiring access to an application to choose between entering Driver's License or Social Security Number to establish the proof of identity needed for authentication.

Respondents: Approximately 600 pilots.

Frequency: On occasion.

Estimated Average Burden per Response: 10 minutes.

Estimated Total Annual Burden: 100 hours.

Issued in Washington, DC, on December 14, 2016.

Ronda L Thompson,

FAA Information Collection Clearance Officer, Performance, Policy & Records Management Branch, ASP–110.

[FR Doc. 2016–30638 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Franklin Boulevard: I–5—McVay Highway. City of Springfield, Lane County, OR

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of Limitations on Claims for Judicial Review of Actions by FHWA and other Federal agencies.

SUMMARY: This notice announces the final environmental action taken by the FHWA that is final within the meaning of 23 U.S.C. 139(l)(1). The action relates to a proposed highway project, Franklin Boulevard: I–5—McVay Highway in the City of Springfield, Lane County, Oregon. The final environmental action taken by FHWA grants approval for the project.

DATES: By this notice, FHWA is advising the public of the categorical exclusion as the final agency action on the Franklin Boulevard: I–5—McVay Highway project, subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the transportation project will be barred unless the claim is filed on or before May 19, 2017. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Michelle Eraut, Program Development Team Leader, Federal Highway Administration, 530 Center Street NE., Suite 420, Salem, Oregon 97301, Telephone: (503) 316–2559, Email: *Michelle.Eraut@dot.gov*. The Franklin Boulevard: I–5—McVay Highway categorical exclusion is available upon written request from FHWA at the address shown above. Comments or questions concerning this proposed action and the Franklin Boulevard: I–5—McVay Highway project should be directed to FHWA at the address provided above.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA, has taken final agency action subject to 23 U.S.C. 139(l)(1) by issuing a categorical exclusion pursuant to the National Environmental Policy Act and approval for the following highway project in the State of Oregon: Franklin Boulevard: I–5—McVay Highway. The project will reconstruct Franklin Boulevard to reconfigure the existing five travel lanes to increase the accessibility of alternative modes of travel. The reconfiguration will include: roundabouts at four intersections; bus turn-out lanes and stops; a buffered bike lane in each direction that is adjacent and separated from the travel lanes; landscaped medians and stormwater treatment facilities; sidewalks, and local access lanes, which are short, single lane, single direction frontage roads separated from the main through lanes. The actions by the Federal agencies and the laws under which such actions were taken are described in the categorical exclusion issued on December 9, 2016. The categorical exclusion is available by contacting FHWA at the address provided above. This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to FHWA Oregon Division programmatic agreements and FHWA Oregon Division programmatic biological opinions, as well as:

1. General: National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4347]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. Air: Clean Air Act [42 U.S.C. 7401–7671(q)].

3. Land: Section 4(f) of the Department of Transportation Act of 1966 [23 U.S.C. 138 and 49 U.S.C. 303]; Section 6(f) of the Land and Water Conservation Fund Act (LWCF) [16 U.S.C. 460*l*–4–460*l*–11.].

4. Wildlife: The Endangered Species Act [16 U.S.C. 1531–1544]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667 (e)]; Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470aa–mm]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)].

6. Social and Economic: Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996].

7. Wetlands and Water Resources: Clean Water Act [33 U.S.C. 1251–1376]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j–26)];

8. Executive Orders: E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1)

Issued On: December 9, 2016.

Phillip A. Ditzler,

Division Administrator.

[FR Doc. 2016–30293 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0328; FMCSA–2012–0282; FMCSA–2012–0283; FMCSA–2014–0308; FMCSA–2014–0309]

Qualification of Drivers; Exemption Applications; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions of 110 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. FMCSA has statutory authority to exempt individuals from this rule if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these CMV drivers.

DATES: Each group of renewed exemptions was effective from the dates stated in the discussions below. Comments must be received on or before January 19, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. FMCSA–2010–0328; FMCSA–2012–0282; FMCSA–2012–0283; FMCSA–2014–0308; FMCSA–2014–0309, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the

name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are from 8 a.m. to 5:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the Federal Motor Carrier Safety Regulations 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 110 individuals listed in this notice have recently become eligible for a renewed exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. The drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

Exemption Decision

This notice addresses 110 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. These 110 drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. Therefore, FMCSA has decided to extend each exemption for a renewable two-year period. Each individual is identified according to the renewal date.

The exemptions are renewed subject to the following conditions: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual submit an annual ophthalmologist's or optometrist's report; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. The following groups of drivers received renewed exemptions in the month of December and are discussed below.

As of December 9, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 37 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (79 FR 66451; 80 FR 2479):

Travis L. Beck (OH)
Corey C. Bennett (MS)
Nicholas J. Borelli (NJ)
Elvis P. Butler (TN)
John H. Butler (OH)
Michael E. Calvert (TX)
Keith J. Cole (WI)
Kevin E. Conti (OH)
Marsh L. Daggett (TX)
Chad E. Hales (UT)
Dennis L. Hooyman (WI)
Lorenza K. Jefferson (VA)
Edward Johnson (TN)
William O. Johnson, Jr.
Michael E. Kroll (WI)
Isolina Matos (NJ)
Rex D. McManaway (IL)
Steven A. Metternick (MI)
Daniel P. Miller (PA)
James K. Ollerich (SD)
Scott B. Olson (ND)
Raymond E. Pawloski (MI)
Loren A. Pingel (CO)
Douglas S. Pitcher (NY)
Terrence A. Proctor (MD)
Salvador Ramirez, Jr. (IL)
Heber E. Rodriguez (VA)
Lukas N. Skutnik (NE)
Daniel C. Sliman (OH)
Jeffrey A. Sturgill (OH)
Maurice S. Styles (MN)
Richard J. Thomas (IN)
Kevin E. Tucker
Robert Vassallo (NY)
Clifford L. White (KS)
Jason L. Woody (KS)
Wesley B. Yokum (PA)

The drivers were included in Docket No. FMCSA–2014–0308. Their exemptions are effective as of December 9, 2016 and will expire on December 9, 2018.

As of December 14, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 11 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (75 FR 63536; 75 FR 77952):

William V. Barbrie (RI)
John P. Catalano (NJ)
Gary J. Dionne (ID)
Thomas C. Donahue (MA)
Marlin K. Johnson (MN)
George Long, Jr. (NM)
Robert Minacapelli (NY)
Joe E. L. Radabaugh (OH)
Ben D. Shelton, Jr. (IL)
Nestor P. Vargas, Jr. (WA)
Harold A. Wendt (MN)

The drivers were included in Docket No. FMCSA–2010–0328. Their exemptions are effective as of December 14, 2016 and will expire on December 14, 2018.

As of December 20, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 17 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (77 FR 63411; 77 FR 64181; 77 FR 75492; 77 FR 75493):

James D. Astle (OH)
Robert E. Carroll (FL)
Thomas L. Gilmore (IA)
Kenneth M. Hansen (IA)
David J. Heppelmann (MN)
Dennis R. Johnson (TN)
Ronald D. Johnston (VA)
Steven M. Knezevich (MI)
Phil J. Kunkel (IN)
Carl E. McCartney (PA)
Fred Nelson, Jr. (PA)
Ricky L. Osterback (WA)
Joseph M. Polkowski, Sr. (PA)
Dan R. Stark (MN)
Chad E. Vanscoy (OH)
Mark A. Welch, Jr. (PA)
Bailey G. Zickefoose, Jr. (WV)

The drivers were included in Docket No. FMCSA–2012–0283. Their exemptions are effective as of December 20, 2016 and will expire on December 20, 2018.

As of December 29, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 45 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (79 FR 70920; 80 FR 5613):

Andrew P. Bivens (TN)
Everett D. Blevins (KY)
Kirk J. Brummeler (GA)
Travis M. Bryan (MA)
Robert A. Chess (PA)
John W. Condy (NY)
Kevin V. Cook (MO)
Guido Criscuolo, Jr. (CT)
Zachary L. Diehl (IL)
Andrea I. Dirksen (IA)
David D. Dowdy (IL)
Clarice L. Dunklin (LA)
Ricky L. Exler (FL)
Paul B. Fuerstenberg (WI)
Nathan M. Gallant (TX)
Louis A. Goodenough (IN)
Tyler L. Gravatt (ID)
Gary W. Honaker (VA)
David G. Horne (VA)
Glenn A. Keifer (SD)
Rex L. Kreutzer (NE)
Larry D. Lloyd (OR)
Dennis D. Markowski (WA)
William F. Melchert-Dinkel (MN)
Brit K. Miller (SD)
Charles B. Petersen (ID)
Anthony J. Politan (IN)
Emil T. Ricci (PA)
Arturo Robles (WY)
Robert F. Rothbauer (WI)
Michael A. Runyan, Jr. (NC)
John D. Sheets (NH)
Kyle L. Shuman (NY)
Jerry W. Smay (CA)
Gregory A. Smith (GA)
William S. Spaeth (WI)
Eloy G. Tijerina (TX)
Santos R. Torres (TX)
Leroy A. Traudt (NE)
Arthur R. Vance (VA)
Gerald S. Volpone, Jr. (MA)
Galen R. Watts (TX)
William R. Welch, Jr. (VA)
John E. Wildenmann (KY)
Edward D. Wright (IN)

The drivers were included in Docket No. FMCSA–2014–0309. Their exemptions are effective as of December 29, 2016 and will expire on December 29, 2018.

Each of the 110 drivers in the aforementioned groups qualifies for a renewal of the exemption. They have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of the 110 drivers for a period of two years is likely to achieve a level of safety equal to that existing without the exemption. The drivers were included in docket numbers FMCSA–2010–0328; FMCSA–2012–0282; FMCSA–2012–0283; FMCSA–2014–0308; FMCSA–2014–0309.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 19, 2017.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 110 individuals from rule prohibiting persons with ITDM from operating CMVs in interstate commerce in 49 CFR 391.41(b)(3). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the medical condition of each applicant for an exemption from rule prohibiting persons with ITDM from operating CMVs in interstate commerce. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket numbers FMCSA–2010–0328; FMCSA–2012–0282; FMCSA–2012–0283; FMCSA–2014–0308; FMCSA–2014–0309 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period. FMCSA may issue a final determination at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2010–0328; FMCSA–2012–0282; FMCSA–2012–0283; FMCSA–2014–0308; FMCSA–2014–0309 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 8, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–30588 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2000–8398; FMCSA–2001–11426; FMCSA–2002–11714; FMCSA–2002–12294; FMCSA–2004–17195; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2005–21711; FMCSA–2006–23773; FMCSA–2006–24783; FMCSA–2007–0071; FMCSA–2007–27897; FMCSA–2008–0106; FMCSA–2008–0174; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2009–0303; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2010–0385; FMCSA–2011–0366; FMCSA–2011–0379; FMCSA–2011–0380; FMCSA–2012–0040; FMCSA–2012–0160; FMCSA–2012–0161; FMCSA–2012–0214; FMCSA–2012–0215; FMCSA–2012–0216; FMCSA–2013–0167; FMCSA–2013–0169; FMCSA–2013–0170; FMCSA–2013–0174; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 125 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Each group of renewed exemptions was effective on the dates stated in the discussions below and will expire on the dates stated in the discussions below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http//www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

II. Background

On October 14, 2016, FMCSA published a notice announcing its decision to renew exemptions for 125 individuals from the vision requirement in 49 CFR 391.41(b)(10) to operate a CMV in interstate commerce and requested comments from the public (81 FR 71173). The public comment period ended on November 14, 2016 and no comments were received.

As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to driver a CMV if that person:

> Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received no comments in this preceding.

VI. Conclusion

As of October 6, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 58 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (65 FR 20245; 65 FR 57230; 67 FR 15662; 67 FR 37907; 67 FR 46016; 67 FR 57266; 67 FR 57627; 69 FR 17263; 69 FR 26206; 69 FR 26921; 69 FR 31447; 69 FR 51346; 69 FR 52741; 70 FR 48797; 70 FR 61493; 71 FR 19602; 71 FR 26602; 71 FR 27033; 71 FR 27034; 71 FR 32183; 71 FR 41310; 71 FR 6826; 71 FR 50970; 71 FR 53489; 72 FR 39879; 72 FR 52419; 73 FR 6242; 73 FR 6244; 73 FR 16950; 73 FR 16952; 73 FR 27018; 73 FR 35194; 73 FR 35200; 73 FR 36955; 73 FR 38498; 73 FR 48270; 73 FR 48273; 73 FR 48275; 73 FR 51336; 73 FR 75807; 74 FR 41971; 74 FR 60022; 75 FR 4623; 75 FR 22179; 75 FR 25918; 75 FR 27622; 75 FR 34209; 75 FR 34211; 75 FR 36778; 75 FR 36779; 75 FR 39725; 75 FR 44050; 75 FR 44051; 75 FR 47886; 75 FR 47888; 75 FR 52062; 75 FR 61833; 75 FR 77942; 76 FR 5425; 76 FR 54530; 77 FR 5874; 77 FR 15184; 77 FR 17109; 77 FR 17117; 77 FR 23797; 77 FR 23799; 77 FR 26816; 77 FR 27845; 77 FR 27850; 77 FR 33558; 77 FR 36338; 77 FR 38381; 77 FR 38384; 77 FR 40945; 70 FR 40946; 77 FR 41879; 77 FR 46153; 77 FR 46793; 77 FR 51846; 77 FR 52388; 77 FR 52389; 77 FR 52391; 77 FR 56262; 77 FR 59245; 78 FR 64271; 78 FR 64274; 78 FR 67454; 78 FR 77778; 78 FR 78477; 79 FR 4803; 79 FR 1908; 79 FR 2748; 79 FR 14333; 79 FR 14571; 79 FR 18392; 79 FR 23797; 79 FR 27365; 79 FR 27681; 79 FR 28588; 79 FR 29498; 79 FR 35212; 79 FR 35218; 79 FR 35220; 79 FR 37842; 79 FR 38649; 79 FR 38659; 79 FR 38661; 79 FR 40945; 79 FR 40945; 79 FR 41735; 79 FR 41740; 79 FR 45868; 79 FR 46153; 79 FR 46300; 79 FR 47175; 79 FR 51642; 79 FR 51643; 79 FR 52388; 79 FR 53514; 79 FR 64001):

Ramon Adame (IL)
Thomas A. Black (MO)
John E. Breslin (NV)
Trixie L. Brown (IN)
Joel W. Bryant (LA)
Howard T. Bubel (ND)
Raymond E. Burrus (CO)
Bradley E. Buzzell (NH)
Dionicio Carrera (TX)
Scott F. Chalfant (DE)
Tommy J. Cross, Jr. (TN)
Tony K. Ellis (IN)
Curtis E. Firari (WI)
Kelly L. Foster (UT)
Donald H. Fuller (NY)
Viktor V. Goluda (SC)
Ronald M. Green (OH)
David W. Grooms (IN)
Clifford J. Harris (VA)
Billy R. Holdman (IL)
Daniel Hollins (KY)
Ralph E. Holmes (MD)
Charles S. Huffman (KS)
Fredrick C. Ingles (WV)
Daniel W. Johnson (NY)
Matthew B. Lairamore (OK)
Terry A. Legates (OK)
Gary McKown (WV)
Ronald S. Milkowski (NJ)
Donald L. Minney (OH)
Jack W. Murphy, Jr. (OH)

Danny W. Nuckles (VA)
Nathan J. Price (ID)
Matias P. Quintanilla (CA)
Jacques W. Rainville (VT)
Antonio A. Ribeiro (CT)
Ronney L. Rogers (WA)
David T. Rueckert (WA)
Kirk Scott (CT)
Ronald H. Sieg (MO)
Kenneth D. Sisk (NC)
David L. Slack (TX)
David M. Smith (IL)
Mark A. Smith (IA)
Scotty W. Sparks (KY)
Robert L. Strange (NC)
Charles E. Stokes (FL)
Samuel M. Stoltzfus (PA)
George W. Thomas (SC)
Malcolm J. Tilghman, Sr. (DE)
Duane L. Tysseling (IA)
Melvin V. Van Meter (PA)
Nicholas J. Vance (OH)
Christopher M. Vincent (NC)
Scott C. Westphal (MN)
Dale E. Williams (TX)
Robert D. Williams (LA)
Michael T. Wimber (MT)

The drivers were included in one of the following dockets: Docket Nos. FMCSA–2000–7006; FMCSA–2002–11714; FMCSA–2002–12294; FMCSA–2004–17195; FMCSA–2005–21711; FMCSA–2006–23773; FMCSA–2006–24783; FMCSA–2007–0071; FMCSA–2007–27897; FMCSA–2008–0106; FMCSA–2008–0174; FMCSA–2009–0303; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0385; FMCSA–2011–0366; FMCSA–2011–0379; FMCSA–2011–0380; FMCSA–2012–0040; FMCSA–2012–0160; FMCSA–2012–0161; FMCSA–2012–0214; FMCSA–2013–0167; FMCSA–2013–0169; FMCSA–2013–0170; FMCSA–2013–0174; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010. Their exemptions are effective as of October 6, 2016 and will expire on October 6, 2018.

As of October 15, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 17 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (67 FR 10471; 67 FR 19798; 69 FR 33997; 69 FR 51346; 69 FR 61292; 71 FR 50970; 71 FR 55820; 73 FR 38497; 73 FR 46973; 73 FR 48270; 73 FR 48271; 73 FR 54888; 73 FR 65009; 75 FR 39725; 75 FR 44050; 75 FR 47883; 75 FR 50799; 75 FR 52063; 75 FR 57105; 75 FR 61833; 75 FR 63257; 77 FR 38381; 77 FR 48590; 77 FR 51846; 77 FR 52388; 77 FR 60010):

William C. Ball (NC)
Julian Collins (GA)
Ivory Davis (MD)
Timothy J. Droeger (MN)
Edward P. Hynes II (VA)
Richard L. Kelley (MN)
Theodore Kirby (MD)
Kelly R. Konesky (AZ)
Joseph A. Leigh, Jr. (NC)
Hollis J. Martin (AL)
Kevin C. Palmer (OR)
Charles O. Rhodes (FL)
Gordon G. Roth (KS)
Julius Simmons, Jr. (SC)
Ted L. Smeltzer (IN)
Stephen B. Whitt (NC)
Darrell F. Woosley (IL)

The drivers were included in one of the following dockets: Docket No. FMCSA–2001–11426; FMCSA–2004–17984; FMCSA–2008–0174; FMCSA–2008–0321; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2012–0160. Their exemptions are effective as of October 15, 2016 and will expire on October 15, 2018.

As of October 21, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 7 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (79 FR 56099; 79 FR 70928):

Terry L. Allen (IL)
Todd A. Carlson (MN)
Ronald Gaines (FL)
Russel K. Gray (OH)
Billy R. Hampton (NC)
Raymond Holt (CA)
Juan C. Puente (TX)

The drivers were included on the following docket: Docket No. FMCSA–2014–0011. Their exemptions are effective as of October 21, 2016 and will expire on October 21, 2018.

As of October 22, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 8 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (73 FR 35194; 73 FR 51689; 73 FR 63047; 75 FR 39725; 75 FR 47883; 75 FR 61883; 75 FR 63257; 75 FR 64396; 77 FR 64582; 79 FR 56104):

Randall J. Benson (MN)
James D. Drabek, Jr. (IL)
Delone W. Dudley (MD)
James W. Lappan (KS)
Jeromy W. Leatherman (PA)
Ernest B. Martin (KY)
Mark L. McWhorter (FL)
Sylvester Silver (VA)

The drivers were included on the following docket: Docket No. FMCSA–2008–0106; FMCSA–2008–0266; FMCSA–2010–0161; FMCSA–2010–0187. Their exemptions are effective as of October 22, 2016 and will expire on October 22, 2018.

As of October 23, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 7 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (77 FR 52381; 77 FR 64841; 79 FR 56097):

Ronald A. Duester (TX)
Charlene E. Geary (SD)
David N. Hinchliffe (TX)
Michael C. Hoff (WA)
Benny L. Sanchez (CA)
Sandeep Singh (CA)
James T. Stalker (OH)

The drivers were included on the following docket: Docket No. FMCSA–2012–0215. Their exemptions are effective as of October 23, 2016 and will expire on October 23, 2018.

As of October 27, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 10 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (65 FR 33406; 65 FR 57234; 65 FR 78256; 66 FR 16311; 67 FR 57266; 69 FR 52741; 69 FR 53493; 69 FR 62742; 71 FR 53489; 71 FR 62148; 73 FR 61925; 75 FR 59327; 77 FR 64583; 79 FR 56117):

David W. Brown (TN)
Monty G. Calderon (OH)
Awilda S. Colon (TN)
Zane G. Harvey, Jr. (VA)
Jeffrey M. Keyser (OH)
Donnie A. Kildow (ID)
David G. Meyers (NY)
Rodney M. Pegg (PA)
Zbigniew P. Pietranik (WI)
Joseph F. Wood (MS)

The drivers were included on the following docket: Docket No. FMCSA–2000–7165; FMCSA–2000–8398; FMCSA–2004–18885. Their exemptions are effective as of October 27, 2016 and will expire on October 27, 2018.

As of October 31, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 18 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (77 FR 56261; 77 FR 65933; 79 FR 58856; 79 FR 59348; 79 FR 72754):

Richard J. Beck (IL)
Donald L. Blakeley II (NV)
Marty R. Brewsteer (KS)
Henry L. Chrestensen (IA)
Sanford L. Goodwin (TX)
Tonia L. Graves (AZ)
Roger S. Hardin (AL)
Gregory S. Hatten (LA)
Thomas J. Long III (PA)
Matthew J. Mantooth (KY)
Thomas J. McClure (IA)
Steven W. Miller (PA)
James J. Monticello (IN)
Aaron F. Naylor (PA)

Klifford N. Siemens (KS)
Steven R. Smith (ID)
Scott E. Tussey (KY)
Aaron H. Walser (ID)

The drivers were included on the following docket: Docket No. FMCSA–2012–0216; FMCSA–2014–0296. Their exemptions are effective as of October 31, 2016 and will expire on October 31, 2018.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: December 9, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–30592 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0288; FMCSA–2012–0281; FMCSA–2014–0306; FMCSA–2014–0307]

Qualification of Drivers; Exemption Applications; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions of 71 individuals from its prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions enable these individuals with ITDM to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions was effective on the dates stated in the discussions below and will expire on the dates stated in the discussions below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8 a.m. to 5:30 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to http//*www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

II. Background

On October 20, 2016, FMCSA published a notice announcing its decision to renew exemptions for 71 individuals from the insulin-treated diabetes mellitus prohibition in 49 CFR 391.41(b)(3) to operate a CMV in interstate commerce and requested comments from the public (81 FR 72658). The public comment period ended on November 21, 2016 and no comments were received.

As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

The physical qualification standard for drivers regarding diabetes found in 49 CFR 391.41(b)(3) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control.

III. Discussion of Comments

FMCSA received no comments in this preceding.

IV. Conclusion

Based upon its evaluation of the 71 renewal exemption applications and that no comments were received, FMCSA confirms its' decision to exempt the following drivers from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce in 49 CFR 391.64(3):

As of November 1, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 27 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (79 FR 59351; 79 FR 77082):

Noe D. Aguilar (CA)
David N. Banks (NC)
Wayne W. Best (PA)
Gregory K. Blythe (IL)
Justin M. Brown (MT)
Clayton G. Hardwick (KY)
Audie C. Holton (GA)
John F. Kincaid (IL)
Craig T. LaPresti (PA)
Lester M. Lee, Jr. (GA)
Aretha Lewis (VA)
Marvin D. Mathis (NC)
Brian M. McFadden (MA)
Sean K. Myhand (GA)
Glen R. Parry (NM)
George E. Patton (AL)
Michael J. Ramey (CO)
Richard J. Rasmussen (NE)
Mark L. Rigby (UT)
Jeffrey K. Roberts (WI)
Marvin A. Ryan (IN)
Eric R. Storm (GA)
Daniel A. Swain (TX)
Sean P. Thomas (IN)
Glenn R. Tyrrell (MN)
Lewis W. Vaught Jr. (NC)
William L. Wiltrout (PA)

The drivers were included in Docket No. FMCSA–2014–0306. Their exemptions are effective as of November 1, 2016 and will expire on November 1, 2018.

As of November 16, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 14 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (75 FR 59788; 75 FR 70077):

Shale W. Anderson (FL)
Charles L. Arnburg (IA)
Ronald D. Ayers (WV)
Garrett D. Couch (MI)
Mark W. Garver (MN)
Donald S. Keller (MI)
Jason M. Luper (MO)
Harold L. Phillips (OK)
Heath A. Senkel (TX)
Roland R. Unruh (KS)
Norman J. VanTuyle II (MI)

John M. Warden (TX)
Donald E. Weadon (MD)
Douglas W. Williams (TN)

The drivers were included in Docket No. FMCSA–2010–0288. Their exemptions are effective as of November 16, 2016 and will expire on November 16, 2018.

As of November 22, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 21 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (79 FR 63214; 80 FR 1070):

Jeffrey S. Argabright (OH)
James L. Crane (MS)
Donald L. Feltman (MN)
Benjamin T. Filip (ND)
Harold L. Gomez (LA)
Arthur M. Gonzalez (TX)
William T. Jensen (NJ)
Robert W. Johnson, Sr. (NY)
Joseph J. Karas (NJ)
Randy C. Lee (NY)
John R. Miller II (OR)
Robert A. Nicolai (MO)
William P. Pearson, II (WI)
Alan M. Primus (IA)
Danny L. Reimers (NM)
Michael L. Reynolds (NC)
Samuel H. Schmidt (MN)
Timothy W. Selk (AK)
Dennis J. Stanley (WI)
Steven M. Weimer (PA)
Michael L. Westbury (SC)

The drivers were included in Docket No. FMCSA–2014–0307. Their exemptions are effective as of November 22, 2016 and will expire on November 22, 2018.

As of November 26, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 9 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (77 FR 59447; 77 FR 70529):

Charles E. Castle (OH)
Larry W. Dearing (IN)
Bradley E. DeWitt (WA)
Leonard R. Dobosenski (MN)
Michael L. Kiefer (SD)
Marcus J. Kyle (IA)
Robert C. Moore (PA)
Jedediaha C. Record (WY)
Jessie L. Webster (KY)

The drivers were included in Docket No. FMCSA–2012–0281. Their exemptions are effective as of November 26, 2016 and will expire on November 26, 2018.

Each of the 71 drivers in the aforementioned groups qualifies for a renewal of the exemption. They have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of the 71 drivers for a period of two years is likely to achieve a level of safety equal to that existing without the exemption. The drivers were included in docket numbers FMCSA–2010–0288; FMCSA–2012–0281; FMCSA–2014–0306; FMCSA–2014–0307.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: December 8, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–30589 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 395

[Docket No. FMCSA–2016–0420]

Commercial Driver's License Standards: Application for Exemption; New Prime, Inc. (Prime)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that New Prime, Inc. (Prime) has applied for an exemption from the requirement in 49 CFR 383.25(a)(1) that a commercial learner's permit (CLP) holder must be accompanied by a commercial driver's license (CDL) holder with the proper CDL class and endorsements seated in the front seat of the vehicle while the CLP holder is operating a commercial motor vehicle (CMV) on public roads or highways. Prime requests an exemption to allow CLP holders who have successfully passed the CDL skills test to be able to drive a CMV without having a CDL holder seated in the front seat beside them. Prime states that the CDL holder would remain in the CMV at all times while the CLP holder is driving, but not necessarily in the passenger seat. Prime believes that the exemption, if granted, would promote greater productivity and help individuals who have passed the CDL skills test return to actively earning a living faster, while achieving a level of safety that is equivalent to or greater than the level of safety provided by complying with the regulations. FMCSA requests public comment on Prime's application for exemption.

DATES: Comments must be received on or before January 19, 2017.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Number FMCSA–2016–0420 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* See the *Public Participation and Request for Comments* section below for further information.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.
- Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The on-line FDMS is available 24 hours each day, 365 days each year.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: For information concerning this notice, contact Mr. Tom Yager, Chief, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 614–942–6477. Email: *MCPSD@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2016–0420), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comments online, go to *www.regulations.gov* and put the docket number, ''FMCSA–2016–0420'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may grant or not grant this application based on your comments.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain parts of the Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Request for Exemption

Prime seeks an exemption from 49 CFR 383.25(a)(1) that would allow CLP holders who have successfully passed a CDL skills test and are thus eligible to receive a CDL, to drive without having a CDL holder seated beside them in the CMV. Prime indicates that the CDL holder will remain in the CMV at all times while the CLP holder is driving—just not in the front seat. At present, Prime's compliance with 49 CFR 383.25(a)(1) delays the second phase of CMV training of its CLP holders who have passed the CDL skills test.

Prime is one of the nation's largest transportation companies with a fleet of more than 7,500 CMVs. Prime advises that 2,500 to 3,500 CLP holders would operate under the terms of the exemption each year. The exemption application states that § 383.25(a)(1) creates undue burdens on Prime and its CLP holders, while also contributing to the unprecedented driver shortage that continues to plague the commercial trucking industry. Presently, the constraints that Prime faces in adhering to the requirements of 49 CFR 383.25(a)(1) are exceptionally cost-intensive. Prior to the implementation of this section of the regulations, it was not uncommon for States to issue temporary CDLs to CLP holders for the return trip to collect the CDL document from their State of domicile. During that time, CDL holders were neither required to log themselves ''on duty'' when supervising the CLP holder who had a temporary CDL, nor were they required to remain in the passenger seat of the CMV. Under that scenario, the productivity of the CMV, the earnings capacity of the CDL and CLP holders, and the logistics of the motor carrier's freight network all went undisturbed. Under the current rule, however, carriers must staff two drivers in the cab of the tractor to accomplish the on-duty work of one.

Prime contends that compliance with the CDL rule leaves it with only two options. It can either: (1) Secure some mode of public transportation to allow the CLP holder to collect his or her CDL document before returning to Prime; or (2) the company can route the driver to his or her State of domicile, often against the natural flow of the freight network. Prime argues that securing public transit for each of these CLP holders under Option 1 entails extreme cost burdens to the company; and option 2 is no more beneficial because routing CLP holders to their home States, commonly without reference to shipper demand, introduces extreme cost inefficiencies.

Other reasons cited by Prime in support of the exemption request include: (1) CDL issuing agencies across States may require many days, if not weeks, to secure the CLP holder's licensure materials. CLP holders suffer great financial hardship during this waiting period. As commercial truck driving is already notorious for its high turnover rates, requiring such protracted waiting periods will greatly augment driver attrition levels. (2) A marked reduction of CLP holders' functional driving skills: CLP holders who are sidelined for many days or weeks will experience a material diminishment in their driving skills, as continuous experiential exposure to commercial driving is required to keep such skills suitably honed; and (3) The industry-wide driver shortage is exacerbated by the current rule. Prospective drivers who learn that they might have to wait several days and be inefficiently routed baci to their home State for CDL licensure, are less likely to enlist in the trucking profession.

The exemption sought would apply only to those Prime drivers who have passed the CDL skills test and hold a valid CLP.

IV. Method To Ensure an Equivalent or Greater Level of Safety

Prime states that granting this exemption will result in a level of safety that is equal to or greater than the level of safety without the exemption. The practical result of the exemption is that a CLP holder who has passed a CDL skills test would be able to drive without complying with § 383.25(a)(1) and begin immediate and productive

on-the-job operation of a CMV on a public road or highway. Anyone who obtained training and took the CDL skills test near his or her home could go directly to the licensing agency, collect the CDL, and begin driving without onboard supervision. It is only when the new driver completes the training and testing in another State that the trip back to obtain the CDL from the State of residence becomes problematic. Allowing CLP holders who have passed the skills test to function as a team driver on the trip home enables these new operators to continue to sharpen their driving skills under the mentoring and observation of a more experienced driver—and they immediately earn an income.

FMCSA has granted an exemption similar to the Prime request on two prior occasions. In the September 23, 2016, **Federal Register**, FMCSA granted a similar exemption from 49 CFR 383.25(a)(1) to CRST Expedited (81 FR 65696). In the June 11, 2015, **Federal Register**, FMCSA also granted this exemption to C.R. England, Inc. (80 FR 33329). Under the terms and conditions of both of these exemptions, a CLP holder who has documentation of passing the CDL skills test may drive a CMV for either of these companies without being accompanied by a CDL holder in the front seat of the vehicle. The Agency believed that both of these requests for exemption would achieve a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption.

A copy of Prime's application for exemption is available for review in the docket for this notice.

Issued on: December 15, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–30633 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0083; FMCSA–2010–0115; FMCSA–2010–0138; FMCSA–2012–0108; FMCSA–2012–0109; FMCSA–2014–0016; FMCSA–2014–0017]

Qualification of Drivers; Exemption Applications; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions of 174 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. FMCSA has statutory authority to exempt individuals from this rule if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these CMV drivers.

DATES: Each group of renewed exemptions was effective from the dates stated in the discussions below. Comments must be received on or before January 19, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. FMCSA–2010–0083; FMCSA–2010–0115; FMCSA–2010–0138; FMCSA–2012–0108; FMCSA–2012–0109; FMCSA–2014–0016; FMCSA–2014–0017, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. e.t, Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are from 8 a.m. to 5:30 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the Federal Motor Carrier Safety Regulations 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 174 individuals listed in this notice have recently become eligible for a renewed exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. The drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

Exemption Decision

This notice addresses 174 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. These 174 drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. Therefore, FMCSA has decided to extend each exemption for a renewable two-year period. Each individual is identified according to the renewal date.

The exemptions are renewed subject to the following conditions: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual submit an annual ophthalmologist's or optometrist's report; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. The following groups of drivers received renewed exemptions in the month of July and are discussed below.

As of July 2, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 30 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (75 FR 25919; 75 FR 28677; 75 FR 38597; 75 FR 38598):

Spencer W. Alexander (UT)
Cody R. Anderson (MT)
Ronnie L. Barker (GA)
Joseph P. Beagan (RI)
Brian C. Blevins (VA)
John M. Charlton (UT)
Stuart A. Dietz (KS)
Michael G. Eikenberry (IN)
Francisco K. Gallardo (AZ)
Devin S. Gibson (UT)
Jason C. Green (MS)
Kimmy D. Hall (AR)
Edward G. Harbin (AR)
Lewis M. Hendershott (NJ)
Mark E. Henning (NY)
Christopher M. Hultman (WI)
Duane K. Kohls (MN)
John F. Lohmuller (IN)
Jerry A. McMurdy (PA)
Steven L. Miller (ND)
H. A. Miller (OR)
Andrew D. Monson (MN)
Timothy J. Nowak (FL)
Peter J. Pendola (VA)
Ross R. Romano (MI)
Max S. Sklarski (NM)
Jason D. Sweet (CA)
Robert M. Thomson (IL)
James P. Tomasik (PA)
Joseph H. Watkins (IN)

The drivers were included in Docket No. FMCSA–2010–0083; FMCSA–2010–0115. Their exemptions are effective as of July 2, 2016 and will expire on July 2, 2018.

As of July 22, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 44 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (79 FR 29484; 79 FR 42628):

Curtis D. Andersen (MT)
Thomas E. Armburst (IL)
Michael A. Barrett (MI)
Jerry G. Clise Jr. (MD)
Richard K. Cressman (ND)
Steven W. Dahl (ND)
Shannon D. Eck (KS)
Manuel Fernandez (PA)
Kevin J. Franje (IA)
Michael E. Goldsberry (VA)
Jared P. Greene (OH)
Michael L. Jobe (PA)
Edwin P. Jonas, II (PA)
David W. Jones (MD)
John T. Katcher (CO)
Glenn T. Keller (PA)
Michael G. Keller (CA)
Jay T. Kirschmann (ND)
James L. Laufenberg (ND)
James R. Longo (MD)
Erik M. Mardesen (IA)
Earl W. Meadows (WV)
Ralph H. Mills (MA)
Matthew C. Moberly (KY)
Brant S. Perry (TX)
Zachary A. Petitt (TX)
James W. Restuccio Jr. (NJ)
Pedro Saavedra Garcia (CA)
David Salmond (UT)
Jerry J. Shipley (KS)
Glenn A. Skonberg (SD)
Douglas R. Smith (KS)
Cheryl G. Stephens (DE)
James F. Stewart (PA)
Martin T. Struthers (NE)
Dennis C. Svec (MI)
Larry L. Taff (AR)
Filbert J. Torres (NM)
Jennifer A. Tyson (PA)
Burdette Walker (PA)
Jacob D. Walter (PA)
Richard E. Watkins (NY)
Harold W. Wilson Jr. (SC)
Ronald D. Young (GA)

The drivers were included in Docket No. FMCSA–2014–0016. Their exemptions are effective as of July 22, 2016 and will expire on July 22, 2018.

As of July 24, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 18 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (77 FR 33554; 77 FR 43417):

Jack D. Alt (NH)
Tony O. Billman (PA)
Tracy M. Dowton (MT)
Anil D. Gharmalker (KS)
Larry A. Hamilton (MO)
Allen K. Kates (NJ)
Andrew L. Lyman (PA)
Nancy A. Plunk (MO)
Victor C. Port (ND)
Scott D. Roles (MN)
Jeffrey A. Ryan (IA)
Keith A. Siekmeier (AK)
Tom L. Simmons (IA)
James H. Stichberry, Jr. (MD)
Loyd J. Wagner (MO)
John F. Watson (IN)
Melvin E. Welch (NJ)
Leroy R. Wille (IA)

The drivers were included in Docket No. FMCSA–2012–0109. Their exemptions are effective as of July 24, 2016 and will expire on July 24, 2018.

As of July 25, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 55 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (79 FR 35844; 79 FR 51223):

Todd Y. Albright (MT)
John H. Ascheman (MN)
Robert M. Borunda (CA)
Alan F. Brown Jr. (IN)
Theodore W. Burnette (CA)
John Canal (NY)
Anthony C. Cole (WY)
Kevin G. Comstock (MN)
Jacob S. Crawford (GA)
Christopher Dave (MI)
Anthony J. Davis (IN)
Justin J. Day (SD)
Charles G. Denegal (WA)
Wayne H. Dirks (WA)
Charles G. Elliott (IN)
Joseph S. Farrow (MN)
James R. Fiecke (ND)
Eric C. Gambill (OH)
Mark P. Gerrits (WI)
Michael Gilon (NH)
Chance A. Gooch (GA)
Robert L. Harris (IN)
Darrell S. Haynes (PA)
Joseph D. Helget (OR)
Charles D. Henderson (NY)
Marvin S. Howard (OH)
Eric A. Knox (KY)
Erik M. Lindquist (WA)
Thomas K. Linkel (IN)
Christine I. Llewellyn (IL)

Ryan A. Malandrone (WI)
Thomas J. Manning (MN)
Steve A. Meharry (WA)
Robert A. Miller Jr. (WV)
Ben G. Moore (IL)
Chad M. Morris (NY)
Paul C. Mortenson (WI)
William D. Murray (AL)
Jacob D. Nafziger (OH)
Edward T. Nauer (VA)
Keith W. Nichols (TX)
Colin R. Parmelee (IN)
Matthew P. Sczpanski (OH)
Anthony S. Sobreiro (NJ)
Colby E. Starner (PA)
Daniel E. Stephens (NY)
Bartholomew Taliaferro (PA)
Johnathan D. Truitt (IL)
Rylan P. Wheeler (IL)
Gordon J. White (MO)
Kelly L. Whitley (NC)
Jerry R. Williams (GA)
Charles L. Wojton (PA)
Michelle L. York (WA)
Steven L. Zimmer (OH)

The drivers were included in Docket No. FMCSA–2014–0017. Their exemptions are effective as of July 25, 2016 and will expire on July 25, 2018.

As of July 26, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 15 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (77 FR 33551; 77 FR 43901):

Larry J. Anderson (MN)
Wade D. Calvin (WA)
Carl A. Candelaria (NM)
Owen R. Dossett (AL)
Jennifer A. Ferguson (SC)
Michael E. Fritz (NV)
Lee A. Haerterich (WI)
Eric W. Holland (CO)
Richard P. Holmen (MN)
Edward Jones (GA)
Paul A. Lacina (ND)
Bradley J. Moore (MO)
Ross W. Petermann (MN)
Randall J. Tatum (MA)
Curtis J. Young (FL)

The drivers were included in Docket No. FMCSA–2012–0108. Their exemptions are effective as of July 26, 2016 and will expire on July 26, 2018.

As of July 27, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 12 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (75 FR 34206; 75 FR 44049):

Clinton R. Carlson II (RI)
Brandon L. Cheek (NC)
Richard A. Dufton, Jr. (NH)
Kenneth Dunn (IN)
Robert J. Dyxin (IL)
Michael H. Hayden (NY)
John T. Jones (OK)
Blake A.S. Keeten (NE)
Randall L. Koegel (NY)
Worden T. Price (NC)
Gary L. Sager (IL)
Darrel D. Schroeder (KS)

The drivers were included in Docket No. FMCSA–2010–0138. Their exemptions are effective as of July 27, 2016 and will expire on July 27, 2018.

Each of the 174 drivers in the aforementioned groups qualifies for a renewal of the exemption. They have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of the 174 drivers for a period of two years is likely to achieve a level of safety equal to that existing without the exemption. The drivers were included in docket numbers FMCSA–2010–0083; FMCSA–2010–0115; FMCSA–2010–0138; FMCSA–2012–0108; FMCSA–2012–0109; FMCSA–2014–0016; FMCSA–2014–0017.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 19, 2017.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 174 individuals from rule prohibiting persons with ITDM from operating CMVs in interstate commerce in 49 CFR 391.41(b)(3). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the medical condition of each applicant for an exemption from rule prohibiting persons with ITDM from operating CMVs in interstate commerce. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket numbers FMCSA–2010–0083; FMCSA–2010–0115; FMCSA–2010–0138; FMCSA–2012–0108; FMCSA–2012–0109; FMCSA–2014–0016; FMCSA–2014–0017 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period. FMCSA may issue a final determination at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and in the search box insert the docket number

FMCSA–2010–0083; FMCSA–2010–0115; FMCSA–2010–0138; FMCSA–2012–0108; FMCSA–2012–0109; FMCSA–2014–0016; FMCSA–2014–0017 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 8, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–30602 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1999–6480; FMCSA–2000–7363; FMCSA–2004–17195; FMCSA–2005–23099; FMCSA–2007–0071; FMCSA–2009–0011; FMCSA–2009–0291; FMCSA–2009–0303; FMCSA–2010–0050; FMCSA–2011–0379; FMCSA–2011–0380; FMCSA–2012–0040; FMCSA–2012–0104; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0005]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 43 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Each group of renewed exemptions were effective on the dates stated in the discussions below and will expire on the dates stated in the discussions below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http//www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

II. Background

On May 9, 2016, FMCSA published a notice announcing its decision to renew exemptions for 43 individuals from the vision requirement in 49 CFR 391.41(b)(10) to operate a CMV in interstate commerce and requested comments from the public (81 FR 28138). The public comment period ended on June 8, 2016 and no comments were received.

As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to driver a CMV if that person:

> Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received no comments in this preceding.

VI. Conclusion

As of June 3, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 34 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (64 FR 68195; 65 FR 20251; 65 FR 45817; 65 FR 77066; 67 FR 17102; 67 FR 38311; 68 FR 1654; 69 FR 17263; 69 FR 17267; 69 FR 26921; 69 FR 31447; 70 FR 7545; 71 FR 4194; 71 FR 13450; 71 FR 16410; 71 FR 27033; 73 FR 6242; 73 FR 9158; 73 FR 11989; 73 FR 16950; 73 FR 28186; 74 FR 60022; 74 FR 65842; 75 FR 4623; 75 FR 9477; 75 FR 9480; 75 FR 9482; 75 FR 9484; 75 FR 14656; 75 FR 22176; 75 FR 27623; 75 FR 28682; 77 FR 10604; 77 FR 10606; 77 FR 13689; 77 FR 15184; 77 FR 17107; 77 FR 17108; 77 FR 17109; 77 FR 27845; 77 FR 27849; 77 FR 27850; 77 FR 29447; 79 FR 1908; 79 FR 10606; 79 FR 10619; 79 FR 14328; 79 FR 14331; 79 FR 14333; 79 FR 14571; 79 FR 17642; 79 FR 18391; 79 FR 18392; 79 FR 21996; 79 FR 22003; 79 FR 27043; 79 FR 28588; 79 FR 29498):

Thomas R. Abbott (TN)
Dean R. Allen (OR)
Robert J. Ambrose (MA)
Rodney R. Anderson (PA)
Ernie E. Black (NC)
Gary O. Brady (WV)
Marland L. Brassfield (TX)
Larry D. Buchanan (NM)
Michael B. Canedy (MN)
Melvin D. Clark (GA)
Dean E. Dexter (SD)
Scott E. Elliot (NH)
Rojelio Garcia-Pena (MI)
Grant G. Gibson (MN)
Stephen H. Goldcamp (OH)
Wai F. King (IL)
Eric W. Kopmann (MO)
Dennis E. Krone (IL)
George E. Lewis (OH)
Travis J. Luce (MI)
Phillip D. Mathys (OH)
Thomas J. Mavraganis (IL)
Richard J. McKenzie, Jr. (MD)
Christopher J. Meerten (OR)
Jason T. Montoya (NM)
Michael Pace (TX)
Tommy L. Ray, Jr. (AL)
George S. Rayson (OH)
Joe A. Root (MN)
Carl D. Short (MO)
Lewis H. West, Jr. (MA)
Donald G. Wilcox (OR)
David E. Williford (NC)
Jimmy S. Zamora, Jr. (TX)

The drivers were included in one of the following dockets: Docket Nos. FMCSA–1999–6480; FMCSA–2000–7363; FMCSA–2004–17195; FMCSA–2005–23099; FMCSA–2007–0071; FMCSA–2009–0011; FMCSA–2009–0291; FMCSA–2009–0303; FMCSA–2010–0050; FMCSA–2011–0379; FMCSA–2011–0380; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004. Their

exemptions are effective as of June 3, 2016 and will expire on June 3, 2018.

As of June 6, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 3 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (77 FR 23799; 77 FR 33558; 79 FR 27365):

Rudolph Bisschop (MA)
Richard Doroba (IL)
Tommy Thomas (CA)

The drivers were included in one of the following dockets: Docket No. FMCSA–2012–0040. Their exemptions are effective as of June 6, 2016 and will expire on June 6, 2018.

As of June 17, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual, DelRay V. Ryckman (SD), has satisfied the conditions for obtaining a renewed exemption from the vision requirements (79 FR 27681; 79 FR 38649).

This driver was included in the following docket: Docket No. FMCSA–2014–0005. The exemption is effective as of June 17, 2016 and will expire on June 17, 2018.

As of June 27, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 5 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (77 FR 27847; 77 FR 38386; 79 FR 29495):

Matthew G. Epps (FL)
Michael E. McAfee (KY)
Joe Ramirez (CA)
James E. Sikkink (IL)
John C. Smith (IL)

The drivers were included on the following docket: Docket No. FMCSA–2012–0104. Their exemptions are effective as of June 27, 2016 and will expire on June 27, 2018.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: December 9, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–30587 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Federal Fiscal Year 2017 Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of the Federal Transportation Administration's (FTA) Fiscal Year (FY) 2017 Annual List of Certifications and Assurances for FTA Grants and Cooperative Agreements, which can be found at FTA's Web site, *www.transit.dot.gov/certs.* This notice provides a condensed list of the pre-award Certifications and Assurances that may apply to an Applicant to FTA for federal assistance and the Award that may be made in FY 2017. This notice also describes both the Applicant and FTA's responsibilities with respect to the Certifications and Assurances and highlights the differences between the FY 2017 Certifications and Assurances and those published for FY 2016. Each Applicant to FTA for federal assistance must submit the Certifications and Assurances that apply to it and any Award for which it seeks federal assistance during FY 2017. An Applicant to FTA typically acts through its authorized representative (You). You, as the Applicant's Authorized Representative, must have the authority to sign the Applicant's Certifications and Assurances and to bind your Applicant's compliance with the Certifications and Assurances you select on its behalf. Your Applicant's Certifications and Assurances must be affirmed by your Applicant's attorney. This notice provides instructions on how and when you should submit your Applicant's Certifications and Assurances for FY 2017.

DATES: *Effective Date:* These FY 2017 Certifications and Assurances are effective October 1, 2016, the first day of FY 2017.

FOR FURTHER INFORMATION CONTACT: The appropriate Regional or Metropolitan Office listed in this notice. For copies of related documents and information, see our Web site at *www.transit.dot.gov/certs* or contact our Office of Administration at 202–366–4007.

Region 1: Boston

States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. Telephone # 617–494–2055.

Region 2: New York

States served: New York and New Jersey. Telephone # 212–668–2170.

Region 3: Philadelphia

States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia. Telephone # 215–656–7100.

Region 4: Atlanta

States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee, Territories served: Commonwealth of Puerto Rico and the U.S. Virgin Islands. Telephone # 404–865–5600.

Region 5: Chicago

States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. Telephone # 312–353–2789.

Region 6: Dallas/Ft. Worth

States served: Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. Telephone # 817–978–0550.

Region 7: Kansas City

States served: Iowa, Kansas, Missouri, and Nebraska. Telephone # 816–329–3920.

Region 8: Denver

States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. Telephone # 303 362–2400.

Region 9: San Francisco

States served: Arizona, California, Hawaii, and Nevada, Territories served: Guam, American Samoa, and the Northern Mariana Islands. Telephone # 415–734–9490.

Region 10: Seattle

States served: Alaska, Idaho, Oregon, and Washington. Telephone # 206–220–7954.

Chicago Metropolitan Office

Area served: Chicago Metropolitan Area. Telephone # 312–353–2789.

Los Angeles Metropolitan Office

Area served: Los Angeles Metropolitan Area. Telephone # 213–202–3950.

Lower Manhattan Recovery Office

Area served: Lower Manhattan. Telephone # 212–668–2170 212–668–1770.

New York Metropolitan Office

Area served: New York Metropolitan Area.Telephone # 212–668–2170.

Philadelphia Metropolitan Office

Area served: Philadelphia Metropolitan Area. Telephone # 215–656–7100.

Washington DC Metropolitan Office

Area served: Washington DC Metropolitan Area.Telephone # 202–219–3562/202–219–3565.

Puerto Rico Office

Area Served: Commonwealth of Puerto Rico. Telephone # 787–771–2537.

SUPPLEMENTARY INFORMATION:

1. What are FTA's responsibilities?

The second sentence of 49 U.S.C. 5323(n) states in pertinent part that, ''[t]he Secretary [of Transportation] shall publish annually a list of all certifications required under this chapter [49 U.S.C. chapter 53]. . . .'' The first sentence of 49 U.S.C. 5323(n) states that, ''[a] certification required under this chapter [53] and any additional certification or assurance required by law or regulation to be submitted to the Secretary [who delegated that authority to the Federal Transit Administrator] may be consolidated into a single document to be submitted annually as part of a grant application under this chapter [53].'' Therefore, FTA has assembled those Certifications and Assurances into the following twenty-three (23) categories:

Category 01. Required Certifications and Assurances for Each Applicant,

Category 02. Lobbying,

Category 03. Procurement and Procurement Systems,

Category 04. Private Sector Protections,

Category 05. Rolling Stock Reviews and Bus Testing,

Category 06. Demand Responsive Service,

Category 07. Intelligent Transportation Systems,

Category 08. Interest and Financing Costs and Acquisition of Capital Assets by Lease,

Category 09. Transit Asset Management Plan and Public Transportation Agency Safety Plan,

Category 10. Alcohol and Controlled Substances Testing,

Category 11. Fixed Guideway Capital Investment Grants Program (New Starts, Small Starts, and Core Capacity Improvement),

Category 12. State of Good Repair Program,

Category 13. Grants for Buses and Bus Facilities and Low or No Emission Vehicle Deployment Grant Programs,

Category 14. Urbanized Area Formula Grants Programs and Passenger Ferry Grant Program,

Category 15. Enhanced Mobility of Seniors and Individuals with Disabilities Programs,

Category 16. Rural and Appalachian Development Programs,

Category 17. Tribal Transit Programs (Public Transportation on Indian Reservations Programs),

Category 18. State Safety Oversight Grant Program,

Category 19. Public Transportation Emergency Relief Program,

Category 20. Expedited Project Delivery Pilot Program,

Category 21. Infrastructure Finance Programs,

Category 22. Paul S. Sarbanes Transit in Parks Program, and

Category 23. Construction Hiring Preferences.

Since 1995, FTA has consolidated the pre-award Certifications and Assurances required by law or regulation into a single document for publication in the **Federal Register**. To receive federal assistance appropriated or made available for the Grant, Cooperative Agreement, Loan, Loan Guarantee, Line of Credit, and Major Credit Instrument programs FTA/DOT administers, your Applicant must submit the annual Certifications and Assurances required for the type of federal assistance it seeks.

These FY 2017 Certifications and Assurances supersede any Certifications and Assurances published in an earlier fiscal year. After publication in the **Federal Register**, each Applicant must submit applicable FY 2017 Certifications and Assurances before FTA may award federal assistance to support that Applicant's request.

2. What is the legal effect of these certifications and assurances?

a. Pre-Award Representations. These Certifications and Assurances are pre-award representations typically required by federal law or regulation that your Applicant must submit before FTA may provide federal assistance for its Award. In general, these FY 2017 Certifications and Assurances are effective October 1, 2016, except as FTA determines otherwise in writing.

Upon publication in the **Federal Register**, FTA may not provide federal assistance until you submit your Applicant's FY 2017 Certifications and Assurances.

b. Binding Commitment. Your Applicant must comply with any Certifications or Assurances you make on its behalf, irrespective of whether you remain your Applicant's authorized representative. When you submit its Certifications and Assurances to FTA, both you and your Applicant are agreeing to comply with those terms.

c. Length of Commitment. Your Applicant's FY 2017 Certifications and Assurances remain in effect until its Award is closed or the end of the useful life of its federally assisted assets, whichever is later. If your Applicant provides different Certifications and Assurances in a later fiscal year, the later Certifications and Assurances will usually apply, except as FTA determines otherwise in writing.

d. Duration. You and your Applicant may use the FY 2017 Certifications and Assurances at FTA's Web site, *www.transit.dot.gov/certs* to support applications for federal assistance until FTA issues its FY 2018 Certifications and Assurances.

e. *The FY 2017 Certifications and Assurances Are Not a Complete List of Federal Requirements.* FTA cautions that the FY 2017 Certifications and Assurances focus mainly on those representations that your Applicant is required to submit to FTA before FTA may award federal assistance. Consequently, these Certifications and Assurances do not include many other federal requirements that will apply to your Applicant and its Award. Your Applicant is responsible for compliance with all applicable federal requirements.

f. Federal Requirements. In addition to the information in this notice and FTA's FY 2017 Apportionments Notice, which will be published separately from this notice, FTA also strongly encourages you and your Applicant's staff and prospective and current Third Party Participants to review all federal legislation, regulations, safety directives, and guidance that apply to them and to your Applicant's proposed Award. The FY 2017 Master Agreement identifies many of those requirements and applicable guidance, and may be accessed at *www.transit.dot.gov.*

g. Penalties for False or Fraudulent Statements. If you provide any false or fraudulent statement to the Federal Government on behalf of your Applicant or yourself, you may incur both federal civil and criminal penalties under the following statutes: (1) The Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. 3801 *et seq.,* (2) U.S. Department of Transportation (U.S. DOT) regulations, ''Program Fraud Civil Remedies,'' 49 CFR part 31, and (3) Section 5323(l)(1) of title 49, United States Code, which authorizes federal criminal penalties and termination of federal assistance if you provide, on behalf of your Applicant or yourself, a false or fraudulent certificate, submission, or statement in connection

with the Federal Transit Program authorized by 49 U.S.C. chapter 53.

3. What are your responsibilities?

a. Make sure that all involved with your Applicant's Award understand the federal requirements that will apply to your Applicant and its Award. FTA strongly advises you, as your Applicant's authorized representative, to read this notice and the Certifications and Assurances on the FTA Web site *www.transit.dot.gov* before selecting Certifications and Assurances on behalf of your Applicant. FTA also advises you to read the information accompanying the apportionment tables when FTA publishes its FY 2017 Apportionment Notices.

Your Applicant is responsible for compliance with all federal requirements that apply to itself and its Award. Other entities and people, including Subrecipients, Third Party Contractors, and Third Party Subcontractors (Third Party Participants) can adversely affect your Applicant's ability to comply with those federal requirements. Accordingly, all Third Party Participants involved in its Award need to know and should agree to comply with the federal requirements that affect your Applicant's Award and themselves, as Third Party Participants.

b. Subrecipient and Other Third Party Participation. Except when FTA has determined otherwise in writing, your Applicant is ultimately responsible for compliance with all Certifications and Assurances that you select on its behalf, even if the Award and some or all of the activities therein will be carried out by Subrecipients or other Third Party Participants. Therefore, FTA strongly recommends that you take appropriate measures to ensure that Subrecipients and other Third Party Participants involved in carrying out your Applicant's Award do not take actions that will cause your Applicant to violate the representations made in its Certifications and Assurances.

c. Submit Your Applicant's Certifications and Assurances. You must submit all Categories of the FY 2017 Certifications and Assurances that apply to your Applicant and the Award(s) it seek in FY 2017. For your convenience, FTA recommends that you submit all twenty-three (23) Categories of Certifications and Assurances. Those provisions of the Certifications and Assurances that do not apply to your Applicant or its Award will not be enforced.

d. Submit Your Applicant's Required Documentation. You must ensure that your Applicant has submitted to FTA a correct, current version of the following documents: (1) Authorizing Resolution; (2) Opinion of Counsel; and (3) Designation of Signature Authority. A new Authorizing Resolution may be needed if a previous Authorizing Resolution does not cover the work in the new application. A new Opinion of Counsel may be needed if your Applicant's legal status has changed. FTA requires that the Designation of Signature Authority reflect the current status of the appropriate officials with authority to bind your Applicant. Should you already have documentation on file reflecting the correct status of your Applicant's officials, further action to simply update the Designation of Signature Authority is not required. Sample templates for the above documents may be accessed at *https://www.transit.dot.gov/trams.* You must upload any updated documents concurrently with your Certifications and Assurances.

e. Obtain the Affirmation of Your Applicant's Attorney. You must obtain an affirmation of your Applicant's Attorney, signed in FY 2017, stating that your Applicant has sufficient authority under its state and local laws to certify its compliance with the FY 2017 Certifications and Assurances that you have selected on its behalf; the Certifications and Assurances have been legally made and constitute legal and binding obligations on your Applicant; and there is no legislation or litigation pending or imminent that might adversely affect the validity of these Certifications and Assurances, or of the performance of your Applicant's FTA assisted Award. Your Applicant's Attorney must sign this affirmation during FY 2017. An Affirmation of your Applicant's Attorney dated in a previous fiscal year is insufficient, unless FTA expressly determines otherwise in writing.

f. When to Submit.

(1) If your Applicant is applying for federal assistance under any of FTA's competitive capital programs (*e.g.,* New Starts, Small Starts, or Core Capacity Improvement) or formula programs, FTA expects to receive your Applicant's FY 2017 Certifications and Assurances within ninety (90) days from the date FTA opens its new electronic award and management system, Transit Award Management System (TrAMS) or soon after the submittal of your Applicant's request for federal assistance for FY 2017.

(2) If your Applicant seeks federal assistance from an FTA program other than a formula program or a discretionary capital or operating program, *e.g.,* for a Public Transportation Innovation (formerly, Research, Development, Demonstration, and Deployment) Award, FTA expects to receive your Applicant's FY 2017 Certifications and Assurances with the submission of its Application for federal assistance or an amendment soon thereafter.

4. Where are FTA's FY 2017 certifications and assurances?

FTA's FY 2017 Certifications and Assurances are available at:

a. FTA's Web site, *www.transit.dot.gov,* and

b. TrAMS, including at *https://www.transit.dot.gov/trams.*

5. What changes have been made since the FY 2016 certifications and assurances were published?

The most significant changes are:

a. In the Preface, we added master credit agreement and State Infrastructure Bank (SIB) to the list of instruments to which the Master Agreement applies.

b. In Category 1.E, ''Suspension and Debarment Certification,'' we have added two new certifications: Category 1.E.2, ''Tax Liability,'' and Category 1.E.3, ''Felony Convictions.''

c. In Category 5.B, ''Bus Testing,'' we note that FTA regulations, ''Bus Testing,'' 49 CFR part 665 are now consistent with 49 U.S.C. 5318.

d. In Category 8.B, ''Acquisition of Capital Assets by Lease,'' we have added an exception to our Capital Leases regulations to provide an exception for rolling stock and related equipment subject to the provisions of section 3019(c) of the FAST Act.

e. In Category 9.A, ''Transit Asset Management Plan,'' we have added references to FTA regulations, ''Transit Asset Management,'' 49 CFR part 625.

f. In Category 9.B, ''Public Transportation Safety,'' FTA is required to establish a comprehensive Public Transportation Safety Program. Three provisions of this Program include the National Public Transportation Safety Plan, the Public Transportation Safety Certification Training Program, and the Public Transportation Agency Safety Plan (*See* 49 U.S.C. 5329(b) through (d)). FTA believes consolidating these provisions into one certification is appropriate for the FY 2017 List of Certifications and Assurances.

g. We added a new Category 9.C, ''State Safety Oversight Requirements,'' which references to 49 U.S.C. 5329(e) and FTA regulations, ''State Safety Oversight,'' 49 CFR part 674.

h. In Category 11, ''Fixed Guideway Capital Investment Grants Program (New Starts, Small Starts, and Core

Capacity Improvement),'' we have added a reference to:

(1) FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625, and

(2) The updated ''Final Interim Policy Guidance, Federal Transit Administration Capital Investment Grant Program,'' June 2016.

i. In Category 12, ''State of Good Repair Program,'' we have added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

j. In Category 13.A, ''Grants for Buses and Bus Facilities Program,'' we have:

(1) Added references to 49 U.S.C. 5329(b) guidance and other final regulations and directives in effect or when issued, that implement the Public Transportation Safety Programs authorized by 49 U.S.C. 5329, and

(2) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

k. In Category 13.B, ''Low or No Emission Vehicle Deployment,'' we have:

(1) Added references to 49 U.S.C. 5329(b) guidance and other final regulations and directives, in effect or when issued, that implement the Public Transportation Safety Programs authorized by 49 U.S.C. 5329, and

(2) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

l. In Category 14.A, ''Urbanized Area Formula Grants Program,'' we have:

(1) Added references to 49 U.S.C. 5329(b) guidance and other final regulations and directives, in effect or when issued, that implement the Public Transportation Safety Programs authorized by 49 U.S.C. 5329, and

(2) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

m. In Category 14.B, ''Passenger Ferry Grant Program,'' we have:

(1) Added references to 49 U.S.C. 5329(b) guidance and other final regulations and directives, in effect or when issued, that implement the Public Transportation Safety Programs authorized by 49 U.S.C. 5329, and

(2) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

n. In Category 15, ''Enhanced Mobility of Seniors and Individuals with Disabilities Programs,'' we have:

(1) Added references to 49 U.S.C. 5329(b) guidance and other final regulations and directives, in effect or when issued, that implement the Public Transportation Safety Programs authorized by 49 U.S.C. 5329, and

(2) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

o. In Category 16.A, ''Formula Grants for Rural Areas Programs,'' we have:

(1) Added references to 49 U.S.C. 5329(b) guidance and other final regulations and directives, in effect or when issued, that implement the Public Transportation Safety Programs authorized by 49 U.S.C. 5329, and

(2) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

p. In Category 16.B, ''Appalachian Development Public Transportation Program,'' we have:

(1) Added references to 49 U.S.C. 5329(b) guidance and other final regulations and directives, in effect or when issued, that implement the Public Transportation Safety Programs authorized by 49 U.S.C. 5329, and

(2) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

q. In Category 17, ''Tribal Transit Programs (Public Transportation on Indian Reservations Programs,'' we have added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

r. In Category 18, ''State Safety Oversight Grant Program,'' we have:

(1) Explained that, depending on how far the Recipient has progressed in developing a State Safety Oversight program fully compliant with 49 CFR part 674, the following FTA regulations will apply:

(a) The Recipient agrees that FTA regulations, ''State Safety Oversight,'' 49 CFR part 674, will apply when its State Safety Oversight program is fully compliant with FTA's requirements, but

(b) The Recipient agrees that FTA regulations, ''Rail Fixed Guideway Systems; State Safety Oversight,'' 49 CFR part 659, will continue to apply to those states that have not yet implemented a fully compliant Public Transportation Safety Program.

(2) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

s. In Category 20, ''Expedited Project Delivery Pilot Program,'' we have added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

t. In Category 21.A, ''Transportation Infrastructure Finance and Innovation Act (TIFIA) Program,'' we have:

(1) Added references to 49 U.S.C. 5329(b) guidance and other final regulations and directives, in effect or when issued, that implement the Public Transportation Safety Programs authorized by 49 U.S.C. 5329, and

(2) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

u. In Category 21.B, ''State Infrastructure Banks (SIB) Program, we have:

(1) Noted that the U.S. DOT Build America Bureau will enter into SIB Cooperative Agreements with the state,

(2) Added references to 49 U.S.C. 5329(b) guidance and other final regulations and directives, in effect or when issued, that implement the Public Transportation Safety Programs authorized by 49 U.S.C. 5329, and

(3) Added a reference to FTA Regulations, ''Transit Asset Management,'' 49 CFR part 625.

6. How do you submit the certifications and assurances?

a. Electronic Submission. Except in rare circumstances and if permitted by FTA, you must submit your Applicant's FY 2017 Certifications and Assurances and your attorney's Affirmation in TrAMS. To submit the Certifications and Assurances, you must be registered in TrAMS. TrAMS contains fields for individually selecting among the twenty-three (23) Categories of Certifications and Assurances that apply to your Applicant and also a designated field for selecting all twenty-three (23) Categories, of which only the requirements that apply to you or your Applicant will be enforced.

As an authorized representative of the Applicant, you must enter your personal identification number (PIN), which is your electronic signature, in TrAMS. The Attorney must enter his or her PIN in TrAMS, affirming your Applicant's legal authority to make and comply with the Certifications and Assurances you have selected on its behalf. You may enter your PIN in place of the Attorney's PIN, provided that your Applicant has on file and uploads to TrAMS a similar affirmation that has been written, dated, and signed by its Attorney in FY 2017.

b. Paper Submission. Only in very limited circumstances may your Applicant submit its FY 2017 Certifications and Assurances solely on paper. For example if the Applicant has demonstrated that it is unable to submit its Certifications and Assurances electronically in TrAMS or is a one-time recipient, and if FTA has agreed in writing to accept your Applicant's Certifications and Assurances on paper, then your Applicant may indicate the Categories of Certifications and Assurances your Applicant is submitting in typewritten hard copy on the Signature Pages.

To do so, you may place a single mark in the designated space to signify your Applicant's agreement to comply with all Categories of Certifications and Assurances to the extent that they apply

to it, or select the specific Categories of Certifications and Assurances that apply to your Applicant and its Award. You must obtain your Attorney's signature, whether on the Signature Page or on a separate document that makes the same affirmation as on the Signature Page. In such a case, the Regional Office or the Headquarters Program Office must attach the paper submission to TrAMS.

For more information, you may contact the appropriate FTA Regional or Metropolitan Office.

Authority. 49 U.S.C. chapter 53; the Fixing America's Surface Transportation (FAST) Act, Pub. L. 114–94, December 4, 2015; and other federal laws administered by FTA; U.S. DOT and FTA regulations codified or to be codified in Title 49, Code of Federal Regulations; and FTA Circulars.

Issued in Washington, DC.

Matthew Welbes,

Executive Director.

[FR Doc. 2016–30614 Filed 12–19–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0128]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel ANDANTE MAR; Invitation for Public Comments

AGENCY: Maritime Administration.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 19, 2017.

ADDRESSES: Comments should refer to docket number MARAD–2016–0128. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ANDANTE MAR is:

—INTENDED COMMERCIAL USE OF VESSEL: ''Six-Pack Charter Sport Fishing and Cruising on the Gulf Coast''

—GEOGRAPHIC REGION: ''Louisiana, Mississippi, Alabama, Florida''

The complete application is given in DOT docket MARAD–2016–0128 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT/MARAD solicits comments from the public to better inform its rulemaking process. DOT/MARAD posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–30652 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0129]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel KALULU; Invitation for Public Comments

AGENCY: Maritime Administration.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 19, 2017.

ADDRESSES: Comments should refer to docket number MARAD–2016–0129. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel KALULU is:

—INTENDED COMMERCIAL USE OF VESSEL: ''Four Seasons Hotel guest transport between Manele Harbor, Lanai and an offshore mooring operated by the Four Seasons Resort for ocean recreation.''

—GEOGRAPHIC REGION: ''Hawaii''

The complete application is given in DOT docket MARAD–2016–0129 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT/MARAD solicits comments from the public to better inform its rulemaking process. DOT/MARAD posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

Date: December 13, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–30656 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration (MARAD)

[Docket No. DOT–MARAD 2016–0127]

Request for Comments of a Previously Approved Information Collection

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on August 30, 2016 (81 FR 59732).

DATES: Comments must be submitted on or before January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Rodney McFadden, Office of Workforce Development, Maritime Administration, 1200 New Jersey Avenue SE., W23–457, Washington, DC 20590. Telephone: 202–366–2647; or email: *rod.mcfadden@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Information to Determine Seamen's Reemployment Rights—National Emergency.

OMB Control Number: 2133–0526.

Type of Request: Renewal of a Previously Approved Information Collection.

Abstract: This collection is needed in order to implement Title 46, United States Code § 52101 which provides the procedures by which MARAD is able to certify that certain merchant seamen are entitled to reemployment rights after completion of their service on U.S. vessels during times of national emergency.

Affected Public: U.S. merchant seamen who have completed designated national service during a time of maritime mobilization need and are seeking re-employment with a prior employer.

Average Expected Annual Number of Activities: 10.

Estimated Number of Respondents: 10.

Estimated Number of Responses: 10.

Annual Estimated Total Annual Burden Hours: 10.

Frequency of Response: Annually.

Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, 725 17th Street NW., Washington, DC 20503.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.93.

By Order of the Maritime Administrator.

Dated: December 13, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–30650 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–2016–0085]

Reports, Forms, and Record Keeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation.

ACTION: Notice.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.This document describes a collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be submitted to OMB on or before January 19, 2017.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, OMB, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer.

FOR FURTHER INFORMATION CONTACT: Leo Yon, Trends Analysis Division (NEF–170), Room W45–215, NHTSA, 1200 New Jersey Ave., Washington, DC 20590. Telephone: (202) 366–7028.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in

such a document. Under OMB's regulation, *see* 5 CFR 1320.8(d), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) how to enhance the quality, utility, and clarity of the information to be collected; and

(iv) how to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following collection of information:

Title: Reporting of Information and Documents about Potential Defects.

Type of Request: Revision of a currently approved information collection.

OMB Control Number: 2127–0616.

Affected Public: Businesses or individuals.

Abstract: This notice requests comment on NHTSA's proposed extension to approved collection of information OMB No. 2127–0616. The Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act (Pub. L. 106–414) was enacted on November 1, 2000. These TREAD requirements of the Act are found in 49 U.S.C. 30166 and many of these requirements are implemented through, and addressed with more specificity in, 49 CFR part 579 *Reporting of Information and Communications about Potential Defects.*

These Early Warning Reporting (EWR) requirements specify that manufacturers of motor vehicles and motor vehicle equipment submit information, periodically or upon NHTSA's request, that includes claims for deaths and serious injuries, property damage data, communications from customers and others, information on incidents resulting in fatalities or serious injuries from possible defects in vehicles or equipment in the United States or in identical or substantially similar vehicles or equipment in a foreign country, and other information that assist NHTSA in identifying potential safety-related defects. The intent of this information collection is to provide early warning of such potential safety-related defects.

Estimated Burden Hours: This approved information collection was last renewed in August 2013, when additional component type codes were added to manufacturer EWR submissions. *See* 78 FR 51412. Due to one-time investments and other associated costs, the collection was approved for 85,193 burden hours and $10.3 million dollars in the first year. We estimated subsequent years would require 45,897 burden hours and $5.75 million dollars. Today we update these estimates by removing the first-year costs associated with the 2013 rulemaking, as well as revising estimates to better align with current EWR volume.

First, the below estimates are adjusted to better reflect current EWR submission volume. Table 1 provides an average annual submission count for each claim category submitted per the requirements of 49 CFR 579:

TABLE 1—ANNUAL AVERAGE OF SUBMISSIONS BY MANUFACTURERS
[2013–2015]

Category of claims	Light vehicles	Heavy, med vehicles	Trailers	Motorcycles	Emergency vehicles	Buses	Tires	Child restraints	Equipment mfr.	Totals
Injury Fatality	9,082	97	13	135	3	12	74	378	8	9,804
Property Damage*	8,554	572	21	16	2	55	2,261	N/A	N/A	11,481
Warranty Claims	Aggregate Data									
Consumer Complaints	Aggregate Data									
Mfr. Field Reports	66,064	7,221	13	1,276	3	461	N/A	4,259	N/A	79,297
Dealer Field Reports	Aggregate Data									
Foreign Death Claims	59	1	1	2	0	0	2	35	0	101
Totals	83,759	7,891	48	1,429	8	528	2,337	4,672	8	100,683

* Property damage claims are aggregate data but are counted differently because they require more time to manually review.

The above updated submission totals represent a 17% increase from the currently approved information collection. Submission totals for each category have risen with an average of 9,804 injury and fatality claims (previously 6,041 claims), 11,481 property damage claims (previously 11,402 claims), 79,297 manufacturer field reports (previously 68,574 field reports), 101 foreign death claims (previously 41 claims), totaling 100,683 submissions on average (previously estimated at 86,058 submissions).

The agency estimates that an average of 5 minutes is required for a manufacturer to process each report, with the exception of foreign death claims. We estimate foreign death claims require an average of 15 minutes to process. Multiplying this average number of minutes by the number of submissions NHTSA receives in each reporting category yields the burden hour estimates found below in Table 2:

TABLE 2—ESTIMATED ANNUAL BURDEN HOURS

Category of claims	Light vehicles	Heavy, med vehicles	Trailers	Motorcycles	Emergency vehicles	Buses	Tires	Child restraints	Equipment mfr.	Totals
Injury Fatality	757	8	1	11	0	1	6	32	1	817
Property Damage*	713	48	2	1	0	5	188	N/A	N/A	957
Warranty Claims	Aggregate Data									
Consumer Complaints	Aggregate Data									
Mfr. Field Reports	5,505	602	1	106	0	38	N/A	355	N/A	6,608
Dealer Field Reports	Aggregate Data									
Foreign Death Claims	15	0	0	1	0	0	1	9	0	25
Totals	6,990	658	4	119	1	44	195	395	1	8,407

* Property damage claims are aggregate data but are counted differently because they require more time to manually review.

Our previous estimates totaled 7,178 burden hours associated with these Early Warning submissions. We now update that total to 8,407 burden hours, a 17% increase, associated with the above noted claim categories.

The burden hours associated with aggregate data submissions for consumer complaints, warranty claims, and dealer field reports are included in reporting and computer maintenance hours. The burden hours for computer maintenance are calculated by multiplying the hours of computer use (for a given category) by the number of manufacturers reporting in a category. Similarly, reporting burden hours are calculated by multiplying hours used to report for a given category by the number of manufacturers for the category. Using these methods and the average number of manufacturers who report annually, we estimate the burden hours for reporting cost and computer maintenance below in Table 3:

TABLE 3—ESTIMATED ANNUAL BURDEN HOURS FOR REPORTING AND COMPUTER MAINTENANCE

Vehicle/equipment category	Average number of manufacturers	Quarterly hours to report per manufacturer	Annual burden hours for reporting	Hours for computer maintenance per manufacturer	Annual burden hours for computer maintenance
Light Vehicles	39	8	1,248	347	13,533
Medium-Heavy Vehicles	39	5	780	86.5	3,374
Trailers	80	1	320	86.5	6,920
Motorcycles	15	2	120	86.5	1,298
Emergency Vehicles	7	5	140	86.5	606
Buses	38	5	760	86.5	3,287
Tires	34	5	680	86.5	2,941
Child Restraints	34	1	136	86.5	2,941
Vehicle Equipment	6	1	24	.....	.....
Totals	.....	.....	4,208	.....	34,899

Thus, the total burden hours for EWR death and injury data, aggregate data and non-dealer field reports is 8,407 (Table 2) + 4,208 (Table 3) + 34,899 (Table 3) = 47,514 burden hours.

In order to provide the information required for foreign safety campaigns, manufacturers must (1) determine whether vehicles or equipment that are covered by a foreign safety recall or other safety campaign are identical or substantially similar to vehicles or equipment sold in the United States, (2) prepare and submit reports of these campaigns to the agency, and (3) where a determination or notice has been made in a language other than English, translate the determination or notice into English before transmitting it to the agency. NHTSA estimates that preparing and submitting each foreign defect report (foreign recall campaign) requires 1 hour of clerical staff and that translation of determinations into English requires 2 hours of technical staff (note: This assumes that all foreign campaign reports require translation, which is unlikely). Between 2013 and 2015, NHTSA received a yearly average of 133 foreign recall reports which results in 133 hours for preparation and submission of the reports (133 defect reports × 1 hour clerical = 133 hours) and 266 hours for technical time (133 foreign recall reports × 2 hours technical = 266 hours.

With respect to the burden of determining identical or substantially similar vehicles or equipment to those sold in the United States, manufacturers of motor vehicles are required to submit not later than November 1 of each year, a document that identifies foreign products and their domestic counterparts. NHTSA continues to estimate that the annual list could be developed with 8 attorney hours and 1 hour for IT work. NHTSA receives these

lists from 83 manufacturers, on average, resulting in 747 burden hours (83 vehicle manufacturers × 8 hours for attorney support = 664 hours) + (83 vehicle manufacturers × 1 hour for IT support = 83 hours).

TABLE 4—HOURLY BURDEN FOR FOREIGN REPORTING

Task	Quantity	Occupation	Burden hours	
			Per unit	Total
Annual List	83	Attorney	8	664
Annual list—Electronic	83	IT	1	83
Foreign Defect Report	133	Clerical	1	133
Foreign Defect report	133	Technical	2	266
Total				1,146

Therefore, the total annual hour burden on manufacturers for reporting foreign safety campaigns and substantially similar vehicles/equipment is 1,146 hours (774 hours professional time + 133 hours clerical time + 266 hours technical time). This is an increase of 154 burden hours from our previous estimate (1,146 hours for current estimate − 992 hours for previous estimate).

Section 579.5 also requires manufacturers to submit notices, bulletins, customer satisfaction campaigns, consumer advisories and other communications that are sent to more than one dealer or owner. Manufacturers are required to submit this information monthly. Section 579.5 does not require manufacturer to create these documents; rather, only copies of these documents must be submitted to NHTSA. Therefore, the burden hours are only those associated with collecting the documents and submitting copies to NHTSA. Manufacturers must index these communications and email them to NHTSA within 5 working days after the end of the month in which they were issued.

NHTSA continues to estimate that we receive about 7,000 notices a year. We estimate that it takes about 5 minutes to collect, index, and send each notice to NHTSA. Therefore, we continue to estimate that it takes 7,000 documents × 5 minutes = 35,000 minutes or 583 hours for manufacturers to submit notices as required under Part 579.5.

TABLE 5—TOTAL BURDEN HOURS FOR THIS COLLECTION

Reporting type	Annual burden hours
EWR Reporting (Table 3)	47,514
Foreign Reporting (Table 4)	1,146
Part 579.5	583
Total	49,243

Estimated Cost Burdens—We now estimate the calculated cost burdens that this collection imposes on industry. The hourly wage rates shown below have been utilized in previous renewals of this collection and are now updated through June 2016. These current rate adjustments are derived from the Employment Cost Index Historical Listing (Volume III) provided by the U.S. Bureau of Labor Statistics to adjust for inflation. The non-seasonally adjusted wages and salaries, for private industry workers, were referenced to calculate the following updated 2016 wage rates:

TABLE 6—HOURLY WAGE RATES BY OCCUPATION

Occupation	Wage rate	
	2011	2016
Attorney	$130.39	$144.47
Engineer	130.39	144.47
IT	145.59	161.31
Technical	94.09	104.25
Clerical	30.69	34.00

2016 wage data from U.S. Department of Labor.

We have also constructed various breakdowns of the average five minutes of labor among the various occupations depending on the type of document that was reviewed. For example, to combine three minutes of technical labor and two minutes of clerical labor produces a combined wage rate of $76.15 per hour, using the adjusted 2016 wage rates in Table 6. Table 7 shows the time allocations and weighted hourly rate by report:

TABLE 7—TIME ALLOCATION AND WEIGHTED HOURLY RATE BY REPORT

Claim type	Attorney	Engineer	IT	Technical	Clerical	Total time	Weighted hourly rate
Claims of Injury/Death	3	0	0	0	2	5	$100.29
Property Damage	0	0	0	3	2	5	76.15
Mfr. Field Reports	0	0	0	3	2	5	76.15
Foreign Deaths	3	10	0	0	2	15	129.74

The total cost for 2016 Claims documents were obtained using the following formula:

K × T × W = Costs for claim type

Where:

K = Documents submitted by industry
T = Average time spent on a document
W = Wage rate based on U.S. Department of Labor and skill mix.

For example, the estimated cost to report light vehicle death and injury claims is $75,899 (9,082 death and injury claims reported × 5/60 hours × $100.29 wage rate).

NHTSA estimates the reporting costs as a function of

- The number of manufacturers reporting;
- The frequency of required reports;
- The number of hours required per report; and
- The cost of personnel to report.

The number of manufacturers reporting is estimated from EWR submission. The frequency of reports is fixed at 4 times per year. The number of hours for reporting ranges from 1

hour for trailer manufacturer to 8 hours for light vehicle manufacturers (*See* Table 3). In addition, we assume that 50 percent of the total burden hours are utilized by technical personnel while clerical staff consumes the remaining 50 percent. In other words, the hourly wage rate for each quarterly report is split evenly between technical and clerical personnel and a weighted average of the wage hour is developed from this assumption. For 2016 the wage rate is $69.13 ([$104.25 × 0.5] + [$34.00 × 0.5]).

The reporting costs are calculated as follows:

$M \times T_p \times 4 \times \$69.13$ = cost of reporting

Where:

M = Manufacturers reporting data in the category

T_p = Reporting time for the category

4 = Quarterly reports per year

$69.13 = Reporting cost wage rate (rounded).

Thus, the estimated reporting cost for light vehicles is $86,272 (39 manufacturers × 8 hours × 4 quarters × $69.13 wage rate).

The costs for computer maintenance including software, hardware, data storage, etc. were calculated using the following formula:

$M \times T_c \times I_T$ = cost of computer maintenance

Where:

M = Manufacturers reporting data in the category

T_c = Annual computer maintenance time per manufacturer for the category

I_T = IT wage rate

The computer maintenance costs for light vehicles are $2,183,059 (39 manufacturers × 347 hours × $161.31 wage rate).

Table 8 shows the annual cost of reporting EWR information to NHTSA using the information outlined in tables 1, 2, 3, 6, and 7:

TABLE 8—ESTIMATE EWR COSTS BY SUBMISSION TYPE

Category	Light vehicles	Heavy, med vehicles	Trailers	Motorcycles	Emergency vehicles	Buses	Tires	Child restraints	Equipment mfr.	Totals
(Injury/Fatality) ...	75,899	811	109	1,128	25	100	618	3,159	67	81,916
Property Damage*	54,284	3,630	133	102	13	349	14,348	0	0	72,859
Warranty Claims	Aggregate Data									
Consumer Complaints	Aggregate Data									
Mfr. Field Reports	419,247	45,825	82	8,098	19	2,926	0	27,028	0	503,224
Dealer Field Reports	Aggregate Data									
Foreign Death Claims	1,914	32	32	65	0	0	65	1,135	0	3,244
Reporting Cost ..	86,272	53,920	22,121	8,295	9,678	52,537	47,007	9,401	1,659	290,891
Computer Maintenance	2,183,059	544,192	1,116,291	209,305	97,675	530,238	474,424	474,424	0	5,629,607
Totals	2,820,674	648,410	1,138,769	226,992	107,410	586,150	536,463	515,147	1,726	6,581,741

Note: Totals may not be exact due to rounding.

Table 9 details the total annual costs for reporting annual list of substantially similar vehicles and foreign safety campaigns:

TABLE 9—ESTIMATED ANNUAL COSTS FOR SUBSTANTIALLY SIMILAR VEHICLES AND FOREIGN SAFETY CAMPAIGNS

Task	Qty	Occupation	2016 wage rate (from Table 6)	Burden hours		Cost
				Per unit	Total	
Annual list	83	Attorney	$144.47	8	664	$95,929
Annual list—Electronic	83	IT	161.31	1	83	13,389
Defect report	133	Clerical	34.00	1	133	4,523
Defect report	133	Technical	104.25	2	266	27,731
Foreign Campaign Totals	.....	.....	.....	.....	1,146	141,572

The cost associated for manufacturers to submit Part 579.5 notices, bulletins, customer satisfaction campaigns, consumer advisories and other communications that are sent to more than one dealer or owner can be estimated from the number of hours and wage of personal submitting the documents. We understand that some manufacturers have clerical staff collect and submit the documents and other have technical staff. Because we do not know how many documents are sent by a particular staff we will assume they are done the higher paid staff. Thus, we estimated the cost to collect and submit Part 579.5 documents at 583 hours × $104.25 for Technical staff = $60,779 for manufacturers to submit notices as required under Part 579.5.

Table 10 shows the estimated cost for manufacturers to report EWR data, foreign campaigns, and Part 579.5 documents through this collection:

TABLE 10—TOTAL DOLLAR ESTIMATES FOR MANUFACTURERS TO COMPLY WITH EWR REPORTING, FOREIGN REPORTING, AND PART 579.5 REPORTING

Reporting type	Annual cost ($)
EWR Reporting (Table 8)	$6,581,741
Foreign Reporting (Table 9)	141,572
Part 579.5 Submissions	60,779
Total	6,784,092

Removed Burdens—Our previous renewal of this collection included one-time cost estimates associated with adding a new vehicle type, fuel and/or propulsion system type, and four new components (stability control, forward collision avoidance, lane departure prevention, and backover prevention) to vehicle EWR reporting. These one-time costs were estimated for manufacturers to amend their reporting templates and revise their software system to support the new reporting requirements. *See* 78 FR 51415. Manufacturers were required to make these changes to their vehicle EWR reporting by January 1, 2015. *See* 79 FR 47591. As these one-time costs have already been incurred and manufacturers have already made the necessary modifications to their systems, a total of 39,296 burden hours and $4.57 million dollars will be removed from this collection.

Summary of Burden Estimate—Based on the foregoing, we estimate the burden hours for industry to comply with the current EWR requirements, foreign campaign requirements and Part 579.5 requirements total 49,243 burden hours (47,514 for EWR requirements + 1,146 hours for foreign campaign requirements + 583 hours for Part 579.5). This is a decrease of 35,950 hours from the currently approved collection, mostly due to the one-time costs we previously estimated and have now removed from this collection. We now estimate the cost burden for current EWR requirements, foreign campaign requirements, and Part 579.5 requirements to total $6,784,092 annually.

Estimated Number of Respondents—NHTSA receives EWR submissions, foreign campaigns, and Part 579.5 submissions from roughly 292 manufacturers per year.

In summary, we estimate that there will be a total of 292 respondents per year associated with OMB No. 2127–0616.

Michael L. Brown,

Acting Director, Office of Defects, Investigation.

[FR Doc. 2016–30637 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2016–0093; Notice 2]

General Motors, LLC, Grant of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition.

SUMMARY: General Motors, LLC (GM), has determined that certain model year (MY) 2016–2017 Cadillac CTS, CT6, XTS and Escalade motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 135, *Light Vehicle Brake Systems.* GM filed a defect report dated August 17, 2016. GM then petitioned NHTSA on August 22, 2016, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

ADDRESSES: For further information on this decision contact Stu Seigel, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–5287, facsimile (202) 366–3081.

SUPPLEMENTARY INFORMATION:

I. Overview

General Motors, LLC (GM), has determined that certain model year (MY) 2016–2017 Cadillac CTS, CT6, XTS and Escalade motor vehicles do not fully comply with paragraph S5.5.5(a) of Federal Motor Vehicle Safety Standard (FMVSS) No. 135, *Light Vehicle Brake Systems.* GM filed a defect report dated August 17, 2016, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* GM then petitioned NHTSA on August 22, 2016, pursuant to 49 U.S.C. 30118(d) and 30120(h) and their implementing regulations at 49 CFR part 556, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of receipt of the petition was published, with a 30-day public comment period, on September 29, 2016, in the **Federal Register** (81 FR 67057). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: *https://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2016–0093.''

II. Vehicles Involved

Affected are 46,205 of the following MY 2016–2017 Cadillac motor vehicles manufactured between March 10, 2015, and June 13, 2016.

- Cadillac CT6
- Cadillac CTS
- Cadillac Escalade
- Cadillac Escalade ESV
- Cadillac XTS

III. Noncompliance

GM explains that the noncompliance is that when the parking brake is applied on the subject vehicles the indicator light that illuminates within the cluster does not meet the lettering height requirements as specified in paragraph S5.5.5(a) of FMVSS No. 135 and also referenced in table 1; column 1, of FMVSS No. 101. Specifically, the lettering height for the indicator on the subject vehicles is 2.44 mm when it should be a minimum height of 3.2 mm.

IV. Rule Text

Paragraph S5.5.5(a) of FMVSS No. 135 states, in pertinent part:

S5.5.5 *Labeling.* (a) Each visual indicator shall display a word or words in accordance with the requirements of Standard No. 101 (49 CFR 571.101) and this section, which shall be legible to the driver under all daytime and nighttime conditions when activated. Unless otherwise specified, the words shall have letters not less than 3.2 mm (⅛ inch) high and the letters and background shall be of contrasting colors, one of which is red . . .

V. Summary of GM's Petition

GM described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, GM submitted the following reasoning:

(a) The park brake applied telltale (identified by the word ''PARK'') is red in color contrasted against a black screen, as required by S5.5.5(a) and (d)(4), conspicuously located and readily visible at the top left-of-center position of the instrument panel cluster. Additionally, the four letters of the word ''PARK'' are all capitalized such

that the 2.44 mm height is preserved across the width of the word.

(b) In addition to the park brake applied telltale required by FMVSS No. 135, all of the affected vehicles also have a driver information center (DIC) message ''Park Brake Set'' that illuminates when the parking brake is applied. The lettering height of this DIC message is 3.24 mm, greater than the 3.2 mm minimum specified for visual indicators in FMVSS No. 135. The DIC message is also substantially wider than the typical width of the telltale required by the standard. The redundant telltale and the DIC message, assure ample communication to the driver that the parking brake is applied.

(c) The operation and performance of the park brake itself is unaffected by this telltale condition. The park brake complies with all applicable requirements of FMVSS No. 135.

(d) The NHTSA has previously granted inconsequential treatment for labeling issues across various motor vehicle safety standards, including for discrepancies involving lettering height, missing information, incorrect information, and misplaced or obscured information. For example, two comparable petitions for inconsequential treatment involving brake telltale lettering height were granted to Kia and Hyundai (reference Docket numbers ''NHTSA–2004–17439'', Notice 2 and ''NHTSA–2004–17439'' (sic), Notice 2, published in the **Federal Register** on July 8, 2004, and July 9, 2004, respectively). The Kia petition cited multiple previous petitions for inconsequential treatment for brake telltale noncompliance granted by NHTSA, and we ask to incorporate them here by reference.

(e) After searching VOQ, TREAD and internal GM databases, GM is not aware of any crashes, injuries, or customer complaints associated with this condition.

(f) GM has corrected this condition in production. All vehicles produced after June 13, 2016, comply with the telltale lettering height specified in FMVSS No. 135.

GM concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA'S Decision

NHTSA's Analysis: NHTSA has reviewed GM's analysis that the subject noncompliance is inconsequential to motor vehicle safety. Specifically, the lettering height for the park brake applied indicator ''Park'' at 2.44 mm versus the FMVSS No. 135 requirement of 3.2 mm poses little if any risk to motor vehicle safety. This decision is based on the following:

1. The subject vehicles appear to meet all of the other parking brake indicator labeling requirements as specified in S5.5.5 of FMVSS No. 135. If a separate indicator is provided for application of the parking brake, the single word ''Park'' or the words ''Parking Brake'' may be used. GM has opted to comply with this section by use of the single word ''PARK'' and has capitalized all four letters of the word providing a more pronounced indicator. The indicator used is legible to the driver under all daytime and nighttime conditions when activated. The indicator is conspicuously located in the top left-of-center position on the instrument panel which is in front of and in clear view of the driver. The ''Park'' indicator is red in color when illuminated and has a black contrasting background. All of these required features help ensure that the indicator can be seen and recognized by the driver when illuminated.

2. The affected vehicles are equipped with a driver information center which is located in the instrument cluster and adjacent to the speedometer, in direct view of the driver. When the parking brake is applied, the FMVSS No. 135 required ''PARK'' indicator is illuminated. Simultaneously, in addition to the ''PARK'' indicator, the information center provides a message that the parking brake is activated with the wording ''Park Brake Set.'' GM stated that the height of this message is 3.24 mm and is substantially wider than the typical width of the required indicators. Illumination of both the ''PARK'' indicator combined with the information center statement ''Park Brake Set'' provides ample communication to the driver that the parking brake has been applied.

NHTSA'S Decision: In consideration of the foregoing, NHTSA decided that GM has met its burden of persuasion that the FMVSS No. 135 noncompliance in the affected vehicles is inconsequential to motor vehicle safety. Accordingly, GM's petition is hereby granted and GM is consequently exempted from the obligation of providing notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject vehicles that GM no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after GM notified them that the subject noncompliance existed.

Authority (49 U.S.C. 30118, 30120: Delegations of authority at 49 CFR 1.95 and 501.8)

Jeffrey M. Giuseppe,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2016–30578 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2016–0109; Notice 1]

Mercedes-Benz USA, LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: Mercedes-Benz USA, LLC (MBUSA), has determined that certain model year (MY) 2015–2016 Mercedes-Benz CLS-Class motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less.* MBUSA filed a Safety Recall Report dated September 12, 2016. MBUSA also petitioned NHTSA on October 4, 2016, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

DATES: The closing date for comments on the petition is January 19, 2017.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this

notice and submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) Web site at *https://www.regulations.gov/*. Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the Internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

SUPPLEMENTARY INFORMATION:

I. Overview

Mercedes-Benz USA, LLC (MBUSA), has determined that certain model year (MY) 2015–2016 Mercedes-Benz CLS-Class motor vehicles do not fully comply with paragraph S4.3(a) of Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less.* MBUSA filed a report dated September 12, 2016, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* MBUSA also petitioned NHTSA on October 4, 2016, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

This notice of receipt of MBUSA's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

II. Vehicles Involved

Approximately 6,678 MY 2015–2016 Mercedes-Benz CLS 400 and Mercedes-Benz CLS 400 4MATIC motor vehicles manufactured between May 23, 2014 and April 21, 2016, are potentially involved.

III. Noncompliance

MBUSA explains that the noncompliance is that the subject vehicles have tire and loading information placards affixed to their B-pillars that incorrectly identify the maximum combined weight of occupants and cargo. Specifically, the Mercedes CLS 400 was manufactured with a tire information placard that identifies a maximum combined weight of 420 kilograms (926 pounds) and the Mercedes CLS 400 4MATIC was manufactured with a tire information placard that identifies a maximum combined weight of 355 kilograms (783 pounds). However, the maximum combined weight of occupants and cargo should be 315 kilograms (694 pounds) for the Mercedes CLS 400 and 325 kg (717 pounds) for the CLS 400 4MATIC. Therefore, the vehicles do not comply with paragraph S4.3 of FMVSS No. 110.

IV. Rule Text

Paragraph S4.3 of FMVSS No. 110 states:

S4.3 *Placard.* Each vehicle, except for a trailer or incomplete vehicle, shall show the information specified in S4.3 (a) through (g), and may show, at the manufacturer's option, the information specified in S4.3 (h) and (i), on a placard permanently affixed to the driver's side B-pillar. . . .

(a) Vehicle capacity weight expressed as ''The combined weight of occupants and cargo should never exceed XXX kilograms or XXX pounds''

V. Summary of MBUSA's Petition

MBUSA described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, MBUSA submitted the following reasoning:

(a) The tires originally equipped on the subject vehicles are able to carry the additional weight indicated on the tire label. Further, the tire pressure detailed on the label is sufficient to carry those weights. The maximum tire and vehicle load information detailed in the table below demonstrates that the tire is designed to carry a higher load than that which was incorrectly set out on the tire label:

Tire dimension	Maximum tire load (lbs)	Maximum vehicle load (per tire)	
		CLS 400 (lbs)	CLS 400 4MATIC (lbs)
18″ front	1708	1243	1289
18″ rear	1609	1256	1278
19″ front	1565	1243	1289
19″ rear	1653	1256	1278

(b) Should the driver follow the values displayed on the tire label, motor vehicle safety is not negatively impacted. The vehicle platform (including chassis and axles) serves other CLS vehicle lines and is designed for vehicles with a higher gross vehicle weight rating (''GVWR''). The platform therefore can handle the potential additional weight.

(c) Subject vehicles are equipped with the B-pillar certification information label in accordance with 49 CFR part 567 indicating a GVWR of 2260 kilograms (4982 pounds) for vehicle type 218.365, the CLS 400, and a GVWR of 2330 kg (5137 pounds) for vehicle type 218.367, the CLS 400 4MATIC. The information detailed on the B-pillar certification information label is correct. Therefore, the driver can refer to this alternative source of information in order to determine the correct maximum load weight of the vehicle.

(d) After identifying the potentially incorrect values in the tire label, Daimler AG (DAG) analyzed potential technical implications, specifically with respect to the requirements of FMVSS No. 110, including potential effects on axles, suspension, brakes, driving dynamic, and crashworthiness. Based on this analysis, an impact on steering, braking or other vehicle dynamics as a result of the tire label weight discrepancy can be excluded.

(e) Moreover, MBUSA is not aware of any customer complaints, accidents or injuries alleged to have occurred as a result of this non-compliance. Hence, field data supports the assertion that the issue described above will have an inconsequential impact on safety.

MBUSA concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that MBUSA no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after MBUSA notified them that the subject noncompliance existed.

Authority: (49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

Jeffrey M. Giuseppe,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2016–30579 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[No. DOT–OST–2016–0239]

Update to U.S. Department of Transportation's NEPA Implementing Procedures

AGENCY: Office of the Secretary, DOT.

ACTION: Notice of availability and request for comment.

SUMMARY: The United States Department of Transportation (Department) is issuing a proposed update to its National Environmental Policy Act (NEPA) implementing procedures, DOT Order 5610.1D, Procedures for Considering Environmental Impacts. Consistent with the Council on Environmental Quality's regulations implementing NEPA, the Department is proposing this update and seeking public review and comment on the proposals.

DATES: Submit comments on or before January 10, 2017.

ADDRESSES: To ensure you do not duplicate your docket submissions, please submit them by only one of the following means:

Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.

Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

Hand Delivery: West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Amy Coyle, Senior Attorney Advisor, U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE., Washington, DC 20590, 202–366–0691, *amy.coyle@dot.gov*; or Camille Mittelholtz, Environmental Policies Team Leader, U.S. Department of Transportation, Office of the Assistant Secretary for Transportation Policy, 1200 New Jersey Avenue SE., Washington, DC 20590, 202–366–4861, *camille.mittelholtz@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Department of Transportation (Department or DOT) is proposing to update its National Environmental Policy Act (NEPA) implementing procedures. The Department last updated its current procedures, DOT Order 5610.1C, Procedures for Considering Environmental Impacts, in 1985 (5610.1C).[1] The proposed Order, DOT Order 5610.1D, Procedures for Considering Environmental Impacts (updated NEPA Order) seeks to achieve the following objectives: (1) Ensure a full and fair NEPA process that includes meaningful public involvement throughout, and the balanced consideration of a reasonable range of alternatives and their impacts on the human environment; (2) improve efficiency and expedite project delivery; (3) provide good customer service to stakeholders through consistent implementation of NEPA across the Department; (4) provide the requisite flexibility for the Department's Operating Administrations (OAs) to apply their NEPA implementing procedures to their specific programs; and (5) balance the needs of all OAs, from those with well-established NEPA programs to those seeking more guidance.

Additionally, the updated NEPA Order addresses relevant project delivery provisions of the Fixing America's Surface Transportation Act (FAST Act) that apply Department-wide, including the following:

- Section 1301 directs the Secretary to align, to the maximum extent practicable, the requirements of Section 4(f) (23 U.S.C. 138/49 U.S.C. 303), Section 106 of the Historic Preservation Act (54 U.S.C. 306108), and NEPA.

[1] 44 FR 56420, Oct. 1, 1979, *available at https://www.transportation.gov/office-policy/transportation-policy/procedures-considering-environmental-impacts-dot-order-56101c.*

Section 23 of the updated NEPA Order addresses section 1301.

- Section 1310 amends 49 U.S.C. 304, which was created by section 1314 of the Moving Ahead for Progress in the 21st Century Act (MAP–21). Under 49 U.S.C. 304 provision, one OA may apply the categorical exclusion established in the procedures of another OA for multimodal projects as defined in 23 U.S.C. 139(a)(5). Section 10(d) of the updated NEPA Order addresses section 1310.
- Section 1311 creates 49 U.S.C. 304a, which provides for use of errata sheets for final environmental impact statements (FEISs), directs the Department to issue a combined FEIS and record of decision (ROD) (FEIS/ROD) to the maximum extent practicable, and provides discretionary processes for incorporation by reference and for one OA to adopt environmental assessments (EAs) and EISs prepared by another OA. Paragraphs 14(b) and 15(c) of the updated NEPA Order address the combined FEIS/ROD. Paragraph 20(g) of the updated NEPA Order addresses adoption. Paragraph 15(b) of the updated NEPA Order addresses errata sheets. The Department does not address incorporation by reference in the updated NEPA Order. However, the Department welcomes comments on whether to add a paragraph to address it.
- Section 1313 creates 49 U.S.C. 310, Aligning Federal Environmental Reviews, which directs the Department to perform several activities: Develop a coordinated and concurrent environmental review and permitting process for transportation projects as well as a program to measure and report on progress towards alignment of Federal reviews and reducing permitting and project delivery timelines; develop a checklist to help project sponsors identify potential natural, cultural, and historic resources in the area of a proposed project; and facilitate annual interagency collaboration sessions. While the Department has undertaken efforts to implement this provision, including developing a checklist [2] and engaging in several interagency collaboration sessions, the Department has not addressed this provision in the updated NEPA Order. In light of the savings provision in 49 U.S.C. 310(g), which makes this section inapplicable to projects subject to 23 U.S.C. 139 (most highway, transit, and railroad projects requiring an EIS), the Department is requesting comment on how it might further implement the provisions of 49 U.S.C. 310 in the updated NEPA Order.
- Section 1432 provides for exemptions and expedited procedures for certain environmental review processes during emergencies. Section 19 of the updated NEPA Order references the availability of this provision.
- Section 9001 establishes the National Surface Transportation and Innovative Finance Bureau, known as the Build America Bureau (Bureau). The Bureau streamlines credit opportunities and grants and provides access to the credit and grant programs with more speed and transparency, while also providing technical assistance and encouraging innovative best practices in project planning, financing, delivery, and monitoring. It also administers several transportation financial assistance programs, including the Transportation Infrastructure Finance and Innovation Act (TIFIA) and Railroad Rehabilitation and Improvement Financing (RRIF) credit programs. The Bureau is a Secretarial Office. As the proposed Order explains, a Secretarial Office may in some situations rely on the OA with the most expertise on the potential environmental impacts of a project to conduct the environmental review process on the Secretarial Office's behalf.

Consistent with the Council on Environmental Quality's (CEQ's) Regulations for Implementing the Procedural Provisions of NEPA, 40 CFR parts 1500–1508 (CEQ regulations), the Department consulted with CEQ on the preparation of the updated NEPA Order. *See* 40 CFR 1507.3(a). In accordance with 40 CFR 1507.3(a), the Department is proposing this updated NEPA Order and seeking public review and comment on the proposals. To facilitate this process, the following section summarizes the general updates made throughout the updated NEPA Order and then the changes or additions by section.

The Department requests comments on the updated NEPA Order, which is available in the docket (DOT–OST–2016–0239) at *www.regulations.gov.* The docket also contains the ''Administrative Record to Update Existing and Support New Categorical Exclusions under the National Environmental Policy Act'' file (supporting information). DOT will respond to comments received on the proposed NEPA Order revisions in a future **Federal Register** notice, to be published after the close of the comment period. That notice will also announce the availability of the final NEPA Order, reflecting any changes implemented as a result of comments received, should a final NEPA Order be issued.

II. Section-by-Section Analysis

General Updates

As a general principle, the Department strived to draft the updated NEPA Order at a high level to apply to the Department's diverse programs and actions, and to the extent possible, avoid creating direct conflicts with existing OA programs and actions. To that end, the Department eliminated the more detailed guidance set forth in Attachment 2 of 5610.1C. Instead, the Department will issue a ''Desk Reference'' that provides more specific guidance on particular provisions of the updated NEPA Order. This will allow the Department to update the Desk Reference when appropriate without having to update the updated NEPA Order. This approach is consistent with CEQ's recommendation that agencies issue ''explanatory guidance'' on their implementing procedures. *See* 40 CFR 1507.3(a).

Another overall goal of the updated NEPA Order is to improve clarity. This includes rephrasing to make clear who is responsible for taking the actions specified in the updated NEPA Order. To improve readability, the updated NEPA Order uses ''OA'' as the entity responsible, and defines ''OA'' to include a Secretarial Office that carries out its own NEPA responsibilities (as opposed to that office relying on an OA's expertise to prepare the NEPA document). The updated NEPA Order also updates the names of the relevant offices that have responsibilities, including the Office of Policy and Office of the General Counsel (and relevant subdivisions thereof). Finally, the updated NEPA Order updates terminology to be consistent with modern NEPA practice and the Department's current operations.

Section 1: Introduction

Section 1 of the updated NEPA Order is a new section added to reflect the historical context of how past transportation decisions impacted communities. The new text further discusses the role of NEPA as a tool to make future transportation decisions that expand opportunity, support socio-economic mobility, and are inclusive of, responsive to, and reflective of communities they impact. It reflects the Department's intent to engage stakeholders earlier in the NEPA

[2] *Available at https://www.transportation.gov/administrations/office-policy/checklist-environmental-requirements-and-resources-1313-and-appendix.*

process to achieve better outcomes that serve all users and to improve the efficiency of the project delivery process.

Section 2: Policy and Intent

The Department made significant revisions to 5610.1C section 2, Policy and Intent. This section emphasizes the Department's goal to achieve an optimal process that equitably considers impacts and provides opportunity for meaningful public involvement throughout the process. Paragraph (a) emphasizes the goals of the updated NEPA Order are to facilitate a collaborative process to achieve optimal outcomes while protecting and enhancing the environment, addressing climate change, and engaging the public, as well as to use the NEPA process as an umbrella to achieve a single environmental review process. Paragraph (b) sets forth the Department's overarching environmental policy, including the need to connect people to opportunity through a safe, efficient, and accessible transportation system. Finally, paragraph (c) sets forth the goals the Department seeks to achieve through the NEPA process, including meaningful public participation and collaboration and consideration of climate change effects.

Section 3: Definitions

The Department is adding a Definitions section to provide further clarity on the meaning of certain terms used in the updated NEPA Order. The Definitions section incorporates by reference the CEQ regulatory definitions set forth in 40 CFR part 1508, and then supplements those definitions where the Department found additional clarity was needed.

Action: In addition to relying upon the definition of action in 40 CFR 1508.18, the Department includes a list of examples of typical DOT actions. Among these are ''policies and plans (including those submitted to DOT by State, tribal, or local agencies, or other public or private applicants, unless otherwise exempted).'' This would not include, for example, transportation improvement plans (TIPs) and statewide improvement plans (STIPs) conducted pursuant to 23 U.S.C. 134 and 135, respectively; STIPs and TIPs are specifically statutorily exempted (23 U.S.C. 134(q) and 23 U.S.C. 135(k), respectively). Additionally, the definition clarifies that a proposal is not an action subject to NEPA if it does not allow for agency discretion to consider environmental impacts in decision making or is not subject to DOT control and responsibility.

Administrator: Recognizing that the responsibilities of the Administrator are often delegated, the updated NEPA Order defines the Administrator as the head of an OA or his/her designee.

Applicant: The updated NEPA Order defines applicant broadly to reflect the variety of applicants encountered across the Department. The updated NEPA Order also recognizes that some OA NEPA implementing procedures (OA Procedures) provide that the applicant will carry out the responsibilities of the OA on its behalf, and therefore could conduct activities under this Order on behalf of that OA.

Class of action: The Department is adopting this term, consistent with its use in 40 CFR 1507.3(b)(2), to mean the level of NEPA review required for a particular action (*i.e.,* a categorical exclusion (CE), an EA, or an EIS).

Council on Environmental Quality (CEQ): The updated NEPA Order makes reference to CEQ on several occasions so the Department is identifying it in the Definitions section.

Cumulative impact: The updated NEPA Order incorporates the definition of cumulative impact from the CEQ regulation with a minor edit to correct an error in the original drafting. This edit was made at the recommendation of CEQ.

Environment: The Department included a definition of environment consistent with the CEQ definition of ''human environment'' at 40 CFR 1508.14 to emphasize the holistic nature of the term.

Environmental review process: The updated NEPA Order includes this term to emphasize that the Department strives to comply not just with NEPA, but all applicable environmental requirements in a single process to ensure efficient project delivery.

Multimodal project: The updated NEPA Order includes both a broad definition of ''multimodal project'' as well as a reference to multimodal project as defined in 23 U.S.C. 139, where this term is used in that context, because this narrower definition is not appropriate for all references to multimodal projects in the updated NEPA Order.

NEPA: The updated NEPA Order provides the full statutory citation for NEPA.

NEPA Document: The updated NEPA Order uses the term NEPA Document in lieu of environmental document as used in the CEQ regulations, and defines it more broadly to include an EIS, record of decision (ROD), EA, finding of no significant impact (FONSI), or any documentation that may be prepared in the application of a CE to a proposed action.

Operating Administration (OA): The updated NEPA Order defines OA to mean any agency established within the Department, and lists the current OAs. As noted in *General Updates* above, to improve readability of the updated NEPA Order, OA would also include a Secretarial Office where that office is carrying out its own NEPA responsibilities.

Shared Use Corridor: The updated NEPA Order defines shared use corridor to provide clarity on its distinction from a multimodal project.

Section 4: Implementation of the Order

This new section addresses the operations of the updated NEPA Order. It updates certain paragraphs from 5610.1C section 1, Background, regarding cancellation and authority, and pulls in the effective date of the updated NEPA Order, which 5610.1C listed separately in section 18.

Paragraph (a)(1) establishes that the updated NEPA Order serves as the overarching procedures for the Department as well as the specific procedures for any Secretarial Office carrying out its own NEPA responsibilities. For example, if the Office of Facilities, which is a Secretarial Office, was constructing a new building, it would rely on the updated NEPA Order for its NEPA implementing procedures. In contrast, if for example, the Federal Railroad Administration (FRA) were delegated or otherwise assigned responsibility to conduct a NEPA review on behalf of the Build America Bureau on a project applying for a RRIF loan, the FRA's NEPA procedures would guide FRA's work on the environmental review for the Bureau.

Consistent with 40 CFR 1507.3(a), paragraph (a)(2) reminds OAs that the updated NEPA Order supplements rather than supplants the CEQ regulations, and that they must comply with the CEQ regulations, the updated NEPA Order, and their own OA Procedures. Because some OAs have unique statutory authorities that govern the environmental review process, the paragraph also acknowledges that those statutes and their implementing regulations govern any conflicts with the updated NEPA Order.

Paragraph (a)(3) provides that OAs may establish in their own OA Procedures more specific processes and standards than those set forth in the updated NEPA Order. Further OA Procedures may contain more stringent timeframes or standards, but the OA

must follow the process set forth in paragraph 30(c) to obtain concurrence from the Office of Policy and Office of the General Counsel.

Paragraph (a)(4) provides clarity on the use of the terms ''must'' and ''should'' in the updated NEPA Order. ''Must'' denotes mandatory activities; ''should'' indicates that the OA has discretion to determine whether the activity is practicable or appropriate.

Paragraph (b) explains the intended treatment of the term ''Office of Policy'' as used throughout the updated NEPA Order. In particular, it specifies that whenever an OA must consult or notify the Office of Policy, the Office of Policy must in turn consult or notify the Office of the General Counsel. This streamlined approach means the OAs only need to make one notification and is consistent with the Department's current practice.

Paragraph (c) provides the authority under which the Department is issuing the updated NEPA Order. Paragraph (d) cancels 5610.1C. Finally, paragraph (e) makes the updated NEPA Order effective upon final publication.

Section 5: General Provisions

The updated NEPA Order includes a new section 5, General Provisions, which provides general direction on the NEPA process, irrespective of the class of action. This section updates and builds upon several provisions from 5610.1C, including section 2, Policy and Intent, paragraphs (b), which addresses the purpose and (c), which addresses the administrative record; and section 7, Preparation and Processing of Draft Environmental Statements, paragraphs (b) Timing of Preparation of Draft Statements and (c) Interdisciplinary Approach and Responsibilities of EIS Preparation.

Paragraph (a) of the updated NEPA Order addresses the timing of the environmental review process, encouraging OAs to begin it as early as possible in the development of the action. It also includes the CEQ regulatory prohibition against taking actions that would have adverse impacts or limit alternatives, including notifying applicants, consistent 40 CFR 1506.1(a)–(b) and 1502.2(f)–(g). Paragraph (b) requires OAs to use an interdisciplinary approach, consistent with 40 CFR 1502.6, and provides that they may use professional services but must have staff with the capacity to evaluate these services and take responsibility for the final content of their NEPA documents, consistent with 40 CFR 1506.5 and 1507.2. Paragraph (c) directs OAs to coordinate all applicable environmental reviews with the NEPA process, and lists the most common examples of other applicable environmental laws, regulations, and Executive Orders for DOT actions. Paragraph (d) sets forth general requirements for NEPA documents including that they be written in plain language and address impacts in proportion to their significance.

Paragraph (e) reminds OAs of the requirement to consider environmental justice, where appropriate, in their NEPA documents, including compliance with Executive Order (E.O.) 12898 and DOT Order 5610.2(a), *Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.* It specifically notes the requirement's applicability regardless of NEPA class of action, noting the need to consider whether the proposed action, individually or cumulatively with other past and present infrastructure decisions, would have disproportionately high and adverse effects on minority or low income populations.

Paragraph (f) reminds OAs of the differences between NEPA and Title VI of the Civil Rights Act, and that fulfilment of the NEPA process does not necessarily result in compliance with Title VI. Paragraph (f) also notes that compliance with the updated NEPA Order can sometimes play a role in supporting compliance with Title VI.

Paragraph (g) reminds OAs of their responsibility to maintain an administrative record. Paragraph (h) addresses use of contractors in preparing NEPA documents and sets forth requirements consistent with 40 CFR 1506.5. This provision expands upon language in 5610.1C section 13, Responsibility, to emphasize the responsibility of the OA to use flexibilities to ensure contractors are unbiased and produce quality work. It also expressly notes the requirement that OAs assess contractors' adequacy of performance, taking into account how the work product ensures the process adequately considers impacts.

Paragraph (i) addresses tracking of NEPA documents. Consistent with 23 U.S.C. 139(o) and current DOT policy guidance, all OAs must post information for all infrastructure projects requiring an EA or EIS on the Permitting Dashboard, *www.permits.performance.gov.* Consistent with 40 CFR 1506.6(e), paragraph (j) identifies where an outside party may request additional information about the environmental process.

Section 6: Planning and Early Coordination

Section 6 of the updated NEPA Order significantly revises 5610.1C section 3, Planning and Early Coordination. Paragraph (a) encourages early and ongoing coordination with all relevant parties including other OAs, Federal, State and local resource and regulatory agencies, stakeholders, and the public. Paragraph (b) directs OAs to consider impacts of a proposed action as early as reasonably possible, preferably during the planning stages of a proposed action. Note that while the updated NEPA Order encourages consideration of environmental impacts during transportation planning, as noted above, this process is explicitly exempted from NEPA pursuant to 23 U.S.C. 134(q) and 135(k). Paragraph (c) encourages reliance on information developed during the planning process so as to avoid duplicating efforts in the NEPA process. Paragraph (d) directs OAs to ensure that their applicants are aware of environmental analysis and review requirements.

Paragraph (e) discusses the scoping process and how it must inform the development of reasonable alternatives. New language emphasizes that the selection of a range of alternatives for further study, where applicable, be thorough and objective, and include reasonable and comparable best estimates of cost, as appropriate. Consistent the CEQ regulations, paragraph (e) notes the selection of a range of alternatives for further study must not predetermine a particular outcome. Paragraphs (f) and (g) encourage tools to improve early coordination, including Memoranda of Understanding (MOUs) and the use of conflict resolution. Finally, paragraph (h) addresses the requirement in 42 U.S.C. 4332(2)(D) to provide early notice to and solicit the views of State or Federal land management entities when a State's proposed action may have significant impacts on another State or a Federal land management entity.

Section 7: Operating Administration Coordination

The Department is adding this new section to specifically address and improve coordination within the Department. Paragraph (a) requires OAs to coordinate if it is reasonably foreseeable that more than one OA may have an action on the same project. Paragraph (b) encourages OAs to determine their respective roles, though the Office of Policy may resolve any disputes. Finally, paragraph (c)

encourages use of conflict resolution to resolve any disputes between OAs.

Section 8: Lead and Cooperating Agencies

Section 8 of the updated NEPA Order revises, but is generally consistent with 5610.1C section 6, Lead Agencies and Cooperating Agencies. This section outlines the responsibilities of lead, joint lead, and cooperating agencies consistent with the CEQ regulations and provides best practices for OAs with respect to working with or serving as a cooperating agency. Finally, paragraph (d) recommends engaging other agencies that do not otherwise meet the definition of a joint lead or cooperating agency to participate in the environmental review process. This is similar to the participating agency role as provided in 23 U.S.C. 139(d).

Section 9: Class of Action Determination

Section 9 of the updated NEPA Order builds upon section 4, Environmental Processing Choice, while moving and expanding the paragraphs on CEs and EAs to their own sections. Paragraph (a) sets forth the standard for determining the appropriate class of action, which is the significance of the impacts on the human environment, including consideration of their context and intensity. See 40 CFR 1508.27. Paragraph (b) requires OAs to establish the scope of the action, consistent with 40 CFR 1508.25, in order to determine the appropriate class of action. Paragraph (c) expands on the issue of scope to ensure that the proposed action has independent utility or significance; does not restrict consideration of alternatives for other reasonably foreseeable actions; and where applicable, connects logical termini or is of sufficient length to address environmental impacts on a broad scope. Paragraph (d) requires OAs to consider potential impacts of the proposed action on the human and natural environment. This includes consideration of the potential for the proposed action, either individually or cumulatively with other actions, including the impacts of other past or present Federal, State or local actions, to significantly affect communities protected by E.O. 12898 and DOT Order 5610.2(a). Paragraph (d) also reminds OAs that they may engage the public to help identify potential impacts. Finally, paragraph (d) reiterates the requirement to consider extraordinary circumstances before determining a CE is the appropriate class of action.

Section 10: Categorical Exclusions (CEs)

Section 10 is a new section that updates 5610.1C paragraph (c), Categorical Exclusions, within section 4, Environmental Processing Choice. CEQ's guidance, *Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act,*[3] recommends that agencies periodically review their existing CEs to ensure they remain current and appropriate. The Department undertook such a review. Paragraph 10(c) provides the results of this review of the list of categories of actions that DOT has determined do not normally individually or cumulatively have a significant effect on the human environment, and therefore normally do not require the preparation of an EA or EIS. Consistent with CEQ's guidance, the Department also developed an Administrative Record to document its conclusions to remove, revise, or establish new CEs. This document is available for public review in the docket.

Paragraph (a) provides the definition of CEs, consistent with 40 CFR 1508.4, as well as the requirement to consider whether extraordinary circumstances are present requiring the preparation of an EA or EIS. Paragraph (a) instructs OAs to conduct environmental studies to determine whether application of the CE is appropriate or whether the OA must prepare an EA or EIS when significant environmental effects could exist.

Paragraph (b) provides a list of extraordinary circumstances that OAs must consider before applying a CE listed in this Order. Among such circumstances are the potential for the action to be inconsistent with applicable Federal, State, Tribal, or local requirements relating to protection of the environment; the potential to have impacts on protected species, lands or other resources; and the potential to have disproportionately high and adverse impacts on minority and low-income populations. This list is only applicable to the CEs listed in the updated NEPA Order. However, when updating OA Procedures, OAs must consider whether any of the extraordinary circumstances provided in paragraph (b) are appropriate to add to their list.

Paragraph (c) provides the list of CEs. Based on its review, the Department proposes to add 10 new CEs, modify five of the existing CEs, and eliminate one CE and part of a CE no longer deemed useful or appropriate. Modifications to existing CEs provide clarity and reflect DOT experience with these activities.

Of the new proposed new CEs, DOT has identified routine operational activities including training and educational activities (c)(3); leasing of space in existing buildings (c)(6); remodeling existing facilities (c)(7); landscaping and landscape maintenance that does not cause introduction or spread of invasive species (c)(8); hearings and public meetings (c)(12); and Administrative actions and proceedings (c)(13).

Paragraph (c)(5) updates existing CE 5 in 5610.1C, which incorporates by reference CEs identified in OA Procedures, and would now allow one OA to apply the CE of another OA. In order to effectively apply the CE of an OA to an action being administered by another OA, the OA making the CE determination must ensure the application of the CE is appropriate and that the action to which the CE is being applied was contemplated when the CE was established. Therefore, the Department has revised the CE to read, ''Action categorically excluded in an OA's Procedures where the action is administered by another OA. The OA with the CE must provide a written determination that the CE applies to the action proposed by the other OA and provide expertise in reviewing the action being categorically excluded.''

Over the last decade, the Department has seen a number of new programs and projects that go beyond the bounds of a particular OA. This updated CE will allow the Department the flexibility to administer its projects and programs more effectively and efficiently, taking advantage of multiple OAs' resources and expertise, while ensuring that CEs are appropriately applied to proposed actions. For example, the Department may ask one OA to administer a grant because it has extensive experience with that type of grantee, but the underlying project falls within the environmental expertise of another OA. The latter OA would determine whether application of its CE to the project is appropriate because it is contemplated within that category of action and no extraordinary circumstances are present such that preparation of an EA or EIS is required. The Department does not intend for this CE to be used to apply a CE to an action that the OA never contemplated when establishing the CE. The Department plans to issue guidance to the OAs to ensure efficient and effective use of this CE.

DOT proposes two new CEs relating to rulemaking and policy activities. The

[3] 75 FR 8045, Apr. 9, 2010, *available at https://ceq.doe.gov/ceq_regulations/NEPA_CE_Guidance_Nov232010.pdf.*

first is the promulgation, modification, or revocation of rules and development of policies, notices, and other guidance documents that are strictly administrative, organizational, or procedural in nature; or are corrective, technical, or minor ((c)(10)). A second is the promulgation, modification, revocation, or interpretation of safety standards, rules, and regulations that do not result in a substantial increase in emissions of air or water pollutants, noise, or traffic congestion, or increase the risk of reportable release of hazardous materials or toxic substances ((c)(11)). Finally, DOT proposes to list financial assistance to an applicant solely for the purpose of refinancing outstanding debt, where the debt funds an action that is already completed as a categorically excluded activity ((c)(14)).

Paragraph (d) recognizes the process created in 49 U.S.C. 304 for the application of another OA's CE for projects that meet the ''multimodal project'' definition in 23 U.S.C. 139(a). The Department is working on an update to its existing guidance on this provision.

Finally, paragraph (e) reminds OAs that they are responsible for complying with all other applicable environmental requirements related to a proposed action when processing the action as a CE. It also cross references to paragraph 5(c), which lists many of the most common requirements.

Section 11: Environmental Assessments (EAs)

Section 11 is a new section to address the preparation of environmental assessments; it updates paragraph (d) of 5610.1C section 4, Environmental Processing Choice, which sets forth situations where the Department must prepare an EA or an EIS. In the updated NEPA Order, paragraph (a) provides the definition of an EA and addresses the requirement to independently evaluate the EA when an applicant prepares it. Paragraph (b) sets forth when an OA must prepare an EA, but paragraph (d) notes that an OA need not prepare an EA if it has determined to prepare an EIS. Paragraph (c) provides examples of typical classes of actions that normally require an EA, consistent with 40 CFR 1507.3(b)(2)(iii). Paragraph (e) addresses public notice and paragraph (f) addresses public involvement for EAs. Paragraph (g) provides the required elements for an EA consistent with 40 CFR 1508.9. Paragraph (h) addresses the alternatives analysis for EAs. To avoid any indication of bias toward a particular alternative where there is more than one alternative, paragraph (h) emphasizes the need to objectively evaluate each alternative at comparable levels of detail and to include, where appropriate, best estimates of costs using consistent methodologies. Paragraph (i) notes that EAs should reflect compliance or plans for compliance with other applicable environmental requirements. Paragraph (j) provides OAs the discretion to solicit public comments on an EA, but requires them to address comments received. Finally, paragraph (k) cross-references to section 18, which addresses re-evaluation and supplemental EAs.

Section 12: Findings of No Significant Impact (FONSIs)

Section 12 updates 5610.1C section 5, Finding of No Significant Impact, continuing to focus on the CEQ regulatory requirements for a FONSI set forth in 40 CFR 1508.13, 1501.7(a)(5), 1506.6, and 1501.4(e). It also addresses mitigated FONSIs, consistent with CEQ guidance, *Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*.[4] Paragraph (c) sets forth the basic requirements for relying on a mitigated FONSI, including identifying the mitigation measures necessary to reduce the potential impacts below significance; ensuring the existence of sufficient legal authority and adequate commitment and resources to execute the mitigation measures; requiring implementation of the mitigation measures in any agreement with an outside party; and where appropriate, providing for monitoring and further action when there is a failure to implement mitigation measures or a failure in their effectiveness.

Section 13: Environmental Impact Statements (EISs)

Sections 13 through 15 address the requirements for EISs. To improve clarity, the Department includes the requirements that apply to both draft and final EISs in Section 13, and then addresses those requirements specific to draft environmental impact statements (DEISs) in Section 14, and FEISs in Section 15. Generally, these sections articulate the requirements from the CEQ regulations, including those in part 1502, as well as those set forth in 5610.1C section 7, Preparation and Processing of Draft Environmental Statements, section 8, Inviting Comments on the Draft EIS, and section 11, Final Environmental Impact Statements. However, as noted above, some of these paragraphs are now addressed in *General Provisions* where the concepts apply more broadly than to EISs only.

Section 13, paragraph (a) sets forth when NEPA requires an EIS, as well as the requirement to prepare a combined FEIS/ROD pursuant to 49 U.S.C. 304a(b)/23 U.S.C. 139(n). Consistent with 40 CFR 1507.3(b)(2)(i), paragraph (b) provides examples of typical classes of actions that normally require an EIS. Paragraph (c) sets forth scoping requirements pursuant to 40 CFR 1501.7 and emphasizes that project scoping includes opportunities to receive input from the public, Federal agencies, State and local governments, and tribes on issues, including alternatives to be evaluated in the EIS. Paragraph (d) addresses the format and content of EISs, including purpose and need, alternatives, affected environment, environmental consequences, and mitigation. Paragraph (d)(2)(a) emphasizes the requirement that the alternatives analysis describe criteria used to identify the range of alternatives and how public and agency input was considered to determine which alternatives to evaluate and which to eliminate. The paragraph also notes that alternatives should be evaluated fully at comparable levels of detail, except where legally permitted to develop a preferred alternative to a higher level of detail, and, where appropriate, include best estimates of cost that are reasonable, comparable, and developed using consistent methodologies. Paragraph (d)(2)(b) addresses the need for the EIS to include information regarding the process used to eliminate alternatives. Paragraph (e) addresses public notice and notice of availability requirements consistent with 40 CFR 1506.6. Paragraph (f) addresses review of EISs prepared pursuant to NEPA Section 102(2)(D). Paragraph (g) sets forth the requirement to file EISs with the Environmental Protection Agency (EPA) pursuant to 40 CFR 1506.9 and notes EPA's guidance on filing. Paragraph (h) sets forth the timing requirements, including the ability to reduce or extend time periods.

Section 14: Draft Environmental Impact Statements (DEISs)

As noted above, Section 14 only addresses those requirements specific to the preparation of DEISs. Paragraph (a) encourages early preparation of the DEIS to ensure the decision maker can meaningfully consider the analysis in the decision-making process. Paragraph (b) encourages OAs to indicate in the DEIS when they intend to issue a

[4] 76 FR 3843, Jan. 21, 2011, *available at https://ceq.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.*

combined FEIS/ROD pursuant to 49 U.S.C. 304a(b)/23 U.S.C. 139(n). Finally, paragraph (c) sets forth the specific circulation and request for comment requirements for DEISs.

Section 15: Final Environmental Impact Statements (FEISs)

As noted above, Section 15 only addresses those requirements specific to the preparation of FEISs. Consistent with 40 CFR 1503.4, paragraph (a) provides guidance on responding to comments on the DEIS in the FEIS. Paragraph (b) provides for the use of errata sheets consistent with 49 U.S.C. 304a(a)/23 U.S.C. 139(n) and 40 CFR 1503.4(c). Paragraph (c) sets forth the 49 U.S.C. 304a(b)/23 U.S.C. 139(n) requirement to issue a combined FEIS/ROD to the maximum extent practicable, unless the FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or there is a significant new circumstance or information relevant to environmental concerns that bears on the proposed action or the impacts of the proposed action. Paragraph (d) directs the FEIS to reflect compliance or plans for compliance with other environmental requirements. Paragraph (e) reiterates existing delegations for approval of FEISs. Paragraph (f) sets forth requirements to notify the Office of Policy for certain FEISs (*e.g.,* highly controversial actions). Finally, paragraph (g) addresses circulation requirements for the FEIS.

Section 16: Record of Decision

This new section sets forth the topics to be addressed in the ROD, including alternatives, factors balanced in decision making, and mitigation measures. Paragraph (b) sets forth the 30-day waiting period required by 40 CFR 1506.10(b)(2) in those instances where the OA determines it is not practicable to issue a combined FEIS/ROD pursuant to 49 U.S.C. 304a(b)/23 U.S.C. 139(n). Finally, paragraph (c) provides that OAs may develop a single ROD for multimodal actions.

Section 17: Tiering and Programmatic Approaches

While 5610.1C section 7(g) addresses tiering, the Department finds tiering and programmatic approaches expedite project delivery, and therefore is devoting a separate section of the updated NEPA Order to this topic. Paragraph (b) defines tiering and emphasizes when use of tiering may be appropriate. Paragraph (c) addresses when programmatic EAs or EISs might be helpful. Finally, paragraph (d) encourages the use of Programmatic Agreements to streamline routine actions or environmental requirements, developing them as broadly as possible to cover the actions of multiple OAs.

Section 18: Re-evaluation and Supplementation

Section 18 updates and clarifies the existing practice for re-evaluation outlined in 5610.1C section 19, Time in Effect of Statements. Re-evaluation is a longstanding practice of the Department to determine whether new information triggers the requirement to supplement an EIS pursuant to 40 CFR 1502.9. Additionally, the Department is revising its dates for re-evaluation from 3 to 5 years to be consistent with Question 32 of the Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (Forty Questions).[5] Paragraph (a) encourages the use of re-evaluation when there are changes to the proposed action or new circumstances or information relevant to environmental concerns. Additionally, it encourages OAs to re-evaluate in writing DEISs if the OA has not issued an FEIS within 5 years of circulation of the DEIS, and FEISs if major steps toward implementation have not commenced within 5 years of FEIS approval. Paragraphs (b)(1) and (b)(2) address the CEQ regulatory criteria for a supplemental EIS, as well as the discretion to supplement. Paragraph (b)(3) addresses the process for preparing a supplemental EA or EIS.

Section 19: Emergency Actions

The Department added a separate section regarding emergency actions to address the CEQ regulation on emergencies, 40 CFR 1506.11, and guidance, *Memorandum for Heads of Federal Departments and Agencies regarding Emergencies and the National Environmental Policy Act,*[6] as well as section 1432 of the FAST Act. This builds on the existing paragraph (c) in 5610.1C section 17, Timing of Agency Action, which details the internal process for consulting with CEQ. The updated NEPA Order addresses generally emergency situations in paragraph (a) and then provides mechanisms for NEPA compliance where the OA anticipates significant impacts in paragraph (b) or non-significant impacts in paragraph (c). In both instances, the updated NEPA Order provides the internal coordination process for such compliance.

Section 20: Adoption of EISs and EAs

The Department added this new section to address adoption of NEPA documents pursuant to the CEQ regulation, 40 CFR 1506.3, and the Department's discretionary adoption authority under 49 U.S.C. 304a(c)(2). Paragraphs (a) through (c) outline the same requirements set forth in 40 CFR 1506.3 for the adoption of EISs. Where the OA was not a cooperating agency, paragraphs (b) and (c) direct the OA to issue a combined FEIS/ROD consistent with the directive in 49 U.S.C. 304a/23 U.S.C. 139(n). Paragraph (d) sets forth the adoption process for EAs. Consistent with Question 32 of the Forty Questions, paragraph (e) requires OAs to reevaluate an EA or EIS that is more than 5 years old before adopting another Federal agency's EA or EIS. Paragraph (f) addresses the notification process. Finally, paragraph (f) acknowledges the discretionary adoption process under 49 U.S.C. 304a(c)(2). The Department intends to issue guidance on the application of this provision, which it will incorporate into the Desk Reference.

Section 21: Mitigation and Monitoring

The Department added this new section to address generally mitigation and monitoring in the NEPA process. Consistent with the approach in 5610.1C, the updated NEPA Order continues to reference mitigation in the context of specific NEPA documents (*e.g.,* EAs, FONSIs, EISs, RODSs). This section is based on the CEQ regulations and guidance, *Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact.*[7] Paragraph (a) describes the purpose of mitigation and paragraph (b) encourages early development of mitigation measures. Paragraph (c) addresses appropriate documentation of mitigation measures and paragraph (d) addresses mitigation commitments. The goal of these provisions is to document the mitigation that the OA both considered and adopted in the NEPA analysis and decision. Due to the importance of ensuring implementation of mitigation measures, the Department has included provisions on ensuring the implementation of mitigation measures, and related monitoring provisions in paragraphs (e) and (f).

[5] 46 FR 18026, Mar. 23, 1981, *available at https://ceq.doe.gov/nepa/regs/40/40p3.htm.*

[6] *Available at https://ceq.doe.gov/ceq_regulations/Emergencies_and_NEPA_Memorandum_12May2010.pdf.*

[7] 76 FR 3843, Jan. 21, 2011, *available at https://ceq.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.*

Section 22: Responsible Official for Secretarial Office Actions

Because the updated NEPA Order serves as the NEPA implementing procedures for Secretarial Offices that may undertake their own NEPA review for actions where they are not relying on the NEPA expertise of an OA, Section 22 provides that the office director serves as the responsible official for approving NEPA documents. Section 22 also provides that the Office of Policy, in conjunction with the Assistant General Counsel for Operations within the Office of the General Counsel, is responsible for general oversight and advice on environmental matters. This section maintains the responsible official set forth in 5610.1C section 21, Responsible Office for Office of the Secretary Actions, but provides clarity that this only applies when the Secretarial Office is serving as the lead agency.

Section 23: Determinations Under Section 4(f) and Integration With NEPA

Section 23 updates 5610.1C's guidance in section 12, Determinations Under Section 4(f) of the DOT Act. This section reflects the current statutory language for protection of certain parklands, refuges, recreation areas, and historic sites under Section 4(f) (49 U.S.C. 303/23 U.S.C 138). Because the Department intends to issue separate DOT-wide guidance or regulations for implementation of Section 4(f) to further reflect current policy and practice in implementing Section 4(f), and because Attachment 2 of 5610.1C would be eliminated, some of the detailed guidance would no longer be part of the updated NEPA Order.

Paragraph 23(a) revises the discussion of findings required by Section 4(f) previously provided in 5610.1C section 12. It no longer provides that an action having more than a minimal effect on lands protected under Section 4(f) normally requires an EIS because DOT experience has shown that use of Section 4(f) lands is not necessarily a significant impact.

Paragraph 23(b) provides that an OA may approve the use of Section 4(f) property if it determines that the proposed action, including any measures to minimize harm, would have a *de minimis* impact on the property. In addition, pursuant to section 1301 of the FAST Act, the revisions in paragraph 23(c) note opportunities to integrate requirements for Section 4(f) with those for NEPA and Section 106 of the National Historic Preservation Act. DOT seeks public comment on the opportunities identified in paragraph 23(c) and also seeks comment on additional opportunities for integration of Section 4(f), NEPA, and Section 106.

Section 24: Review of NEPA Documents Prepared by Other Agencies

Section 24 revises 5610.1C section 9, Review of Environmental Statements Prepared by Other Agencies. The level of detail provided in 5610.1C is no longer necessary because the OAs have decades of experience with these reviews. Therefore, the Department streamlined this section to summarize its general responsibilities and internal coordination process.

Section 25: Public Involvement

Section 25 greatly expands upon 5610.1C section 14, Citizen Involvement Procedures, to give the Department additional guidance on the purpose of public involvement in the NEPA process (paragraph (a)) and provide a variety of mechanisms (paragraph (b)) to achieve the goal of promoting meaningful public involvement early in the process to ensure an efficient project delivery process that meets the needs of stakeholders. Paragraph (c) states the OAs' obligation to comply with E.O. 12372, *Intergovernmental Review of Federal Programs,* and the implementing regulations in 49 CFR part 17, when applicable. Paragraph (d) updates 5610.1C section 14(e) regarding the requirements for public hearings and public meetings consistent with 40 CFR 1506.6(c). Finally, paragraph (e) requires posting of NEPA documents online where appropriate and practicable.

Section 26: Conflict Resolution

This new section promotes the use of both informal conflict resolution as well as environmental collaboration and conflict resolution (ECCR) consistent with the September 7, 2012 CEQ/OMB joint *Memorandum on Environmental Collaboration and Conflict Resolution.*[8] Because the Department has a separate, more detailed Order on conflict resolution, DOT Order 5611.1a, *U.S. Department of Transportation National Procedures for Elevating Highway and Transit Environmental Disputes,*[9] the updated NEPA Order only provides a high-level overview of informal conflict resolution and ECCR, with a cross-reference to that Order.

Section 27: Pre-Decision Referrals to the Council on Environmental Quality

Section 27 of the updated NEPA Order revises 5610.1C section 10, Pre-decision Referrals to the Council on Environmental Quality. This section addresses the internal process for addressing or making referrals to CEQ. Overall, the process remains the same, but the Department revised this section to provide clarity consistent with the general updates discussed above.

Section 28: Proposal for Legislation

Section 28 of the updated NEPA Order addresses the requirements for legislative EISs consistent with 40 CFR 1506.8. The updated NEPA Order revises 5610.1C section 15, Proposal for Legislation, for clarity consistent with the general updates discussed above.

Section 29: International Actions

Section 29 of the updated NEPA Order addresses the implementation of E.O. 12114, *Environmental Effects Abroad of Major Federal Actions.* Section 29 streamlines 5610.1C section 16, International Actions, by cross referencing to the E.O. rather than repeating the E.O.'s applicability criteria. It also provides that OAs must prepare any required EIS consistent with the updated NEPA Order and OA Procedures. Finally, this section reflects edits for clarity consistent with the general updates discussed above.

Section 30: Operating Administration Implementing Procedures

Section 30 updates and supplements 5610.1C section 20, Implementing Instructions. Consistent with the Department's existing procedures, Section 30(a) of the updated NEPA Order requires OAs to either issue their own implementing procedures (OA Procedures) or rely upon the NEPA Order, but issue supplemental guidance. In addition to setting forth the basic requirements for OA Procedures, consistent with 40 CFR 1505.1 and 1507.3, Section 30 also details the relationship between the updated NEPA Order and existing OA Procedures. Consistent with paragraph (d), once the Department finalizes the updated NEPA Order, OAs must evaluate their existing procedures to determine whether they are consistent with the updated NEPA Order. If not, the OAs must develop a plan and schedule to make revisions and obtain concurrence from the Office of Policy and Office of the General Counsel on the plan and schedule. In the interim period, paragraph (e) provides that OAs may continue to follow their existing OA Procedures, but have the discretion to rely on new

[8] *Available at https://www.udall.gov/documents/Institute/OMB_CEQ_Memorandum_2012.pdf.*

[9] *Available at https://www.environment.fhwa.dot.gov/strmlng/dot5611_order.asp.*

provisions in the updated NEPA Order. Finally, paragraph (f) sets forth the internal review and concurrence process for establishing or updating OA Procedures, and paragraph (g) directs the Office of Policy to maintain them on a DOT Web site.

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

Anthony Foxx,

Secretary of Transportation.

[FR Doc. 2016–30660 Filed 12–19–16; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request: Record and Disclosure Requirements—Consumer Financial Protection Bureau Regulations B, C, E, M, Z, and DD and Board of Governors of the Federal Reserve System Regulation CC

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the renewal of an information collection as required by the Paperwork Reduction Act of 1995 (PRA).

An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning the renewal of an information collection titled, ''Record and Disclosure Requirements—Consumer Financial Protection Bureau (CFPB) Regulations B, C, E, M, Z, and DD and Board of Governors of the Federal Reserve System (FRB) Regulation CC.''

DATES: Comments must be submitted on or before February 21, 2017.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by email, if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0176, 400 7th Street SW., Suite 3E–218, mail stop 9W–11, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *pracomments@occ.treas.gov*. You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, mail stop 9W–11, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires Federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing this notice of the renewal of the following information collection:

Title: Record and Disclosure Requirements—Consumer Financial Protection Bureau (CFPB) Regulations B, C, E, M, Z, and DD and Board of Governors of the Federal Reserve System (FRB) Regulation CC.

OMB Control No.: 1557–0176.

Type of Review: Regular review.

Affected Public: Businesses or other for-profit.

Frequency of Response: On occasion.

Burden Estimates:

Estimated Number of Respondents: 1,390.

Estimated Annual Burden: 3,887,872 hours.

Description: This information collection covers CFPB Regulations B, C, E, M, Z, and DD and FRB Regulation CC. The CFPB and FRB regulations include the following provisions:

Reg B—12 CFR 1002—Equal Credit Opportunity Act

This regulation implements the Equal Credit Opportunity Act (15 U.S.C. 1601 *et seq.*). The regulation prohibits lenders from discriminating against credit applicants on a prohibited basis, establishes rules for retaining records of credit applications and collecting information about the applicant's race and other personal characteristics in applications for certain dwelling-related loans, requires lenders to report the credit history in the names of both spouses on an account, requires lenders to provide applicants with copies of appraisal reports in connection with credit transactions, and requires notification of action taken on a credit application.

Reg C—12 CFR 1003—Home Mortgage Disclosure

This regulation implements the requirements of the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*). The regulation requires certain financial institutions to report data to the appropriate Federal agency about home purchase loans, home improvement loans, and refinancings that it originates or purchases, or for which it receives certain applications, and to disclose certain data to the public.

Reg E—12 CFR 1005—Electronic Fund Transfers

This regulation carries out the purposes of the Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*), which establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfers and remittance transfer services and the financial institutions or other persons that offer these services.

Reg M—12 CFR 1013—Consumer Leasing

This regulation implements the consumer leasing provisions of the Truth in Lending Act (12 U.S.C. 1601 *et seq.*). The regulation: Ensures that lessees of personal property receive meaningful disclosures that enable them to compare lease terms with other leases and, where appropriate, with credit transactions; limits the amount of balloon payments in consumer lease

transactions; and provides for accurate disclosure of lease terms in advertising.

Reg Z—12 CFR 1026—Truth in Lending

This regulation implements the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) and certain provisions of the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*). The regulation prescribes uniform methods for computing the cost of credit, disclosing credit terms and costs, and resolving errors on certain types of credit accounts.

Reg CC—12 CFR 229—Availability of Funds and Collection of Checks

This regulation implements the Expedited Funds Availability Act (12 U.S.C. 4001–4010) and the Check Clearing for the 21st Century Act (12 U.S.C. 5001–5018). The regulation contains: Rules regarding the duty of banks to make funds deposited into accounts available for withdrawal, including availability schedules and the disclosure of funds availability practices; rules to expedite the collection and return of checks by banks; and general provisions relating to substitute checks, including the disclosure and notices that banks must provide.

Reg DD—12 CFR 1030—Truth in Savings

This regulation implements the Truth in Savings Act (12 U.S.C. 4301 *et seq.*). The regulation requires depository institutions to provide disclosures so that consumers can meaningfully compare accounts at different depository institutions.

Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 13, 2016.

Karen Solomon,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2016–30497 Filed 12–19–16; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Open Meeting of the Federal Advisory Committee on Insurance

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces that the Department of the Treasury's Federal Advisory Committee on Insurance (''Committee'') will convene a meeting on Thursday, January 5, 2017, in the Cash Room, 1500 Pennsylvania Avenue NW., Washington, DC 20220, from 1:00–5:00 p.m. Eastern Time. The meeting is open to the public, and the site is accessible to individuals with disabilities.

DATES: The meeting will be held on Thursday, January 5, 2017, from 1:00–5:00 p.m. Eastern Time.

ADDRESS: The Federal Advisory Committee on Insurance meeting will be held in the Cash Room, Department of the Treasury, 1500 Pennsylvania Avenue NW., Washington, DC 20220. The meeting will be open to the public. Because the meeting will be held in a secured facility, members of the public who plan to attend the meeting must either:

1. *Register online.* Attendees may visit *http://www.cvent.com/d/hvq26p?ct=6128d144-9ad5-45f5-910c-c7b44560aae0&RefID=FACI+General+Registration* and fill out a secure online registration form. A valid email address will be required to complete online registration.

NOTE: online registration will close at 11:59 p.m. Eastern Time on Friday, December 30, 2016.

2. Contact the Federal Insurance Office (FIO), at (202) 622–0512, by 5:00 p.m. Eastern Time on Friday, December 30, 2016, and provide registration information.

Requests for reasonable accommodations under Section 504 of the Rehabilitation Act should be directed to Marcia Wilson, Office of Civil Rights and Diversity, Department of the Treasury at (202) 622–8177, or *marcia.wilson@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Chester McPherson, Deputy Director, Consumer Affairs, FIO, Room 1410, Department of the Treasury, 1500 Pennsylvania Avenue NW., Washington, DC 20220, at (202) 622–0512 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with the Federal Advisory Committee Act, 5 U.S.C. App. II, 10(a)(2), through implementing regulations at 41 CFR 102–3.150.

Public Comment: Members of the public wishing to comment on the business of the Federal Advisory Committee on Insurance are invited to submit written statements by any of the following methods:

Electronic Statements

- Send electronic comments to *faci@treasury.gov.*

Paper Statements

- Send paper statements in triplicate to the Federal Advisory Committee on Insurance, Room 1410, Department of the Treasury, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

In general, the Department of the Treasury will post all statements on its Web site *http://www.treasury.gov/about/organizational-structure/offices/Pages/Federal-Insurance.aspx* without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. The Department of the Treasury will also make such statements available for public inspection and copying in the Department of the Treasury's Library, 1500 Pennsylvania Avenue NW., Washington, DC 20220, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect statements by telephoning (202) 622–0990. All statements, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

Tentative Agenda/Topics for Discussion: This is a periodic meeting of the Federal Advisory Committee on Insurance. In this meeting, the Committee will discuss a number of issues, including blockchain technology in the insurance sector, the changing auto safety landscape, and an overview of insurance fraud. The Committee will

also receive updates from its subcommittees.

Michael T. McRaith,

Director, Federal Insurance Office.

[FR Doc. 2016–30632 Filed 12–19–16; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

Reimbursement for Caskets and Urns for Burial of Unclaimed Remains in a National Cemetery

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is updating the monetary reimbursement rates for caskets and urns purchased for the interment in a VA national cemetery of Veterans who die with no known next of kin and where there are insufficient resources for furnishing a burial container. The purpose of this notice is to notify interested parties of the rates that will apply to reimbursement claims that occur during calendar year (CY) 2017.

FOR FURTHER INFORMATION CONTACT: Eric Axelbank, Budget Operations and Field Support Division, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420. Telephone: (202) 632–7236 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 2306(f) of title 38, U.S.C., authorizes VA National Cemetery Administration (NCA) to furnish a casket or urn for interment in a VA national cemetery of the unclaimed remains of Veterans for whom VA cannot identify a next of kin and determines that sufficient financial resources for the furnishing of a casket or urn for burial are not available. VA implemented regulations to administer this authority as a reimbursement benefit in section 38.628 of title 38, Code of Federal Regulations.

Reimbursement for a claim received in any CY will not exceed the average cost of a 20-gauge metal casket or a durable plastic urn during the fiscal year (FY) preceding the CY of the claim. Average costs are determined by market analysis for 20-gauge metal caskets, designed to contain human remains, with a gasketed seal, and external rails or handles. The same analysis is completed for durable plastic urns, designed to contain human remains, which include a secure closure to contain the cremated remains.

Using this method of computation, in FY 2016, the average costs for caskets were determined to be $2,069 and $163 for urns. Accordingly, the reimbursement rates payable for qualifying interments occurring during CY 2017 are $2,069 for caskets and $163 for urns.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on December 13, 2016, for publication.

Dated: December 13, 2016.

Jeffrey Martin,

Office Program Manager, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2016–30510 Filed 12–19–16; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 81 Tuesday,

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Part II

Department of Homeland Security

U.S. Customs and Border Protection

19 CFR Parts 4, 7, 10, 11, et al.

Regulatory Implementation of the Centers of Excellence and Expertise; Interim Final Rule

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Parts 4, 7, 10, 11, 12, 24, 54, 101, 102, 103, 113, 132, 133, 134, 141, 142, 143, 144, 145, 146, 147, 151, 152, 158, 159, 161–163, 173, 174, 176 and 181

[USCBP–2016–0075; CBP Dec. No. 16–26]

RIN 1651–AB02

Regulatory Implementation of the Centers of Excellence and Expertise

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Interim final rule.

SUMMARY: In 2012, U.S. Customs and Border Protection (CBP) developed a test to incrementally transition the operational trade functions that traditionally reside with port directors to the Centers of Excellence and Expertise (Centers). The purpose of the test was to broaden the ability of the Centers to make decisions by waiving certain identified regulations to the extent necessary to provide the Center directors, who manage the Centers, with the authority to make the decisions normally reserved for the port directors. At this time, CBP is prepared to end the test and establish the Centers as a permanent organizational component of the agency and to transition certain additional trade functions to the Centers. This rule amends the CBP regulations on an interim basis to implement this organizational change by: Defining the Centers and the Center directors; amending the definition for port directors to distinguish their functions from those of the Center directors; identifying the Center management offices; explaining the process by which importers will be assigned to Centers; providing the importer with an appeals process for its Center assignment; identifying the regulatory functions that will be transitioned from the port directors to the Center directors and those that will be jointly carried out by the port directors and the Center directors; and providing clarification in applicable regulations that payments and documents may continue to be submitted at the ports of entry or electronically.

DATES: *Effective date:* This interim rule is effective January 19, 2017.

Comment date: Written comments must be submitted on or before January 19, 2017.

ADDRESSES: You may submit comments identified by *docket number,* by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2016–0075.
- *Mail:* Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, Attention: Trade and Commercial Regulations Branch, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on this rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected on regular business days between the hours of 9 a.m. and 4:30 p.m. at Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE., 10th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Lori Whitehurst, CBP Office of Field Operations by telephone (202) 344–2536 or by email, *lori.j.whitehurst@cbp.dhs.gov;* or Susan S. Thomas, CBP Office of Field Operations by telephone (202) 344–2511 or by email, *susan.s.thomas@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this interim final rule. U.S. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this regulatory change. Comments that will provide the most assistance to CBP will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information or authority that support such recommended change. Written comments must be submitted on or before January 19, 2017. CBP will consider those comments and make any changes appropriate after consideration of those comments.

Background

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I. Purpose and History of the Centers of Excellence and Expertise (Centers)

A. Purpose of the Centers

U.S. Customs and Border Protection (CBP) established ten Centers of Excellence and Expertise (Centers) managed from strategic locations around the country to focus CBP's trade expertise on industry-specific issues and provide tailored support for importers. The concept of the Centers arose in response to claims that CBP's port-by-port trade processing authority sometimes resulted in similar goods entered at different ports of entry receiving disparate processing treatment causing trade disruptions, increased transaction costs, and information lapses for both CBP and the importer. CBP established the Centers to facilitate trade, reduce transaction costs, increase compliance with applicable import laws, and achieve uniformity of treatment at the ports of entry for the identified industries. CBP believes that providing broad decision-making authority to the Centers will better enable the Centers to achieve these goals for CBP and the trade.

B. History of the Centers

The concept of Centers was developed as a result of discussions with the Advisory Committee on Commercial Operations of U.S. Customs and Border Protection (COAC), which promoted the management by account framework. The COAC is an advisory committee established in accordance with the provisions of the *Federal Advisory Committee Act* (FACA), 5 U.S.C. App. 2. COAC provides advice and makesrecommendations to the Commissioner of CBP, the Secretary of the Department of Homeland Security, and the Secretary of the Treasury on all matters involving the commercial operations of CBP and related U.S. Department of Homeland Security (DHS) and Treasury functions. CBP has continually consulted COAC throughout the development of the Centers.

In October 2011, CBP established the first two Centers: The Electronics Center managed from Long Beach, California; and the Pharmaceuticals Center (later renamed the *Pharmaceuticals, Health & Chemicals Center*) managed from New York City, New York.

On May 10, 2012, the Acting Commissioner of CBP announced at the West Coast Trade Symposium two new Centers: The Automotive & Aerospace Center managed from Detroit, Michigan, and the Petroleum, Natural Gas & Minerals Center managed from Houston, Texas.

On August 28, 2012, CBP published a General Notice in the **Federal Register** (77 FR 52048) announcing a test broadening the ability of the Centers to make decisions by waiving certain identified regulations under title 19 of the Code of Federal Regulations (19 CFR) to provide the Center directors with the authority to make the decisions normally reserved for the port directors. The notice provided centralized decision-making authority to the following Centers: Electronics; Pharmaceuticals, Health & Chemicals; Automotive & Aerospace; and Petroleum, Natural Gas & Minerals. The notice invited all businesses that met the eligibility criteria set forth in the notice to apply, including, but not limited to Customs-Trade Partnership Against Terrorism (C–TPAT) and Importer Self Assessment (ISA) program members.

On November 27, 2012, the Deputy Commissioner of CBP announced at the East Coast Trade Symposium six new Centers: The Agriculture & Prepared Products managed from Miami, Florida; the Apparel, Footwear & Textiles managed from San Francisco, California; the Base Metals managed from Chicago, Illinois; the Consumer Products & Mass Merchandising managed from Atlanta, Georgia; the Industrial & Manufacturing Materials managed from Buffalo, New York; and the Machinery managed from Laredo, Texas.

On April 4, 2013, CBP published a General Notice in the **Federal Register** (78 FR 20345) to announce the six new Centers and list the additional regulations that would be waived for test participants.

On March 10, 2014, CBP published a General Notice in the **Federal Register** (79 FR 13322) to modify the existing test by changing the scope of coverage for some of the Centers and the types of entries that would be processed by the Centers, waiving an additional regulation for Center test participants, and clarifying the submission process for responses to Requests for Information and Notices of Action.

Since their establishment in October 2011, the Centers have been staffed with CBP employees who facilitate trade by providing account management for members in the identified industries, engaging in risk segmentation, and by strengthening trade outreach.

Under the test, the Centers have had the ability to review entries and the Center directors, who are tasked with leading the Centers, have had decision-making authority for the functions identified by regulation in the test notices, which, for the most part, dealt with the post-release environment. Under the test, the Center directors have also had the ability to make recommendations to the port directors concerning decisions that were retained by the port directors notwithstanding the test.

On September 11, 2014, Commissioner R. Gil Kerlikowske signed Delegation Order number 14–004, which delegated to the Center directors all functions, authorities, rights, privileges, powers, and duties vested in port directors by law, regulation, or otherwise. The delegation enabled these functions, authorities, rights, privileges, powers, and duties to be exercised concurrently by port directors and Center directors. CBP began implementing the delegation order on January 28, 2015, for the Electronics Center, the Pharmaceutical, Health & Chemicals Center, and the Petroleum, Natural Gas & Minerals Center.

II. Finalization of the Centers of Excellence and Expertise Test

During the Centers' test period, CBP incrementally transitioned to the Center directors some of the trade functions that traditionally reside with the port directors, such as determinations, notifications, and processing concerning duty refund claims based on 19 U.S.C. 1520(d) and issuance of all Requests for Information (CBP Form 28). As explained in the Executive Order 13563 and Executive Order 12866 section below, the Centers met their trade enhancement goals and the test was a success. Moreover, section 110 of the

Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114–125, 130 Stat. 122, February 24, 2016) required that the Centers of Excellence and Expertise be developed and implemented. Therefore, at this time, CBP is prepared to end the Centers' test and establish the Centers as a permanent organizational component of the agency and to transition certain additional trade functions to the Centers, such as the processing of quota entry summaries (*see* 19 CFR part 132) and determining whether to provide importers with a reasonable opportunity to label products (*see* 19 CFR part 11). To accomplish this goal, CBP is realigning and shifting certain staff positions from the port director chain of command to the Center director chain of command. The staff that is handling the trade functions under the port director will continue to handle those same functions under the Center directors, but they will be reallocated by industry specialization and will report to one of the ten Centers. The staff who will report to the Centers includes: Import Specialists, Entry Specialists, and Liquidation Specialists. As explained in the Executive Order 13563 and Executive Order 12866 section below, this realignment is virtual, in that Center personnel will remain at their current location, primarily at ports of entry, to stay accessible to the trade community and to continue to assist with enforcement and compliance issues that arise. The staff who will continue to report to the port directors includes: CBP Officers, Agriculture Specialists, FPF Officers, and Seized Property Specialists.

CBP notes that certain authorities and responsibilities that were provided to the Center directors by waiving certain regulatory sections in the test notices will not be transitioned to the Centers under the regulations. CBP has made the decision to maintain the current regulatory authorities for: The control, movement, examination and release of cargo; export; drawback; and Fines, Penalties & Forfeitures. The sections that will not be transitioned to the Centers under the regulations that were transitioned in the test notices are listed here along with parenthetical explanations: § 10.66 (exportation of goods); § 10.67 (exportation of goods); § 12.3 (condition of release); § 12.73(k) (detention of motor vehicle); § 12.80 (condition of release); § 134.3(b)(2) (location of examination); § 141.58(c) (request to ship merchandise separately); § 142.13 (condition of release); § 144.34(a) (physical transport of goods from warehouse); § 141.57 (incremental release of split shipments); § 146.63 (Foreign Trade Zone release); § 162.79b (involves Fines, Penalties & Forfeitures officers); § 181.13 (involves Fines, Penalties & Forfeitures officers); and § 191.61 (drawback).

This document also amends certain regulations to jointly authorize the port directors and Center directors to implement certain functions, such as the authority to accept certain documentation (*see, e.g.,* 19 CFR 10.41a(e)) and collect payments (*see, e.g.,* 19 CFR 24.2). The reason for providing joint authority to the port directors and Center directors is to ensure that the trade mission and security mission are met regardless of the hour of operation for either of the personnel. CBP believes that providing broad decision-making authority to the Centers will better enable the Centers to facilitate trade, reduce transaction costs, increase compliance with applicable import laws, and achieve uniformity of treatment at the ports of entry for the identified industries. As such, this document amends the CBP regulations on an interim basis to more fully implement the Centers by: Defining the Centers and the Center directors; amending the definition for port directors to distinguish their functions from those of the Center directors; identifying the Center management offices; explaining the process by which importers will be assigned to Centers; providing the importer with an appeals process for its Center assignment; identifying the regulatory functions that will be transitioned from the port directors to the Center directors and those that will be jointly carried out by the port directors and the Center directors; and providing clarification in applicable regulations that payments and documents may continue to be submitted at the ports of entry or electronically.

This document also provides a list of industries that will be covered by each of the Centers.

A. Definition for the Centers

This document amends § 101.1 of title 19 of the regulations (19 CFR 101.1) to define the Centers of Excellence and Expertise as national CBP offices that are responsible for performing certain trade functions and making certain determinations as set forth in this title, regarding importations of merchandise by their assigned importers, regardless of the ports of entry at which the importations occur. The Centers are organized by industry sectors, which are categorized by the Harmonized Tariff Schedule of the United States (HTSUS) numbers. The list of HTSUS numbers is published in this document and any change made to that list will be announced in a subsequent **Federal Register** document.

B. Definition for Center Director

This document amends § 101.1 of title 19 of the regulations (19 CFR 101.1) to define the term ''Center director'' as the person who manages their designated Center and is responsible for certain trade decisions and functions concerning that Center and the importers that are processed by that Center.

C. Revised Definition for Port and Port of Entry

This document amends § 101.1 by revising the definition of ''Port'' and ''Port of Entry'' by updating the term ''Customs'' to ''U.S. Customs and Border Protection (CBP)'' or ''customs'', as applicable, to reflect the nomenclature changes made necessary by the transfer of the legacy U.S. Customs Service of the Department of the Treasury to the Department of Homeland Security (DHS) and DHS' subsequent renaming of the component as U.S. Customs and Border Protection on March 31, 2007 (*see* 72 FR 20131, dated April 23, 2007).

D. Definition for Port Director

This document amends § 101.1 to add a definition of ''Port director'' that is consistent with the description currently found in the definition for ''port'' and ''port of entry'' but also distinguishes the port directors responsibilities from those of the Center director. The new definition for ''Port director'' is the person who has jurisdiction within the geographical boundaries of their port of entry unless the regulations provide that particular trade functions or determinations are exclusively within the purview of a Center Director or other CBP personnel.

E. Designation of Center Management Offices

This document creates a new § 101.10 in title 19 of the regulations (19 CFR 101.10) to provide a list of the existing Centers and their management offices. The Center management offices will continue to be located in the cities that were designated in the published test notices noted above. The Centers and the cities wherein each management office is located is as follows: *Agriculture & Prepared Products,* Miami, Florida; *Apparel, Footwear & Textiles,* San Francisco, California; *Automotive & Aerospace,* Detroit, Michigan; *Base Metals,* Chicago, Illinois; *Consumer Products and Mass Merchandising,* Atlanta, Georgia;

Electronics, Long Beach, California; *Industrial & Manufacturing Materials,* Buffalo, New York; *Machinery,* Laredo, Texas; *Petroleum, Natural Gas & Minerals,* Houston, Texas; *Pharmaceuticals, Health & Chemicals,* New York City, New York.

F. Assignment of Importers to the Centers

Generally, each importer will be assigned to an industry-category administered by a specific Center based on the tariff classification in the HTSUS of the predominant number of goods imported. The list of HTSUS numbers that will be used by CBP for the importer's placement in a Center is the same list of HTSUS numbers that are referenced in the definition for Centers (see § 101.1). Factors that may cause CBP to place an importer in a Center not based on the tariff classification of the predominant number of goods imported include the importer's associated business practices within an industry, the intended use of the predominant number of goods imported, or the high relative value of goods imported. Brokers acting as the IOR will have their entry summary processed by the Center relating to the predominant HTSUS number for the entry summary since brokers' business models do not necessarily align within a particular industry sector.

G. Appeal of Center Assignment

All importers may appeal the Center assignment at any time by submitting a written appeal, with a subject line identifier reading ''Appeal Regarding Center Assignment'', to U.S. Customs and Border Protection, Office of Field Operations, Executive Director, Cargo and Conveyance Security (CCS) Division, 1300 Pennsylvania Ave. NW., Suite 2.3D, Washington, DC 20229–1015 or by email to *CEE@cbp.dhs.gov.* Appeals must include the following information: (1) Current Center assignment;

(2) Preferred Center assignment; (3) All affected Importer of Record (IOR) numbers and associated bond numbers; and (4) Written justification for the change in Center assignments; and (5) Import data, as follows:

(i) *For new importers.* Projected importations at the four (4) digit HTSUS heading level during the current year; or

(ii) *For importers with less than one year of prior import history.* Projected importations and prior import data with entry summary lines and value at the four (4) digit HTSUS heading level; or

(iii) *For importers with more than one year of prior import history.* One year of prior import data with entry summary lines and value at the four (4) digit HTSUS heading level.

H. Transitioning of Trade Functions to the Centers

This document amends certain regulations to transition to the Center directors a variety of post-release trade functions that are currently handled by the port directors, including decisions and processing related to entry summaries; decisions and processing related to all types of protests; suspension and extension of liquidations; decisions and processing concerning free trade agreements and duty preference programs; decisions concerning warehouse withdrawals wherein the goods are entered into the commerce of the United States; all functions and decisions concerning country of origin marking issues; functions concerning informal entries; and classification and appraisement of merchandise, including valuation of merchandise.

This document also amends some regulations to identify the circumstances where the port directors and the Center directors will have joint authority. For example, § 141.56(a) is amended to note that CBP may accept, either at the port of entry or electronically, one entry summary for consumption or for warehouse for merchandise covered by multiple entries for immediate transportation, subject to the requirements of § 142.17(a), provided the merchandise covered by each immediate transportation entry is released at the port of destination under a separate entry, in accordance with § 142.3. The reference to ''port directors'' is being removed and replaced with ''CBP'' because the authority to accept the entry summary will continue to reside with the personnel working for the port directors and will also be extended to the personnel working for the Center directors. Importers will continue to have the ability to submit the documentation at the port or electronically and this ability is merely being reflected in the regulation. In this example, if the entry summary were submitted electronically to CBP, it would be internally routed to the appropriate Center. As a second example, the port director and Center director personnel will have joint authority for all functions involving sampling and redelivery requests (*see, e.g.,* 19 CFR 132.14(a)(4)(i)(A)). CBP notes that while the redelivery notices may be sent out by either personnel working for the port director or the Center director, the resolution of marking issues will be the sole authority of the Center directors.

This document also amends the regulations to provide that port directors and the Center directors will have joint authority to collect payments. These amendments do not affect the public's responsibility to continue to submit payments using the same methods of payment that are prescribed in the regulations today; they merely extend the authority to accept payments to Center directors as well (*see e.g.,* 19 CFR 10.49(d) and 24.2). For example, § 24.2 is amended in this document to include a reference to Center directors as persons authorized to receive customs collections. The revised text would read as follows: ''Center directors, port directors, CBP cashiers, CBP officers, CBP dock tellers, and such other officers and employees as the Center director or port director will designate will receive Customs collections.''

Any functions that are not identified in this package as being transferred to the Centers will remain with the parties who are currently engaging in those activities, as per the regulations. While the language in § 4.14 of the regulations need not be amended to show that the function is being transitioned to the Center directors, CBP notes that the Vessel Repair Units (VRUs) will no longer report to the port directors and will instead report to the Automotive & Aerospace Center.

The responsibilities of the public remain unchanged after the amendments are implemented. Importers of record may continue to file entry documentation where the importer's merchandise is entered. Importers and brokers who file electronically through the Automated Broker Interface (ABI) will continue to use CBP's authorized electronic data interchange system to submit required import data with CBP. Paper filings at the ports of entry will remain unchanged. Importers and brokers who file paper entries may continue to file at the port of entry where the paper documents will be processed, reviewed, and accepted by CBP, which may be personnel working for either the Center director or the port director. When necessary, CBP will internally route the data to the appropriate Center for review and processing. As per usual, CBP will continue its process of contacting the filer if there are any problems and will notify the filer of the appropriate person at CBP to contact if a response is necessary.

Any decisions or requests for information or samples that were made by the port director prior to the publication of this document will

remain valid and effective. Any protest that was filed with a port director prior to the effective date of this document, will be transferred to the relevant Center director to make a decision on the protest. When applicable, this document amends certain regulations to provide that determinations made by the port directors or Center directors before the effective date of this document are valid to the same extent as determinations made by a Center director after the effective date of this document. Similarly, when applicable, this document amends certain regulations to note that submission of information to the port directors or Center directors before the effective date of this document is valid to the same extent as submission of information made to a Center director after the effective date of this document. Center directors may have made determinations or accepted documents prior to the effective date of this document pursuant to the Center test or the Delegation Order described in section I.B. of the Background section of this document.

I. Scope of Industries Covered by Each Center

The test notices defined the types of merchandise for which each Center is responsible by identifying the Harmonized Tariff Schedule of the United States (HTSUS) headings for which each Center is responsible. CBP will continue to define the scope of industries covered by each Center by the HTSUS heading that will be handled by each Center. The scope of industries covered by each Center has been defined as noted below.

If changes are made to the scope of coverage for any of the Centers, CBP will announce the change in the **Federal Register**.

1. Agriculture & Prepared Products Center

For inclusion in the Agriculture & Prepared Products Center, importers must be part of the agriculture, aquaculture, animal products, vegetable products, prepared food, beverage, alcohol, tobacco or similar industries based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the term ''agriculture and prepared products'' to consist of merchandise classified under Chapters 1 through 24 of the HTSUS.

2. Apparel, Footwear & Textiles Center

For inclusion in the Apparel, Footwear & Textiles Center, importers must be part of the wearing apparel, footwear, textile mill, textile mill products, or similar industries based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the term ''apparel, footwear, and textiles'' to consist of merchandise classified under headings 4015, 4203, 4303, 4304, 5001 through 5007, 5101 through 5113, 5201 through 5212, 5301, 5302, 5303, 5305 through 5311, 5401 through 5408, 5501 through 5516, 5601 through 5609, 5701 through 5705, 5801 through 5811, 5901 through 5911, 6001 through 6006, 6101 through 6117, 6201 through 6217, 6301 through 6310, 6401 through 6406, 6501, 6502, 6504, 6505 6506, and 6507 of the HTSUS.

3. Automotive & Aerospace Center

For inclusion in the Automotive & Aerospace Center, importers must be part of the automotive, aerospace, or other transportation equipment and related parts industries based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the term ''automotive'' to consist of merchandise classified under headings 8701 through 8711, 8713, 8714, and 8716, HTSUS. For purposes of assigning an importer to this Center, CBP considers the term ''aerospace'' to consist of merchandise classified under headings 8801 through 8805, HTSUS. For purposes of assigning an importer to this Center, CBP considers the term ''other transportation equipment and related parts'' to consist of merchandise classified under headings 4011 through 4013, 8406 through 8412, 8511, 8512, 8601 through 8609, 8901 through 8908, HTSUS.

4. Base Metals Center

For inclusion in the Base Metals Center, importers must be part of the steel, steel mill products, ferrous and nonferrous metal, or similar industries based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the term ''base metals'' to consist of merchandise classified under headings 7201 through 7308, 7312 through 7318, 7320, 7322, 7324 through 7413, 7415, 7419 through 7614, 7616 through 8113, and 8307 through 8311 of the HTSUS.

5. Consumer Products & Mass Merchandising Center

For inclusion in the Consumer Products and Mass Merchandising Center, importers must be part of the household goods, consumer products, or similar industries, and or mass merchandisers of products typically sold for home use based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the term ''consumer products and mass merchandising'' to consist of merchandise classified under headings 3303 through 3307, 3401, 3406, 3605, 3924, 3926, 4201, 4202, 4205, 4206, 4414, 4419, 4420, 4421, 4602, 4803, 4817, 4818, 4820, 4901 through 4911, 6601 through 6603, 6701 through 6704, 6911 through 6913, 7113 through 7118, 7319, 7321, 7323, 7418, 7615, 8210 through 8215, 8301, 8303 through 8306, 8469, 8470, 8508, 8509, 8510, 8513, 8516, 8539, 8712, 8715, 9001 through 9006, 9013, 9101 through 9114, 9201, 9202, 9205 through 9209, 9401, 9403 through 9405, 9503 through 9508, 9601 through 9619, and 9701 through 9706 of the HTSUS.

6. Electronics Center

For inclusion in the Electronics Center, importers must be part of the electronics industry based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the term ''electronics'' to consist of merchandise classified under headings 3818, 8471, 8473, 8501 through 8504, 8517 through 8538, and 8540 through 8548 of the HTSUS.

7. Industrial & Manufacturing Materials Center

For inclusion in the Industrial & Manufacturing Materials Center, importers must be part of the plastics, polymers, rubber, leather, wood, paper, stone, glass, precious stones or precious metals, or similar industries based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the term ''industrial and manufacturing materials'' to consist of merchandise classified under headings 2501 through 2530, 3901 through 3923, 3925, 4001 through 4010, 4016 through 4115, 4301, 4302, 4401 through 4413, 4415 through 4418, 4501 through 4601, 4701 through 4802, 4804 through 4814, 4816, 4819, 4821, 4822, 4823, 6801 through 6910, 6914 through 7011, 7013, 7014 through 7112, 7309 through 7311, and 9406 of the HTSUS.

8. Machinery Center

For inclusion in the Machinery Center, importers must be part of the tools, machine tools, production

equipment, instruments, or similar industries based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the term ''machinery'' to consist of merchandise classified under headings 8201 through 8209, 8302, 8401 through 8405, 8413 through 8468, 8472, 8474 through 8484, 8486, 8487, 8505 through 8507, 8514, 8515, 9007, 9008, 9010, 9011, 9012, 9014 through 9017, 9020, 9023 through 9033, and 9301 through 9307 of the HTSUS.

9. Petroleum, Natural Gas & Minerals Center

For inclusion in the Petroleum, Natural Gas & Minerals Center, importers must be part of the petroleum, natural gas, petroleum related, minerals, or mining industries based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the terms ''petroleum'' and ''natural gas'' to consist of merchandise classified under headings 2709 through 2713, HTSUS. For purposes of assigning an importer to this Center, CBP considers the term ''petroleum related'' to consist of merchandise classified under headings 2701, 2705, 2707, 2708, 2714, 2715, 2716, and 3826, HTSUS. For purposes of assigning an importer to this Center, CBP considers the terms ''minerals'' or ''mining'' to consist of merchandise classified under headings 2601 through 2621, 2702, 2703, 2704, and 2706, HTSUS.

10. Pharmaceuticals, Health & Chemicals Center

For inclusion in the Pharmaceuticals, Health & Chemicals Center, importers must be part of the pharmaceuticals, health, or chemical and allied industries based on the tariff classification in the HTSUS of the predominant number of goods imported. For purposes of assigning an importer to this Center, CBP considers the term ''pharmaceuticals'' to consist of merchandise classified under headings 2936, 2937, 2939, 2941, 3001 through 3006, HTSUS. For purposes of assigning an importer to this Center, CBP considers the term ''health equipment'' to consist of merchandise classified under headings 4014, 9018, 9019, 9021, 9022, and 9402, HTSUS. For purposes of assigning an importer to this Center, CBP considers the term ''chemicals'' to consist of merchandise classified under headings 2801 through 2935, 2938, 2940, 2942, 3101 through 3302, 3402 through 3405, 3407 through 3604, 3606 through 3817, and 3819 through 3825, HTSUS.

III. Explanation of Amendments

This section of the document explains the amendments that are being made in various parts of title 19 of the Code of Federal Regulations (19 CFR) to: Transition functions from the port directors to the Center directors; jointly authorize the port directors and Center directors to implement certain functions; or provide clarification that payments and documents may continue to be submitted at the ports of entry or electronically. CBP has decided not to amend the following parts of 19 CFR because the functions are not transitioning to the Centers or because the parts are included in another regulatory package: 111, 114, 118, 122, 123, 125, 127, 191 and 192.

A. Part 4—Vessels in Foreign and Domestic Trades

Section 4.94a(d) is amended to provide that upon entry completion and deposit of duty under § 4.94a(d), the bond posted with CBP will be returned to the importer of record, and a new bond on CBP Form 301, containing the bond conditions set forth in 19 CFR 113.62, may be required by the Center director, rather than by the port director. This bond function is being transferred from the port directors to the Center directors because it is a post-release function.

B. Part 7—Customs Relations With Insular Possessions and Guantanamo Bay Naval Station

Section 7.3(e)(1)(iii)(B) is amended to provide the Center director, rather than the port director, with the authority to determine whether an importation into an insular possession or the United States results from the original commercial transaction between the importer and the producer or the latter's sales agent.

Section 7.3(e)(2) is amended to provide that the Center director, rather than the port director, will have the authority to require that appropriate shipping papers, invoices, or other documents be submitted within 60 days of the date of entry as evidence that the goods were shipped to the United States directly from an insular possession or shipped from the United States directly to an insular possession and returned from the insular possession to the United States by direct shipment within the meaning of section 7.3(e)(1). The Center director, rather than the port director, will also have the authority to determine whether evidence of direct shipment will be subject to verification. The section is also being amended to provide that evidence of direct shipment will not be required when the Center director, rather than the port director, is otherwise satisfied, taking into consideration the kind and value of the merchandise, that the goods qualify for duty-free treatment under General Note 3(a)(iv), HTSUS, and section 7.3(a).

Section 7.3(f)(1) is amended to provide the Center director, rather than the port director, with the authority to decide whether goods qualify for duty-free treatment under section 7.3(a)(1).

Section 7.3(f)(2) is amended to provide that the declarations noted in § 7.3(f)(2)(i)–(ii) must be filed with the entry/entry summary unless the Center director, rather than the port director, is satisfied by reason of the nature of the goods or otherwise that the goods qualify for such duty-free entry.

C. Part 10—Articles Conditionally Free, Subject to a Reduced Rate, etc.

In Part 10, the responsibilities and functions currently designated by the regulations for the port directors will be transferred to the Center directors, except for those found in the following sections and those described further below:

- 10.5(d), (e), (g), and (h): *Shooks and staves; cloth boards; port director's account.*
- 10.6: *Shooks and staves; claim for duty exemption.*
- 10.7: *Substantial containers or holders.*
- 10.31(b): *Entry; bond.*
- 10.36(a): *Commercial travelers' samples; professional equipment and tolls of trade; theatrical effects and other articles.*
- 10.38(a), (f), and (g): *Exportation.*
- 10.39(d)(2), (e)(2), (e)(3), and (g): *Cancellation of bond charges.*
- 10.41b(b), (b)(1), (b)(2)(vi), (b)(3)–(b)(6), and (i): *Clearance of serially numbered substantial holders or outer containers.*
- 10.53(e)(5): *Antiques.*
- 10.59(a)(3) and (e): *Exemption from customs duties and internal-revenue tax.*
- 10.60(f) and (h): *Forms of withdrawals; bond.*
- 10.61: *Withdrawal permit.*
- 10.62(c)(1), (e), and (f): *Bunker fuel oil.*
- 10.62a(b): *Blanket withdrawals for certain merchandise.*
- 10.62b(g)(9): *Aircraft turbine fuel.*
- 10.64(a) and (b): *Crediting or cancellation of bonds.*
- 10.65(c)(2): *Cigars and cigarettes.*
- 10.66(b), (a)(3) and (c)(1): *Articles exported for temporary exhibition and returned; horses exported for horse*

racing and returned; procedure on entry.

- 10.67(c): *Articles exported for scientific or educational purposes and returned; procedure on entry.*
- 10.68(a): *Procedure.*
- 10.71(e): *Purebred animals; bond for production of evidence; deposit of estimated duties; stipulation.*
- 10.75: *Wild animals and birds; zoological collections.*
- 10.81(a): *Use in any port.*
- 10.101(c) and (d): *Immediate delivery.*
- 10.107(b) and (c): *Equipment and supplies; admission.*
- 10.151: *Importations not over $800.*
- 10.152: *Bona-fide gifts.*

These functions, which generally occur at the ports and relate to pre-release decisions, will remain with the port directors: Collection of information used to make release decisions; functions concerning exportation; determinations concerning destruction of merchandise; decisions and functions concerning the physical control of warehoused goods and the transfer of those goods from warehouse to warehouse or warehouse to port and the final disposition regarding entry; decisions and functions concerning vessels; decisions concerning passengers; pre-release decisions and functions; and decisions concerning importations not over $800 and bona-fide gifts.

The following sections in Part 10 include either the responsibilities and functions for personnel working for either the port director and Center director or the section contains additional regulatory changes as noted below:

- Sections 10.8(d) (*Articles exported for repairs or alterations*) and 10.9(d) (*Articles exported for processing*): From the *port director* to *port director or Center director* because personnel working for either the port director or the Center director will have the authority to require at the time of entry a deposit of estimated duties.
- Section 10.37 (*Extension of time for exportation*): From the *director of the port where the entry was filed* to the *Center director* for purposes of permitting the Center director, rather than the port director, to grant extensions of time for exportation upon written application on CBP Form 3173, provided the articles have not been exported or destroyed before the receipt of the application, and liquidated damages have not been assessed under the bond before receipt of the application. Also, this document adds language to the section to provide that the written application on CBP Form 3173 may be submitted *to CBP, either at the port of entry or electronically* meaning here that the application may be submitted using the means currently permitted; however, the authority to collect the form will be extended to the personnel working for both Center directors and the port directors.
- Section 10.40(b) (*Refund of cash deposits*): From the *port director* to the *Center director* to provide that the Center director, rather than the port director will notify the importer in writing that the entire cash deposit will be transferred to the regular account as liquidated damages. Also, this document adds language to the section to provide that the written application for relief from the payment of the full liquidated damages must be filed with the *Center director.*
- Section 10.41a(e) (*Lift vans, cargo vans, shipping tanks, skids, pallets, and similar instruments of international traffic; repair components*): From *the port director* to *CBP, either at the port of entry or electronically* so that the consumption entry may be submitted using the means currently permitted; however, the authority to collect the document will be extended to the personnel working for both Center directors and the port directors.
- Section 10.49(d) (*Articles for exhibition; requirements on entry*): From the *director of the port of entry* to *CBP, either at the port of entry or electronically* so that the duties may be submitted using the means currently permitted (*e.g.,* through the Automated Clearing House (ACH)); however, the authority to collect and deposit the duties will be extended to the personnel working for both Center directors and the port directors.
- Section 10.71(c) (*Purebred animals; bond for production of evidence; deposit of estimated duties; stipulation*) and 10.121(b) (*Visual or auditory materials of an educational, scientific, or cultural character*): From the *port director* to *CBP, either at the port of entry or electronically* to indicate that the importer may continue to make its submission of stipulation documentation and duties using the means currently permitted; however, the authority to accept the payments and documentation will be extended to both the port director and Center director personnel.
- Section 10.84(e) (*Automotive vehicles and articles for use as original equipment in the manufacture of automotive vehicles*): From *the director of the port where entry was made* to *CBP, either at the port of entry or electronically* so as to allow the written notice concerning the intended use of motor-vehicle equipment to be submitted using the means of submission currently permitted and to also extend the authority to collect the notice to both the Center director and port director personnel.
- Section 10.91(c)(2) (*Prototypes used exclusively for product development and testing*): From *the port director where the entry or withdrawal of the prototype was made* to *CBP, either at the port of entry or electronically* and from *port director* to *Center director.* This document removes the words ''the port director where the entry or withdrawal of the prototype was made'' and adds in their place the words ''CBP, either at the port of entry or electronically'' to provide that notice of the sale of the prototype or any part(s) of the prototype must be submitted using the means currently permitted, but the authority to collect the notice is extended to both Center director and port director personnel. The term ''port director'' in the final sentence is replaced with ''Center director'' to provide that the Center director, rather than the port director, has the authority to request proof of actual use of the prototype.
- Section 10.102(a) (*Duty-free entries*): From the *port director* to the *Center director* because duty assessment is being transitioned to the Center director personnel. Also, this document adds language to the section to provide that the required certification may be received *either at the port of entry or electronically.*
- Section 10.179(b)(1) (*Canadian crude petroleum subject to a commercial exchange agreement between United States and Canadian refiners*): From the *director of the port where the original entry was made* to *CBP, either at the port of entry or electronically,* so as to allow the certification required under § 10.179(a) to continue to be filed using the means permitted currently.
- Section 10.235(b) (*Filing of claim for preferential tariff treatment*): From *the Customs port where the declaration was originally filed* to *CBP, either at the port of entry or electronically* because the declarations that the imported article qualifies for preferential tariff treatment may continue to be submitted using the means permitted currently and the authority to collect the declarations will be extended to both the Center director and port director personnel.
- Section 10.245(b) (*Filing of claim for preferential treatment*): From *the CBP port where the declaration was originally filed* to *CBP, either at the port of entry or electronically* to provide that

the corrected declaration will be effected by submission of a letter or other written statement using the means permitted currently and the authority to collect the corrected declarations will be extended to both the Center director and port director personnel.

- Sections 10.441(a) (*Filing procedures*), 10.591(a) (*Filing procedures*), 10.870(a) (*Filing procedures*), 10.911(a) (*Filing procedures*), 10.1011(a) (*Filing procedures*), 10.2011(a) (*Filing procedures*), and 10.3011(a) (*Filing procedures*): From *the director of the port at which the entry covering the good was filed* to *CBP, either at the port of entry or electronically* so that the post-importation claim for a refund may be submitted using the means currently permitted; however, the authority to collect the document will be extended to the personnel working for both Center directors and the port directors.
- Section 10.847(c) (*Filing of claim for duty-free treatment*): From *the CBP port where the claim was originally filed* to *CBP, either at the port of entry or electronically* so that the post-entry documentation for a refund, including corrections to claims for duty-free treatment, may be submitted using the means currently permitted; however, the authority to collect the document will be extended to the personnel working for both Center directors and the port directors.

D. Part 11—Packing and Stamping; Marking

Section 11.12(b) is amended to provide the Center director, rather than the port director, with the authority to allow the importer a reasonable opportunity to label imported wool products that were not correctly labeled where the Center director is satisfied that the error or omission did not involve fraud or willful neglect.

Section 11.12(c) is amended to provide that the Center director, rather than the port director, will set the bond amount for packages of wool products that are not designated for examination and are released.

Section 11.12(d) is amended to require the Center director, rather than the port director, to provide written notice to the importer of any lack of compliance with the Wool Products Labeling Act of 1939 in respect of an importation of wool products, and to note that pursuant to § 141.113 the Center director, rather than the port director, will demand the immediate return of the involved products to Customs custody, unless the lack of compliance is forthwith corrected.

Section 11.12(e) is amended to give the Center director, rather than the port director, the discretion to determine whether the imported wool products have been brought into compliance with the Wool Products Labeling Act of 1939.

Section 11.12(f) is amended to state that if any fraudulent violation of the Wool Products Labeling Act of 1939 with respect to imported articles comes to the attention of the Center director, the involved merchandise shall be placed under seizure, or a demand shall be made for the redelivery of the merchandise if it has been released from Customs custody, and the case shall be reported to the Federal Trade Commission, Washington, DC.

Section 11.12a(b) is amended to provide that if imported fur products are not correctly labeled and the Center director, rather than the port director, is satisfied that the error or omission involved no fraud or willful neglect, the importer shall be afforded a reasonable opportunity to label the merchandise under Customs supervision to conform with the requirements of such act and the rules and regulations of the Federal Trade Commission.

Section 11.12a(c) is amended to provide that the Center director, rather than the port director, will set the bond amount for packages of fur products that are not designated for examination and are released.

Section 11.12a(d) is amended to provide that the Center director, rather than the port director, will give written notice to the importer of any lack of compliance with the Fur Products Labeling Act (15 U.S.C. 69b) in respect of an importation of fur products, and pursuant to § 141.113 the Center director, rather than the port director, will demand the immediate return of the involved products to Customs custody, unless the lack of compliance is forthwith corrected.

Section 11.12a(e) is amended to provide that the Center director, rather than the port director, needs to be fully satisfied that a product covered by a notice and demand given pursuant to § 11.12a(d), that has not been promptly returned to Customs custody, has been brought into compliance with the Fur Products Labeling Act.

Section 11.12a(f) is amended to provide that if any fraudulent violation of the act with respect to imported articles comes to the attention of a Center director, the involved merchandise shall be placed under seizure, or a demand shall be made for the redelivery of the merchandise if it has been released from Customs custody, and the case shall be reported to the Federal Trade Commission, Washington, DC 20580.

Section 11.12b(b) is amended to provide that if imported fiber products are not correctly labeled and the Center director, rather than the port director, is satisfied that the error or omission involved no fraud or willful neglect, the importer shall be afforded a reasonable opportunity to label the merchandise under customs supervision to conform with the requirements of such Act and the rules and regulations of the Federal Trade Commission.

Section 11.12b(c) is amended to provide that the Center director, rather than the port director, will set the bond amount for packages of fiber products that are not designated for examination and are released.

Section 11.12b(d) is amended to require the Center director, rather than the port director, to provide written notice to the importer of any lack of compliance with the Textile Fiber Products Identification Act in respect of an importation of fiber products, and pursuant to § 141.113 of this chapter to demand the immediate return of the involved products to customs custody, unless the lack of compliance is corrected.

Section 11.12b(e) is amended to provide that the Center director, rather than the port director, needs to be fully satisfied that a product covered by a notice and demand given pursuant to § 11.12b(d), that has not been promptly returned to Customs custody, has been brought into compliance with the Fiber Products Identification Act (15 U.S.C. 70 through 70k).

Section 11.12b(f) is amended to provide that if any willful or flagrant violation of the Act with respect to the importation of articles comes to the attention of a Center director, the involved merchandise shall be placed under seizure, or a demand shall be made for the redelivery of the merchandise if it has been released from Customs custody, and the case shall be reported to the Federal Trade Commission, Washington DC 20580.

E. Part 12—Special Classes of Merchandise

Section 12.26(f) is amended to provide that if the permit referred to in § 12.26(e) is refused by the Fish and Wildlife Service, or if the permit is not produced within the said 30 days, an authorized CBP official (a CBP employee working for either the port director or the Center director) shall promptly recall the property, if delivered under bond, and shall require its immediate exportation at the expense of the importer or consignee.

Section 12.39(b)(2)(i) is amended to provide that, to enter merchandise that is the subject of a Commission exclusion order, importers must file with CBP prior to entry a bond in the amount determined by the Commission that contains the conditions identified in the special importation and entry bond set forth in appendix B to part 113 of this chapter. The term ''CBP'' here means that importers may file the bond with personnel working for either the port director or the Center director.

Section 12.39(b)(3) is amended to provide that CBP shall notify each importer or consignee of articles released under bond pursuant to § 12.39(b)(2) when the Commission's determination of a violation of § 337 becomes final and that entry of the articles is refused. The term ''CBP'' here means personnel working for either the port director or the Center director.

Section 12.39(b)(4) is amended to provide that in addition to the notice given to importers or consignees of articles released under bond, CBP shall provide written notice to all owners, importers or consignees of articles which are denied entry into the United States pursuant to an exclusion order that any future attempt to import such articles may result in the articles being seized and forfeited. The term ''CBP'' here means personnel working for either the port director or the Center director. The paragraph is also amended by removing ''by port directors'' in the last sentence to read as follows: Copies of all such notices are to be forwarded to the Executive Director, Commercial Targeting and Enforcement, Office of Trade, at CBP Headquarters, and to the Office of The General Counsel, USITC, 500 E Street SW., Washington, DC 20436.

Section 12.39(c)(1)(iii) is amended to conform with the modification to paragraph (b)(4), above. Similarly, the term ''CBP'' in this instance means personnel working for either the port director or the Center director.

Section 12.39(e)(2) is amended to provide that CBP shall enforce any court order or USITC exclusion order based upon a mask work registration in accordance with the terms of such order. The term ''CBP'' here means personnel working for either the port director or the Center director.

Section 12.73(j) is amended to provide that, if good cause is shown, the Center director, rather than the port director, has the authority to extend the period of time that the importer has to submit a U.S. Environmental Protection Agency (EPA) statement that the vehicle or engine is conformity with Federal emission requirements. The prescribed statement must be delivered by the importer to CBP, either to the port of entry or electronically. This means that the importer may continue to submit the statement using the means currently permitted, but the authority to collect the statement will be extended to the personnel working for either the Center director or port director.

Section 12.121(a)(2)(ii) is amended to provide that a Center director, rather than the port director, may, in his discretion, approve an importer's use of a ''blanket'' certification, in lieu of filing a separate certification for each chemical shipment, for any chemical shipment that conforms to a product description provided to Customs pursuant to § 12.121(a)(2)(ii)(A). This document also amends the section to provide that in approving the use of a ''blanket'' certification, the Center director, rather than the port director, should consider the reliability of the importer and Customs broker.

Section 12.121(a)(2)(ii)(A) is amended to provide that a ''blanket'' certification must be filed with CBP, either at the port of entry or electronically. This means that the importer may continue to submit the statement using the means currently permitted, but the authority to collect the statement will be extended to the personnel working for either the Center director or port director.

Section 12.121(a)(2)(ii)(B) is amended to provide that a ''blanket'' certification will remain valid, and may be used, for 1 year from the date of approval unless the approval is revoked earlier for cause by the Center director.

F. Part 24—Customs Financial and Accounting Procedure

Section 24.1(a)(3)(i) is amended to provide that an uncertified check drawn by an interested party on a national or state bank or trust company of the United States or a bank in Puerto Rico or any possession of the United States if such checks are acceptable for deposit by a Federal Reserve bank, branch Federal Reserve bank, or other designated depositary shall be accepted if there is on file with CBP a bond to secure the payment of the duties, taxes, fees, interest, or other charges, or if a bond has not been filed, the organization or individual drawing and tendering the uncertified check has been approved by an authorized CBP official (a CBP employee working for either the port director or the Center director) to make payment in such manner. In determining whether an uncertified check shall be accepted in the absence of a bond, an authorized CBP official shall use available credit data obtainable without cost to the Government, such as that furnished by banks, local business firms, better business bureaus, or local credit exchanges, sufficient to satisfy him of the credit standing or reliability of the drawer of the check.

Section 24.1(a)(3)(ii) is amended to provide that if, during the preceding 12-month period, an importer or interested party has paid duties or any other obligation by check and more than one check is returned dishonored by the debtor's financial institution, an authorized CBP official (a CBP employee working for either the port director or Center director) shall require a certified check, money order or cash from the importer or interested party for each subsequent payment until such time that an authorized CBP official is satisfied that the debtor has the ability to consistently present uncertified checks that will be honored by the debtor's financial institution.

Section 24.2 is amended to include Center directors to the list of CBP employees that are authorized to receive Customs collections. They are also permitted, along with the port directors, to designate employees who are authorized to receive Customs collections.

Section 24.4(a) is amended to provide that an importer, including a transferee of alcoholic beverages in a customs bonded warehouse who wishes to pay on a semi-monthly basis the estimated import taxes on alcoholic beverages entered, or withdrawn from warehouse, for consumption by him during such a period may apply by letter to the Center director, either at a port of entry or electronically, rather than to the director of each port at which he wishes to defer payment. The reason the language ''Center director, either at the port of entry or electronically'' is used rather than ''CBP, either at the port of entry or electronically'' is because the Center director will have the authority to permit a deferral of payment, but the importer may submit the letter either to the port of entry or electronically. The paragraph is also amended to provide that an importer who receives approval from the Center director, rather than the port director, to defer such payments may, however, continue to pay the estimated import taxes due at the time of entry, or withdrawal from warehouse, for consumption. While the Center directors will be responsible for the duty impact and entry summary aspects of the bonded warehouses, the port directors will remain responsible for the physical control and supervision of the bonded warehouses.

Section 24.4(b) is amended to provide that an importer may begin the deferral of payments of estimated tax to a

Customs port in the first deferral period beginning after the date of the written approval by the Center director, rather than the port director. An importer may use the deferred payment system until the Center director, rather than the port director, advises such importer that he is no longer eligible to defer the payment of such taxes.

Section 24.4(c)(1) is amended to provide that an importer must state his estimate of the largest amount of taxes to be deferred in any semimonthly period based on the largest amount of import taxes on alcoholic beverages deposited with CBP in such a period during the year preceding his application. He must also identify any existing bond or bonds that he has on file with CBP and shall submit in support of his application the approval of the surety on his bond or bonds to the use of the procedure and to the increase of such bond or bonds to such larger amount or amounts as may be found necessary by the Center director. These changes are being made to reflect that bonds will be maintained by both the port directors and Center directors and that bonds amount determinations related to the importation of alcoholic beverages will be made by the Center directors.

Section 24.4(c)(2) is amended to provide that each application noted in § 24.4 must include a declaration in substantially the following language: I declare that I am not presently barred by CBP from using the deferred payment procedure for payment of estimated taxes upon imports of alcoholic beverages, and that if I am notified by a Center director to such effect I shall advise any future Center director where approval has been given to me to use such procedure. The purpose of using the term ''CBP'' rather than keeping ''port director'' in this declaration is to take into account if the importer is presently barred by a port director or a Center director. The other instances of ''port director'' have been changed to ''Center director'' because this document is transferring from the port directors to the Center directors the authority to bar importers from using the deferred payment procedures for payment of estimated taxes upon imports of alcoholic beverages. Future Center directors are accounted for in this language in case an importer's industry changes and the importer is placed in a new Center.

Section 24.4(d)(1) is amended to provide that the Center director, rather than the port director, will notify the importer, or his authorized agent if requested, of approval for using the deferred payment procedures.

Section 24.4(i) is amended to provide that the deferred payment privilege once approved by the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017, will remain in effect until terminated under the provisions of § 24.4(h) or the importer or surety requests termination. This section is being amended to include date ranges because the decisions made prior to the effective date of these regulatory amendments will have been made by the port director or Center director (pursuant to the Delegation Order described in section I.B. of the Background section of this document) and the decisions made on or after the effective date of these regulatory amendments will be made by the Center director.

Section 24.14(c) is amended to provide that CBP's stamp, rather than the port director's stamp, will be impressed upon a completely prepared bill or receipt for the purchase of customs forms that is presented by the purchaser at the time of purchase.

G. Part 54—Certain Importations Temporarily Free of Duty

Section 54.5(b) is amended to provide that no deposit of estimated duty shall be required upon the entry, or withdrawal from warehouse for consumption, of the articles described in paragraph (a) of this section if the Center director, rather than the port director, is satisfied at the time of entry, or withdrawal, by written declaration of the importer that the merchandise is being imported to be used in remanufacture by melting, or to be processed by shredding, shearing, compacting, or similar processing which renders it fit only for the recovery of the metal content. The reason this authority is being transitioned to the Center director is because Center director personnel, rather than port director personnel, will be in the position to determine whether goods meet the requirements for duty free entry and determine rates of duty generally.

Section 54.6(c) is amended to require the importer to submit to CBP, either at the port of entry or electronically, a statement from the superintendent or manager of the plant at which the articles were used in remanufacture by melting, or were processed by shredding, shearing, compacting, or similar processing which rendered them fit only for the recovery of the metal content showing the information contained in § 54.6(c)(1)–(c)(4). Currently, the importer is required to submit this statement to the port director. The language is being amended to permit the importer to submit the statement using the means currently permitted, while also extending the authority to collect the statement to personnel working for either the Center director or the port director.

Section 54.6(c)(4) is amended to provide that the statement submitted by the importer must contain a description of the remanufacture or processing in sufficient detail to enable the Center director, rather than the port director, to determine whether it constituted a use in remanufacture by melting, or processing by shredding, shearing, compacting, or similar processing which rendered the articles fit only for the recovery of the metal content.

H. Part 101—General Provisions

Section 101.1 is amended to include: The definition for the Centers; the definition for Center director; the revised definition for port and port of entry; and the definition for port director. A new section 101.10 includes language describing the designation of Center Management Offices; the factors considered for the assignment of importers to the Centers; and the process for appealing a Center assignment. The new or amended language is described in detail in Section II.E of this document.

I. Part 102—Rules of Origin

Section 102.23(a) is amended to provide that if an entry filed for commercial importations of textile or apparel products fails to include the manufacturer identification code (MID) properly constructed from the name and address of the manufacturer, the Center director, rather than the port director, may reject the entry or take other appropriate action. The reason for this change is because entry rejection or other appropriate action will be done by personnel working for the Center director, rather than the port director.

Section 102.23(b) is amended to provide that if the Center director, rather than the port director, is unable to determine the country of origin of a textile or apparel product, the importer must submit additional information as requested by the Center director.

Section 102.25 is amended to provide that if the Center director, rather than the port director, is unable to determine the country of origin of the textile or apparel products for which preferential tariff treatment is sought, they will not be entitled to preferential tariff treatment or any other benefit under the NAFTA for which they would otherwise be eligible.

J. Part 103—Availability of Information

Section 103.26 is amended to add Center directors to the list of officials that may, in the interest of federal, state, and local law enforcement, upon receipt of demands of state or local authorities, and at the expense of the State, authorize employees under their supervision to attend trials and administrative hearings on behalf of the government in any state or local criminal case, to produce records, and to testify as to facts coming to their knowledge in their official capacities.

Section 103.32 is amended to add ''Center directors'' to the list of CBP officials who must refrain from disclosing facts concerning seizures, investigations, and other pending cases until Customs action is completed.

K. Part 113—Customs Bonds

Appendix B to part 113 is amended to provide that if it is determined, as provided in § 337 of the Tariff Act of 1930, as amended, to exclude merchandise from the United States, then, on notification from CBP, the principal is obligated to export or destroy under Customs supervision the merchandise released under this stipulation within 30 days from the date of the CBP's notification. The purpose of this change is to enable CBP to transition to the Center directors the exclusion order functions provided in section 12.39 of title 19 of the CFR (19 CFR 12.39).

Appendix C to part 113 currently notes that the corporate seal is to be used when no power of attorney has been filed with the port director of customs. This document amends Appendix C to part 113 by removing the words ''the port director of customs'' and adding in their place the term ''CBP'', which means personnel working for either the port director or the Center director.

L. Part 132—Quotas

Section 132.11a(c) is amended to provide that if presentation is chosen to be made pursuant to § 132.11a(a)(2) and payment is not made as required through the statement processing method, the Center director, rather than the port director, may require filing of an entry summary for consumption with estimated duties attached as described in § 132.11(a)(1) for future filings.

Section 132.12(a) is amended to provide that the Center director, rather than the port director, will approve the opening of the quota period.

Section 132.13(a)(1)(i) is amended to provide that when instructed by Headquarters, the Center director, rather than the port director, will require an importer to present an entry summary for consumption, or its electronic equivalent, with estimated duties attached, at the over-quota rate of duty until Headquarters has determined the quantity, if any, of the merchandise entitled to the quota rate.

Section 132.13(a)(1)(ii) is amended to provide that the documentation must be presented to CBP, either at the port of entry or electronically, which here means that the importer may use the method(s) of submission currently permitted to submit the documentation; however, the authority to collect the documentation is being extended to the personnel working for either the port director or the Center director.

Section 132.13(a)(2) is amended to remove the words ''at the port of entry'' and replaced with ''to CBP, either at the port of entry or electronically'' so as to provide that the entry summary for consumption or withdrawal for consumption, or their electronic equivalents, must be presented to CBP, which means personnel working for either the port director or the Center director, using the means currently permitted.

Section 132.14(a)(4)(i)(A) is amended to provide that an authorized CBP official (a CBP employee working for either the port director or the Center director) may demand the return to Customs custody of the released merchandise in accordance with § 141.113.

Section 132.14(a)(4)(i)(B) is amended to provide that the Center director shall require the timely presentation to CBP, either at the port of entry or electronically, of the entry summary for consumption, or a withdrawal for consumption, with the estimated duties attached. The term to ''CBP, either at the port of entry or electronically'', here means that the documentation may be presented to CBP using the means currently permitted; however, the authority to collect the documentation is being extended to the personnel working for either the port director or the Center director.

Section 132.14(a)(4)(ii)(A) is amended to provide that the Center director shall require the timely presentation, to CBP, either at the port of entry or electronically, of the entry summary for consumption, or a withdrawal for consumption, with estimated duties attached. The term to ''CBP, either at the port of entry or electronically'', here means that the documentation may be presented to CBP using the means currently permitted; however, the authority to collect the documentation is being extended to the personnel working for either the port director or the Center director.

M. Part 133—Trademarks, Trade Names, and Copyrights

Section 133.26 is amended by permitting an authorized CBP official to demand redelivery of released merchandise. This section is amended by removing the words ''the port director'' and adding in their place the words ''an authorized CBP official'' so as to extend the authority to demand redelivery of released merchandise to a CBP employee working for either the port director or the Center director.

Section 133.46 is amended to provide that if it is determined that articles which have been released from CBP custody are subject to the prohibitions or restrictions of this subpart, an authorized CBP official (a CBP employee working for either the port director or the Center director) shall promptly make demand for redelivery of the articles under the terms of the bond on CBP Form 301, containing the bond conditions set forth in § 113.62, in accordance with § 141.113.

N. Part 134—Country of Origin Marking

Section 134.3(b) is amended by removing the words ''[t]he port director'' and replacing it with ''[a]n authorized CBP official'' so as to provide that CBP employees working for either the port director or the Center director have joint authority to demand redelivery of released articles that were not marked legally with the country of origin. CBP notes that while the redelivery notices may be sent out by either personnel working for the port director or the Center director, the resolution of marking issues will be the sole authority of the Center directors.

Section 134.25(a) is amended by removing the words ''port director having custody of the article,'' and adding in their place the words ''Center director'' to provide that the Center director, rather than the port director, is the party who will make the determination as to whether the article in question will be repacked after its release. Moreover, the paragraph is amended to require the importer to certify to the Center director that: (1) If the importer does the repacking, the new container shall be marked to indicate the country of origin of the article in accordance with the requirements of this part; or (2) if the article is intended to be sold or transferred to a subsequent purchaser or repacker, the importer shall notify such purchaser or transferee, in writing, at the time of sale or transfer, that any repacking of the article must conform to

these requirements. This section is also amended by removing the words ''at each port where the article is entered'' and adding in their place the words ''CBP, either at the port of entry or electronically.'' The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the certification is being extended to personnel working for either the port director or the Center director.

Section 134.25(c) is amended to require the certificate of marking for repacked J-list articles and articles incapable of being marked to be filed with the Center director, rather than with the port director. The section is also amended to provide that in case of failure to timely file the certification required under § 134.25, the Center director may decline to accept a bond for the missing document and demand redelivery of the merchandise under § 134.51.

Section 134.26(a) is amended by removing the words ''port director having custody of the article,'' and adding in their place the words ''Center director'' to provide that the Center director, rather than the port director, is the party who will make the determination as to whether the article in question will be repacked after its release. Moreover, the paragraph is amended to require the importer to certify to CBP, either at the port of entry or electronically, that: (1) If the importer does the repacking, he shall not obscure or conceal the country of origin marking appearing on the article, or else the new container shall be marked to indicate the country of origin of the article in accordance with the requirements of this part; or (2) if the article is intended to be sold or transferred to a subsequent purchaser or repacker, the importer shall notify such purchaser or transferee, in writing, at the time of sale or transfer, that any repacking of the article must conform to these requirements. This section is also amended by removing the words ''at each port where the article(s) is entered'' and adding in their place the words ''CBP, either at the port of entry or electronically.'' The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the certification is being extended to personnel working for either the port director or the Center director.

Section 134.26(c) is amended by noting that the certificate of marking statement required in § 134.26(a) must be filed with the Center director, rather than the port director, and in case of repeated failure to timely file the required certification, the Center director, rather than the port director, may decline to accept a bond for the missing document and demand redelivery of the merchandise under § 134.51.

Section 134.34(a) is amended to allow the Center director, rather than the port director, to make an exception under § 134.32(d).

Section 134.34(b) is amended by noting that the Center director, rather than the port director, will have the authority to extend the sixty (60)-day deferral period for liquidation of entries of imported articles which are to be repacked after release from CBP custody.

Section 134.51(a) is amended by requiring the Center director, rather than the port director, to notify the importer on Customs Form 4647, or its electronic equivalent, to arrange with the Center director's office, rather than the port director's office, to properly mark an article or container that has not been legally marked, or to return all released articles to CBP custody for marking, exportation, or destruction.

Section 134.51(b) is amended by requiring that the identity of the imported article, which was not legally marked and is to be exported, destroyed, or marked under CBP supervision, to be established to the satisfaction of the Center director, rather than the port director.

Section 134.51(c) is amended by noting that the Center director, rather than the port director, may accept a certificate of marking as provided for in § 134.52 in lieu of marking under CBP supervision.

Section 134.52(a) is amended by noting that Center directors, rather than port directors, may accept certificates of marking supported by samples of articles required to be marked, for which Customs Form 4647, or its electronic equivalent, was issued, from importers or from actual owners complying with the provision of § 141.20, to certify that marking of the country of origin on imported articles as required by this part has been accomplished.

Section 134.52(b) is amended by requiring that the certificates of marking must be filed in duplicate with CBP, either at the port of entry or electronically. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of filing the certificates of marking as currently permitted; however, the authority to collect the certification is being extended to personnel working for either the port director or the Center director. Moreover, the Center director, rather than the port director, will now have the authority to waive the production of the marked sample when he is satisfied that the submission of such sample is impracticable.

Section 134.52(c) is amended by requiring the Center director, rather than the port director, to notify the importer or actual owner when the certificate of marking is accepted. Moreover, the paragraph is amended to authorize the Center director, rather than the port director, to spot check the marking of articles on which a certificate has been filed.

Section 134.52(d) is amended by removing the words ''port director'' and adding in their place the words ''Center director'', thereby stating that if a false certificate of marking is filed with the Center director indicating that goods have been properly marked when in fact they have not been so marked, a seizure shall be made or claim for monetary penalty reported under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592).

Section 134.52(e) is amended by noting that the Center director, rather than the port director, may require physical supervision of marking as specified in § 134.51(c) in those cases in which he determines that such action is necessary to insure compliance with part 134.

Section 134.53(a)(2) is amended by providing the Center director, rather than the port director, with the discretion to accept a bond on CBP Form 301, containing the basic importation and entry bond conditions set forth in § 113.62 as security for the requirements of 19 U.S.C. 1304(f) and (g).

Section 134.54(a) is amended to provide that the Center director, rather than the port director, is allowed, for good cause shown, to extend the 30 day period of time that the importer has to properly mark or redeliver all merchandise previously released to him.

The ability to demand payment of liquidated damages incurred under the bond will remain with the port director.

O. Part 141—Entry of Merchandise

Section 141.20(a)(1) is amended to provide that a consignee in whose name an entry summary for consumption, warehouse, or temporary importation under bond is filed, or in whose name a rewarehouse entry or a manufacturing warehouse entry is made, and who desires, under the provisions of section

485(d), Tariff Act of 1930, as amended (19 U.S.C. 1485(d)), to be relieved from statutory liability for the payment of increased and additional duties shall declare at the time of the filing of the entry summary or entry documentation, as provided in § 141.19(a), that he is not the actual owner of the merchandise, furnish the name and address of the owner, and file with CBP, either at the port of entry or electronically, within 90 days from the time of entry (see § 141.68) a declaration of the actual owner of the merchandise acknowledging that the actual owner will pay all additional and increased duties. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the declaration is being extended to personnel working for either the port director or the Center director.

Section 141.20(a)(2) is amended to provide that if the consignee desires to be relieved from contractual liability for the payment of increased and additional duties voluntarily assumed by him under the single-entry bond which he filed in connection with the entry documentation and/or entry summary, or under his continuous bond against which the entry and/or entry summary is charged, he shall file a bond of the actual owner on Customs Form 301, containing the bond conditions set forth in § 113.62 of this chapter, with CBP, either at the port of entry or electronically, within 90 days from the time of entry. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the bond is being extended to personnel working for either the port director or the Center director.

Section 141.35 is amended to provide that any power of attorney shall be subject to revocation at any time by written notice given to and received by CBP, either at the port of entry or electronically. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the written notice is being extended to personnel working for either the port director or the Center director.

Section 141.38 is amended to provide that a power of attorney shall not be required if the person signing Customs documents on behalf of a resident corporation is known to CBP to be the president, vice president, treasurer, or secretary of the corporation. When a power of attorney is required for a resident corporation, it shall be executed by a person duly authorized to do so. The term ''CBP'' here means either the personnel working for the port director or the personnel working for the Center director.

Section 141.44 is amended to provide that unless a power of attorney specifically authorizes the agent to act thereunder at the appropriate Center and at all Customs ports, the name of the appropriate Center or each port where the agent is authorized to act thereunder shall be stated in the power of attorney. The power of attorney shall be filed with CBP, either at the port of entry or electronically, in a sufficient number of copies for distribution to the appropriate Center and each port where the agent is to act, unless exempted from filing by § 141.46. The Center director or port director with whom a power of attorney is filed, irrespective of whether his Center or port is named therein, shall approve it, if it is in the correct form and the provisions of this subpart are complied with, and forward any copies intended for other ports or another Center as appropriate. The language ''CBP, either at the port of entry or electronically'' here means that the power of attorney may be filed using the means of submission currently permitted; however, the authority to collect the power of attorney documentation is being extended to personnel working for either the port director or the Center director.

Section 141.45 is amended to provide that upon request of a party in interest, the Center director or a port director may have on file an original power of attorney document and will forward a certified copy of the document to another Center director or port director.

Section 141.46 currently states that a customhouse broker is required to obtain a valid power of attorney but he is not required to file the power of attorney with a port director. This document amends § 141.46 by removing the words ''a port director'' and adding in their place the term ''CBP'' to mean either the port director personnel or the Center director personnel.

Section 141.52 is amended to provide that under certain delineated circumstances, if the Center director, rather than the port director, is satisfied that there will be no prejudice to: Import admissibility enforcement efforts; the revenue; and the efficient conduct of CBP business, separate entries may be made for different portions of all merchandise arriving on one vessel or vehicle and consigned to one consignee. One of the delineated circumstances, specifically § 141.52(i), is also amended to remove the reference to the ''port director'' and add ''Center director'' to read as follows: A special application is submitted to the Commissioner of Customs with the recommendation of the Center director concerned and is approved by the Commissioner.

Section 141.56(a) is amended to provide that CBP may accept, either at the port of entry or electronically, one entry summary for consumption or for warehouse for merchandise covered by multiple entries for immediate transportation, subject to the requirements of § 142.17(a), provided the merchandise covered by each immediate transportation entry is released at the port of destination under a separate entry, in accordance with § 142.3. The reference to ''port directors'' is being removed and replaced with ''CBP may accept, either at the port of entry or electronically'' because the authority to accept the entry summary will continue to reside with the personnel working for the port directors and will also be extended to the personnel working for the Center directors. Importers will continue to have the ability to submit the documentation at the port or electronically and this ability is merely being reflected in the regulation.

Section 141.61(e)(2) is amended to provide that a Center director, rather than a port director, may require additional documentation to substantiate the statistical information required by § 141.61(e)(1).

Section 141.61(e)(2)(ii) is amended to provide that a Center director, rather than a port director, may grant a reasonable extension of time to produce the required documentation for good cause shown. (See § 141.91(d) for bond requirements relating to failure to produce an invoice.)

Section 141.61(e)(4) is amended to provide that a Center director, rather than a port director, will reject a form for failure to provide required statistical information if the information is omitted or if the information provided clearly appears on its face, or is known to the CBP officer, to be erroneous.

Section 141.63(a) is amended to provide that under certain delineated circumstances, entry summary documentation may be submitted at the customhouse for preliminary review, without estimated duties attached, within such time before arrival of the merchandise as may be fixed by the Center director, rather than by the port director.

Section 141.63(b) is amended to provide that entry summary documentation may be submitted at the

customhouse for preliminary review, without estimated duties attached, within such time after arrival of quota-class merchandise as may be fixed by the Center director, if the entry summary for consumption will be presented at the opening of the quota period, as provided in § 132.12(a).

Section 141.69(c) is amended by removing the words ''the port director'' and adding in their place the words ''CBP'' so as to provide that personnel working for either the port director or the Center director may require documentary evidence as to the movement of merchandise between its removal from the port of entry or the place of intended release and its return to the port of entry.

Section 141.83(c)(2) is amended by removing the words ''[t]he port director'' and replacing it with ''CBP''. The first sentence of the paragraph would therefore read: ''CBP may accept a copy of a required commercial invoice in place of the original.'' This change would allow the commercial invoice when necessary for entry (for purposes of release) to remain with the port director and when necessary for entry summary and withdrawal for consumption to be handled by the Center director.

Section 141.85 the Pro Forma Invoice language is amended by removing the words ''Advices of the Port Director'' and adding in their place the term ''CBP''. The purpose of this change is to note that the prices, or in the case of consigned goods the values, of the merchandise may be based on the advices of the port director personnel or the Center director personnel. This document also amends § 141.85 by removing the words ''file it with the Port Director'' and adding in their place the words ''file it with an authorized CBP official''. The purpose of this change is to note that the invoice may be filed with an ''authorized CBP official'', meaning a CBP employee working for either the port director or the Center director.

Section 141.86(a) includes a list of information that must be included in each invoice of imported merchandise. Paragraph 141.86(a)(11) provides that the invoice must set forth all goods or services furnished for the production of the merchandise *(e.g.,* assists such as dies, molds, tools, engineering work) not included in the invoice price. However, goods or services furnished in the United States are excluded. The paragraph is being amended to provide that annual reports for goods and services, when approved by the Center director, rather than the port director, will be accepted as proof that the goods or services were provided.

Section 141.88 is amended to provide that when the Center director, rather than the port director, determines that information as to computed value is necessary in the appraisement of any class or kind of merchandise, he shall so notify the importer, and thereafter invoices of such merchandise shall contain a verified statement by the manufacturer or producer of computed value as defined in § 402(e), Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. 1401a(e)).

Section 141.91(a) is amended by removing the words ''[t]he port director'' and adding in their place the term ''CBP''. This change would allow the port director personnel to accept entry documentation without the invoice and would allow the Center director personnel to accept entry summary documentation without the invoice if they are satisfied that the failure to produce the required invoice is due to a cause beyond the control of the importer.

Section 141.91(d) is amended to provide that if needed for statistical purposes, the invoice shall be produced within 50 days after the date of the entry summary (or the entry, if there is no entry summary) is required to be filed, unless a reasonable extension of time is granted by the Center director, rather than the port director, for good cause shown.

Section 141.92(a) is amended by removing the words ''[t]he port director'' and adding in their place the term ''CBP''. This change would allow the port director personnel (at entry stage) and the Center director personnel (at the entry summary stage) to waive production of a required invoice when they are satisfied that either: (1) the importer cannot by reason of conditions beyond his control furnish a complete and accurate invoice; or (2) the examination of merchandise, final determination of duties, and collection of statistics can be effected properly without the production of the required invoice.

Section 141.92(b) includes a list of documents that are required to be filed by the importer with the entry as a condition to the granting of a waiver for the production of a required invoice. This document amends § 141.92(b)(4) to provide that the Center director, rather than the port director, may require other information for either appraisement or classification of the merchandise, or for statistical purposes. This responsibility is being provided to only the Center director because it concerns appraisement and classification issues.

Section 141.105 is amended to provide that if either the importer of record or the actual owner whose declaration and superseding bond have been filed in accordance with § 141.20 desires, he may estimate, on the basis of information contained in the entry papers or obtainable from the Center director, rather than the port director, the probable amount of unpaid duties which will be found due on the entire entry and deposit them in whole or in part with CBP, either at the port of entry or electronically. The deposit shall be tendered in writing in the form provided in § 141.105 and instead of using the words ''To the Port Director'' the form should state ''To CBP''. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the unpaid duties is being extended to personnel working for either the port director or the Center director.

Section 141.113(a)(2) is amended to provide that the Center director, rather than the port director, may demand the return to CBP custody of merchandise that is found after release to be not legally marked. Demand may be made no later than 30 days after the date of examination in the case of merchandise examined at the importer's premises or such other appropriate places as determined by the port director or Center director.

Section 141.113(b) is amended to provide that if the Center director, rather than the port director, finds during the conditional release period that a textile or textile product is not entitled to admission into the commerce of the United States because the country of origin of the textile or textile product was not accurately represented to CBP, he shall promptly demand its return to CBP custody.

Section 141.113(c)(3) is amended to provide that the FDA will communicate to the Center director, rather than the port director, if the FDA refuses admission of a food, drug, device, cosmetic, or tobacco product into the United States, or if any notice of sampling or other request is not complied with. The paragraph is also amended to provide that the demand for redelivery of the product to CBP custody may be carried out by an authorized CBP official (a CBP employee working for either the port director or the Center director). The prescription of a bond, described in the last sentence of the paragraph, will remain with the port director.

Section 141.113(d) is amended by removing the words ''the port director'' and adding in their place the words ''an authorized CBP official'' and by removing the words ''he'' and adding in its place the words ''an authorized CBP official''. The reason for these changes is to note that if at any time after entry an authorized CBP official, which may be a CBP employee working for either the port director or the Center director, finds that any merchandise contained in an importation is not entitled to admission into the commerce of the United States for any reason not enumerated in §§ 141.113(a), (b), or (c), that same authorized CBP official or a different authorized CBP official shall promptly demand the return to CBP custody of any such merchandise which has been released.

Section 141.113(e) is amended by removing the words ''the port director'' and adding in their place the words ''an authorized CBP official''. The reason for this amendment is to note that if the importer has not promptly complied with a request for samples or additional examination packages made by an authorized CBP official (which may be a CBP employee working for either the port director or the Center director) pursuant to § 151.11, that same authorized CBP official or a different authorized CBP official may demand the return of the necessary merchandise to CBP custody.

Section 141.113(g) is amended by noting that an authorized CBP official, which is a CBP employee working for either the port director or the Center director, will retain one copy, with the date of mailing or delivery noted thereon, of the demand for the return of merchandise to CBP, which is made on Customs Form 4647, or its electronic equivalent, other appropriate form, or by letter, and it will be made part of the entry record.

Section 141.113(i) is amended to reflect that an authorized CBP official (a CBP employee working for either the port director or the Center director) may demand return of merchandise to CBP custody.

P. Part 142—Entry Process

Section 142.3(c) is amended by removing the reference to ''port director'' and replacing it with ''CBP'' because the authority to require additional copies of the entry summary documentation will continue to reside with the personnel working for the port directors and will also be extended to the personnel working for the Center directors.

Section 142.11(b) is amended by removing the reference to ''port director'' and replacing it with ''CBP'' because the authority to require additional copies of the entry summary will continue to reside with the personnel working for the port directors and will also be extended to the personnel working for the Center directors.

Section 142.13(a) is amended to provide that CBP, meaning either the personnel working for the Center director or the port director, may require that the entry summary documentation be filed and that estimated duties, if any, be deposited at the time of entry before the merchandise is released if any of the circumstances noted in § 142.13(a)(1)–(4) apply. The reason that the Center director personnel and the port director personnel will have joint authority for live entries is to ensure that the trade mission and security mission are met regardless of the hour of operation for either of the personnel.

Section 142.17(a) is amended to provide that the Center director, rather than the port director, has the authority to permit the filing of one entry summary for merchandise the subject of separate entries if certain delineated circumstances are met.

Section 142.17a(a) is amended to provide that the Center director, rather than the port director, may permit a broker as nominal consignee to file a consolidated entry summary in his own name under his own bond covering shipments of like or similar merchandise consigned to various ultimate consignees as long as certain delineated circumstances are met.

Section 142.18(a) is amended to provide that an authorized CBP official (a CBP employee working for either the port director or the Center director) will demand return to CBP custody of merchandise released at time of entry that is later found to be prohibited in accordance with § 141.113.

Section 142.28(a) is amended to provide that that an authorized CBP official (a CBP employee working for either the port director or the Center director) will demand return to CBP custody if merchandise released under a special permit for immediate delivery later is found to be prohibited.

Q. Part 143—Special Entry Procedures

Section 143.22 is amended to provide that CBP may require a formal consumption or appraisement entry for any merchandise if deemed necessary for import admissibility enforcement purposes; revenue protection; or the efficient conduct of customs business. This means that either port director or Center director personnel may require a formal consumption or appraisement entry in these circumstances. While the handling of informal entries will be transitioned to the Center directors, in this case, personnel working for either the port director or the Center director need to have the authority to require formal entry to ensure that the trade mission is met regardless of the hour of operation for either of the personnel.

Section 143.23 is amended to provide that except for the types of merchandise listed in § 143.23 which may be entered on the forms indicated, merchandise to be entered informally must be entered on a CBP Form 368 or 368A, (serially numbered) or CBP Form 7501, or its electronic equivalent or, if authorized by the Center director, rather than the port director, upon the presentation of a commercial invoice which contains the declaration noted in § 143.23, signed by the importer or his agent. This function is being transitioned to the Center directors because it involves informal entry.

R. Part 144—Warehouse and Rewarehouse Entries and Withdrawals

Section 144.5 is amended to provide that merchandise must not remain in a bonded warehouse beyond 5 years from the date of importation or such longer period of time as the Center director, rather than the port director, may at his discretion permit upon proper request being filed and good cause shown. While the Center directors will be responsible for the duty impact and entry summary aspects of the bonded warehouses, the port directors will remain responsible for the physical control and supervision of the bonded warehouses.

Section 144.12 is amended to provide that the entry summary, Customs Form 7501, or its electronic equivalent shall show the value, classification, and rate of duty as approved by the Center director, rather than the port director, at the time the entry summary is filed.

Section 144.13 is amended to provide that a bond on Customs Form 301, containing the bond conditions set forth in § 113.62 shall be filed in the amount required by the Center director, rather than the port director, to support the entry documentation. The reason that the Center director will be determining the amounts for these bonds is because the bond is for the purpose of protecting the revenue.

Section 144.38 concerns withdrawals for consumption. Section 144.38(d) is amended to provide that the Center director, rather than the port director, may increase or decrease the amount of estimated duties to be deposited on the final withdrawal to bring the aggregate amount of duties deposited into balance

with the amount which he estimates will be finally due upon liquidation.

Section 144.41(h) is amended to provide that a protest may be filed with CBP, either at the port of entry or electronically, against a liquidation made under § 159.7(a) or (b) of this chapter, or against a refusal to liquidate pursuant to said sections. In all other cases, any protest shall be filed against the original warehouse entry. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the protest is being extended to personnel working for either the port director or the Center director.

S. Part 145—Mail Importations

Section 145.12(a) is amended to provide that CBP, meaning personnel working for either the Center director or the port director, may require formal entry of any mail shipment regardless of value if it is necessary to protect the revenue. The reason that the Center director personnel and the port director personnel will have joint authority for requiring formal entry is to ensure that the trade mission is met regardless of the hour of operation for either of the personnel.

Section 145.14(b) is amended to provide that since there is no provision for post office supervision of these special marking requirements, such as those contained in the Textile Fiber Products Identification Act, the Wool Products Labeling Act, and the Trademark Act, CBP shall require compliance with the law and regulations (see parts 11 and 133 of this chapter). Currently, the regulatory language provides that the ''port director shall require compliance'', but the language is being amended in this document to note that ''CBP'' shall require compliance since both Center director and port director personnel will be enforcing the applicable laws and regulations.

T. Part 146—Foreign Trade Zones

Section 146.65(b)(3) is amended to provide that an allowance in the dutiable value of foreign trade zone merchandise may be made by the Center director, rather than by the port director, in accordance with the provisions of subparts B and C of part 158 (19 CFR part 158, subparts B and C), for damage, deterioration, or casualty while the merchandise is in the zone.

Section 146.65(c) is amended to provide that the Center director, rather than the port director, is authorized to provide an extension of liquidation.

U. Part 147—Trade Fairs

Section 147.32 is amended to provide that the Center director, rather than the port director, will detail an officer to act as his representative at the fair and shall station inside the buildings as many additional Custom officers and employees as may be necessary to properly protect the revenue.

Section 147.33 is amended to read as follows: [a]ll actual and necessary charges for labor, services, and other expenses in connection with the entry, examination, appraisement, custody, abandonment, destruction, or release of articles entered under the regulations of this part, together with the necessary charges for salaries of Customs officers and employees in connection with the accounting for, custody of, and supervision over, such articles, shall be reimbursed by the fair operator to the Government, payment to be made to CBP, either at the port of entry or electronically, on the port director's or Center director's demand made before January 19, 2017 or on the Center director's demand made on or after January 19, 2017, for deposit to the appropriation from which paid. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the payment is being extended to personnel working for either the port director or the Center director. This section is being amended to include date ranges because the demands made prior to the effective date of these regulatory amendments will have been made by the port director or Center director (pursuant to the Delegation Order described in section I.B. of the Background section of this document) and the demands made on or after the effective date of these regulatory amendments will be made by the Center director.

Section 147.41 is amended by noting that the Center director, rather than the port director, may demand payment of any unpaid duty, tax, fees, charges, or exaction due on any article removed from the trade fair premises or disposed of contrary to subpart E of part 147, including any article lost or stolen regardless of the fair operator's fault. The section is also amended to provide that the payment must be made to CBP, either at the port of entry or electronically. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the payment is being extended to personnel working for either the port director or the Center director.

V. Part 151—Examination, Sampling, and Testing of Merchandise

Section 151.10 is amended to provide that when necessary, an authorized CBP official, which includes personnel working for either the port director or the Center director, may obtain samples of merchandise for appraisement, classification, or other official purposes.

Section 151.11 is amended to provide that if an authorized CBP official (a CBP employee working for either the port director or the Center director) requires samples or additional examination packages of merchandise which has been released from CBP custody, an authorized CBP official (either the CBP official that made the initial requestor a different CBP official) will send the importer a written request, on Customs Form 28, or its electronic equivalent, Request for Information, or other appropriate form, to submit the necessary samples or packages. If the request is not promptly complied with, that same authorized CBP official or a different authorized CBP official may make a demand under the bond for the return of the necessary merchandise to CBP custody in accordance with § 141.113 of this chapter.

Section 151.12(c)(5) is amended to provide that a commercial laboratory accredited by Customs agrees to promptly investigate any circumstance which might affect the accuracy of work performed as an accredited laboratory, to correct the situation immediately, and to notify the port director, the Executive Director, and the Center director of such matters, their consequences, and any corrective action taken or that needs to be taken. The amendment adds ''Center director'' to the list of persons who must be provided notification.

Section 151.12(c)(6) is amended to provide that a commercial laboratory accredited by Customs agrees to immediately notify the port director, the Executive Director, and the Center director of any attempt to impede, influence, or coerce laboratory personnel in the performance of their duties, or of any decision to terminate laboratory operations or accredited status. The amendment adds ''Center director'' to the list of persons who must be provided notification.

Section 151.13(b)(5) is amended to provide that a commercial gauger approved by Customs agrees to promptly investigate any circumstance which might affect the accuracy of work performed as an approved gauger, to correct the situation immediately, and

to notify the port director, the Executive Director, and the Center director of such matters, their consequences, and any corrective action taken or that needs to be taken. The amendment adds ''Center director'' to the list of persons who must be provided notification.

Section 151.13(b)(6) is amended to provide that a commercial gauger approved by Customs agrees to immediately notify the port director, the Executive Director, and the Center director of any attempt to impede, influence, or coerce gauger personnel in the performance of their duties, or of any decision to terminate gauger operations or approval status. The amendment adds ''Center director'' to the list of persons who must be provided notification.

Section 151.51(b) is amended to provide that when, on the basis of invoice information, the nature of any available sample, knowledge of prior importations of similar materials, and other data, the Center director, rather than the port director, is satisfied that metal-bearing ores entered under heading 2617, HTSUS, as containing less than 1 percent of metals dutiable under headings 2603, 2607, and 2608, HTSUS, are properly entered, he may liquidate the entry on the basis of the assay information contained in the entry papers.

Section 151.52(c) is amended to provide that where no commercial samples have been taken, an authorized CBP official (a CBP employee working for either the port director or the Center director) shall take representative samples from different parts of the shipment.

Section 151.54 is amended to provide that an authorized CBP official (a CBP employee working for either the port director or the Center director) may secure from the importer a certified copy of the commercial settlement tests for moisture and for assay which shall be transmitted with the commercial samples to the Custom laboratory.

Section 151.55 is amended to provide that deductions for the loss of copper, lead, or zinc content during processing, as authorized by Chapter 26, Additional U.S. Note 1, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202), shall be made by the Center director, rather than the port director, in the liquidation of any entry only if the importer has followed the procedures set forth in that headnote.

Section 151.65 is amended to provide that duties on wool or hair subject to duty at a rate per clean kilogram may be estimated at the time of filing the entry summary on the basis of the clean yield shown on the entry summary if the Center director, rather than the port director, is satisfied that the revenue will be properly protected. Liquidated duties shall be based upon the Center director's, rather than the port director's, final determination of clean yield. Moreover, the section is amended to provide that this adjustment shall be made by increasing or decreasing such estimated percentage clean yield of each lot by the difference between the percentage clean yield of the related sampling unit, as determined by the Center director, rather than the port director, and the weighted average percentage clean yield for the sampling unit, as computed from the estimated percentages clean yield and net weights shown on the entry summary for the lots included in the sampling unit.

Section 151.68(c) is amended to provide that an authorized CBP official (a CBP employee working for either the port director or the Center director) may designate other imported wool or hair to be weighed, sampled, and tested for clean yield, unless such sampling or testing is not feasible.

Section 151.69(b) is amended to provide that when part of an original sampling unit, which has been weighed, sampled, and tested in accordance with subpart E of part 151, is exported from continuous Customs custody without having been manipulated as provided for in section 562, Tariff Act of 1930, as amended (19 U.S.C. 1562), the percentage clean yield of the part not exported shall be determined, at the discretion of the Center director, rather than the port director, either on the basis of a new determination by reweighing, resampling, and retesting, or by a computation as described in § 151.69(a), for either the exported or the remaining part.

Section 151.70 is amended to provide that the Center director or chief chemist, rather than the port director, may desire a second test for clean yield of wool or hair.

Section 151.71(a) is amended to provide that a report of the percentage clean yield of each general sample as established by test in a Customs laboratory, or a statement of the reason for not testing a general sample, shall be forwarded to the Center director, rather than to the port director.

Section 151.71(b) is amended to provide that where samples of wool or hair have been tested in a Customs laboratory and the Center director, rather than the port director, has received a copy of the Laboratory Report, Customs Form 6415, the Center director, rather than the port director, shall promptly provide notice of the test results by mailing a copy of that report to the importer.

Section 151.71(c) is amended to provide that if the importer is dissatisfied with the port director's or Center director's finding of clean yield, made before January 19, 2017, or the Center director's finding of clean yield made on or after January 19, 2017, he may file with CBP, either at the port of entry or electronically, a written request in duplicate for another laboratory test for percentage clean yield. Such request shall be filed within 14 calendar days after the date of mailing of the notice of the port director's or Center director's finding of clean yield. The request shall be granted if it appears to the Center director to be made in good faith and if a second general sample as provided for in § 151.70 is available for testing, or if all packages or, in the opinion of the Commissioner of Customs, an adequate number of the packages represented by the general sample are available and in their original imported condition. This section is being amended to include date ranges because the decisions made prior to the effective date of these regulatory amendments will have been made by the port director or Center director (pursuant to the Delegation Order described in section I.B. of the Background section of this document) and the decisions made on or after the effective date of these regulatory amendments will be made by the Center director. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the written request for another laboratory test for percentage clean yield is being extended to personnel working for either the port director or the Center director.

Section 151.73(b) is amended to provide that the importer's request shall be filed in writing with the Center director within 14 calendar days after the date of mailing of the notice of the port director's or Center director's findings based on the retest mailed before January 19, 2017, or within 14 calendar days after the date of mailing of the notice of the Center director's findings based on the retest mailed on or after January 19, 2017. This provision is amended to include reference to mailings sent before and after the effective date of this document in the **Federal Register** because before the effective date of this document, the port director or Center director (pursuant to the Delegation Order described in section I.B. of the Background section of this document) will have issued the findings and the findings issued on or

after the effective date of this document, will be issued by the Center director.

Section 151.73(c) is amended to provide that the Center director, rather than the port director, shall cause a representative quantity of the wool or hair in dispute to be selected and tested by a commercial method approved by the Commissioner of Customs. Moreover, the paragraph is amended to note that such test shall be made under the supervision and direction of the Center director, rather than the port director, at an establishment approved by him, and the expense thereof, including the actual expense of travel and subsistence of Customs officers but not their compensation, shall be paid by the importer.

Section 151.74 is amended to provide that if the Center director, rather than the port director, is not satisfied with the results of any test provided for in § 151.71 or § 151.73, he may, within 14 calendar days after receiving the report of the results of such test, proceed to have another test made upon a suitable sample of the wool or hair at the expense of the Government. When the Center director, rather than the port director, is proceeding to have another test made, he shall, within the 14-day period specified in this paragraph, notify the importer by mail of that fact.

Section 151.75 is amended to provide that the Center director, rather than the port director, has the authority to make a final determination on clean yield and must base that determination upon a consideration of all the tests made in connection with the wool or hair concerned.

Section 151.76(a) is amended to provide that the Center director, rather than the port director, shall cause wool dutiable at a rate per clean kilogram to be examined for grade.

Section 151.76(b) is amended to provide that if classification of the wool at the grade or grades determined on the basis of the examination will result in the assessment of duty at a rate higher than the rate provided for wool of the grade stated in the entry, the Center director, rather than the port director, shall promptly notify the importer by mail.

Section 151.76(c) is amended to provide that if the importer is dissatisfied with the port director's or Center director's findings as to the grades of wool, made before January 19, 2017, or the Center director's findings as to the grade or grades of the wool made on or after January 19, 2017, he may, within 14 calendar days after the date of mailing of the notice of the port director's or Center director's findings, file in duplicate a written request with the Center director for another determination of grade or grades, stating the reason for the request. Notice of the Center director's findings on the basis of the reexamination of the wool shall be mailed to the importer. This section is being amended to include date ranges because the decisions made prior to the effective date of these regulatory amendments will have been made by the port director or Center director (pursuant to the Delegation Order described in section I.B. of the Background section of this document) and the decisions made on or after the effective date of these regulatory amendments will be made by the Center director. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the written request for another determination of grade or grades of wool is being extended to personnel working for either the port director or the Center director.

Section 151.84 is amended to provide that the Center director, rather than the port director, shall have one or more samples of each sampled bale of cotton stapled by a qualified Customs officer, or a qualified employee of the Department of Agriculture designated by the Commissioner of Customs for the purpose, and shall promptly mail the importer a notice of the results determined.

Section 151.85 is amended to provide that if the importer is dissatisfied with the port director's or Center director's determination, made before January 19, 2017, or the Center director's determination made on or after January 19, 2017, he may file with the Center director, within 14 calendar days after the mailing of the notice, a written request in duplicate for a redetermination of the staple length. Each such request shall include a statement of the claimed staple length for the cotton in question and a clear statement of the basis for the claim. The request shall be granted if it appears to the Center director to be made in good faith. In making the redetermination of staple length, the Center director may obtain an opinion of a board of cotton examiners from the U.S. Department of Agriculture, if he deems such action advisable. This section is being amended to include date ranges because the decisions made prior to the effective date of these regulatory amendments will have been made by the port director or Center director (pursuant to the Delegation Order described in section I.B. of the Background section of this document) and the decisions made on or after the effective date of these regulatory amendments will be made by the Center director.

W. Part 152—Classification and Appraisement of Merchandise

Section 152.1(c) is amended to provide that if there is no positive evidence at hand as to the actual date of exportation, the Center director, rather than the port director, shall ascertain or estimate the date of exportation by all reasonable ways and means in his power, and in so doing may consider dates on bills of lading, invoices, and other information available to him.

Section 152.2 is amended to provide that if the Center director, rather than the port director, believes that the entered rate or value of any merchandise is too low, or if he finds that the quantity imported exceeds the entered quantity, and the estimated aggregate of the increase in duties on that entry exceeds $15, he shall promptly notify the importer on Customs Form 29, or its electronic equivalent, specifying the nature of the difference on the notice. Liquidation shall be made promptly and shall not be withheld for a period of more than 20 days from the date of mailing of such notice unless in the judgment of the Center director, rather than the port director, there are compelling reasons that would warrant such action.

Section 152.13(a) is amended to provide that the Center director, rather than the port director, will give written notice to the importer as promptly as possible after any commingling of merchandise is discovered.

Section 152.13(c)(1) is amended to provide that to obtain the benefit of General Note 3(f), HTSUS, the importer shall, within 30 days after the date of mailing or personal delivery of the notice provided for in § 152.13(a), file with the Center director, rather than the port director, evidence showing performance of the commercial settlement tests specified in General Note 3(f), HTSUS.

Section 152.13(c)(3) is amended to provide that to obtain the benefit of General Note 3(f), HTSUS, the importer shall, within 30 days after the date of mailing or personal delivery of the notice provided for in § 152.13(a), file with the Center director, rather than the port director, documentary proof which will satisfy him that the merchandise is entitled to the lower rate of duty under General Note 3(f), HTSUS.

Section 152.13(d) is amended to provide that the 30-day limit for filing the evidence specified in General Note 3(f) or for performing the segregation

specified in General Note 3(f), Harmonized Tariff Schedule of the United States, may be extended by the Center director, rather than the port director, for additional periods of 30 days each, but not beyond 6 months from the date of mailing or personal delivery of the notice provided for in paragraph (a) of this section, if the importer makes written application for each extension and gives satisfactory reasons for its allowance. The paragraph is also amended to provide that the written application must be filed with the Center director, rather than the port director.

Section 152.16(c) is amended to provide that if a court decision overruling a protest contains a definite statement that a higher rate than that assessed by the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017, was properly chargeable, such higher rate shall be applied to all merchandise, whether identical or similar to that passed on by the court, which is affected by the principles of the court's decision and which is entered or withdrawn for consumption after 30 days from the date of the publication of the court's decision in the Customs Bulletin. The Center director is included for the dates prior to the effective date of this document because under the Center test, the assessments for the Center test participants may have been made by the Center director. Moreover, pursuant to the Delegation Order (noted in section I.B. of the Background section of this document) the assessments may have been made by the Center director as well. However, the assessments made on or after the effective date of these regulatory amendments will be made by the Center director.

Section 152.26 is amended to provide that the Center director, rather than the port director, shall furnish to importers the latest information as to values in his possession, subject to certain conditions. This document amends the conditions by removing the words ''port director'' or ''port director's'' where they appear and replacing them with ''Center director'' or ''Center director's'' so as to note that the information shall be given only in regard to merchandise to be appraised by, or under the jurisdiction of, the Center director who receives the request, and only with respect to merchandise for which there is presented evidence of a firm commitment or intent to import such merchandise into the United States. Also, the section is amended to provide that value information shall be given by the Center director only with an understanding and agreement in each case that the information is in no sense an appraisement and is not binding upon the Center director's action when he appraises the merchandise. Moreover, the section is amended to provide that the Center director shall not be required to reply to a written request for value information after a value for the merchandise has been declared on entry unless he has information indicating a probable appraised value different from such entered value.

Section 152.101(c) is amended to provide that the importer's request for the application of the computed value method before the deductive value method must be made at the time the entry summary for the merchandise is filed with CBP, either at the port of entry or electronically (see § 141.0a(b) of this chapter). The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the entry summary is being extended to personnel working for either the port director or the Center director.

Section 152.101(d) is amended to provide that upon receipt of a written request from the importer within 90 days after liquidation, the Center director, rather than the port director shall provide a reasonable and concise written explanation of how the value of the imported merchandise was determined.

Section 152.103(a)(5)(iii) is amended to provide that a sale for export and placement for through shipment to the United States under § 152.103(a)(5)(ii) shall be established by means of a through bill of lading to be presented to CBP, either at the port of entry or electronically. The paragraph is also amended to provide that only in those situations where it clearly would be impossible to ship merchandise on a through bill of lading (*e.g.,* shipments via the seller's own conveyance) will other documentation satisfactory to the Center director, rather than the port director, showing a sale for export to the United States and placement for through shipment to the United States be accepted in lieu of a through bill of lading. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the bill of lading is being extended to personnel working for either the port director or the Center director.

Section 152.103(d) is amended to provide that if the value of an assist is to be added to the price actually paid or payable, or to be used as a component of computed value, the Center director, rather than the port director, shall determine the value of the assist and apportion that value to the price of the imported merchandise in one of the manners delineated in § 152.103(d)(1)–(d)(2).

Section 152.103(l) is amended to provide that the Center director, rather than the port director, shall not disregard a transaction value solely because the buyer and seller are related.

Section 152.103(l)(2)(iii) is amended to provide that if one of the test values provided in § 152.103(j)(2)(i) has been found to be appropriate, the Center director shall not seek to determine if the relationship between the buyer and seller influenced the price. If the Center director already has sufficient information to be satisfied, without further detailed inquiries, that one of the test values is appropriate, he shall not require the importer to demonstrate that the test value is appropriate.

Section 152.103(m) is amended to provide that when CBP has grounds for rejecting the transaction value declared by an importer and that rejection increases the duty liability, the Center director, rather than the port director, shall inform the importer of the grounds for the rejection. The importer will be afforded 20 days to respond in writing to the Center director, rather than the port director, if in disagreement.

Section 152.105(h)(3)(i)(2) is amended to provide that the Center director, rather than the port director, will review on its merits each case involving the following issues: If the imported merchandise loses its identity as a result of further processing, the method specified in § 152.105(c)(3) will not be applicable unless the value added by the processing can be determined accurately without unreasonable difficulty for either importers or Customs; and if the imported merchandise maintains its identity but forms a minor element of the merchandise sold in the United States, the use of § 152.105(c)(3) will be unjustified.

Section 152.106(f)(2) is amended to provide that, if not contrary to domestic law regarding disclosure of information, and if information other than that supplied by or on behalf of the producer is used to determine computed value, the Center director, rather than the port director, shall inform the importer, upon written request, of: (i) The source of the information, (ii) the data used,

and (iii) the calculation based upon the specified data.

X. Part 158—Relief From Duties on Merchandise Lost, Damaged, Abandoned, or Exported

Section 158.3 is amended to provide that allowance shall be made in the assessment of duties for lost or missing packages of merchandise included in an entry summary whenever it is established to the satisfaction of the Center director, rather than the port director, before the liquidation of the entry summary becomes final that the merchandise claimed to be lost or missing was not ''permitted.''

Section 158.5(a) is amended to provide that an allowance shall be made in the assessment of duties for deficiencies in the contents of packages when, before the liquidation of the entry becomes final, the importer files in the case of a concealed shortage, a Customs Form 5931, in triplicate, executed by the importer alone, and the Center director, rather than the port director, is satisfied as to the validity of the claim.

Section 158.13(b) is amended to provide that if the port director is satisfied after any necessary investigation that the merchandise contains moisture or impurities as described in § 158.13(a), the Center director, rather than the port director, will make allowance for the amount thereof in the liquidation of the entry. The reason that the term ''port director'' is being maintained the first time it appears in this provision is because entry and condition of release issues will continue to be handled by the personnel working for the port directors. The word ''he'' in the provision originally meant ''the port director''; however, the words ''he shall'' is being removed and replaced with ''the Center director will'' because the authority to make liquidation determinations is being transitioned to the Center directors.

Y. Part 159—Liquidation of Duties

Section 159.7(b) is amended by removing the words ''at the port where the merchandise is held in CBP custody'' and replacing them with the words ''by the Center director'' to specifically provide that the Center director personnel will effectuate on the effective date of the change any necessary reliquidations of customs duty or tax on merchandise covered by a rewarehouse entry which may be required by reason of a change in rate of customs duty or tax made by an act of Congress or a proclamation of the President.

Section 159.7(c) is amended by removing the words ''port director of the port where the merchandise is entered for rewarehouse'' and replacing them with ''Center director'' to provide that the Center director, rather than the port director where the merchandise is entered for rewarehouse, has the authority to determine that circumstances that make it advisable to follow the liquidation of the original warehouse entry and to make an appropriate adjustment in the amount of duties to be assessed under the rewarehouse entry.

Section 159.12(a)(1) is amended to provide that the Center director, rather than the port director, may extend the one (1)-year statutory period for liquidation for an additional period not to exceed one (1)-year under certain circumstances, including if the importer requests an extension in writing before the statutory period expires and shows good cause why the extension should be granted.

Section 159.12(a)(1)(ii) is amended by stating that ''good cause'' is demonstrated when the importer satisfies the Center director, rather than the port director, that more time is needed to present to CBP information which will affect the pending action, or there is a similar question under review by CBP.

Section 159.12(b) is amended by noting that if the Center director, rather than the port director, extends the time for liquidation, as provided in § 159.12(a)(1), he promptly will notify the importer or the consignee and his agent and surety on CBP Form 4333–A, appropriately modified, that the time has been extended and the reasons for doing so.

Section 159.12(c) is amended to provide that if the liquidation of an entry is suspended as required by statute or court order, as provided in § 159.12(a)(2), the Center director, rather than the port director, promptly will notify the importer or the consignee and his agent and surety on CBP Form 4333–A, appropriately modified, of the suspension.

Section 159.12(d)(1) is amended to provide that if an extension has been granted because CBP needs more information and the Center director, rather than the port director, thereafter determines that more time is needed, he may extend the time for liquidation for an additional period not to exceed 1 year provided he issues the notice required by § 159.12(b) before termination of the prior extension period.

Section 159.12(d)(2) is amended to provide that if the Center director, rather than the port director, finds that good cause (as defined in § 159.12(a)(1)(ii)) exists, he will issue a notice extending the time for liquidation for an additional period not to exceed 1 year.

Section 159.12(e) is amended to provide that the total time for which extensions may be granted by the Center director may not exceed 3 years. Currently, the regulation states that the extension granted by the port director may not exceed 3 years. This provision is being amended because the authority to make liquidation determinations is being transitioned to the Center directors.

Section 159.22(d)(2) is amended to provide that if the Center director, rather than the port director, is of the opinion that the invoice or schedule tare does not correctly represent the tare of the merchandise the actual tare shall be ascertained and in so doing the weigher shall empty and weigh as many casks, boxes, and other coverings as he may deem necessary.

Section 159.36(b) is amended to provide that when multiple rates have been certified for a foreign currency, the rate to be used for Customs purposes shall be the type of certified rate which the Center director, rather than the port director, is satisfied, from information in his own files, information obtained and presented to him by the importer, or information obtained from other sources, is uniformly applicable under the laws and regulations of the country of exportation to the particular class of merchandise on the date of exportation.

Section 159.36(c) is amended to provide that if the Center director, rather than the port director, has credible information that a type of rate or combination of types of rates which would otherwise be applicable under § 159.36(b) were not required or permitted, as the case may be, under the laws and regulations of the country of exportation to be used uniformly during any period in connection with the payment for all merchandise of the class involved, he shall immediately submit a detailed report to the Commissioner of Customs, and shall suspend appraisement and liquidation as to all merchandise of the class involved exported to the United States during the period involved, until instructions are received from the Commissioner of Customs.

Section 159.36(d) is amended to provide that if the Center director, rather than the port director, has credible information that a type of rate or combination of types of rates not applicable to payment for the merchandise was required or permitted

in payment of costs, charges, or expenses, the currency conversions for the exchange covering payment for the merchandise and for the exchange covering such costs, charges, or expenses shall be calculated separately. Moreover, the paragraph is amended to provide that in the event that any type of rate uniformly applicable to payment of such dutiable costs, charges, or expenses for merchandise of the class involved was a type of rate not certified in accordance with § 159.34 or § 159.35, the Center director, rather than the port director, shall immediately submit a detailed report to the Commissioner of Customs, and shall suspend appraisement and liquidation as to all merchandise of the class involved exported to the United States during the period involved, until instructions are received from the Commissioner.

Section 159.38 is amended to provide that for purposes of calculating estimated duties, the Center director, rather than the port director, shall use the rate or rates appearing to be applicable under the instructions in this subpart to the merchandise involved. When it is not yet known what certified rate or rates are applicable or no rate has been certified, the Center director, rather than the port director, shall take into account all the information in his possession and shall use the highest rate or combination of rates (*i.e.,* the rate or combination of rates showing the highest amount of United States money), certified or uncertified as the case may be, which could be applicable.

Section 159.44 is amended to provide that whenever it appears that imported articles may be subject to the special duties provided for in section 802, Act of September 8, 1916 (15 U.S.C. 73), the Center director, rather than the port director, shall report the matter to the Commissioner of Customs and await instructions with respect to the imposition of such duties.

Section 159.58(a) is amended to provide that upon receipt of notification from the Commissioner, the Center director will suspend liquidation on merchandise entered, or withdrawn from warehouse, for consumption, on or after the date of publication of the ''Notice of Preliminary Affirmative Antidumping Determination,'' ''Notice of Final Affirmative Antidumping Determination'' or ''Notice of Violation of Agreement'' as provided by part 353, chapter III, of this title. The Center director will immediately notify the importer, consignee, or agent of each entry of merchandise in question with respect to which liquidation is suspended.

Section 159.58(b) is amended to provide that upon receipt of notification from the Commissioner, the Center director will suspend liquidation on merchandise entered, or withdrawn from warehouse, for consumption, on or after the date of publication of the ''Notice of Preliminary Affirmative Countervailing Duty Determination,'' ''Notice of Final Affirmative Countervailing Duty Determination'' or ''Notice of Violation of Agreement,'' as provided by part 355, Chapter III, of this title. The Center director will immediately notify the importer, consignee, or agent of each entry of merchandise in question with respect to which liquidation is suspended.

Z. Part 161—General Enforcement Provisions

Section 161.16 concerns the filing of a claim for informant compensation. Paragraph (b) is amended to provide that the Special Agent in Charge, U.S. Immigration and Customs Enforcement, Homeland Security Investigations will forward the form to the Center director (rather than the port director), who will make a recommendation on the form as to approval and the amount of the award. The Center director, rather than the port director, will forward the form to CBP Headquarters for action. If for any reason a claim has not been transmitted by the Center director, the claimant may apply directly to CBP Headquarters.

AA. Part 162—Inspection, Search, and Seizure

Section 162.74(c) is amended to provide that concerning prior disclosures, after Headquarters reviews the actual loss of duties, taxes and fees and renders its decision, the concerned Fines, Penalties, and Forfeitures Officer will be notified and the concerned Center director, rather than the CBP port, will recalculate the loss, if necessary, and notify the disclosing party of any actual loss of duties, taxes or fees increases.

Section 162.80(a)(1) is amended to provide that when an entry is the subject of an investigation for possible violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), or of a penalty action established under that section, the Center director, rather than the port director, subject to the provisions of paragraph (a)(2) of this section, may liquidate the entry and CBP, either at the port of entry or electronically, may collect duties before the conclusion of the investigation or final disposition of the penalty action if the Center director, rather than the port director, determines that liquidation would be in the interest of the Government. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the duties is being extended to personnel working for either the port director or the Center director.

Section 162.80(a)(2)(i) is amended to provide that an entry not liquidated within one (1)-year from the date of entry or final withdrawal of all merchandise covered by a warehouse entry shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent unless the time for liquidation is extended by the Center director (rather than the port director) because of certain circumstances delineated in § 162.80(a)(2)(i)(A)–(C).

Section 162.80(a)(2)(iii) is amended to provide that the Center director, rather than the port director, promptly shall notify the importer or consignee concerned and any authorized agent and surety of the importer or consignee in writing of any extension or suspension of the liquidation period.

BB. Part 163—Recordkeeping

Section 163.1(a)(2)(vii) is amended to provide that the maintenance of any documentation that the importer may have in support of a claim for preferential tariff treatment under the United States-Singapore Free Trade Agreement (SFTA), including a SFTA importer's supporting statement if previously required by the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017. This section is being amended to include date ranges because the decision to require a SFTA importer's supporting statement made prior to the effective date of these regulatory amendments will have been made by the port director or Center director (pursuant to the Delegation Order described in section I.B. of the Background section of this document) and the decision made on or after the effective date of these regulatory amendments will be made by the Center director.

Section 163.7(a) is amended by including Center directors to the list of individuals, who may in certain noted situations, issue a summons requiring a person within a reasonable period of time to appear before the appropriate CBP officer and to produce records or give relevant testimony under oath or both.

The appendix to part 163 is amended at section 10.512 of part IV to add the

Center director to the port director regarding importer's supporting statements related to Singapore Free Trade Agreement claims before the effective date of this document and changing port director to Center director for importer's supporting statements on or after the effective date of this document.

CC. Part 173—Administrative Review in General

Section 173.1 is amended to provide that Center directors, rather than port directors, have broad responsibility and authority to review transactions to ensure that the rate and amount of duty assessed on imported merchandise is correct and that the transaction is otherwise in accordance with the law.

Section 173.2 is amended to provide that the Center director, rather than the port director, may review transactions for correctness, and take appropriate action under his general authority to correct errors, including those in appraisement where appropriate, at the time of: (a) Liquidation of an entry; (b) Voluntary reliquidation completed within 90 days after liquidation; (c) Voluntary correction of an exaction within 90 days after the exaction was made; (d) Reliquidation made pursuant to a valid protest covering the particular merchandise as to which a change is in order; or (e) Modification, pursuant to a valid protest, of a transaction or decision which is neither a liquidation or reliquidation.

Section 173.3(a) is amended to provide that the Center director, rather than the port director, may reliquidate on his own initiative a liquidation or a reliquidation to correct errors in appraisement, classification, or any other element entering into the liquidation or reliquidation, including errors based on misconstruction of applicable law. A voluntary reliquidation may be made even though a protest has been filed, and whether the error is discovered by the Center director or is brought to his attention by an interested party.

Section 173.4(a) is amended to provide that even though a valid protest was not filed, the Center director, rather than the port director, upon timely application and for entries of merchandise made, or withdrawn from warehouse for consumption, before December 18, 2004, may correct pursuant to section 520(c)(1), Tariff Act of 1930, as amended, a clerical error, mistake of fact, or other inadvertence meeting the requirements of § 173.4(a)(1), by reliquidation or other appropriate action.

Section 173.4(a)(2) is amended to provide that a clerical error, mistake of fact, or other inadvertence meeting the requirements of § 173.4(a)(1) must be brought to the attention of the Center director or other appropriate CBP officer within 1 year after the date of liquidation or exaction. The term ''other appropriate CBP officer'' includes personnel working for the port director.

Section 173.4a is amended to provide that pursuant to section 520(a)(4), Tariff Act of 1930, as amended (19 U.S.C. 1520(a)(4)), the Center director, rather than the port director may, prior to liquidation of an entry, take appropriate action to correct a clerical error that resulted in the deposit or payment of excess duties, fees, charges, or exactions.

DD. Part 174—Protests

Section 174.0 is amended to provide that part 174 deals with the administrative review of decisions of the both the port director and Center director.

Section 174.3(b)(1) states that a corporate power of attorney to file protests shall be signed by a duly authorized officer or employee of the corporation. Paragraph (b)(1) is amended to provide that if the Center director, rather than the port director, is otherwise satisfied as to the authority of such corporate officer or employee to grant such power of attorney, compliance with the requirements of § 141.37 of this chapter may be waived with respect to such power.

Section 174.3(c) is amended to provide that powers of attorney issued by a partnership shall be limited to a period not to exceed 2 years from the date of receipt thereof by the Center director. The date on which the power of attorney information is input into CBP's authorized electronic data interchange system will be considered the date of receipt by the Center director.

Section 174.3(d) is amended to provide that any power of attorney shall be subject to revocation at any time by written notice given to and received by CBP, either at the port of entry or electronically. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to collect the notice is being extended to personnel working for either the port director or the Center director.

Section 174.12(d) is amended by removing the words ''port director whose decision is protested'' and replacing it with ''CBP, either at the port of entry or electronically''. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to receive the protest is being extended to personnel working for either the port director or the Center director.

Section 174.13(b) is amended to provide that a single protest may be filed with respect to more than one entry with CBP, either at any port or electronically, if all such entries entries involve the same protesting party, and if the same category of merchandise and a decision or decisions common to all entries are the subject of the protest. The language ''with CBP, either at any port or electronically'' here means that the importer may choose the means of submission; however, the authority to receive the protest is being extended to personnel working for either the port director or the Center director.

Section 174.14(e) is amended to provide that rather than the amendment to a protest being filed with the port director with whom the protest was filed, an amendment to a protest shall be filed with CBP, either at the port of entry or electronically. The language ''CBP, either at the port of entry or electronically'' here means that the importer may use the means of submission currently permitted; however, the authority to receive the protest is being extended to personnel working for either the port director or the Center director.

Section 174.15(b)(2) is amended to provide that consolidation of protests under § 174.15(a) may be done by the port director or Center director, before January 19, 2017, or the Center director on or after January 19, 2017. The Center director is included for the dates prior to the effective date of this document because under the Center test, protests for the test participants were processed and decided upon by the Center director. Moreover, pursuant to the Delegation Order (described in section **I.B.** of the **Background** section of this document) protests may have been processed and decided upon by the Center director as well. Therefore, before the effective date of this document, the consolidation of protests may be done by the port director or Center director, and on or after the effective date of this document, any consolidation of protests covered by this provision will be handled by the Center director, rather than by the port director.

Section 174.16 is amended to provide that a protest shall not be filed against the reliquidation decision of the port director or Center director made before

January 19, 2017, or the reliquidation decision of the Center director made on or after January 19, 2017, upon any question not involved in the reliquidation. The Center director is included for the dates prior to the effective date of this document because under the Center test, reliquidation determinations for the test participants were made by the Center director and pursuant to the Delegation Order (described in section **I.B.** of the **Background** section of this document), reliquidation determinations for others may have been made by the Center director as well. Moreover, on or after the effective date of this document, reliquidation determinations will be made by the Center director, rather than by the port director.

Section 174.21(a) is amended to provide that, except as provided in § 174.21(b), the Center director, rather than the port director, shall review and act on a protest filed in accordance with section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), within 2 years from the date the protest was filed.

Section 174.21(b) is amended to provide that if the protest relates to an administrative action involving exclusion of merchandise from entry or delivery under any provision of the Customs laws, the Center director, rather than the port director, shall review and act on a protest filed in accordance with section 514(a)(4), Tariff Act of 1930, as amended (19 U.S.C. 1514(a)(4)), within 30 days from the date the protest was filed.

Section 174.22(a) is amended to provide that written requests for accelerated disposition of protests may be filed with the port director, Center director, or other CBP officer with whom the protest was filed. Accordingly, the authority to receive the written requests for accelerated disposition of protests resides with personnel working for either the port director or the Center director.

Section 174.22(c) is amended to provide that the Center director shall review the protest which is the subject of the request for accelerated disposition within 30 days from the date of mailing of a request for accelerated disposition filed in accordance with the provisions of § 174.22, and may allow or deny the protest in whole or in part.

Section 174.22(d) is amended to provide that the Center director, rather than the port director, will be responsible for allowing or denying a protest which is the subject of a request for accelerated disposition. As amended, it will be the Center director's, rather than the port director's, failure to do so within thirty days from the date of mailing such request that will result in the protest being deemed to have been denied at the close of the thirtieth day following such date of mailing.

Section 174.23 is amended to provide that a protesting party may seek further review of a protest in lieu of review by the Center director by filing, on the form prescribed in § 174.25, an application for such review within the time allowed and in the manner prescribed by § 174.12 for the filing of a protest. The filing of an application for further review shall not preclude a preliminary examination by the Center director for the purpose of determining whether the protest may be allowed in full. If such preliminary examination indicates that the protest would be denied in whole or in part by the Center director in the absence of an application for further review; however, he shall forward the protest and application for consideration in accordance with § 174.26.

Section 174.24 is amended to provide that a further review of a protest which would otherwise be denied by the Center director, rather than the port director, shall be accorded a party filing an application for further review which meets the requirements of § 174.25 when the decision against which the protest was filed meets one of the listed criteria in § 174.24.

Section 174.24(a) is amended to state that further review shall be accorded when a decision against which the protest was filed is alleged to be inconsistent with a ruling of the Commissioner of CBP or his designee, or with a decision made by CBP with respect to the same or substantially similar merchandise.

Section 174.24(b) is amended to state that further review shall be accorded when a decision against which the protest was filed is alleged to involve questions of law or fact which have not been ruled upon by the Commissioner of CBP or his designee or by the Customs courts.

Section 174.24(c) is amended to state that further review shall be accorded when a decision against which the protest was filed involves matters previously ruled upon by the Commissioner of CBP or his designee or by the Customs courts but facts are alleged or legal arguments presented which were not considered at the time of the original ruling.

Section 174.24(d) is amended to state that further review shall be accorded when a decision against which the protest was filed is alleged to involve questions which the Headquarters Office, U.S. Customs and Border Protection, refused to consider in the form of a request for internal advice pursuant to § 177.11(b)(5).

Section 174.26(a) is amended to provide that if upon examination of a protest for which an application for further review was filed the Center director, rather than the port director, is satisfied that the claim is valid, he shall allow the protest.

Section 174.26(b) is amended to provide that if upon examination of a protest for which an application for further review was filed the Center director, rather than the port director, decides that the protest in his judgment should be denied in whole or in part, the Center director, rather than the port director, will forward the application together with the protest and appropriate documents to be reviewed as delineated in § 174.26(b)(1)–(2).

Section 174.26(b)(2) is amended to provide that all other protests shall be reviewed by a designee of the Center director (rather than by a designee of the port director) who did not participate directly in the decision which is the subject of the protest.

Section 174.27 is amended to provide that upon completion of further review, the protest and appropriate documents forwarded for review shall be returned to the Center director, rather than the port director, together with directions for the disposition of the protest.

Section 174.29 is amended to provide that the Center director, rather than the port director, shall allow or deny in whole or in part a protest filed in accordance with section 514, Tariff Act of 1930, as amended, (19 U.S.C. 1514) within 2 years from the date the protest was filed. If the protest is allowed in whole or in part the Center director, rather than the port director, shall remit or refund any duties, charge, or exaction found to have been collected in excess, or pay any drawback found due. Moreover, the section is amended to provide that if the protest is denied in whole or in part the Center director, rather than the port director, shall give notice of the denial in the form and manner prescribed in § 174.30.

Section 174.30(b) is amended to provide that the importer of record or consignee may give notice to CBP, either at the port of entry or electronically, instructing that notice of denial of any protest involving merchandise imported in his name or on his behalf shall be mailed to a person other than the person filing such protest or the designee of such person. This document also amends the provision to note that notice of denial of a protest shall be mailed to the substituted person so designated only if the notice of substitution is

received by CBP prior to a denial by him of such protest. The language ''CBP, either at the port of entry or electronically'' here means that the importer of record or consignee may use the means of submission currently permitted; however, the authority to receive the notice is being extended to personnel working for either the port director or the Center director.

Section 174.30(c) is amended to provide that the Center director, rather than the port director, shall note on the notice of denial of a protest the payment of all liquidated duties, charges, or exactions, if he has actual knowledge of such payment at the time that the protest is denied.

EE. Part 176—Proceedings in the Court of International Trade

Section 176.1 is amended to provide that when an action is initiated in the Court of International Trade a copy of the summons shall be served in the manner prescribed by the Court of International Trade upon the CBP official(s) who denied the protest(s), and an additional copy shall be served upon the Assistant Chief Counsel for Court of International Trade Litigation, United States Customs and Border Protection, 26 Federal Plaza, New York, N.Y. 10007. The term ''CBP official(s)'' is added here in place of ''director of each port where a protest cited in the summons was denied'' because the protest may have been denied by either a CBP employee working for either the Center director or the port director depending on the date on which the protests were denied.

FF. Part 181—North American Free Trade Agreement

Section 181.12(b)(1) is amended by noting that for purposes of determining compliance with the provisions of part 181 (19 CFR part 181), the records required to be maintained under § 181.12 shall be made available for examination and inspection by the Center director or other appropriate Customs officer in the same manner as provided in part 163 of this chapter in the case of U.S. importer records.

Section 181.22(b) is amended to provide that an importer who claims preferential tariff treatment on a good under § 181.21 shall provide, at the request of the Center director, rather than the port director, a copy of each Certificate of Origin pertaining to the good which is in the possession of the importer.

Section 181.22(b)(3) is amended to provide that a Certificate of Origin submitted to CBP under § 181.22(b) or under § 181.32(b)(3) shall be completed either in the English language or in the language of the country from which the good is exported. If the Certificate is completed in a language other than English, the importer shall also provide to the Center director (rather than the port director), upon request, a written English translation thereof.

Section 181.22(c) is amended to provide that a Certificate of Origin shall be accepted by the Center director, rather than the port director, as valid for the purpose set forth in § 181.11(a), provided that the Certificate is completed, signed and dated in accordance with the requirements of § 181.22(b). The paragraph is also amended to provide that if the Center director, rather than the port director, determines that a Certificate is illegible or defective or has not been completed in accordance with § 181.22(b), the importer shall be given a period of not less than five working days to submit a corrected Certificate. Acceptance of a Certificate will result in the granting of preferential tariff treatment to the imported good unless, in connection with an origin verification initiated under subpart G of part 181 (19 CFR part 181) or based on a pattern of conduct within the meaning of § 181.76(c), the Center director determines that the imported good does not qualify as an originating good or should not be accorded such treatment for any other reason as specifically provided for elsewhere in part 181 (19 CFR part 181). A Certificate shall not be accepted in connection with subsequent importations during a period referred to in § 181.22(b)(5)(ii) if, based on an origin verification under subpart G of part 181 (19 CFR part 181), the Center director, rather than the port director, determined that a previously imported identical good covered by the Certificate did not qualify as an originating good.

Section 181.22(d)(1)(i) is amended to provide that except as otherwise provided in § 181.22(d)(2), an importer shall not be required to have a Certificate of Origin in his possession for an importation of a good for which the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017, has in writing waived the requirement for a Certificate of Origin because the port director or Center director is otherwise satisfied that the good qualifies for preferential tariff treatment under the NAFTA. This provision is amended to include reference to dates before and after the effective date of this document in the **Federal Register** because the port director or the Center director (pursuant to the Center test or the Delegation Order described in section I.B. of the Background section of this document), may have waived the Certificate of Origin before the effective date of this document in the **Federal Register** and only the Center director may waive the Certificate of Origin on or after the effective date of this document in the **Federal Register**.

Section 181.22(d)(1)(iii) is amended to provide that except as otherwise provided in § 181.22(d)(2), an importer shall not be required to have a Certificate of Origin in his possession for a commercial importation for which the total value of originating goods does not exceed US$2,500, provided that, unless waived by the Center director (rather than the port director), the producer, exporter, importer or authorized agent includes on, or attaches to, the invoice or other document accompanying the shipment the signed statement as noted in § 181.22(d)(1)(iii).

Section 181.22(d)(2) is amended to provide that if the Center director, rather than the port director, determines that an importation described in § 181.22(d)(1) forms part of a series of importations that may reasonably be considered to have been undertaken or arranged for the purpose of avoiding a certification requirement set forth in part 181 (19 CFR part 181), the Center director, rather than the port director, shall notify the importer in writing that for that importation the importer must have in his possession a valid Certificate of Origin to support the claim for preferential tariff treatment.

Section 181.23(a) is amended to note that if the importer fails to comply with any requirement under part 181 (19 CFR part 181), including submission of a Certificate of Origin under § 181.22(b) or submission of a corrected Certificate under § 181.22(c), the Center director, rather than the port director, may deny preferential tariff treatment to the imported good.

Section 181.23(b) is amended to provide that where the requirements for preferential tariff treatment set forth elsewhere in part 181 (19 CFR part 181) are met, the Center director, rather than the port director, nevertheless may deny preferential tariff treatment to an originating good if the good is shipped through or transshipped in a country other than the United States, Canada or Mexico and the importer of the good does not provide, at the request of the Center director, copies of the customs control documents that indicate to the satisfaction of the Center director that the good remained under customs control while in such other country.

Section 181.32(a) is amended to require that a post-importation claim for a refund under § 181.31 be filed with

CBP, either at the port of entry or electronically. The language ''CBP, either at the port of entry or electronically'' here means that the means of submission currently permitted may be used; however, the authority to receive the post-importation claim for a refund is being extended to personnel working for either the port director or the Center director.

Section 181.33(a) is amended to provide that after receipt of a post-importation claim under § 181.32, the Center director, rather than the port director, shall determine whether the entry covering the good has been liquidated and, if liquidation has taken place, whether the liquidation has become final.

Section 181.33(b) is amended to provide that if the Center director, rather than the port director, determines that any protest or any petition or request for reliquidation relating to the good has not been finally decided, the Center director, rather than the port director, shall suspend action on the claim filed under this subpart until the decision on the protest, petition or request becomes final. If a summons involving the tariff classification or dutiability of the good is filed in the Court of International Trade, the Center director, rather than the port director, shall suspend action on the claim filed under this subpart until judicial review has been completed.

Section 181.33(c)(1) is amended to provide that if the Center director, rather than the port director, determines that a claim for a refund filed under this subpart should be allowed and the entry covering the good has not been liquidated, the Center director, rather than the port director, shall take into account the claim for refund under this subpart in connection with the liquidation of the entry.

Section 181.33(c)(2) is amended to provide that if the Center director, rather than the port director, determines that a claim for a refund filed under subpart D of part 181 (19 CFR part 181, subpart D) should be allowed and the entry covering the good has been liquidated, whether or not the liquidation has become final, the entry must be reliquidated in order to effect a refund of duties pursuant to this subpart. If the entry is otherwise to be reliquidated based on administrative review of a protest or petition for reliquidation or as a result of judicial review, the Center director, rather than the port director, shall reliquidate the entry taking into account the claim for refund under this subpart.

Section 181.33(c)(3) is amended to provide that if any information is provided to Customs pursuant to § 181.32(b)(4) or (5) of part 181 (19 CFR part 181), that information, together with notice of the allowance of the claim and the amount of duty refunded pursuant to this subpart, shall be provided by the Center director, rather than the port director, to the customs administration of the country from which the good was exported.

Section 181.33(d)(1) is amended to provide that the Center director, rather than the port director, may deny a claim for a refund filed under this subpart if the claim was not filed timely, if the importer has not complied with the requirements of this subpart, if the Certificate of Origin submitted under § 181.32(b)(3) of part 181 (19 CFR part 181) cannot be accepted as valid (see § 181.22(c)), or if, following initiation of an origin verification under § 181.72(a), the Center director, rather than the port director, determines either that the imported good did not qualify as an originating good at the time of importation or that a basis exists upon which preferential tariff treatment may be denied under § 181.72(d), § 181.74(c) or § 181.76(c).

Section 181.33(d)(2) is amended to provide that if the Center director, rather than the port director, determines that a claim for a refund filed under this subpart should be denied and the entry covering the good has not been liquidated, the Center director, rather than the port director, shall deny the claim in connection with the liquidation of the entry, and written notice of the denial and the reason therefor shall be given to the importer and, in the case of a denial on the merits, to any person who completed and signed a Certificate of Origin relating to the good.

Section 181.33(d)(3) is amended to provide that if the Center director, rather than the port director, determines that a claim for a refund filed under subpart D of part 181 (19 CFR part 181, subpart D) should be denied and the entry covering the good has been liquidated, whether or not the liquidation has become final, the claim may be denied without reliquidation of the entry. If the entry is otherwise to be reliquidated based on administrative review of a protest or petition for reliquidation or as a result of judicial review, such reliquidation may include denial of the claim filed under this subpart. In either case, the Center director, rather than the port director, shall give written notice of the denial and the reason therefor to the importer and, in the case of a denial on the merits, to any person who completed and signed a Certificate of Origin relating to the good.

Section 181.64(c)(2) is amended to provide that Center director, rather than the port director, may require such additional documentation as is deemed necessary to prove actual exportation of the goods from the United States for repairs or alterations, such as a foreign customs entry, a foreign customs invoice, a foreign landing certificate, bill of lading, or airway bill.

Section 181.64(c)(3) is amended to provide that if the Center director, rather than the port director, is satisfied, because of the nature of the goods or production of other evidence, that the goods are imported under circumstances meeting the requirements of § 181.64, he may waive submission of the declarations provided for in § 181.64(c)(1).

Section 181.64(c)(4) is amended to provide that for goods returned after having been repaired or altered in Canada other than pursuant to a warranty, the Center director, rather than the port director, shall require a deposit of estimated duties based upon the full cost or value of the repairs or alterations. The paragraph is also amended to provide that the duties must be deposited with CBP, either at the port of entry or electronically. The language ''CBP, either at the port of entry or electronically'' here means that the means of submission currently permitted may be used; however, the authority to collect the duties is being extended to personnel working for either the port director or the Center director.

Section 181.112(a) is amended to provide that the term ''*Adverse marking decision*'' means a decision made by the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017, which an exporter or producer of merchandise believes to be contrary to the provisions of Annex 311 of the NAFTA and which may be protested by the importer pursuant to § 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), and part 174 of this chapter. The paragraph is also amended to provide that examples of adverse marking decisions include determinations by the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017: that an imported article is not a good of a NAFTA country, as determined under the Marking Rules, and that it therefore cannot be marked ''Canada'' or ''Mexico''; that a good of a NAFTA country is not marked in a manner which is sufficiently permanent; and that a good of a NAFTA country does not qualify for an exception from marking specified in Annex 311 of the NAFTA. The Center

director is included for the dates prior to the effective date of this document because under the Center test this provision was waived to the extent to allow adverse marking decisions for the test participants to be made by the Center director. Moreover, before the effective date of this document, the Center director may have made adverse marking decisions pursuant to the Delegation Order (described in section I.B. of the Background section of this document). However, on and after the effective date of this document, any adverse marking decisions concerning this provision will be handled by the Center director, rather than by the port director.

Section 181.113(a) is amended to provide that the exporter or producer of the merchandise which is the subject of an adverse marking decision may request a statement concerning the basis for the decision by filing a typewritten request, in English, with CBP, either at the port of entry or electronically. The language ''CBP, either at the port of entry or electronically'' here means that the means of submission currently permitted may be used; however, the authority to receive the petition is being extended to personnel working for either the port director or the Center director and the request may be submitted electronically.

Section 181.114(a) is amended to provide that the Center director, rather than the port director, will issue a written response to the requestor within 30 days of receipt of a request containing the information specified in § 181.113. If the request is incomplete, such that the transaction in question cannot be identified, the Center director, rather than the port director, will notify the requestor in writing within 30 days of receipt of the request regarding what information is needed.

Section 181.114(b) is amended to reflect that the Center director, rather than the port director, will be providing the response noted in § 181.114(a).

Section 181.115(b) is amended by removing the words ''port director with whom the protest was filed'' and adding in their place the words ''Center director'' to reflect that if an exporter or producer of merchandise want to intervene in an importer's protest of an adverse marking decision, the party must file their intervention with the Center director.

Section 181.115(e) is amended to provide that if final administrative action has already been taken with respect to the importer's protest at the time the intervention is filed, the Center director, rather than the port director, shall so advise the exporter or producer and, if the importer has filed a civil action in the Court of International Trade as a result of a denial of the protest, the Center director, rather than the port director, shall advise the exporter or producer of that filing and of the exporter's or producer's right to seek to intervene in such judicial proceeding. If final administrative action has not been taken on the protest, the Center director, rather than the port director, shall forward the intervention letter to the CBP office which has the importer's protest under review for consideration in connection with the protest.

Section 181.116(a) is amended to provide that if the importer filed a protest on which final administrative action has not been taken and notice of the pending protest was not provided to the exporter or producer under § 181.114, a petition filed under § 181.116 shall be treated by the Center director, rather than the port director, as an intervention under § 181.115.

Section 181.116(b) is amended to provide that a petition under § 181.115 shall be typewritten, in English, and shall be filed, in triplicate, with the port of entry or filed electronically with CBP.

Section 181.116(d)(1) is amended to provide that within 60 days of the date of receipt of the petition, the Center director, rather than the port director, shall determine if the petition is to be granted or denied, in whole or in part. The paragraph is also amended to provide that if, after reviewing the petition, the Center director, rather than the port director, agrees with all of the petitioner's claims and determines that the initial adverse marking decision was not correct, a written notice granting the petition shall be issued to the petitioner. The paragraph is also amended to provide that a description of the merchandise, a brief summary of the issue(s) and the Center director's findings shall be forwarded to the Director, Tariff Classification Appeals Division, Customs Headquarters, for publication in the Customs Bulletin. The paragraph is further amended to provide that if, after reviewing the petition, the Center director, rather than the port director, determines that the initial adverse marking decision was correct in its entirety, a written notice shall be issued to the petitioner advising that the matter has been forwarded to the Director, Tariff Classification Appeals Division, Customs Headquarters, for further review and decision. Finally, the paragraph is amended to provide that all relevant background information, including available samples, a description of the adverse marking decision and the reasons for the decision, and the Center director's recommendation shall be furnished to Headquarters.

Section 181.121 is amended by removing the words ''port director or other Customs officer'' and adding in their place the words ''port director, Center director, or other CBP officer'' to specify that Center directors, in addition to port directors and other CBP officers who have possession of confidential business information collected pursuant to part 181 (19 CFR part 181) shall, in accordance with part 103 (19 CFR part 103), maintain its confidentiality and protect it from any disclosure that could prejudice the competitive position of the persons providing the information.

IV. Statutory and Regulatory Requirements

A. Executive Order 13563 (Improving Regulation and Regulatory Review) and Executive Order 12866 (Regulatory Planning and Review)

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

1. Purpose of the Rule

Prior to the launch of the Centers test, CBP port directors overseeing imports were solely responsible for facilitating lawful importation; protecting U.S. revenue by assessing and collecting customs duties, taxes and fees; and detecting, interdicting, and investigating illegal international trafficking in arms, munitions, counterfeit goods, currency, and acts of terrorism at their U.S. port of entry. Historically, when a shipment reached the United States, the importer of record (*i.e.,* the owner, purchaser, or licensed customs broker designated by the owner, purchaser, or consignee) would file entry documents and a bond for the imported goods with the director of the port where the merchandise was entered. If necessary, CBP staff working under the port director would then hold or examine the shipment or validate the entry documents to ensure the

merchandise's safety, security, and customs compliance with U.S. importing guidelines, or its general admissibility. The port director would release the shipment from CBP custody if no legal or regulatory violations occurred, allowing post-cargo release (hereafter, post-release) processing to commence. Within 10 working days of the merchandise's entry at a designated customhouse, CBP would require the importer to file entry summary documentation consisting of a return of the entry package to the importer, broker, or his authorized agent after merchandise is permitted release and an entry summary (CBP Form 7501), and to deposit any estimated duties on the shipment. In some cases, CBP would send a formal request for other invoices and documents (via a CBP Form 28: Request for Information) to the importer to assess duties, collect statistics, or determine that import requirements have been satisfied prior to processing the entry summary. Before completing the importation process, CBP Import Specialists and Entry Specialists working under the port director would review and process all entry summary and related documentation; classify and appraise the merchandise; collect final duties, taxes, and fees on the goods entered; and liquidate entry summaries. If necessary, these CBP trade personnel would also review and process protests, perform importer interviews, initiate monetary trade penalties, and initiate liquidated damages cases. Due to CBP's port-by-port trade processing authority and scope, the length, holds, exams, document submission requirements, and determinations of cargo entry and release vary widely among ports of entry. Importers often claim to receive disparate processing treatment for similar goods entered at different ports of entry, causing trade disruptions, increased transaction costs, and information lapses for not only the importer but also CBP. With an intent to facilitate trade, provide consistent import processing treatment, reduce transaction costs, and strengthen the agency's trade knowledge and enforcement posture, CBP began testing an organizational concept in 2011 that grouped agency trade expertise and operational responsibilities by industry and related import accounts into designated Centers of Excellence and Expertise.

Since their test implementation, the Centers have successfully met their trade enhancement goals. Based on such success, CBP would like to discontinue the Centers test and establish the Centers as permanent organizational components of CBP through regulatory amendments.

With this rule, CBP will formally transition certain trade enforcement responsibilities in addition to the majority of post-release trade functions from the purview of port directors to Center directors.[1] Port directors will continue to retain singular authority over regulations pertaining to the control, movement, examination, and release of cargo. The Centers will focus on nationwide entry summary processing and other trade oversight on a per-importer account basis through a virtual means, which will replace traditional post-release import processing *per* entry at *each* port of entry with processing by a single assigned Center according to the importer account. To conduct such national, industry-focused processing, CBP will permanently staff the Centers with personnel specializing in trade matters through an internal realignment, which will impose no costs onto CBP. All Centers personnel will remain at their current location, primarily at ports of entry, to stay accessible to the trade community and to continue to assist with enforcement and compliance issues that arise at ports of entry with the physical importation of cargo. CBP will remotely manage employees through multidisciplinary teams located across the nation, thereby enabling CBP to extend the Centers' hours of service to trade members, maintain a high level of industry expertise in major port cities, and staff Centers with industry experts from across the country.

2. Costs and Benefits of Rule

In this regulatory impact analysis, CBP discusses the costs and benefits that CBP and trade members will experience with the regulatory implementation of the Centers of Excellence and Expertise in qualitative and, when possible, quantitative terms. CBP excludes any sunk costs already incurred during the Centers test phase from this assessment as such costs are not a result of this rule. The document ''Program Assessment of the Centers of Excellence and Expertise,'' available in the docket for this rulemaking, assesses certain impacts of the Centers test phase.

a. Costs

This rule will introduce minimal costs to CBP and the trade community because it largely meets its objectives through low- to no-cost internal organization changes. The transition of post-release import processing and trade-related responsibilities from ports of entry to Centers will not affect the duties, taxes, and fees payment and entry summary submission process for importers, nor will it adversely impact other post-release activities (*e.g.,* processing duty refund claims, reviewing protests). Even with the Centers, importers may continue to file payments and paper entry summary documentation to CBP either at the port of entry or electronically. All payments from the trade community, whether submitted to a Center, at a port of entry, or electronically, will continue to go directly to CBP's Office of Administration. If trade enforcement or post-release processing issues emerge, CBP will maintain its formal importer notification and remedy process. Upholding these administrative processes will generate no related costs to the agency. CBP will only experience costs from this rule with regards to entry summary document rerouting and Center assignment appeals.

Following this rule's implementation, if an importer or broker submits paper entry summary documentation at a port of entry without an appropriate Center representative on site, CBP staff at the port will reroute the documents internally by electronic means to the Center assigned to manage the importer's account. This electronic rerouting system will not introduce costs to CBP because the agency created such necessary technological capabilities during the Centers test phase. However, document rerouting will create time, or opportunity, costs. CBP estimates that it will need to reroute 9,000 entry summary documents each year based on historical paper documentation rerouting needs and an anticipated lack of physical Center representation at certain ports of entry.[2] This estimate does not take into account CBP system enhancements recently completed and in development that would minimize document rerouting costs. Each document will take a CBP port employee an average of 8 minutes (0.13 hours) to reroute electronically to the appropriate Center.[3] Multiplying this time burden by the projected number of forms rerouted per year, CBP finds that CBP will incur an annual time burden of 1,200 hours to reroute paper documentation for post-release processing.

[1] *See* the ''Explanation of Amendments'' section for a detailed list of trade function transitions occurring with this rule.

[2] Source: CBP's Office of Field Operations, January 15, 2015.

[3] Source: CBP's Office of Field Operations, January 15, 2015.

In addition to sustaining document rerouting costs on account of the Centers, CBP will experience costs from processing (*i.e.,* reviewing and making a determination on) Center assignment appeals. Generally, CBP will assign each importer to a specific Center based on the HTSUS classification and industry sector corresponding to the predominant number of goods they import.[4] If an importer is displeased with their Center assignment, they may appeal it at any time by submitting a written appeal to CBP by mail or email. Appeals must include the following information: (1) Current Center assignment; (2) Preferred Center assignment; (3) All affected IOR numbers and associated bond numbers; (4) Written justification for the change in Center assignment; and (5) Import data, as described in the ''Finalization of the Centers of Excellence and Expertise Test'' section. CBP projects that importers will file a total of 60 Center assignment appeals each year.[5] Each appeal will take an estimated 60 minutes (1 hour), on average, for CBP Headquarters staff to process.[6] CBP will generally notify trade members of its Center appeal decisions by electronic means, thus imposing no additional cost to the agency.[7] Based on the expected number of Center appeals submitted annually and CBP's time burden to manage each appeal, CBP will sustain a yearly time burden of 60 hours from this rule's Center assignment appeals process.

As outlined throughout this rule, the responsibilities of the trade community will remain largely unchanged after the Centers' regulatory implementation. Importers may continue to file pre- and post-cargo release documentation and payments where their merchandise is entered. CBP personnel, who may work for either a Center director or a port director will accept all paper import documents from trade members. When necessary, CBP will internally route documentation to the appropriate Center for review and processing. Importers and brokers who file electronically will continue to use CBP's automated systems, such as ABI, to submit required import data and payments to CBP. Meanwhile, CBP will maintain a consistent formal notification and remedy process with importers regarding post-release and other trade-related issues following the Centers' establishment. Trade members will only incur costs from this rule when appealing a Center assignment.

Importers may choose to appeal their Center assignment for a number of reasons, including the expectation of better service or product knowledge at another Center. As previously discussed, if an importer chooses to appeal their Center assignment, they must submit a written appeal to CBP by mail or email that includes information about their current and preferred Center assignments (see ''Finalization of the Centers of Excellence and Expertise Test'' for specific appeal requirements). CBP estimates that each appeal will take 60 minutes (1 hour) for an importer to complete,[8] at an opportunity cost of $30.05 based on an importer's $30.05 hourly value of time.[9] [10] Due to the relative affordability of submitting a Center assignment appeal via email rather than mail, CBP believes that the vast majority of importers will file appeals electronically. Therefore, CBP does not consider the printing or mailing costs for an importer to submit a Center assignment appeal in this analysis. By applying the cost for importers to complete and submit a Center assignment appeal to the previously mentioned expected number of Center assignment appeals filed annually, CBP finds that this rule's appeals process will generate $1,803 in yearly costs to the trade community.

Certain trade members, particularly Customs-accredited laboratories and Customs-approved gaugers, may incur added costs with this rule's amendments to their obligations outlined in 19 CFR 151.12(c)(5)-(6) and 19 CFR 151.13(b)(5)-(6). As amended, CBP will require Customs-accredited laboratories to notify an additional CBP representative, the Center director, of ''any circumstance which might affect the accuracy of work performed as an accredited laboratory, . . . their consequences, and any corrective action taken or that needs to be taken'' and ''. . . of any attempt to impede, influence, or coerce laboratory personnel in the performance of their duties, or of any decision to terminate laboratory operations or accredited status.'' [11] Similarly, CBP will require Customs-approved gaugers to notify an additional CBP representative, the Center director, of ''any circumstance which might affect the accuracy of work performed as an approved gauger, . . . their consequences, and any corrective action taken or that needs to be taken'' and ''. . . of any attempt to impede, influence, or coerce gauger personnel in the performance of their duties, or of any decision to terminate gauger operations or approval status.'' [12] Under current regulations, CBP mandates Customs-accredited laboratories and Customs-approved gaugers to contact the port director and Executive Director on these matters described. Given that CBP has not received any notifications currently required under 19 CFR

[4] The list of HTSUS numbers that will be used by CBP for the importer's placement in a Center is the same list of HTSUS numbers that are referenced in the definition for Centers (*see* § 101.1). Factors that may cause CBP to place an importer in a Center not based on the HTSUS classification of the predominant number of goods imported include the importer's associated business practices within an industry, the intended use of the predominant number of goods imported, or the high relative value of goods imported.

[5] Source: CBP's Office of Field Operations, January 15, 2015.

[6] Source: CBP's Office of Field Operations, January 15, 2015.

[7] Source: CBP's Office of Field Operations, January 15, 2015.

[8] Source: CBP's Office of Field Operations, January 26, 2015.

[9] CBP bases the $30.05 wage rate on the Bureau of Labor Statistics' (BLS) 2014 median hourly wage rate for Cargo and Freight Agents ($19.89), which CBP assumes best represents the wage for importers, multiplied by the ratio of BLS' average 2014 total compensation to wages and salaries for Office and Administrative Support occupations (1.4813), the assumed occupational group for importers. CBP then rounded and adjusted this figure, which was in 2014 U.S. dollars, to 2016 U.S. dollars using a 1.0 percent annual growth rate, as recommended by the U.S. Department of Transportation's value of travel time guidance. Source of median wage rate: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, ''May 2014 National Occupational Employment and Wage Estimates, United States- Median Hourly Wage by Occupation Code: Occupation Code 43–5011.'' Updated March 25, 2015. Available at *http://www.bls.gov/oes/2014/may/oes435011.htm.* Accessed June 15, 2015. Source of total compensation to wages and salaries ratio: U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. *Employer Costs for Employee Compensation Historical Listing March 2004—December 2015,* ''Table 3. Civilian workers, by occupational group: Employer costs per hours worked for employee compensation and costs as a percentage of total compensation, 2004–2015 by Respondent Type: Office and administrative support occupations.'' June 10, 2015. Available at *http://www.bls.gov/ncs/ect/sp/ececqrtn.pdf.* Accessed June 15, 2015. The total compensation to wages and salaries ratio used is equal to the average of the 2014 quarterly estimates (shown under Mar., June, Sep., Dec.) of the total compensation cost per hour worked for Office and Administrative Support occupations ($24.66) divided by the calculated average of the 2014 quarterly estimates (shown under Mar., June, Sep., Dec.) of wages and salaries cost per hour worked for the same occupation category ($16.6475). Source of suggested growth rate: U.S. Department of Transportation, Office of Transportation Policy. *The Value of Travel Time Savings: Departmental Guidance for Conducting Economic Evaluations Revision 2 (2015 Update),* ''Table 4 (Revision 2-corrected): Recommended Hourly Values of Travel Time Savings.'' April 29, 2015. Available at *http://www.transportation.gov/sites/dot.gov/files/docs/Revised%20Departmental%20Guidance%20on%20Valuation%20of%20Travel%20Time%20in%20Economic%20Analysis.pdf.* Accessed June 15, 2015.

[10] The opportunity cost estimate is equal to the median hourly wage of an importer ($30.05) multiplied by the hourly time burden for an importer to complete and submit a Center assignment appeal (1 hour), and then rounded.

[11] *See* 19 CFR 151.12(c)(5) and 151.12(c)(6).

[12] *See* 19 CFR 151.13(b)(5) and 151.13(b)(6).

151.12(c)(5)–(6) and 19 CFR 151.13(b)(5)–(6) in the past 20 years, CBP assumes in this analysis that the Centers rule's additional CBP notification step for Customs-accredited laboratories and Customs-approved gaugers will not introduce any costs to these parties.[13]

In all, the Centers rule will introduce a time burden of 1,260 hours to CBP each year and an annual cost of $1,803 to trade members.

b. Benefits

This rule will likely produce valuable benefits to CBP and the trade community. This section of the analysis largely discusses the benefits of the rule qualitatively due to quantitative data limitations. Based on the success of the Centers test, CBP believes that as permanent organizational components, the Centers will continue to provide uniform post-release processing and trade-related decision-making, strengthen critical agency knowledge of industry practices and products, heighten CBP's trade enforcement skills, and improve trade communication, though on a much grander scale than observed during the test phase because of the expansion of the Centers concept to all importers.

The Centers allow CBP to conduct uniform entry summary processing and trade-related decision-making nationwide on an industry-specific, importer account basis by transitioning the post-release processing of an importer's goods from a transactional level at each port of entry to one assigned Center. Such organization has already benefited at least one Center test participant, who claims that they have gained numerous administrative efficiencies since joining the Center, including time and cost savings from reduced paperwork submission requirements.[14] Once established as permanent CBP components, the Centers will presumably require fewer information requests and conduct better informed trade compliance actions than in the current environment, leading to time and cost savings to CBP and trade members. Currently, when a non-Center test participating importer enters similar merchandise at different U.S. ports of entry that requires supplemental information for entry summary processing, CBP personnel at each port of entry will generally submit a CBP Form 28: Request for Information to the importer. In this case, the importer must respond to each request, even if the responses are identical, and CBP personnel at each port of entry must review the duplicative information received from the importer. With the Centers, the importer will receive only one CBP Form 28 for the merchandise's entry summary processing, requiring CBP personnel to review the importer's supplemental information only once. For each avoidance of a CBP Form 28, CBP will save 10 minutes (0.17 hours) of time in issuing the request and reviewing the requested information.[15] Importers can expect to save an estimated 120 minutes (2 hours) in preparation time for each avoided CBP Form 28 response[16] and $60.10 in averted opportunity costs.[17] CBP and some importers may experience additional printing and mailing cost savings through reduced CBP Form 28 submissions, though the extent of these savings is unknown.

With a single Center conducting all post-release processing for a particular importer, determinations on protests, marking, and classification matters will also now be consistent rather than sometimes contrasting as in the current environment, where importers occasionally receive different determinations on similar trade compliance issues depending on the port of entry where their merchandise is processed that sometimes requires duplicative action on behalf of CBP and the importer. This consistency may enhance importers' awareness of CBP's positions on trade compliance issues, which may lead to improved compliance and an unknown amount of subsequent savings to both parties in the future. To the extent that this rule's uniform processing and determinations also decrease post-entry amendments, post-summary corrections, exams, hold times, and other trade obstacles, the benefits of this rule will be higher.

In addition to creating uniform post-release processing and determinations, the Centers will strengthen CBP trade personnel's industry knowledge by concentrating their expertise into a specific import industry set as opposed to the entire range of import industries. According to outreach conducted while evaluating this rule, such focused expertise has already enriched CBP-Trade relations, as demonstrated through a Centers test participant's claim that Center account managers are very knowledgeable of their industry and are now more familiar with their imports and trade issues.[18] As Centers staff increase their awareness of importers and their merchandise, they may issue fewer requests for information, exams, or holds, which would provide significant time and cost savings to CBP and trade members. The Centers' industry focus has also enriched trade enforcement. Using knowledge gathered through processing solely entry summaries for the electronics industry, Electronics Center employees uncovered a counterfeit electronic adapter import operation. Since discovering the counterfeiting operation, the Electronics Center has worked with the rights holder to add a trademark onto their electronic device to prevent future intellectual property rights (IPR) violations and subsequent economic losses.[19] Based on the benefits of enhanced industry knowledge gained during the Centers test phase, the permanent establishment of the Centers will likely enhance CBP-Trade relations, facilitate trade, and result in an improved ability to identify high-risk commercial importations that could enhance import safety, increase revenue protection, and reduce economic losses associated with trade violations.

Furthermore, the Centers will improve communication among CBP and the entire U.S. importing universe by replacing communication with each port of entry with communication with one Center. The Centers will serve as a single source for trade members to contact regarding such subjects as importing requirements, IPR infringement or other trade violations, merchandise holds, and PGA issues, eliminating the need for trade members to contact multiple CBP employees and for multiple CBP employees to share duplicative information with members of the trade. Such a decrease in redundant information requests and

[13] Based on the number of notifications received by CBP's Laboratories and Scientific Services as of January 2015. Source: CBP's Office of Field Operations, January 15, 2015.

[14] Source: Teleconference with CBP's Pharmaceuticals, Health & Chemicals Center test participant on December 19, 2013.

[15] Source: U.S. Office of Management and Budget, Office of Information and Regulatory Affairs. *RegInfo.gov.* ''Supporting Statement Request for Information 1651–0023.'' June 20, 2014. Available at *http://www.reginfo.gov/public/do/PRAView Document?ref_nbr=201403-1651-004.* Accessed January 20, 2015.

[16] Source: U.S. Office of Management and Budget, Office of Information and Regulatory Affairs. *RegInfo.gov.* ''Supporting Statement Request for Information 1651–0023.'' June 20, 2014. Available at *http://www.reginfo.gov/public/do/PRAView Document?ref_nbr=201403-1651-004.* Accessed January 20, 2015.

[17] The opportunity cost estimate is equal to the previously-discussed median hourly wage of an importer ($30.05) multiplied by the hourly time burden for an importer to complete a CBP Form 28 response (2 hours), and then rounded.

[18] Source: Teleconference with CBP's Pharmaceuticals, Health & Chemicals Center test participant on December 19, 2013.

[19] Source: Teleconference with CBP's Electronics Center test on December 3, 2013.

sharing will produce time and cost savings to the trade community and CBP. The Centers will also allow for enhanced communication with importers by offering extended hours of service compared to port of entry service hours, which may expedite trade. Without information on the amount of duplicative communication eliminated with the emergence of the Centers or the volume of trade expedited through the Centers' extended hours of service, the overall value of these communication benefits is unknown.

c. Net Impact of Rule

In summary, this rule's formal establishment of the Centers of Excellence and Expertise will introduce costs and benefits. CBP will sustain 1,260 added work hours each year from rerouting paper documentation and reviewing Center assignment appeals, while trade members will bear an annual cost of $1,803 attributable to Center assignment appeals. CBP and trade members will also experience benefits from this rule's decreased import costs and time burdens, streamlined trade processing, broadened industry and trade compliance knowledge, enhanced trade enforcement posture, and improved communication, though the overall value of these benefits is unknown. Although not fully quantified, CBP believes this rule's benefits to CBP and the trade community will be considerable, while its costs to these parties will be relatively negligible. For these reasons, CBP asserts that the benefits of this rule will outweigh its costs, thus providing an overall net benefit to the agency and members of the trade community.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business concern per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). CBP is issuing this rule as an interim final rule under the agency management and personnel and procedural rule exceptions of the Administrative Procedure Act. Thus, a Regulatory Flexibility Act analysis is not required. *See* 5 U.S.C. 553. Nonetheless, CBP considered the economic impact of this rule on small entities.

Through this rule, CBP will formally transition certain trade enforcement responsibilities in addition to the majority of post-release trade functions from the purview of port directors to Center directors.[20] Port directors will continue to retain singular authority over regulations pertaining to the control, movement, examination, and release of cargo. Because the Centers will introduce a new post-release processing method for all U.S. imports, this rule's regulatory changes will affect all importers and related members of the trade who enter goods into the United States, including those considered ''small'' under the Small Business Administration's (SBA) size standards.[21] For this reason, CBP believes that this rule will impact a substantial number of small entities.

This rule will generate costs and benefits to importers and related members of the trade. As outlined throughout this rule, the responsibilities of the trade community remain largely unchanged after the Centers' regulatory implementation. However, trade members may experience costs when filing a Center assignment appeal and when notifying a Center under amended 19 CFR 151.12(c)(5)–(6) and 19 CFR 151.13(b)(5)–(6) requirements.

As previously mentioned in the ''Executive Order 13563 (Improving Regulation and Regulatory Review) and Executive Order 12866 (Regulatory Planning and Review)'' section, importers will incur an opportunity cost of $30.05 per Center assignment appeal. With 60 appeals expected each year, the annual cost of Center assignment appeals to the entire trade community will equal $1,803. It is likely that some small entities will file Center assignment appeals, though the exact number is unknown. Regardless of the number of small entities impacted by this requirement, CBP does not believe that a cost of $30.05 to file a Center assignment appeal will amount to a ''significant'' level to these entities.

Under current regulations, CBP mandates Customs-accredited laboratories and Customs-approved gaugers to contact the port director and Executive Director on the matters described in 19 CFR 151.12(c)(5)–(6) and 19 CFR 151.13(b)(5)–(6). Given that CBP has not received any such notifications in the past 20 years, CBP assumes that this rule's added requirement to contact a Center director per 19 CFR 151.12(c)(5)–(6) and 19 CFR 151.13(b)(5)–(6)'s amendments will not impact a substantial number of small entities. In the event that a Customs-accredited laboratory or Customs-approved gauger considered ''small'' has to notify an additional CBP representative according to these regulatory changes, CBP does not believe that requiring one more phone call, letter, or email will cause a significant economic impact to the entity.

Besides costs, importers and related members of the trade will experience benefits from this rule, though the value of these benefits is unknown due to data limitations. The trade community will likely benefit from this rule's uniform post-release processing and decision-making, increased agency knowledge of industry practices and products, and improved communication with CBP, based on observations from the Centers test. CBP expects the Centers' uniform post-release processing and trade-related determinations to decrease administrative burdens on the trade, resulting in time and cost savings. This uniformity may also enhance the trade community's awareness of CBP's position on trade compliance issues, which may improve compliance and generate an unknown amount of subsequent savings to trade members in the future. The Centers' strengthened industry focus will likely enhance CBP-Trade relations, facilitate trade, and result in an improved ability to identify high-risk commercial importations that could increase import safety, increase revenue protection, and reduce economic loss associated with trade violations. By replacing port-by-port communication with communication with one Center, the Centers will serve as a single source for trade members to contact regarding such subjects as importing requirements, IPR or other trade violation reports, merchandise holds, and PGA issues. This sole communication source will eliminate the need for trade members to contact multiple CBP resources, which will likely produce additional time and cost savings. The Centers will also allow for enhanced communication between CBP and the trade community by offering extended hours of service compared to port of entry service hours, which may expedite trade. Despite their unknown value, CBP notes that the economic impact of these changes on small entities, if any, will be entirely beneficial.

Although CBP presumes that this rule will affect a substantial number of small entities, CBP does not believe that the

[20] *See* the ''Explanation of Amendments'' section for a detailed list of trade function transitions occurring with this rule.

[21] *See* 13 CFR 121.101–13 CFR 121.201.

economic impact of this rule on small entities will be significant. Accordingly, CBP believes that this regulation will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. As this document does not involve any collections of information under the Act, the provisions of the Act are inapplicable.

V. Administrative Procedure Act

The Administrative Procedure Act (APA) requires agencies to provide advance public notice and seek public comment on substantive regulations. *See* 5 U.S.C. 553. The APA, however, provides several exceptions to these requirements.

Pursuant to 5 U.S.C. 553(a)(2), public notice and the opportunity to provide public comment are inapplicable to matters relating to ''agency management or personnel.'' This interim final rule relates to agency management and personnel because it involves the transitioning of certain work functions from the port directors and the port director personnel to the Center directors and the Center director personnel.

Pursuant to 5 U.S.C. 553(b)(A), rules of ''agency organization, procedure, and practice'' are also exempted from the notice-and-comment requirements of the APA. This interim final rule permanently creates the Centers, which have been operating under a test period that began in 2012 and have been implemented through **Federal Register** Notices and a CBP Delegation Order. Through this interim final rule, CBP is ending the test period and establishing the Centers as a permanent organizational component of the agency.

Finally, 5 U.S.C. 553(b)(B) of the APA authorizes CBP to dispense with notice and comment requirements when CBP for good cause finds that notice and comment is ''impracticable, unnecessary, or contrary to the public interest.'' CBP has been operating the Centers as a test for several years pursuant to 19 CFR 101.9(a), which authorizes CBP to conduct test programs or procedures to evaluate the effectiveness of certain operational procedures. The Centers have been staffed with CBP employees who facilitate trade by providing account management for members in the identified industries; engaging in risk segmentation; and strengthening trade outreach. This interim final rule codifies CBP personnel adjustments and internal agency procedures that reflect a realignment of certain trade functions within CBP, rather than a substantive change in policy. Therefore, advance notice and comment is unnecessary.

VI. Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a), which provides that the authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of Homeland Security pursuant to section 403(1) of the Homeland Security Act of 2002. Accordingly, this interim final rule to amend such regulations may be signed by the Secretary of Homeland Security (or his delegate).

List of Subjects

19 CFR Part 4

Customs duties and inspection, Exports, Freight, Harbors, Maritime carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

19 CFR Part 7

American Samoa, Coffee, Cuba, Customs duties and inspection, Guam, Guantanamo Bay Naval Station, Kingman Reef, Liquors, Midway Islands, Puerto Rico, Wake Island, Wine.

19 CFR Part 10

Caribbean Basin initiative, Customs duties and inspection, Exports, Reporting and recordkeeping requirements.

19 CFR Part 11

Customs duties and inspection, Labeling, Packaging and containers.

19 CFR Part 12

Customs duties and inspection, Reporting and recordkeeping requirements.

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Harbors, Reporting and recordkeeping requirements, Taxes.

19 CFR Part 54

Customs duties and inspection, Metals, Reporting and recordkeeping requirements.

19 CFR Part 101

Customs duties and inspection, Harbors, Organization and functions (Government agencies), Seals and insignia, Vessels.

19 CFR Part 102

Canada, Customs duties and inspection, Imports, Mexico, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 103

Administrative practice and procedure, Confidential business information, Courts, Freedom of information, Law enforcement, Privacy, Reporting and recordkeeping requirements.

19 CFR Part 113

Common carriers, Customs duties and inspection, Exports, Freight, Laboratories, Reporting and recordkeeping requirements, Surety bonds.

19 CFR Part 132

Customs duties and inspection.

19 CFR Part 133

Copyright, Customs duties and inspection, Reporting and recordkeeping requirements Trade names, Trademarks.

19 CFR Part 134

Customs duties and inspection, Labeling, Packaging and containers.

19 CFR Part 141

Customs duties and inspection, Reporting and recordkeeping requirements.

19 CFR Part 142

Canada, Customs duties and inspection, Mexico, Reporting and recordkeeping requirements.

19 CFR Part 143

Customs duties and inspection, Reporting and recordkeeping requirements.

19 CFR Part 144

Customs duties and inspection, Reporting and recordkeeping requirements, Warehouses.

19 CFR Part 145

Mail importations.

19 CFR Part 146

Administrative practice and procedure, Customs duties and inspection, Exports, Foreign trade zones, Penalties, Petroleum, Reporting and recordkeeping requirements.

19 CFR Part 147

Customs duties and inspection, Fairs and expositions, Reporting and recordkeeping requirements, Surety bonds.

19 CFR Part 151

Cigars and cigarettes, Cotton, Customs duties and inspection, Fruit juices, Laboratories, Metals, Oil imports, Reporting and recordkeeping requirements, Sugar, Wool.

19 CFR Part 152

Customs duties and inspection.

19 CFR Part 158

Customs duties and inspection, Exports, Freight, Reporting and recordkeeping requirements.

19 CFR Part 159

Antidumping, Countervailing duties, Customs duties and inspection, Foreign currencies.

19 CFR Part 161

Customs duties and inspection, Exports, Law enforcement.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Drug traffic control, Exports, Law enforcement, Marihuana, Penalties, Reporting and recordkeeping requirements, Search warrants, Seizures and forfeitures.

19 CFR Part 163

Administrative practice and procedure, Customs duties and inspection, Exports, Imports, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 173

Administrative practice and procedure, Customs duties and inspection.

19 CFR Part 174

Administrative practice and procedure, Customs duties and inspection.

19 CFR Part 176

Courts, Customs duties and inspection.

19 CFR Part 181

Administrative practice and procedure, Canada, Customs duties and inspection, Exports, Imports, Mexico, Reporting and recordkeeping requirements, Trade agreements.

Amendments to the Regulations

■ For the reasons given above and under the authority of 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), and 1624, CBP amends parts 4, 7, 10, 11, 12, 24, 54, 101, 102, 103, 113, 132, 133, 134, 141, 142, 143, 144, 145, 146, 147, 151, 152, 158, 159, 161, 162, 163, 173, 174, 176, and 181 of the CBP regulations (19 CFR Parts 4, 7, 10, 11, 12, 24, 54, 101, 102, 103, 113, 132, 133, 134, 141, 142, 143, 144, 145, 146, 147, 151, 152, 158, 159, 161, 162, 163, 173, 174, 176, and 181) as set forth below: Also, for the reasons given above and under the authority of 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), and 1624, those parts of Chapter I of the CBP regulations (chapter I) listed below are amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

■ 1. The general authority citation for part 4 and the specific authority citation for section 4.94a continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 501, 60105.

* * * * *

Section 4.94a also issued under 19 U.S.C. 1484b;

* * * * *

■ 2. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
4.94a(d)	appropriate port director	Center director.

PART 7—CUSTOMS RELATIONS WITH INSULAR POSSESSIONS AND GUANTANAMO BAY NAVAL STATION

■ 3. The authority citation for part 7 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624; 48 U.S.C. 1406i.

■ 4. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
7.3(e)(1)(iii)(B)	port director	Center director.
7.3(e)(2)	port director	Center director.
7.3(f)(1)	port director	Center director.
7.3(f)(2)	port director	Center director.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

■ 5. The general authority citation for part 10 and the specific authority citations for §§ 10.804, 10.864, 10.866, 10.906, 10.1006, and 10.3006 continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314.

* * * * *

Sections 10.801 through 10.829 also issued under 19 U.S.C. 1202 (General Note 30, HTSUS) and Pub. L. 109–169, 119 Stat. 3581 (19 U.S.C. 3805 note).

* * * * *

Sections 10.861 through 10.890 also issued under 19 U.S.C. 1202 (General Note 31, HTSUS) and Pub. L. 109–283, 120 Stat. 1191 (19 U.S.C. 3805 note).

* * * * *

Sections 10.901 through 10.934 also issued under 19 U.S.C. 1202 (General Note 32, HTSUS), 19 U.S.C. 1520(d), and Pub. L. 110–138, 121 Stat. 1455 (19 U.S.C. 3805 note).

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Sections 10.1001 through 10.1034 also issued under 19 U.S.C. 1202 (General Note 33, HTSUS), 19 U.S.C. 1520(d),

and Pub. L. 112–41, 125 Stat. 428 (19 U.S.C. 3805 note).

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Sections 10.3001 through 10.3034 also issued under 19 U.S.C. 1202 (General Note 34, HTSUS), 19 U.S.C. 1520(d), and Pub. L. 112–42, 125 Stat. 462 (19 U.S.C. 3805 note).

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■ 6. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
10.1(b)	port director	Center director.
10.1(d)	port director	Center director.
10.3(a)	port director	Center director.
10.3(c)(3)	port director	Center director.
10.8(b)	port director	Center director.
10.8(c)	port director	Center director.
10.8(d)	port director	port director or Center director.
10.8a(c)	port director	Center director.
10.9(b)	port director	Center director.
10.9(c)	port director	Center director.
10.9(d)	port director	port director or Center director
10.21	port director	Center director.
10.24(b)	port director	Center director.
10.24(c)	port director	Center director.
10.24(d)	port director	Center director.
10.24(e)	port director	Center director.
10.31(a)(3)(ii)	port director	Center director.
10.31(f)	port director	Center director.
10.37	director of the port where the entry was filed	Center director.
10.37	CBP form 3173,	CBP form 3173, which may be submitted to CBP, either at the port of entry or electronically.
10.39(a)	port director	Center director.
10.39(b)	port director	Center director.
10.41a(a)(2)	port director	Center director.
10.41a(e)	the port director	CBP, either at the port of entry or electronically.
10.43(a)	port director	Center director.
10.48(c)	port director	Center director.
10.48(d)	port director	Center director.
10.49(b)	port director	Center director.
10.49(d)	director of the port of entry	CBP, either at the port of entry or electronically.
10.52	port director	Center director.
10.53(g)	port director	Center director.
10.56(e)	port director	Center director.
10.70(a)	port director	Center director.
10.71(c)	the port director	CBP, either at the port of entry or electronically.
10.83(a)	port director	Center director.
10.84(d)	port director	Center director.
10.84(e)	director of the port where entry was made	CBP, either at the port of entry or electronically.
10.91(a)(2)(i)	port director	Center director.
10.91(a)(2)(ii) introductory text	port director	Center director.
10.91(a)(2)(ii)(A)	port director	Center director.
10.91(e)(1)	port director	Center director.
10.91(f)(2)(ii)	port director	Center director.
10.102(d)	port director	Center director.
10.104	port director	Center director.
10.108	port director	Center director.
10.121(b)	the port director	CBP, either at the port of entry or electronically.
10.134	port director	Center director.
10.172	port director	Center director.
10.173(a)	port director	Center director.
10.173(b)	port director	Center director.
10.173(c)	port director	Center director.
10.174(a)	port director	Center director.
10.174(b)	port director	Center director.
10.175(d)(2)	port director	Center director.
10.177(b)	port director	Center director.
10.179(b)(1)	the director of the port where the original entry was made.	CBP, either at the port of entry or electronically.
10.183(e)	port director	Center director.
10.183(g)	port director	Center director.

Section	Remove	Add
10.192	port director	Center director.
10.193(c)(2)	port director	Center director.
10.194(a)	port director	Center director.
10.194(b)	port director	Center director.
10.196(b)	port director	Center director.
10.198(a)(1)(i)	port director	Center director.
10.198(a)(1)(ii)	port director	Center director.
10.198(b)	port director	Center director.
10.198(c)	port director	Center director.
10.199(c)(1)(iii)(B)	port director	Center director.
10.199(d)(1)	port director	Center director.
10.199(d)(2)	port director	Center director.
10.199(e)(2)(i)	port director	Center director.
10.199(e)(2)(ii)	port director	Center director.
10.199(f)(1)	port director	Center director.
10.199 (f)(2)	port director	Center director.
10.199(h)	port director	Center director.
10.206(d)(2)	port director	Center director.
10.207(b)(1)(i)	port director	Center director.
10.207(b)(1)(ii)	port director	Center director.
10.207(c)	port director	Center director.
10.207(d)(1)	port director	Center director.
10.207(d)(2)	port director	Center director.
10.207(e)	port director	Center director.
10.213(d)(3)(ii)	port director	Center director.
10.216(b)	port director	Center director.
10.216(c)	port director	Center director.
10.216(d)(1)(i)	port director	Center director.
10.216(d)(1)(iii)	port director	Center director.
10.216(d)(2)	port director	Center director.
10.217(a)	port director	Center director.
10.223(d)(3)(ii)	port director	Center director.
10.226(b) introductory text	port director	Center director.
10.226(c)	port director	Center director.
10.226(d)(1)(i)	port director	Center director.
10.226(d)(1)(iii)	port director	Center director.
10.226(d)(2)	port director	Center director.
10.227(a)	port director	Center director.
10.233(d)(3)(ii)	port director	Center director.
10.235(b)	the Customs port where the declaration was originally filed.	CBP, either at the port of entry or electronically.
10.236(b) introductory text	port director	Center director.
10.236(c)	port director	Center director.
10.236(d)(1)(i)	port director	Center director.
10.236(d)(1)(iii)	port director	Center director.
10.236(d)(2)	port director	Center director.
10.237(a) introductory text	port director	Center director.
10.243(d)(3)(ii)	port director	Center director.
10.245(b)	the CBP port where the declaration was originally filed.	CBP, either at the port of entry or electronically.
10.246(b) introductory text	port director	Center director.
10.246(c)	port director	Center director.
10.246(d)(1)(i)	port director	Center director.
10.246(d)(1)(iii)	port director	Center director.
10.246(d)(2)	port director	Center director.
10.247(a)	port director	Center director.
10.253(b)(3)(ii)	port director	Center director.
10.256(b) introductory text	port director	Center director.
10.256(c)	port director	Center director.
10.256(d)(1)(i)	port director	Center director.
10.256(d)(1)(iii)	port director	Center director.
10.256(d)(2)	port director	Center director.
10.257(a) introductory text	port director	Center director.
10.307(c)	port director	Center director.
10.307(e) introductory text	port director	Center director.
10.307(e)(2)	port director	Center director.
10.309	port director	Center director.
10.411(a) introductory text	port director	Center director.
10.411(d)	port director	Center director.
10.413	port director	Center director.
10.414(b)	port director	Center director.
10.416(a)	port director	Center director.
10.416(b)	port director	Center director.
10.422(a) introductory text	port director	Center director.

Section	Remove	Add
10.422(c)	port director	Center director.
10.423(b)	port director	Center director.
10.424(a)	port director	Center director.
10.424(b)	port director	Center director.
10.430(c)(3)	port director	Center director.
10.431	port director	Center director.
10.441(a)	the director of the port at which the entry covering the good was filed.	CBP, either at the port of entry or electronically.
10.442(a)	port director	Center director.
10.442(b)	port director	Center director.
10.442(c)(1)	port director	Center director.
10.442(c)(2)	port director	Center director.
10.442(d)(1)	port director	Center director.
10.442(d)(2)	port director	Center director.
10.442(d)(3)	port director	Center director.
10.470(a) introductory text	port director	Center director.
10.511(a) introductory text	port director	Center director.
10.513(b)	port director	Center director.
10.515(a)	port director	Center director.
10.515(b)	port director	Center director.
10.550(a) introductory text	port director	Center director.
10.584(a) introductory text	port director	Center director.
10.584(c)	port director	Center director.
10.586(b)	port director	Center director.
10.588(a)	port director	Center director.
10.588(b)	port director	Center director.
10.589(c)(3)	port director	Center director.
10.591(a)	the director of the port at which the entry covering the good was filed.	CBP, either at the port of entry or electronically.
10.592(a)	port director	Center director.
10.592(b)	port director	Center director.
10.592(c)(1)	port director	Center director.
10.592(c)(2)	port director	Center director.
10.592(d)(1)	port director	Center director.
10.592(d)(2)	port director	Center director.
10.592(d)(3)	port director	Center director.
10.610(a)	port director	Center director.
10.610(b)	port director	Center director.
10.616(a) introductory text	port director	Center director.
10.704(a) introductory text	port director	Center director.
10.706(b)	port director	Center director.
10.708(a)	port director	Center director.
10.708(b)	port director	Center director.
10.710(c)(2)(iii)	port director	Center director.
10.712	port director	Center director.
10.764(a) introductory text	port director	Center director.
10.766(b)	port director	Center director.
10.768(a)	port director	Center director.
10.768(b)	port director	Center director.
10.781(a)	port director	Center director.
10.781(b)	port director	Center director.
10.784(a)	port director	Center director.
10.806(b)	port director	Center director.
10.808(a)	port director	Center director.
10.808(b)	port director	Center director.
10.821(a) introductory text	port director	Center director.
10.823(a)	port director	Center director.
10.823(b)	port director	Center director.
10.824(a)	port director	Center director.
10.847(c)	the CBP port where the claim was originally filed.	CBP, either at the port of entry or electronically.
10.868(a)	port director	Center director.
10.868(b)	port director	Center director.
10.870(a)	the director of the port at which the entry covering the good was filed.	CBP, either at the port of entry or electronically.
10.871(a)	port director	Center director.
10.871(b)	port director	Center director.
10.871(c)(1)	port director	Center director.
10.871(c)(2)	port director	Center director.
10.871(d)(1)	port director	Center director.
10.871(d)(2)	port director	Center director.
10.871(d)(3)	port director	Center director.
10.884(a) introductory text	port director	Center director.
10.886(a)	port director	Center director.

Section	Remove	Add
10.886(b)	port director	Center director.
10.887(a)	port director	Center director.
10.904(a) introductory text	port director	Center director.
10.904(c)	port director	Center director.
10.908(a)	port director	Center director.
10.908(b)	port director	Center director.
10.909(c)(3)	port director	Center director.
10.911(a)	the director of the port at which the entry covering the good was filed.	CBP, either at the port of entry or electronically.
10.912(a)	port director	Center director.
10.912(b)	port director	Center director.
10.912(c)(1)	port director	Center director.
10.912(c)(2)	port director	Center director.
10.912(d)(1)	port director	Center director.
10.912(d)(2)	port director	Center director.
10.912(d)(3)	port director	Center director.
10.926(a) introductory text	port director	Center director.
10.1004(a) introductory text	port director	Center director.
10.1004(c)	port director	Center director.
10.1004(d)(2)	port director	Center director.
10.1008(a)	port director	Center director.
10.1008(b)	port director	Center director.
10.1009(c)(3)	port director	Center director.
10.1011(a)	the director of the port at which the entry covering the good was filed.	CBP, either at the port of entry or electronically.
10.1012(a)	port director	Center director.
10.1012(b)	port director	Center director.
10.1012(c)(1)	port director	Center director.
10.1012(c)(2)	port director	Center director.
10.1012(d)(1)	port director	Center director.
10.1012(d)(2)	port director	Center director.
10.1012(d)(3)	port director	Center director.
10.1026(a) introductory text	port director	Center director.
10.2004(a) introductory text	port director	Center director.
10.2004(c)	port director	Center director.
10.2004(d)(2)	port director	Center director.
10.2006(b)	port director	Center director.
10.2008(a)	port director	Center director.
10.2008(b)	port director	Center director.
10.2009(c)(3)	port director	Center director.
10.2011(a)	the director of the port at which the entry covering the good was filed.	CBP, either at the port of entry or electronically.
10.2012(a)	port director	Center director.
10.2012(b)	port director	Center director.
10.2012(c)(1)	port director	Center director.
10.2012(c)(2)	port director	Center director.
10.2012(d)(1)	port director	Center director.
10.2012(d)(2)	port director	Center director.
10.2012(d)(3)	port director	Center director.
10.2026(a) introductory text	port director	Center director.
10.3004(a) introductory text	port director	Center director.
10.3004(c)	port director	Center director.
10.3004(d)(2)	port director	Center director.
10.3008(a)	port director	Center director.
10.3008(b)	port director	Center director.
10.3009(c)(3)	port director	Center director.
10.3011(a)	the director of the port at which the entry covering the good was filed.	CBP, either at the port of entry or electronically.
10.3012(a)	port director	Center director.
10.3012(b)	port director	Center director.
10.3012(c)(1)	port director	Center director.
10.3012(c)(2)	port director	Center director.
10.3012(d)(1)	port director	Center director.
10.3012(d)(2)	port director	Center director.
10.3012(d)(3)	port director	Center director.
10.3026(a) introductory text	port director	Center director.

■ 7. Section 10.40(b) is revised to read as follows:

§ 10.40 Refund of cash deposits.

* * * * *

(b) If any article entered under Chapter 98, subchapter XIII, Harmonized Tariff Schedule of the United States, is not exported or destroyed within the period of time during which articles may remain in the

customs territory of the United States under bond (including any lawful extension), the Center director shall notify the importer in writing that the entire cash deposit will be transferred to the regular account as liquidated damages unless a written application for relief from the payment of the full liquidated damages is filed with the Center director within 60 days after the date of the notice. If such an application is timely filed, the transfer of the cash deposit to the regular account as liquidated damages shall be deferred pending the decision of the Headquarters, U.S. Customs and Border Protection or, in appropriate cases, the Center director on the application.

§ 10.91 [Amended]

■ 8. Section 10.91(c)(2) is amended by removing the words ''the port director where the entry or withdrawal of the prototype was made'' in the first sentence and adding in their place the words ''CBP, either at the port of entry or electronically'' and by removing the words ''port director'' in the last sentence and adding in their place the words ''Center director''.

§ 10.102 [Amended]

■ 9. Section 10.102(a) is amended by removing the words ''port director'' and adding in their place the words ''Center director'' and by removing the words ''upon the receipt'' and adding in their place the words ''upon the receipt, either at the port of entry or electronically,''.

§ 10.804 [Amended]

■ 10. Section 10.804(a) introductory text is amended by removing the words ''to CBP'' and by removing the words ''port director'' and adding in their place the words ''Center director''.

§ 10.864 [Amended]

■ 11. Section 10.864(a) introductory text is amended by removing the words ''to CBP'' and by removing the words ''port director'' and adding in their place the words ''Center director''.

§ 10.866 [Amended]

■ 12. Section 10.866(b) is amended by removing the words ''port director'' each place that it appears and adding in their place the words ''Center director'' and by removing the words ''to CBP''.

§ 10.906 [Amended]

■ 13. Section 10.906(b) is amended by removing the words ''port director'' each place that it appears and adding in their place the words ''Center director'' and by removing the words ''to CBP''.

§ 10.1006 [Amended]

■ 14. Section 10.1006(b) is amended by removing the words ''port director'' each place that it appears and adding in their place the words ''Center director'' and by removing the words ''to CBP''.

§ 10.3006 [Amended]

■ 15. Section 10.3006(b) is amended by removing the words ''port director'' each place that it appears and adding in their place the words ''Center director'' and by removing the words ''to CBP''.

PART 11—PACKING AND STAMPING; MARKING

■ 16. The authority citation for part 11 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i) and (j), Harmonized Tariff Schedule of the United States), 1624.

■ 17. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
11.12(b)	port director	Center director.
11.12(c)	port director	Center director.
11.12(d)	port director	Center director.
11.12(e)	port director	Center director.
11.12(f)	port director	Center director.
11.12a(b)	port director	Center director.
11.12a(c)	port director	Center director.
11.12a(d)	port director	Center director.
11.12a(e)	port director	Center director.
11.12a(f)	port director	Center director.
11.12b(b)	port director	Center director.
11.12b(c)	port director	Center director.
11.12b(d)	port director	Center director.
11.12b(e)	port director	Center director.
11.12b(f)	port director	Center director.

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 18. The general authority citation for part 12 and the specific authority citations for § 12.73 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.73 and 12.74 also issued under 19 U.S.C. 1484, 42 U.S.C. 7522, 7601;

* * * * *

■ 19. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
12.26(f)	the port director	an authorized CBP official.
12.39(b)(2)(i)	the port director	CBP.
12.39(b)(3)	Port directors	CBP.
12.39(b)(4)	under bond, port directors	under bond, CBP.
12.39(b)(4)	20436 by port directors	20436.

Section	Remove	Add
12.39(c)(1)(iii)	the port director of the port in which the entry was attempted.	CBP.
12.39(e)(2)	The port director	CBP.
12.121(a)(2)(ii) introductory text	port director	Center director.
12.121(a)(2)(ii)(A)	port director	CBP, either at the port of entry or electronically.
12.121(a)(2)(ii)(B)	port director	Center director.

■ 20. Section 12.73(j) is revised to read as follows:

§ 12.73 Motor vehicle and engine compliance with Federal antipollution emission requirements.

* * * * *

(j) *Release under bond.* If a declaration filed in accordance with paragraph (i)(2) of this section states that the entry is being filed under circumstances described in either paragraph (c)(4), (h)(1), (h)(2), (h)(3) or (h)(4) of this section, the entry shall be accepted only if the importer or consignee gives a bond on Customs Form 301, containing the bond condition set forth in § 113.62 of this chapter for the production of an EPA statement that the vehicle or engine is in conformity with Federal emission requirements. Within the period in paragraph (h)(2), (h)(3) or (c)(4) of this section, or in the case of paragraph (h)(1) or (h)(4) of this section, the period specified by EPA in its authorization for an exemption, or such additional period as the Center director may allow for good cause shown, the importer or consignee shall deliver to CBP, either at the port of entry or electronically, the prescribed statement. If the statement is not delivered to CBP within the specified period, the importer or consignee shall deliver or cause to be delivered to the port director those vehicles which were released under a bond required by this paragraph. In the event that the vehicle or engine is not redelivered within five days following the date specified in the preceding sentence, liquidated damages shall be assessed in the full amount of the bond, if it is a single entry bond, or if a continuous bond is used, the amount that would have been taken under a single entry bond.

* * * * *

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

■ 21. The general authority citation for part 24 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1505, 1520, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 3717, 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*).

* * * * *

■ 22. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right colum:

Section	Remove	Add
24.1(a)(3)(ii)	the port director	an authorized CBP official.
24.4(a)	director of each port at which he wishes to defer payment.	Center director, either at a port of entry or electronically.
24.4(a)	a port director	the Center director.
24.4(b)	port director	Center director.
24.4(d)(1)	port director	Center director.
24.14(c)	port director's	CBP's.

■ 23. Section 24.1(a)(3)(i) is revised to read as follows:

§ 24.1 Collection of Customs duties, taxes, fees, interest, and other charges.

* * * * *

(a) * * *

(3)(i) An uncertified check drawn by an interested party on a national or state bank or trust company of the United States or a bank in Puerto Rico or any possession of the United States if such checks are acceptable for deposit by a Federal Reserve bank, branch Federal Reserve bank, or other designated depositary shall be accepted if there is on file with CBP a bond to secure the payment of the duties, taxes, fees, interest, or other charges, or if a bond has not been filed, the organization or individual drawing and tendering the uncertified check has been approved by an authorized CBP official to make payment in such manner. In determining whether an uncertified check shall be accepted in the absence of a bond, an authorized CBP official shall use available credit data obtainable without cost to the Government, such as that furnished by banks, local business firms, better business bureaus, or local credit exchanges, sufficient to satisfy him of the credit standing or reliability of the drawer of the check. For purposes of this paragraph, a customs broker who does not have a permit for the district (see the definition of ''district'' at § 111.1 of this chapter) where the entry is filed, is an interested party for the purpose of CBP's acceptance of such broker's own check, provided the broker has on file the necessary power of attorney which is unconditioned geographically for the performance of ministerial acts. CBP may look to the principal (importer) or to the surety should the check be dishonored.

* * * * *

■ 24. Section 24.2 is revised to read as follows:

§ 24.2 Persons authorized to receive Customs collections.

Center directors, port directors, CBP cashiers, CBP officers, CBP dock tellers, and such other officers and employees as the Center director or port director will designate will receive Customs collections.

■ 25. Section 24.4(c) and (i) are revised to read as follows:

§ 24.4 Optional method for payment of estimated import taxes on alcoholic beverages upon entry, or withdrawal from warehouse, for consumption.

* * * * *

(c) *Content of application and supporting documents.* (1) An importer must state his estimate of the largest amount of taxes to be deferred in any semimonthly period based on the largest amount of import taxes on alcoholic

beverages deposited with CBP in such a period during the year preceding his application. He must also identify any existing bond or bonds that he has on file with CBP and shall submit in support of his application the approval of the surety on his bond or bonds to the use of the procedure and to the increase of such bond or bonds to such larger amount or amounts as may be found necessary by the Center director.

(2) Each application must include a declaration in substantially the following language:

I declare that I am not presently barred by CBP from using the deferred payment procedure for payment of estimated taxes upon imports of alcoholic beverages, and that if I am notified by a Center director to such effect I shall advise any future Center director where approval has been given to me to use such procedure.

* * * * *

(i) *Duration of deferred payment privilege.* The deferred payment privilege once approved by the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017, will remain in effect until terminated under the provisions of paragraph (h) or the importer or surety requests termination.

* * * * *

PART 54—CERTAIN IMPORTATIONS TEMPORARILY FREE OF DUTY

■ 26. The authority citation for part 54 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i); Section XV, Note 5, Harmonized Tariff Schedule of the United States), 1623, 1624.

■ 27. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
54.5(b)	port director	Center director.
54.6(c)(4)	port director	Center director.

§ 54.6 [Amended]

■ 28. Section 54.6(c) introductory text is amended by removing the words ''the director of the port of entry'' and adding in their place the words ''CBP, either at the port of entry or electronically,''.

PART 101—GENERAL PROVISIONS

■ 29. The general authority citation for part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

* * * * *

■ 30. In § 101.1:

■ a. Add in alphabetical order, definitions of *Center director, Centers of Excellence and Expertise* or *Centers,* and *Port director.*

■ b. Revise the definitions of *Port* and *port of entry*

The additions and revision read as follows:

§ 101.1 Definitions.

* * * * *

Center director. The term ''Center director'' means the person who manages their designated Center and is responsible for certain trade decisions and functions concerning that Center and the importers that are processed by that Center.

* * * * *

Centers of Excellence and Expertise or *Centers.* The terms ''Centers of Excellence and Expertise'' or ''Centers'' refer to national CBP offices that are responsible for performing certain trade functions and making certain determinations as set forth in particular regulatory provisions regarding importations by importers that are considered by CBP to be in the industry sector, regardless of the ports of entry at which the importations occur. Industry sectors are categorized by the Harmonized Tariff Schedule of the United States (HTSUS) numbers representing an industry sector. The list of HTSUS numbers will be published in a **Federal Register** document and any change made to that list will be announced in a subsequent **Federal Register** document.

* * * * *

Port and *port of entry.* The terms ''port'' and ''port of entry'' refer to any place designated by Executive Order of the President, by order of the Secretary of the Treasury, or by Act of Congress, at which a U.S. Customs and Border Protection (''CBP'') officer is authorized to accept entries of merchandise to collect duties, and to enforce the various provisions of the customs and navigation laws. The terms ''port'' and ''port of entry'' incorporate the geographical area under the jurisdiction of a port director. (The customs ports in the Virgin Islands, although under the jurisdiction of the Secretary of the Treasury, have their own customs laws (48 U.S.C. 1406(i)). These ports, therefore, are outside the customs territory of the United States and the ports thereof are not ''ports of entry'' within the meaning of these regulations).

* * * * *

Port director. The term ''port director'' means the person who has jurisdiction within the geographical boundaries of their port of entry unless the regulations provide that particular trade functions or determinations are exclusively within the purview of a Center Director or other CBP personnel.

* * * * *

■ 31. Add § 101.10 to read as follows:

§ 101.10 Centers of Excellence and Expertise.

(a) *Center Management Offices.* The Centers of Excellence and Expertise (Centers) (see definition in § 101.1) are managed out of the following locations:

Centers of Excellence and Expertise (Centers)	Management offices
Agriculture & Prepared Products.	Miami, Florida.
Apparel, Footwear & Textiles.	San Francisco, California.
Automotive & Aerospace.	Detroit, Michigan.
Base Metals	Chicago, Illinois.
Consumer Products & Mass Merchandising.	Atlanta, Georgia.
Electronics	Long Beach, California.
Industrial & Manufacturing Materials.	Buffalo, New York.
Machinery	Laredo, Texas.
Petroleum, Natural Gas & Minerals.	Houston, Texas.
Pharmaceuticals, Health & Chemicals.	New York, New York.

(b) *Assignment of importers to the Centers.* Generally, each importer will be assigned to an industry-category administered by a specific Center based on the tariff classification in the HTSUS of the predominant number of goods imported. The list of HTSUS numbers that will be used by CBP for the importer's placement in a Center is the same list of HTSUS numbers that are referenced in the definition for Centers

(see § 101.1). Factors that may cause CBP to place an importer in a Center not based on the tariff classification of the predominant number of goods imported include the importer's associated business practices within an industry, the intended use of the predominant number of goods imported, or the high relative value of goods imported.

(c) *Appeal of Center assignment.* An importer may appeal the Center assignment at any time by submitting a written appeal, with a subject line identifier reading ''Appeal Regarding Center Assignment'', to U.S. Customs and Border Protection, Office of Field Operations, Executive Director, Cargo and Conveyance Security (CCS), 1300 Pennsylvania Ave. NW., Suite 2.3D, Washington, DC 20229–1015 or by email to *CEE@cbp.dhs.gov*. Appeals must include the following information:

(1) Current Center assignment;

(2) Preferred Center assignment;

(3) All affected Importer of Record (IOR) numbers and associated bond numbers;

(4) Written justification for the change in Center assignments; and

(5) Import data:

(i) *For new importers.* Projected importations at the four (4) digit HTSUS heading level during the current year; or

(ii) *For importers with less than one year of prior import history.* Projected importations and prior import data with entry summary lines and value at the four (4) digit HTSUS heading level; or

(iii) *For importers with more than one year of prior import history.* One year of prior import data with entry summary lines and value at the four (4) digit HTSUS heading level.

PART 102—RULES OF ORIGIN

■ 32. The authority citation for part 102 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624, 3314, 3592.

■ 33. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
102.23(a)	port director	Center director.
102.23(b)	port director	Center director.
102.25	port director	Center director.

PART 103—AVAILABILITY OF INFORMATION

■ 34. The general authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * *

■ 35. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
103.32	port directors and other CBP officers	port directors, Center directors, and other CBP officers.

§ 103.26 [Amended]

■ 36. Section 103.26 is amended by removing the words ''Port directors'' and adding in their place the words ''Center directors, port directors''.

PART 113—CBP BONDS

■ 37. The general authority citation for part 113 is revised to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

* * * * *

■ 38. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
Appendix B to Part 113	port director of CBP	CBP.
Appendix B to Part 113	port director's	CBP's.
Appendix C to Part 113	the port director of customs	CBP.

PART 132—QUOTAS

■ 39. The general authority citation for part 132 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1623, 1624.

* * * * *

■ 40. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
132.11a(c)	port director	Center director.
132.12(a)	port director	Center director.
132.13(a)(1)(i)	port director	Center director.
132.13(a)(1)(ii)	presented	presented to CBP, either at the port of entry or electronically,.
132.13(a)(2)	at a port of entry	to CBP, either at the port of entry or electronically.

■ 41. Section 132.14 is amended by revising paragraphs (a)(4)(i)(A) and (B) and (a)(4)(ii)(A) to read as follows:

§ 132.14 Special permits for immediate delivery; entry of merchandise before presenting entry summary for consumption; permits of delivery.

* * * * *

(a) * * *

4) * * *

(i) * * *

(A) An authorized CBP official may demand the return to Customs custody of the released merchandise in accordance with § 141.113 of this chapter;

(B) The Center director shall require the timely presentation to CBP, either at the port of entry or electronically, of the entry summary for consumption, or a withdrawal for consumption, with the estimated duties attached;

* * *

(ii) * * *

(A) The Center director shall require the timely presentation to CBP, either at the port of entry or electronically, of the entry summary for consumption, or a withdrawal for consumption, with estimated duties attached;

* * * * *

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

■ 42. The authority citation for part 133 continues to read as follows:

Authority: 15 U.S.C. 1124, 1125, 1127; 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1202, 1499, 1526, 1624; 31 U.S.C. 9701. Sections 133.21 through 133.25 also issued under 18 U.S.C. 1905; Sec. 818(g), Pub. L. 112–81 (10 U.S.C. 2302).

■ 43. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column;:

Section	Remove	Add
133.26	the port director	an authorized CBP official.
133.46	the director of the port of entry	an authorized CBP official.

PART 134—COUNTRY OF ORIGIN MARKING

■ 44. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1304, 1624.

■ 45. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
134.3(b) introductory text	The port director	An authorized CBP official.
134.25(c)	port director	Center director.
134.26(c)	port director	Center director.
134.34(a) introductory text	port director	Center director.
134.34(b)	port director	Center director.
134.51(a)	port director	Center director.
134.51(a)	port director's office	Center director's office.
134.51(b)	port director	Center director.
134.51(c)	port director	Center director.
134.52(a)	Port directors	Center directors.
134.52(c)	port director	Center director.
134.52(d)	port director	Center director.
134.52(e)	port director	Center director.
134.53(a)(2)	port director	Center director.

§ 134.25 [Amended]

■ 46. Section 134.25(a) is amended by:

■ a. Removing the words ''port director having custody of the article,'' and adding in their place the words ''Center director'';

■ b. Removing the words ''the port director'' and adding in their place the words ''the Center director''; and

■ c. Removing the words ''at each port where the article is entered'' and adding their place the words ''with CBP, either at the port of entry or electronically''.

§ 134.26 [Amended]

■ 47. Section 134.26(a) is amended by:

■ a. Removing the words ''port director having custody of the article,'' and adding in their place the words ''Center director'';

■ b. Removing the words ''the port director'' and adding in their place the words ''the Center director''; and

■ c. Removing the words ''at each port where the article(s) is entered'' and adding their place the words ''with CBP, either at the port of entry or electronically''.

§ 134.52 [Amended]

■ 48. Section 134.52(b) is amended by removing the words ''the port director'' in the first sentence and adding in their place the words ''CBP, either at the port of entry or electronically'' and by removing ''The port director'' in the second sentence and adding in their place the words ''The Center director''.

§ 134.54 [Amended]

■ 49. Section 133.54(a) is amended by removing the words ''port director'' in the first instance and adding in their place the words ''Center director''.

PART 141—ENTRY OF MERCHANDISE

■ 50. The general authority citation for part 141 and the specific authority citations for §§ 141.83 and 141.105 continue to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1498, 1624.

* * * * *

Subpart F also issued under 19 U.S.C. 1481;

Subpart G also issued under 19 U.S.C. 1505;

* * * * *

■ 51. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the

section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
141.20(a)(1)	the port director	CBP, either at the port of entry or electronically.
141.20(a)(2)	the port director	CBP, either at the port of entry or electronically.
141.35	the port director	CBP, either at the port of entry or electronically.
141.38	the port director	CBP.
141.45	port director	Center director or port director.
141.46	a port director	CBP.
141.52 introductory text	port director	Center director.
141.52(i)	port director	Center director.
141.56(a)	Port directors may accept	CBP may accept, either at the port of entry or electronically.
141.61(e)(2) introductory text	port director	Center director.
141.61(e)(2)(ii)	port director	Center director.
141.61(e)(4)	port director	Center director.
141.63(a) introductory text	port director	Center director.
141.63(b)	port director	Center director.
141.69(c)	the port director	CBP.
141.83(c)(2)	The port director	CBP.
141.85	Advices of the Port Director	Advice by CBP.
141.85	file it with the Port Director	file it with an authorized CBP official.
141.86(a)(11)	port director	Center director.
141.88	port director	Center director.
141.91(a)	The port director	CBP.
141.91(d)	port director	Center director.
141.92(a) introductory text	The port director	CBP.
141.92(b)(4)	port director	Center director.
141.113(a)(2)	port director may	Center director may.
141.113(a)(2)	port director	port director or Center director.
141.113(b)		
141.113(d)	the port director	an authorized CBP official.
141.113(d)	he	an authorized CBP official.
141.113(e)	the port director	an authorized CBP official.
141.113(g)	the port director	an authorized CBP official.
141.113(i)	the port director	an authorized CBP official.

■ 52. Section 141.44 is revised to read as follows:

§ 141.44 Designation of Center and Customs ports in which power of attorney is valid.

Unless a power of attorney specifically authorizes the agent to act thereunder at the appropriate Center and at all CBP ports, the name of the appropriate Center or each port where the agent is authorized to act thereunder shall be stated in the power of attorney. The power of attorney shall be filed with CBP, either at the port of entry or electronically, in a sufficient number of copies for distribution to the appropriate Center and each port where the agent is to act, unless exempted from filing by § 141.46. The Center director or port director with whom a power of attorney is filed, irrespective of whether his Center or port is named, shall approve it, if it is in the correct form and the provisions of this subpart are complied with, and forward any copies intended for other ports or another Center as appropriate.

§ 141.105 [Amended]

■ 53. Section 141.105 is amended by:

■ a. Removing the words ''from the port director'' and adding in their place the words ''from the Center director'';

■ b. Removing the words ''with the port director'' and adding in their place the words ''with CBP, either at the port of entry or electronically''; and

■ c. Removing the words ''To the Port Director'' and adding in their place the words ''To CBP''.

§ 141.113 [Amended]

■ 54. Section 141.113(c)(3) is amended by removing the words ''CBP port director who will demand the redelivery of the product to CBP custody'' and adding in their place the words ''Center director. An authorized CBP official will demand the redelivery of the product to CBP custody''.

PART 142—ENTRY PROCESS

■ 55. The authority citation for part 142 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

■ 56. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
142.3(c)	port director	CBP.
142.11(b)	port director	CBP.
142.17(a) introductory text	port director	Center director.
142.17a(a) introductory text	port director	Center director.
142.18(a) introductory text	the port director	an authorized CBP official.

Section	Remove	Add
142.28(a) introductory text	the port director	an authorized CBP official.

§ 142. 13 [Amended]

■ 57. Section 142.13(a) is amended in its heading and in its introductory text by removing the words ''port director'' and adding in their place ''CBP''.

PART 143—SPECIAL ENTRY PROCEDURES

■ 58. The authority citation for part 143 continues to read as follows:

Authority: 19 U.S.C. 66, 1321, 1414, 1481, 1484, 1498, 1624, 1641.

■ 59. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
143.22	The port director	CBP.
143.23 introductory text	port director	Center director.

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

■ 60. The general authority citation for part 144 continues to read as follows:

Authority: 19 U.S.C. 66, 1484, 1557, 1559, 1624.

* * * * *

■ 61. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
144.5	port director	Center director.
144.12	port director	Center director.
144.13	port director	Center director.
144.38(d)	port director	Center director.

■ 62. Section 144.41(h) is revised to read as follows:

§ 144.41 Entry for rewarehouse.

* * * * *

(h) *Protest.* A protest may be filed with CBP, either at the port of entry or electronically, against a liquidation made under § 159.7(a) or (b) of this chapter, or against a refusal to liquidate pursuant to said sections. In all other cases, any protest shall be filed against the original warehouse entry.

PART 145—MAIL IMPORTATIONS

■ 63. The general authority citation for part 145 and the sectional authority for § 145.12 continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States, 1624.

* * * * *

Section 145.12 also issued under 19 U.S.C. 1315, 1484, 1498;

* * * * *

■ 64. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
145.12(a)(1)	The port director	CBP.
145.12(a)(1)	if in his opinion	if
145.14(b)	port director	CBP.

PART 146—FOREIGN TRADE ZONES

■ 65. The authority citation for part 146 continues to read as follows:

Authority: 19 U.S.C. 66, 81a–81u, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624.

■ 66. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
146.65(b)(3)	port director	Center director.
146.65(c)	port director	Center director.

PART 147—TRADE FAIRS

■ 67. The authority citation for part 147 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624, 1751–1756, unless otherwise noted.

■ 68. In the table below, for each section indicated in the left column, remove the words indicated in the middle column

from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
147.32	port director	Center director.
147.41	on demand by the port director	on the Center director's demand to CBP, either at the port of entry or electronically.

■ 69. Section 147.33 is revised to read as follows:

§ 147.33 Reimbursement by fair operator.

All actual and necessary charges for labor, services, and other expenses in connection with the entry, examination, appraisement, custody, abandonment, destruction, or release of articles entered under the regulations of this part, together with the necessary charges for salaries of Customs officers and employees in connection with the accounting for, custody of, and supervision over, such articles, shall be reimbursed by the fair operator to the Government, payment to be made to CBP, either at the port of entry or electronically, on the port director's or Center director's demand made before January 19, 2017 or on the Center director's demand made on or after January 19, 2017, for deposit to the appropriation from which paid.

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

■ 70. The general authority citation for part 151 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i) and (j), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

■ 71. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
151.10	the port director	an authorized CBP official.
151.11	the port director	an authorized CBP official.
151.11	he shall	an authorized CBP official will.
151.12(c)(5)	both the port director and the Executive Director.	the port director, the Executive Director, and the Center director.
151.12(c)(6)	both the port director and the Executive Director.	the port director, the Executive Director, and the Center director.
151.13(b)(5)	both the port director and the Executive Director.	the port director, the Executive Director, and the Center director.
151.13(b)(6)	both the port director and the Executive Director.	the port director, the Executive Director, and the Center director.
151.51(b)	port director	Center director.
151.52(c)	the port director	an authorized CBP official.
151.54	The port director	An authorized CBP official.
151.55	port director	Center director.
151.65	port director	Center director.
151.65	port director's	Center director's.
151.68(c)	the port director	an authorized CBP official.
151.69(b)	port director	Center director.
151.70	port director	Center director.
151.71(a)	port director	Center director.
151.71(b)	port director	Center director.
151.73(c)	port director	Center director.
151.75	port director	Center director.
151.76(a)	port director	Center director.
151.76(b)	port director	Center director.
151.84	port director	Center director.

■ 72. Section 151.71(c) is revised to read as follows:

§ 151.71 Laboratory testing for clean yield.

* * * * *

(c) *Importer's request for retest.* If the importer is dissatisfied with the port director's or Center director's finding of clean yield, made before January 19, 2017, or the Center director's finding of clean yield made on or after January 19, 2017, he may file with CBP, either at the port of entry or electronically, a written request in duplicate for another laboratory test for percentage clean yield. Such request shall be filed within 14 calendar days after the date of mailing of the notice of the port director's or Center director's finding of clean yield. The request shall be granted if it appears to the Center director to be made in good faith and if a second general sample as provided for in § 151.70 is available for testing, or if all packages or, in the opinion of the Commissioner of Customs, an adequate number of the packages represented by the general sample are available and in their original imported condition.

* * * * *

■ 73. Section 151.73(b) is revised to read as follows:

§ 151.73 Importer's request for commercial laboratory test.

* * * * *

(b) *Time for filing request.* The importer's request shall be filed in writing with the Center director within 14 calendar days after the date of mailing of the notice of the port

director's or Center director's findings based on the retest mailed before January 19, 2017, or within 14 calendar days after the date of mailing of the notice of the Center director's findings based on the retest mailed on or after January 19, 2017.

* * * * *

■ 74. Section 151.74 is revised to read as follows:

§ 151.74 Retest at Center director's request.

If the Center director is not satisfied with the results of any test provided for in § 151.71 or § 151.73, he may, within 14 calendar days after receiving the report of the results of such test, proceed to have another test made upon a suitable sample of the wool or hair at the expense of the Government. When the Center director is proceeding to have another test made, he shall, within the 14-day period specified in this paragraph, notify the importer by mail of that fact.

■ 75. Section 151.76(c) is revised to read as follows:

§ 151.76 Grading of wool.

* * * * *

(c) *Importer's request for reexamination.* If the importer is dissatisfied with the port director's or Center director's findings as to the grade or grades of the wool, made before January 19, 2017, or the Center director's findings as to the grade or grades of wool made on or after January 19, 2017, he may, within 14 calendar days after the date of mailing of the notice of the port director's or Center director's findings, file in duplicate a written request with the Center director for another determination of grade or grades, stating the reason for the request. Notice of the Center director's findings on the basis of the reexamination of the wool shall be mailed to the importer.

■ 76. Section 151.85 is revised to read as follows:

§ 151.85 Importer's request for redetermination.

If the importer is dissatisfied with the port director's or Center director's determination made before January 19, 2017, or the Center director's determination made on or after January 19, 2017, he may file with the Center director, within 14 calendar days after the mailing of the notice, a written request in duplicate for a redetermination of the staple length. Each such request shall include a statement of the claimed staple length for the cotton in question and a clear statement of the basis for the claim. The request shall be granted if it appears to the Center director to be made in good faith. In making the redetermination of staple length, the Center director may obtain an opinion of a board of cotton examiners from the U.S. Department of Agriculture, if he deems such action advisable. All expenses occasioned by any redetermination of staple length, exclusive of the compensation of CBP officers, shall be reimbursed to the Government by the importer.

PART 152—CLASSIFICATION AND APPRAISEMENT OF MERCHANDISE

■ 77. The general authority citation for part 152 and the specific authority citation for § 152.26 continue to read as follows:

Authority: 19 U.S.C. 66, 1401a, 1500, 1502, 1624;

* * * * *

Subpart C also issued under 19 U.S.C. 1503;

* * * * *

■ 78. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
152.1(c)	port director	Center director.
152.2	port director	Center director.
152.13(a)	port director	Center director.
152.13(c)(1)	port director	Center director.
152.13(c)(3)	port director	Center director.
152.13(d)	port director	Center director.
152.13(d)	application	application to the Center director.
152.101(c)	the port director	CBP, either at the port of entry or electronically.
152.101(d)	port director	Center director.
152.103(d) introductory text	port director	Center director.
152.103(l)(1) introductory text	port director	Center director.
152.103(l)(2)(iii)	port director	Center director.
152.105(i)(2)	port director	Center director.
152.106(f)(2) introductory text	port director	Center director.

■ 79. Section 152.16(c) is revised to read as follows:

§ 152.16 Judicial changes in classification.

* * * * *

(c) *Higher rate.* If a court decision overruling a protest contains a definite statement that a higher rate than that assessed by the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017, was properly chargeable, such higher rate shall be applied to all merchandise, whether identical or similar to that passed on by the court, which is affected by the principles of the court's decision and which is entered or withdrawn for consumption after 30 days from the date of the publication of the court's decision in the Customs Bulletin.

* * * * *

■ 80. Section 152.26 is revised to read as follows:

§ 152.26 Furnishing value information to importer.

The Center director will furnish to importers the latest information as to values in his possession, subject to the following conditions:

(a) *Before appraisement.* Value information will be given before appraisement only in response to a specific oral or written request by the importer, supported by an adequate reason for the request, or where required by CBP purposes, such as in determining proper estimated duties to be deposited or notification of increased duties in accordance with § 152.2.

(b) *Only for merchandise under Center director's jurisdiction.* The information will be given only in regard to merchandise to be appraised by, or under the jurisdiction of, the Center director who receives the request, and

only with respect to merchandise for which there is presented evidence of a firm commitment or intent to import such merchandise into the United States.

(c) *Information by importer.* Each request must be accompanied by the latest information as to the values in question which the importer has or can reasonably obtain.

(d) *Information not binding.* Value information will be given by the Center director only with an understanding and agreement in each case that the information is in no sense an appraisement and is not binding upon the Center director's action when he appraises the merchandise.

(e) *No reply required after entry.* The Center director will not be required to reply to a written request for value information after a value for the merchandise has been declared on entry unless he has information indicating a probable appraised value different from such entered value.

§ 152.103 [Amended]

■ 81. In § 152.103:

■ a. Paragraph (a)(5)(iii) is amended by removing ''the port director'' in the first sentence and adding in their place the words ''CBP, either at the port of entry or electronically'' and by removing the words ''port director'' in the second sentence and adding in their place the words ''Center director''; and

■ b. Paragraph (m) is amended by removing the word ''Customs'' each place it appears and adding in its place the term ''CBP'' and by removing the words ''port director'' each place it appears and adding in their place the words ''Center director''.

PART 158—RELIEF FROM DUTIES ON MERCHANDISE LOST, DAMAGED, ABANDONED, OR EXPORTED

■ 82. The authority citation for part 158 continues to read as follows:

Authority: 19 U.S.C. 66, 1624, unless otherwise noted. Subpart C also issued under 19 U.S.C. 1563.

■ 83. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
158.3	port director	Center director.
158.5(a)	port director satisfies himself	Center director is satisfied.

■ 84. Section 158.13(b) is revised to read as follows:

§ 158.13 Allowance for moisture and impurities.

* * * * *

(b) *Allowance by Center director.* If the port director is satisfied after any necessary investigation that the merchandise contains moisture or impurities as described in paragraph (a) of this section, the Center director will make allowance for the amount thereof in the liquidation of the entry.

PART 159—LIQUIDATION OF DUTIES

■ 85. The general authority citation for part 159 continues to read as follows:

Authority: 19 U.S.C. 66, 1500, 1504, 1624.

* * * * *

■ 86. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
159.7(b)	at the port where the merchandise is held in CBP custody.	by the Center director.
159.7(c)	port director of the port where the merchandise is entered for rewarehouse.	Center director.
159.12(a)(1) introductory text	port director	Center director.
159.12(a)(1)(ii)	port director	Center director.
159.12(b)	port director	Center director.
159.12(c)	port director	Center director.
159.12(d)(1)	port director	Center director.
159.12(d)(2)	port director	Center director.
159.12(e)	port director	Center director.
159.22(d)(2)	port director	Center director.
159.36(b)	port director	Center director.
159.36(c)	port director	Center director.
159.36(d)	port director	Center director.
159.38	port director	Center director.
159.44	port director	Center director.

■ 87. Section 159.58 is revised to read as follows:

§ 159.58 Dumping and countervailing duties; action by Center director.

(a) *Antidumping matters.* Upon receipt of notification from the Commissioner, the Center director will suspend liquidation on merchandise entered, or withdrawn from warehouse, for consumption, on or after the date of publication of the ''Notice of Preliminary Affirmative Antidumping Determination,'' ''Notice of Final Affirmative Antidumping Determination'' or ''Notice of Violation of Agreement'' as provided by part 353, chapter III, of this title. The Center director will immediately notify the importer, consignee, or agent of each entry of merchandise in question with respect to which liquidation is suspended. The notice will indicate the relevant ascertained and determined or estimated antidumping duty.

(b) *Countervailing matters.* Upon receipt of notification from the Commissioner, the Center director will suspend liquidation on merchandise entered, or withdrawn from warehouse, for consumption, on or after the date of publication of the ''Notice of Preliminary Affirmative Countervailing Duty Determination,'' ''Notice of Final Affirmative Countervailing Duty

Determination'' or ''Notice of Violation of Agreement,'' as provided by part 355, Chapter III, of this title. The Center director will immediately notify the importer, consignee, or agent of each entry of merchandise in question with respect to which liquidation is suspended. The notice will indicate the relevant ascertained and determined or estimated countervailing duty.

PART 161—GENERAL ENFORCEMENT PROVISIONS

■ 88. The general authority citation for part 161 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1600, 1619, 1624.

* * * * *

■ 89. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
161.16(b)	port director	Center director.

PART 162—INSPECTION, SEARCH, AND SEIZURE

■ 90. The general authority citation for part 162 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1592, 1593a, 1624, 6 U.S.C. 101, 8 U.S.C. 1324(b).

* * * * *

■ 91. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
162.74(c)	CBP port	Center director.
162.80(a)(2)(i)	port director	Center director.
162.80(a)(2)(iii)	port director	Center director.

§ 162.80 [Amended]

■ 92. Section 162.80(a)(1) is amended by:

■ a. Removing the words ''port director'' and adding in their place the words ''Center director'';

■ b. Removing the words ''and collect duties'' and adding in their place the words ''and CBP, either at the port of entry or electronically, may collect duties''; and

■ c. Removing the word ''he'' and adding in its place the words ''the Center director''.

PART 163—RECORDKEEPING

■ 93. The general authority citation for part 163 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1484, 1508, 1509, 1510, 1624.

* * * * *

■ 94. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
163.7(a) introductory text	port director, field director of regulatory audit	port director, Center director, field director of regulatory audit.

■ 95. Section 163.1(a)(2)(vii) is revised to read as follows:

§ 163.1 Definitions.

* * * * *

(a) * * *

(2) * * *

(vii) The maintenance of any documentation that the importer may have in support of a claim for preferential tariff treatment under the United States-Singapore Free Trade Agreement (SFTA), including a SFTA importer's supporting statement if previously required by the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017.

* * * * *

■ 96. The Appendix to Part 163 is amended under section IV by revising the entry for ''§ 10.512'' to read as follows:

Appendix to Part 163—Interim (a)(1)(A) List

* * * * *

IV. * * *

§ 10.512 SFTA records that the importer may have in support of a SFTA claim for preferential tariff treatment, including an importer's supporting statement if previously required by the port director or Center director before January 19, 2017 or the Center director on or after January 19, 2017.

* * * * *

PART 173—ADMINISTRATIVE REVIEW IN GENERAL

■ 97. The authority citation for part 173 continues to read as follows:

Authority: 19 U.S.C. 66, 1501, 1520, 1624.

■ 98. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
173.1	Port directors	Center directors.

Section	Remove	Add
173.2 introductory text	port director	Center director.
173.3(a)	port director	Center director.
173.4(a) introductory text	port director	Center director.
173.4(a)(2)	director of the port of entry	Center director.
173.4a	port director	Center director.

PART 174—PROTESTS

■ 99. The general authority citation for part 174 and the specific authority citation for § 174.21 continue to read as follows:

Authority: 19 U.S.C. 66, 1514, 1515, 1624. Section 174.21 also issued under 19 U.S.C. 1499.

■ 100. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
174.0	port director	port director and Center director.
174.12(d)	the port director whose decision is protested ..	CBP, either at the port of entry or electronically.
174.13(b)	at any port	with CBP, either at any port or electronically,.
174.21(a)	port director	Center director.
174.21(b)	port director	Center director.
174.22(a)	the port director or other CBP officer with whom the protest was filed.	the port director, Center director, or other CBP officer with whom the protest was filed.
174.22(c)	port director	Center director.
174.22(d)	port director	Center director.
174.24 introductory text	port director	Center director.
174.24(a)	Commissioner of Customs	Commissioner of CBP.
174.24(a)	at any port	by CBP.
174.24(b)	Commissioner of Customs	Commissioner of CBP.
174.24(c)	Commissioner of Customs	Commissioner of CBP.
174.24(d)	United States Customs Service	U.S. Customs and Border Protection.
174.26(a)	port director	Center director.
174.26(b) introductory text	port director	Center director.
174.26(b) introductory text	he shall	the Center director will.
174.26(b)(2)	port director	Center director.
174.27	port director	Center director.
174.29	port director	Center director.
174.29	19 U.S.C. 1514)	(19 U.S.C. 1514).

§ 174.3 [Amended]

■ 101. In § 174.3:

■ a. Paragraph (b)(1) is amended by removing the words ''port director'' and adding in their place the words ''Center director'';

■ b. Paragraph (c) is amended by removing the words ''port director'' and adding in their place the words ''Center director''; and

■ c. Paragraph (d) is amended by removing the words ''the port director'' and adding in their place the words ''CBP, either at the port of entry or electronically''.

§ 174.14 [Amended]

■ 102. Section 174.14(e) is amended by removing the words ''the port director with whom the protest was filed'' and adding in their place the words ''CBP, either at the port of entry or electronically'', and by removing the words ''with whom it is required to be filed''.

§ 174.15 [Amended]

■ 103. Section 174.15(b)(2) is amended by removing the words ''port director'' and adding in their place the words ''port director or Center director, before January 19, 2017, or the Center director on or after January 19, 2017,''.

■ 104. Section 174.16 is revised to read as follows:

§ 174.16 Limitation on protests after reliquidation.

A protest shall not be filed against the reliquidation decision of the port director or Center director made before January 19, 2017, or the reliquidation decision of the Center director made on or after January 19, 2017, upon any question not involved in the reliquidation.

■ 105. Section 174.23 is revised to read as follows:

§ 174.23 Further review of protests.

A protesting party may seek further review of a protest in lieu of review by the Center director by filing, on the form prescribed in § 174.25, an application for such review within the time allowed and in the manner prescribed by § 174.12 for the filing of a protest. The filing of an application for further review shall not preclude a preliminary examination by the Center director for the purpose of determining whether the protest may be allowed in full. If such preliminary examination indicates that the protest would be denied in whole or in part by the Center director in the absence of an application for further review; however, he shall forward the protest and application for consideration in accordance with § 174.26.

§ 174.30 [Amended]

■ 106. In § 174.30:

■ a. Paragraph (b) is amended by removing ''the port director'' the first time it appears and adding in their place the words ''CBP, either at the port of entry or electronically,'', and by removing the words ''the port director'' the second time it appears and adding in their place the term ''CBP''; and

■ b. Paragraph (c) is amended by removing the words ''port director'' and adding in their place the words ''Center director''.

PART 176—PROCEEDINGS IN THE COURT OF INTERNATIONAL TRADE

■ 107. The authority citation for part 176 continues to read as follows:

Authority: R.S. 251, as amended, sec. 624, 46 Stat. 759; 19 U.S.C. 66, 1624, unless otherwise noted.

■ 108. Section 176.1 is revised to read as follows:

§ 176.1 Service of summons.

When an action is initiated in the Court of International Trade a copy of the summons will be served in the manner prescribed by the Court of International Trade upon the CBP official(s) who denied the protest(s), and an additional copy will be served upon the Assistant Chief Counsel for Court of International Trade Litigation, United States Customs and Border Protection, 26 Federal Plaza, New York, N.Y. 10007.

PART 181—NORTH AMERICAN FREE TRADE AGREEMENT

■ 109. The general authority citation for part 181 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624, 3314;

* * * * *

■ 110. In the table below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column:

Section	Remove	Add
181.12(b)(1)	port director	Center director.
181.22(b) introductory text	port director	Center director.
181.22(b)(3)	port director	Center director.
181.22(c)	port director	Center director.
181.22(d)(1)(iii)	port director	Center director.
181.22(d)(2)	port director	Center director.
181.23(a)	port director	Center director.
181.23(b)	port director	Center director.
181.32(a)	the director of the port at which the entry covering the good was filed.	CBP, either at the port of entry or electronically.
181.33(a)	port director	Center director.
181.33(b)	port director	Center director.
181.33(c)(1)	port director	Center director.
181.33(c)(2)	port director concerned	Center director.
181.33(c)(3)	port director	Center director.
181.33(d)(1)	port director	Center director.
181.33(d)(2)	port director	Center director.
181.33(d)(3)	port director	Center director.
181.64(c)(2)	port director	Center director.
181.64(c)(3)	port director	Center director.
181.64(c)(4)	port director	Center director.
181.64(c)(4)	duties	duties to CBP, either at the port of entry or electronically.
181.113(a)	the port director who issued the decision	CBP, either at the port of entry or electronically.
181.114(a)	port director	Center director.
181.114(b) introductory text	port director	Center director.
181.115(b)	port director with whom the protest was filed	Center director.
181.116(a)	port director	Center director.
181.116(b)	the port director who issued the adverse marking decision.	with the port of entry or filed electronically with CBP.
181.121	port director or other Customs officer	port director, Center director, or other CBP officer.

■ 111. Section 181.22(d)(1)(i) is revised to read as follows:

§ 181.22 Maintenance of records and submission of Certificate by importer.

* * * * *

(d) * * *

(1) * * *

(i) An importation of a good for which the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017, has in writing waived the requirement for a Certificate of Origin because the port director or Center director is otherwise satisfied that the good qualifies for preferential tariff treatment under the NAFTA;

* * * * *

■ 112. Section 181.112(a) is revised to read as follows:

§ 181.112 Definitions.

* * * * *

(a) *Adverse marking decision* means a decision made by the port director or Center director before January 19, 2017, or the Center director on or after January 19, 2017, which an exporter or producer of merchandise believes to be contrary to the provisions of Annex 311 of the NAFTA and which may be protested by the importer pursuant to § 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), and part 174 of this chapter. Notification of an adverse marking decision is given to an importer in the form of a CBP Form 4647, or its electronic equivalent, (Notice to Mark and/or Notice to Redeliver) and/or by assessing marking duties on improperly marked merchandise. Examples of adverse marking decisions include determinations by the port director or Center director before December 20, 2016, or the Center director on or after January 19, 2017: That an imported article is not a good of a NAFTA country, as determined under the Marking Rules, and that it therefore

cannot be marked ''Canada'' or ''Mexico''; that a good of a NAFTA country is not marked in a manner which is sufficiently permanent; and that a good of a NAFTA country does not qualify for an exception from marking specified in Annex 311 of the NAFTA. Adverse marking decisions do not include: Decisions issued in response to requests for advance rulings under subpart I of this part or for internal advice under part 177 of this chapter; decisions on protests under part 174 of this chapter; and determinations that an article does not qualify as an originating good under General Note 12, HTSUS, and the appendix to this part.

* * * * *

§ 181.115 [Amended]

■ 113. Section 181.115(e) is amended by removing the words ''port director'', in its heading and in its text, each place that they appear and adding in their place the words ''Center director''.

§ 181.116 [Amended]

■ 114. Section 181.116(d)(1) is amended by removing the words ''port director'', in its heading and in its text, each place that they appear and adding in their place the words ''Center director'', and by removing the words ''port director's'' each place that they appear and adding in their place the words ''Center director's''.

Dated: December 7, 2016.

Jeh Charles Johnson,

Secretary.

[FR Doc. 2016–29719 Filed 12–19–16; 8:45 am]

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Part III

Department of Health and Human Services

Administration for Children and Families

45 CFR Part 1351
Runaway and Homeless Youth; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1351

RIN 0970–AC43

Runaway and Homeless Youth

AGENCY: Family and Youth Services Bureau (FYSB), Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule reflects existing statutory requirements in the Runaway and Homeless Youth Act and changes made via the Reconnecting Homeless Youth Act of 2008. More specifically, the rule establishes program performance standards for Runaway and Homeless Youth grantees providing services to eligible youth and their families. Revisions have been made to the rule regarding additional requirements that apply to the Basic Center, Transitional Living, and Street Outreach Programs, including non-discrimination, background checks, outreach, and training. Furthermore, the rule updates existing regulations to reflect statutory changes made to the Runaway and Homeless Youth Act, and updates procedures for soliciting and awarding grants. This final rule makes changes to the proposed rule published on April 14, 2014, and is in response to public comments recommending ways to improve the rule.

DATES: This final rule is effective January 19, 2017. However, compliance with the new performance standards is not required until the beginning of the next budget period after promulgation of this final rule.

FOR FURTHER INFORMATION CONTACT: Christopher Holloway, (202) 205–9560 (not a toll-free call). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

This final rule is published under the authority granted to the Secretary of Health and Human Services by the Runaway and Homeless Youth Act (Title III of the Juvenile Justice and Delinquency Prevention Act of 1974), 42 U.S.C. 5701 *et seq.* as amended by the Reconnecting Homeless Youth Act of 2008 (Pub. L. 110–378). Specifically, under 42 U.S.C. 5702, ''the Secretary of Health and Human Services . . . may issue such rules as the Secretary considers necessary or appropriate to carry out the purposes of this subchapter.''

II. Background

The Runaway and Homeless Youth Act (''the Act'') authorizes three major grant programs administered by the Family and Youth Services Bureau (FYSB), Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), in the Department of Health and Human Services (HHS). These programs support local efforts to assist youth who have run away or are homeless.

The Basic Center Grant Program (hereafter referred to as the Basic Center Program) funds grants to community-based public and nonprofit private agencies (and combinations of such entities) to establish and operate local centers to provide services for runaway and homeless youth and for the families of such youth. Services provided include the provision of outreach, crisis intervention, temporary shelter, counseling, family unification, and aftercare services to runaway and homeless youth and their families. Basic Center projects generally serve youth under 18 years of age and can provide up to 21 days of shelter.

The Transitional Living Grant Program (hereafter referred to as the Transitional Living Program) provides grants to public and private organizations to establish and operate transitional living youth projects for homeless youth, including for community-based shelter including group homes, host family homes, and supervised apartments for youth, ages 16 to under 22, who cannot safely live with their own families. Transitional Living projects provide a safe, stable, and nurturing environment for up to 21 months. Young people who have not yet reached their 18th birthday at the end of the 21-month period may continue to receive services until they turn 18. Services include counseling in basic life skills, interpersonal skill building, educational advancement, job attainment skills, and physical and mental health care. These services are designed to help youth who are homeless develop the skills necessary to make a successful transition to self-sufficient living. The Transitional Living Program also funds Maternity Group Homes, which are specifically designed to meet the needs of pregnant and parenting youth.

The Sexual Abuse Prevention Program (hereafter referred to as the Street Outreach Program) provides grants to nonprofit private agencies for street-based outreach and education, including treatment, counseling, provision of information, and referrals for runaway, homeless, and street youth 21 years and younger who have been subjected to or are at risk of being subjected to sexual abuse, prostitution or sexual exploitation.

The Act also authorizes additional activities conducted through grants, including grants for research, evaluation, and service projects; grants for a national communications system to assist runaway and homeless youth in communicating with their families and service providers; and grants for technical assistance and training. This final rule covers all of these activities.

The Reconnecting Homeless Youth Act of 2008 (hereafter referred to as ''the 2008 Act'') (Pub. L. 110–378) reauthorized the Runaway and Homeless Youth Act (hereafter referred to as ''the Act'') through federal fiscal year (FY) 2013, and made a number of changes to the Act, including a requirement for the establishment of performance standards. Specifically, section 386A of the 2008 Act, Performance Standards, requires that: (1) HHS issue rules that specify performance standards; (2) HHS consult with grantees and national nonprofit organizations concerned with youth homelessness in developing those standards; and (3) HHS integrate the performance standards into the HHS processes for grant making, monitoring, and evaluation for the three major grant programs under the Act.

We have already implemented elements of these statutory mandates through funding opportunity announcements, technical assistance and training, and data collection. This final rule allows us to complete implementation of these legislative requirements. In addition, it will bring the program's codified regulations, last updated August 17, 2000 (65 FR 50139), into conformity with existing statutory provisions, the administrative and managerial procedures we already use in accordance with the 2008 Act, and previous statutory changes.

We intend to provide technical assistance to grantees that focuses on effective implementation of these performance standards, and to implement them as new budget periods begin, after promulgation of this final rule, rather than in the middle of an existing budget period.

III. Consultation and the Development of the Final Rule

In keeping with the requirements of the 2008 Act, the Family and Youth Services Bureau (FYSB) sought input from grantees and other stakeholders prior to the development of the proposed rule. In April 2009, FYSB conducted a consultation forum that brought together forty-four individuals including subject experts, technical assistance providers, Runaway and Homeless Youth (RHY) grantees, federal staff, persons with extensive program monitoring experience, and national, regional and statewide youth servicing organization representatives.

FYSB also obtained stakeholder perspectives and other information to inform the proposed rule in a number of additional ways. Since 2008, we have conducted national conferences bringing together all stakeholder groups and allowing for broad, informal exchanges of views. One such conference, the 2008 Runaway and Homeless Youth Grantee Conference was attended by 442 participants (including representatives from 252 grantee organizations) to share ideas, promising approaches, and best practices. Participants met in over 30 different workshops addressing both universal issues and specific programmatic needs of the three major RHY programs. Through the Runaway and Homeless Youth Training and Technical Assistance Centers, we have conducted an extensive training, technical assistance, and monitoring effort aimed not only at assisting grantees, but also at obtaining their feedback on operational issues. In tandem with these efforts, we conducted an in-depth review of existing regulatory and sub-regulatory issuances and developed a comprehensive set of on-site review materials, in use since February 2009.

These consultative processes provided valuable input that we used in formulating the performance and procedural standards. Importantly, the input we received emphasized that:

- The standards should promote an integrated, holistic approach to service delivery.
- The standards should be responsive to the complex social identities (*i.e.,* race, ethnicity, nationality, religion/spirituality, gender identity/expression, sexual orientation, socioeconomic status, disability, language, beliefs, values, behavior patterns, or customs) of clients.
- The standards should serve as models for program quality and encourage programs to strive for excellence.
- The standards should achieve a balance between clarity and precision of regulatory intent and regulatory flexibility so that programs can be most responsive to local needs, settings, and circumstances.
- The standards should place emphasis on family-focused aspects of the program by strengthening links with local community providers, and helping families identify and address individualized goals.
- Standards of any kind—whether performance or procedural—should facilitate rather than impede local flexibility in creating and operating effective programs that respond to local needs and priorities.
- Standards should not unnecessarily impose burdensome requirements that would divert local resources away from service.

We retained these principles in developing the final rule. As we stated in the proposed rule, we believe that ''Regular measurement of progress toward specified outcomes is a vital component of any effort at managing-for-results.'' (Harry P. Hatry, *Performance Measurement,* Urban Institute Press, 2006). However, we recognized that effective, workable, and successful performance standards are extremely difficult to formulate and often need amending over time. Among the difficulties encountered are: (1) Some of the most important goals may be qualitative rather than quantitative; (2) near-term results may not correctly signal long-term effects; (3) measurement and appraisal may reduce the resources available for services; and (4) local circumstances may vary and achieving a lower absolute result in some settings may actually reflect superior performance over other settings because difficulties were greater. Despite these difficulties, we have increasingly incorporated performance measures and standards into the Runaway and Homeless Youth Program's ongoing operations to drive program improvement and help assure accountability. The standards and measures in this rule are appropriate, realistic, and consistent with the underlying complexity of the problems and processes involved in serving homeless and runaway youth.

In the proposed rule preamble, we stated that we welcomed comments on whether our proposed standards struck the proper balance in meeting the objectives stated above, including measuring the most important program goals that are feasible to measure, preserving flexibility to grantees, and minimizing unnecessary burden. We asked for suggestions, particularly those supported by research or evaluative evidence, for improvements in the proposed standards. To assist in such comments, we provided specific regulatory text that commenters could review and suggest changes. As described later in this preamble, we received useful and detailed comments from individuals, providers, advocacy groups, government agencies, and others that have assisted us in making the decisions reflected in this final rule.

As a result of the consultative and rulemaking process, this final rule codifies a targeted number of process and procedural requirements in order to minimize burden to grantees and to provide grantees flexibility in meeting their performance standards and in dealing with unique circumstances in their communities. This final rule reflects that there are many effective practices that are best handled through technical assistance and training rather than established as regulatory standards.

We will work closely with our grantees in implementation of this final rule through our training and technical assistance activities to ensure they thoroughly understand the new standards and reporting requirements.

IV. Scope of the Final Rule

This final rule establishes Runaway and Homeless Youth Program Performance Standards to help assess the quality and effectiveness of the Runaway and Homeless Youth Program nationally by providing indicators of successful outcomes for youth. The performance standards will be used to monitor individual grantee performance in achieving the purposes of the Act. Program projects will also be subject to other requirements including other applicable regulations (*e.g.,* civil rights regulations), and those cited in funding opportunity announcements.

This final rule also makes largely technical changes to existing program rules to conform to current law and to correct outdated provisions. Equally important, it revises our regulatory provisions on making awards to reflect the performance standards and to reflect onsite review and monitoring procedures that have been in place for a number of years.

This final rule is effective 30 days after publication in the **Federal Register**; however, compliance with the new performance standards will not be required until the beginning of the next budget period (October 1) after the effective date of the final rule. This will allow existing grantees time to come into compliance with the new

standards, and provide time for us to assist grantees, and avoid confusion that may result from changing standards in the middle of budget periods. To assist grantees, we will provide them with guidance on best practices for implementing the standards. We will also conduct additional technical assistance to help grantee agencies understand and implement the new standards. We intend the final rule to complement our other efforts to strengthen Runaway and Homeless Youth grantee monitoring and to improve the overall program.

V. Summary of Public Comments

We received 72 responsive and unique comments or sets of comments on the proposed rule, not including comments that were word-for-word identical. Multiple organizations and individuals endorsed several of these comment sets, and the total number of commenting individuals and organizations was about 300. About a dozen comments expressed overall support for the rule and made no specific suggestions for change.

Without exception, the substantive comments reflect an understanding of the many problems affecting runaway and homeless youth, and of the many challenges that arise in administering programs for these youth. This understanding was evident in not only comments from advocacy groups and other organized commenters, but also the comments from individual service providers and from concerned individuals. We were able to accommodate many, but not all, of the recommendations in these comments. In some cases, the statute gives us little or no flexibility to accept commenter recommendations. In other cases, we agree that the comment raises an important issue, but not that the issue can or should be addressed through this regulation. Many recommendations in the comments address issues that we believe are best addressed either in implementation guidance, in funding opportunity announcements, or in individual decisions by service providers themselves. Other issues raised involved the respective roles of federal and state governments, or of other agencies or programs involved in the lives of these youth (*e.g.,* housing programs, juvenile justice system). In our response to each issue raised by commenters, we address these factors insofar as they affect the decision in the final rule. These exceptions aside, we accepted many dozens of suggested changes in whole or in part, and believe that the comments were helpful in improving the final rule.

VI. Section-by-Section Discussion of the Regulatory Provisions, Issues, and Comments

We received a number of comments that did not address a particular section of the proposed rule either directly or by inference. We address those first.

Comment: One commenter said that the law needs to make room for faith-based programs.

Response: We did not make any changes to the final rule in response to this comment because the existing ACF Policy on Grants to Faith-Based Organizations already establishes ACF's commitment to partnering with faith-based organizations.

More specifically, the ACF Policy on Grants to Faith-Based Organizations states the following: ''This administration is committed to providing the full range of legally permissible services to people who need them, and to doing so in a timely fashion and in a manner that respects the diverse religious and cultural backgrounds of those we serve. At the same time, we also are committed to finding ways for organizations to partner with us even if they object to providing specific services on religious grounds.'' The full policy can be found here: *http://www.acf.hhs.gov/acf-policy-on-grants-to-faith-based-organizations.*

Comment: One commenter pointed out that our background preamble discussion of transitional housing being a ''long-term environment,'' in light of the 21-month period for which such housing can be provided in the Transitional Living Program as compared to the 21-day period allowed in the Basic Center Program, is not seen as a long-term solution in housing programs administered by HUD.

Response: We agree that the Transitional Living Program services are not permanent housing solutions, or even long-term when compared to the housing options that HUD offers. As indicated throughout the proposed and final rules, one of the major priorities of the RHY Program is, whenever reasonably and safely possible, to return youth to their family homes for support until they can find their own longer-term solutions, or, when reunification is not possible, to assist youth in establishing more permanent arrangements. Within the context of the Continuum of Care Program, as defined by HUD, and its housing and service structure, TLP is considered transitional housing and BCP is considered emergency shelter. Neither is considered to be a permanent placement. We have therefore deleted references to ''long-term'' transitional living services throughout this rule.

Comment: One commenter asked that we add a requirement that youth served by these programs be actively involved in developing these services, through meaningful leadership positions and involvement in policy development and evaluation. Research supporting this position was provided.

Response: The idea is worth future consideration. We think it would likely present concerns if established as a regulatory requirement at this point in time, in part because it was not presented as a proposal for the public, including stakeholders, to comment on.

Subpart A. Definition of Terms

The significant terms in § 1351.1 reflect current statutory terminology and operating practice. We proposed to revise a number of existing definitions, to add a number of definitions, to delete a few definitions that we do not believe are useful or necessary, and to change the format of the definitions. We requested comment on each new or revised definition. The additions and revisions are intended to reflect both recent changes to the statute and important practices in the administration of the program. The definitions section applies to all grants under the Act. Each individual definition only applies where it is applicable to each type of grant. We received comments on many, but not all, of the definitions.

We are leaving unchanged and as proposed the definitions on which we received no comments. These include the following terms: Act, client, drop-in center, drug abuse education and prevention services, runaway and homeless youth project, short-term training, state, supervised apartments, and technical assistance.

Act

We received no comments on this definition and have retained it in this final rule.

Aftercare

We proposed to revise the definition of Aftercare to read: 'Aftercare means additional services provided beyond the period of residential stay that offer continuity and supportive follow-up to youth served by the program.'

Comment: We received one comment on this definition. That comment suggested that we not limit this term to residential care, pointing out that aftercare could apply to non-residential services. The commenter also suggested adding a reference to the family.

Response: The only two programs affected by this regulation that would have an aftercare component are residential programs (BCP and TLP), so it is not appropriate to expand the aftercare definition to programs that are not residential. Regarding the request to add references to families receiving aftercare services, our statutory mission under § 312(b)(5) of the Act includes a provision to ''develop an adequate plan for providing counseling and aftercare services to such youth, [and] for encouraging the involvement of their parents or legal guardians in counseling . . . '' We interpret the statute as intending the aftercare provision to be provided for youth specifically but we do encourage parental involvement. Therefore, we have retained the proposed rule language in this final rule.

Area

We proposed to delete the existing regulatory definition of ''area'' in the NPRM because a precise definition is not required for the purposes of the program. Receiving no comments, we have deleted it in this final rule.

Background Check

We received a dozen unique comments on this definition and/or on the related requirement in proposed § 1351.20(l), which is numbered § 1351.23(j) in this final rule, (requirements that apply to all Runaway and Homeless Youth Program local services grants) that all grantees ''shall conduct complete background checks on all employees and volunteers.'' These comments represent in total over a hundred individuals and organizations. Most of the comments argued that the definition and/or requirement as worded were too broad and would be both expensive, time consuming (weeks for responses from some states), and disruptive of program operations.

Comments: Several comments objected to making this a national background check, rather than one focused on state records. These comments argued that this would be both burdensome and time consuming. One commenter suggested adding consultants as individuals who should be subject to background checks.

Several commenters objected to subjecting volunteers to the same check as employees (*e.g.,* checking employment records and driving records for volunteers). Other commenters felt that the proposed definition was ambiguous as to what was required for volunteers' background checks. In particular, several commenters pointed out that many volunteers may be one-time attendees at particular events, that some staff and volunteers may not work directly with youth, and that some volunteers may not have unsupervised contact with youth; these commenters recommended exemptions in cases such as these. As examples, volunteers might be used to cook hot meals on holidays, might be guest speakers, or might visit one time as a member of a community group.

Several commenters asked whether the driving record check would apply only to those who transport youth. One commenter pointed out that some kinds of criminal backgrounds do not pose serious risk of harm to the grantee or clients, and asked for clarification that employment of such persons (who might have committed minor crimes as youth) not be prohibited. Several commenters noted that there was ambiguity as to what kind of national check might be required and several pointed out that at least one state performed an out-of-state check only for states in which the person has recently lived.

Response: In order to provide clarity, we have revised the final rule to address many of the above comments. We agree that the proposed rule needed more clarity regarding what kinds of background checks are required. As a result, we have revised the final rule at § 1351.23(j) to clarify that grantees shall conduct a background check on all employees, contractors, volunteers, and consultants who have regular and unsupervised private contact with youth served by the grantee, and on all adults who reside in or operate host homes.

We do not agree with the comments that request background checks only include state records. Both state and national records are necessary for youth safety. However, we did revise the final rule to provide clarity on which background checks are required.

We did not address background check fees in this rule. We understand programs may bear costs associated with background checks and we encourage programs to use the resources available to them and consider ways to allocate funds differently to cover these costs.

In the interest of youth safety and to be mindful that all parties have an obligation to exercise due diligence, our proposed definition and related requirements for background checks have been revised in the final rule. We have revised the definition of background check for employees, consultants, contractors, and employment applicants to include: State or tribal criminal history records (including fingerprint checks); Federal Bureau of Investigation criminal history records including fingerprint checks, (to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award); a child abuse and neglect registry check (to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award); and a sex offender registries check.

The plans, procedures, and standards must identify background check findings that would disqualify an applicant from consideration for employment to provide services for which assistance is made available in accordance with this part. To further protect children's safety, in § 1351.20(l), which is numbered § 1351.23(j) in this final rule, we also require that programs document the justification for any hire where an arrest, pending criminal charge, or conviction is present.

Budget Period

In the NPRM, we proposed defining the term Budget Period as ''*Budget period* means the interval of time into which a multi-year period of assistance (project period) is divided for budgetary and funding purposes. '' We received no comments on this definition. However, this definition was used only in proposed § 1351.34, which, as described below, has been removed from this final rule. Therefore, we are also removing this definition from the final rule.

Case Management

Case management is a central concept in serving client youth, and we proposed to add a definition to read: Case management means assessing the needs of the client and, as appropriate, arranging, coordinating, monitoring, evaluating, and advocating for a package of services to meet the specific needs of the client.

Comment: We received one comment on this definition, asking that we add the phrase ''identification of needs.''

Response: In the interest of clarity we have made the requested change, and have also included new language making clear that identifying the needs of a client should be done in consultation with the client.

Client

We did not receive any comments on this definition and therefore have retained the proposed definition in the final rule.

Congregate Care

We proposed congregate care to read: Congregate care means a shelter type that combines living quarters and restroom facilities with centralized dining services, shared living spaces, and access to social and recreational activities.

Comments: We received two comments on the definition of congregate care suggesting that it too closely aligned with the definition of family home.

Response: We agree with the comments and have adjusted the definition to add the qualification that a congregate care shelter is not a family home.

Contact

Contacting homeless youth is a core function of the entire program, and the primary function of the Street Outreach Program. We proposed to define Contact to read: Contact means the engagement between Street Outreach Program staff and homeless youth in need of services that could reasonably lead to shelter or significant harm reduction. Closely related to this definition, and dependent on this definition, is § 1351.32, where we proposed as a performance measure for the Street Outreach Program the total number of contacts made by the project, giving the projects credit for repeatedly reaching youth.

Comment: We received twelve comments on, either, the definition of contact, the performance measure, or both. Some comments represented multiple individuals and organizations, about 200 in total. Several of these comments argued that the definition should include explicit references to locations frequented by homeless youth. Most argued it should be broadened to include street youth at risk of homelessness or runaway status, not just those already in those situations, pointing out that the statute uses the term ''at risk'' in describing the purpose of the Street Outreach Program.

Response: We appreciate these comments and have made most of the suggested changes. Although the multiple settings in which youth might be contacted are implicit in the proposed definition, we agree that it adds clarity to list some of them. We agree that ''at risk'' youth should count as contacts and are adding this to the definition. Accordingly, we have revised the definition to say that Contact includes ''youth who are at risk of homelessness or runaway status or homeless youth in need of services that could reasonably lead to shelter or significant harm reduction'' and have added a sentence saying, ''[t]his contact may occur on the streets, at a drop-in center, or at other locations known to be frequented by homeless, runaway, or street youth.''

Core Competencies of Youth Worker

Core competencies are essential in providing services that lead to improved outcomes for clients. We proposed to add a definition for core competencies of youth worker to read: Core competencies of youth worker means the ability to demonstrate skills in six domain areas: (1) Professionalism (including, but not limited to, consistent and reliable job performance, awareness and use of professional ethics to guide practice), (2) applied positive youth development approach (including, but not limited to, skills to develop a positive youth development plan and identifying the client's strengths in order to best apply a positive youth development framework), (3) cultural and human diversity (including, but not limited to, gaining knowledge and skills to meet the needs of clients of a different race, ethnicity, nationality, religion/spirituality, gender identity/expression, sexual orientation), (4) applied human development (including, but not limited to, understanding the needs of those at risk and with special needs), (5) relationship and communication (including, but not limited to, working with clients in a collaborative manner), and (6) developmental practice methods (including, but not limited to, utilizing methods focused on genuine relationships, health and safety, intervention planning).

Comment: We received six unique comments on the definition of core competencies of youth workers. One commenter expressed the hope that items number (3) and (4) mean to address and include lesbian, gay, bisexual, transgender, and/or questioning (LGBTQ) youth. Another commenter recommended that item number (6) add the importance of working within an ''ecological framework'' that understands family and community and the role of the worker and client within that framework. Two commenters expressed the hope that youth workers will progress toward becoming certified by either state or national certifying bodies, and are guided in their professional development by competency domains and manuals developed by a national certifying body. One commenter said that all staff need not be trained in all competencies.

Response: We appreciate these comments and have made no changes in the final rule. The details of skills development among youth workers within the domain areas we identify will depend on education, training, and on-the-job experience, much of which will be unique to individual workers and their work assignments. We expect that such education and training will often utilize the perspectives and materials mentioned in the comments, but see no reason to add such detail in a codified rule. Regarding lesbian, gay, bisexual, transgender or questioning (LGBTQ) youth, we do intend the core competencies of youth workers to address and include the needs of these youth, and believe that this is clear in the standards as written. As for the comment on not all staff needing training in all competencies, we agree. We address this in the final text of § 1351.23. We expect youth workers to complete core competency training in order to effectively fulfill their job responsibilities working with runaway and homeless youth. We do not expect that every staff person to be trained in core competencies, but all staff members who work directly with youth should receive training sufficient to meet the stated core-competencies of youth workers.

Counseling Services

We proposed to revise the definition of counseling services to include runaway prevention and intervention related services as follows: Counseling services means the provision of guidance, support, referrals for services including, but not limited to, health services, and advice to runaway or otherwise homeless youth and their families, as well as to youth and families when a young person is at risk of running away. These services are designed to alleviate the problems that have put a youth at risk of running away or contributed to his or her running away or being homeless. We received six unique comments on our proposed revision, several of them endorsed by many individuals or organizations.

Comment: One commenter asked why the first sentence of the definition didn't directly say homeless.

Response: We think that the definition as worded, which includes the phrase ''runaway or otherwise homeless youth'', clearly includes homeless youth, and have not made this change.

Comment: One commenter said that counseling services should explicitly include therapeutic services, including trauma-informed psychotherapy. Relatedly, two other comments recommended removing the word ''advice'' and replacing it with ''clinical

services'' to include mental health counseling and psychotherapy.

Response: We do not agree with the comments suggesting that we require therapeutic or clinical mental health care services in place of ''advice.'' The Act does not authorize grantees to provide health care services directly and our grants do not include funding for professional health care providers. Our grantees' counseling services are intended to provide both advice and referrals when mental health services are needed (see our following discussion of health care services). Accordingly, we have not made this change.

Comment: Two commenters said that many youth were ''forced out'' of family homes because of their sexual orientation or gender identity, that a term such as ''where appropriate and in the best interest of youth'' should condition the language concerning advice and counseling for families, and that the word ''families'' should include ''individuals identified by such youth as family'' (to include legally unrelated individuals with whom youth have ''strong, supportive relationships''). These comments pointed out that parental abandonment or rejection is often the cause of runaway or homeless status among LGBTQ youth.

Response: We agree with the commenters who focused on the point that youth are often ''forced out'' of family homes. As to advice and counseling, the Act expresses a strong preference for reuniting youth and their families, and therefore, we expect grantees to work towards reunification as appropriate and safe for youth. Sometimes it will be impossible to locate families; the youth or family or both may refuse counseling; or some other impediment to reunification may arise. Grantees are not expected to achieve the impossible. Taking into consideration the statute and this comment, we have added language that counseling should be provided ''as appropriate.'' We have also added the phrase ''in consultation with clients'' to emphasize that these services and advice must reflect the unique situation that faces each particular youth.

Furthermore, based on a comment received urging ACF to specifically prohibit conversion therapy in § 1351.19 of the proposed rule we are adding a sentence to the definition of ''counseling services'' to specifically exclude conversion therapy and referrals to conversion therapy by adding language at the end of the definition that says ''[a]ny treatment or referral to treatment that aims to change someone's sexual orientation, gender identity or gender expression is prohibited.'' This change is described further in the comments to § 1351.19 of the proposed rule in this preamble.

Demonstrably Frequented by or Reachable

We proposed to delete the existing regulatory definition of ''Demonstrably frequented by or reachable''. The definition is unnecessary. No commenters raised any concern over this change and this final rule deletes it.

Drop-In Center

We received no comments on the proposed definition and have left it unchanged in the regulatory text.

Drug Abuse Education and Prevention Services

Drug abuse education and prevention services are important, and are defined under that term in the Act (section 387(1)). We proposed to broaden the substance of the statutory definition in regulatory text to read: 'Drug abuse education and prevention services means services to prevent or reduce drug and/or alcohol abuse by runaway and homeless youth, and may include (1) individual, family, group, and peer counseling; (2) drop-in services; (3) assistance to runaway and homeless youth in rural areas (including the development of community support groups); (4) information and training relating to drug and/or alcohol abuse by runaway and homeless youth to individuals involved in providing services to such youth; and (5) activities to improve the availability of local drug and/or alcohol abuse prevention services to runaway and homeless youth.' Our reasons for the broadening of this definition are two-fold. First, we note that the RHY statute explicitly contemplates services to address alcohol abuse in section 387(5). Second, the inclusion of alcohol abuse in addition to drug abuse is standard practice in the substance abuse field as is demonstrated in the definition used by the Substance Abuse and Mental Health Services Administration: 'substance abuse means the abuse of alcohol or other drugs.' We received no comments on this definition and it is retained as proposed.

Health Care Services

In the proposed rule, the definition of health care services read: 'Health care services means physical, mental, behavioral and dental health services and, in the case of Maternity Group Homes mean those provided to the child of the youth; and where applicable and allowable within a program, family or household members of the youth shall receive information on appropriate health related services.'

Comment: We received four unique comments on the proposed definition, some of these representing multiple individuals and organizations. Three comments pointed out that the language as drafted did not clearly cover both youth and any children of these youth. A fourth comment generally praised the proposed definition, but raised two issues, one concerning the need for longer-term treatment, and one concerning the confidentiality of private health information that might be provided to family members.

Response: We have revised the definition to state more clearly that health care is not only for the client youth, but also in some cases for the child of the youth. We agree that longer-term treatment and privacy of medical information are important issues. We do not believe, however, that they should be addressed in a definition and respond to this comment in our discussion of requirements concerning referral services and information confidentiality. Additionally, based on a comment received in § 1351.19 of the proposed rule to specifically prohibit conversion therapy, we are adding a sentence to the definition of ''health care services'' in § 1351.1 to specifically exclude conversion therapy and referrals to conversion therapy by adding language at the end of the definition that says ''[a]ny treatment or referral to treatment that aims to change someone's sexual orientation, gender identity, or gender expression is prohibited.''

Home-Based Services

We proposed to follow the substance of the statutory definition (section 387(2)) of home-based services to read as follows: Home-based services means services provided to youth and their families for the purpose of preventing such youth from running away or otherwise becoming separated from their families and assisting runaway youth to return to their families. It includes services that are provided in the residences of families (to the extent practicable), including intensive individual and family counseling and training related to life skills and parenting.

Comment: We received three unique comments on the proposed definition of home-based services, representing in total about 50 individuals and organizations. One commenter suggested that we retitle this definition to refer to ''family support and reunifications services'' rather than ''home-based'' services, to reflect the

clear purpose of the services as defined. This commenter also recommended adding a definition for supportive housing to capture the need for in-home services when the youth does not live with his or her family. The other commenters said that the definition should specifically allow for the case where family reunification is not in the best interest of the youth.

Response: We have not changed the definition. The term ''home-based'' is the statutory term used in the Runaway and Homeless Youth Act and we see no compelling reason to depart from the terminology of the statute. The commenters are correct that the focus is on family reunification, but we think ''home-based'' is well understood to mean services provided in the home of the youth's family. Underlying both sets of comments is the point that there will be cases where family reunification is not in the best interest of the youth. We agree with this point. However, nothing in this definition (or elsewhere in the rule) prevents or inhibits either youth or their service providers from considering that question and reaching a decision that home-based services are not possible or appropriate in a particular case, even though they are the preferred outcome in the great majority of cases. We deal further with the issue of ''best interest of the youth'' in our discussion of additional requirements that apply to all local services grants.

Homeless Youth

Homeless youth is an essential definition because it identifies individuals eligible to be served under the Act. We proposed to revise the previous definition to read as follows, paraphrasing the Act (section 387(3)): 'Homeless youth means an individual who cannot live safely with a parent, guardian or relative, and who has no other safe alternative living arrangement. For purposes of Basic Center Program eligibility, a homeless youth must be less than 18 years of age (or higher if allowed by a state or local law or regulation that applies to licensure requirements for child- or youth-serving facilities). For purposes of Transitional Living Program eligibility, a homeless youth cannot be less than 16 years of age and must be less than 22 years of age (unless the individual commenced his or her stay before age 22, and the maximum service period has not ended).'

Comment: We received six unique comments on this definition, one endorsed by many individuals and organizations, focusing on a number of specific issues. One commenter asked if a youth could stay in the Basic Center program if an individual enrolled before age 18 and turned 18 while in the programs, or whether that meant that the newly 18 year old individual would become his or her own legal guardian. Another asked whether the Basic Center age could be raised to 19. Two commenters asked whether the age for Transitional Living could be raised, mentioning 24, 24½, or 25 as options. One commenter recommended that the term ''guardian'' be replaced by ''legal guardian.'' One commenter requested clarification that ''safety'' be interpreted broadly to include not only safety from physical harm, but also from emotional and mental harm. Another comment noted conflicts between state laws and federal policies which include different ages for services. The commenter also noted that the terms ''cannot live safely'' and ''no other safe alternative'' are not included in some state definitions but are included in the federal definition of youth homelessness.

Response: These age limits and the restrictions related to safe environments are taken from the federal statute's definition of homeless youth in section 387(3) of the Act. We agree that there are circumstances where these strict limitations may inhibit service provision, but note that nothing prevents a state government, a local government, or a private organization from funding services directly for older youth or those who otherwise do not qualify under federal law. Regarding the Basic Center program age limits, section 387(3)(A)(i) says in the case of a youth seeking shelter in a center under the Basic Center program, a homeless youth is ''less than 18 years of age or is less than a higher maximum age if the State where the center is located has an applicable State or local law (including a regulation) that permits such higher maximum age in compliance with licensure requirements for child- and youth-serving facilities.'' For the Transitional Living Program, section 387(3)(A)(ii) says youth who can be served in the program must be not less than 16 years of age and either (I) less than 22 years of age; or (II) not less than 22 years of age, as the expiration of the maximum period of stay permitted if such individual commences such stay before reaching 22 years of age.

The word ''guardian'' normally means an officially appointed legal guardian, but for consistency with other text we have added the word ''legal'' to our definition. We agree with the comment that ''safe'' and ''safely'' encompass avoiding mental (including emotional) and physical harm. We further note that Runaway and Homeless Youth projects must also serve youth at risk of running away or becoming homeless, which is particularly important when either physical or mental abuse or family instability is involved. Finally, while there are some instances in which state definitions of ''youth homelessness'' differ from federal law, the federal statutory language which governs RHY programs is very specific and cannot be amended without action from Congress. This definition aligns with the existing statutory language in the Act.

Host Family Home

We proposed host family home to read: Host family home means a family or single adult home that provides shelter to a homeless youth.

Comment: We received four unique comments on this definition, with over 100 individuals and organizations endorsing one set of comments. Two comments said that our definitions of congregate care and host family home were essentially identical. A third comment said that in at least one state what we called a host family home would be allowed to serve two homeless youth, not merely a single youth. The fourth comment asked why the word family was used rather than host, and whether a home could be a family home if only one adult was present.

Response: While we agree that the definitions of 'congregate care' and 'host family home contain similar elements, we do not agree that our definitions are essentially identical. A host family home implies the presence of a person or family who rents or owns the building or apartment and uses it as its own domicile, and takes in or ''hosts'' one or possibly two homeless youth who will live with the person or family. If no homeless youth are present, it is still that person's or family's domicile. For clarity, we have revised the definition to include that a host family home means a home or domicile. A family retains discretion as to whether it hosts a particular youth or any youth. In contrast, a congregate care shelter need not be and ordinarily would not be the domicile of a family, would ordinarily serve a larger number of homeless youth, would have essentially all spaces shared, and would have organized social and recreational activities. Congregate care facilities are also normally licensed as shelters, whereas a family host home may be able to host unrelated individuals without a license. As to calling the home by that term, we were following the statutory terminology. As our definition states, a family may be a single adult. We do agree that there are circumstances where a family might be willing and able to host more than one youth (for example,

multiple siblings), and have revised the definition to allow for that option.

Intake

Intake services are essential functions under the Act. We proposed to define intake to read: 'Intake means a process for gathering information to assess eligibility and the services required to meet the immediate needs of the client.'

Comment: We received three comments on the definition of intake, One commenter recommended that the intake definition include a clause stating that ''intake may occur in the context of a community-level coordinated entry or assessment system,'' with the justification that HUD has Continuum of Care regulations that can serve an important intake role. Another comment made the same point about the HUD process without recommending specific language. One commenter suggested that it would be beneficial for the program if ACF encouraged grantees to participate in broader planning processes within Continuum of Care areas.

Response: We agree that all the comments raise valid concerns. We have added to the intake definition: 'The intake process may be operated independently but grantees should, at minimum, ensure they are working with their local Continuum of Care to ensure that referrals are coordinated and youth have access to all of the community's resources, given the major role that HUD-funded programs perform in serving homeless individuals of all ages. We have not, however, limited it to any particular system or process, since states or communities need flexibility to experiment or supplement. We did not include a planning and coordination requirement in the definition, as it more appropriately belongs in our requirements. We proposed a requirement for participating in training and technical assistance related to coordinated services in local networks in proposed § 1351.20(a), which applies to all local service grants, and are revising it in this final rule to include participation in coordinated networks (one of which would be Continuum of Care areas).

Juvenile Justice System

Extremely important in this program are interfaces between Runaway and Homeless Youth projects and the juvenile justice system. We received no comments on our proposed language but have recognized that only the term ''juvenile justice system'' is referenced in the Act and in other places in regulatory text. For this reason, we have deleted the words ''institutions, or authorities'' from the defined term.

''Law Enforcement Structure'' and ''A Locality''

In the proposed rule, we stated that ''law enforcement structure'' and ''a locality'' are definitions that are unnecessary in these regulations and accordingly we proposed to delete them. We received no comments on these proposals, and the final rule deletes these definitions.

Maternity Group Home

For runaway and homeless youth who are pregnant or who have children, congregate or scattered-site maternity-related services are essential. Accordingly, we proposed: 'Maternity group home means a community-based, adult-supervised transitional living arrangement where client oversight is provided on site or on-call 24 hours a day and that provides pregnant or parenting youth and their children with a supportive environment in which to learn parenting skills, including child development, family budgeting, health and nutrition, and other skills to promote their long-term economic independence and ensure the well-being of their children.'

Comment: We received one comment. The commenter asked what was meant by ''transitional'' and what justification there would be for placement into other settings such as individual apartments if more time were needed to assess youth functioning.

Response: For the purposes of the RHY Maternity Group Home program, ''transitional'' simply means that these services are temporary and limited either by age and/or by function. For example, maternity group homes may be specifically tailored to serve pregnant or parenting youth who are transitioning to self-sufficiency. The basic purpose of a maternity group home is to prepare youth for a more permanent home, and the duties of a group home include assessing readiness for that change. The final rule leaves this definition unchanged.

Outreach

We proposed to add a definition for outreach to read as follows: 'Outreach means finding runaway, homeless, and street youth, or youth at risk of becoming runaway or homeless, who might not use services due to lack of awareness or active avoidance, providing information to them about services and benefits, and encouraging the use of appropriate services.' Outreach includes low-barrier services such as food packs and personal hygiene packs.

Comment: We received two comments on this definition. One commenter asked if a drop-in center could perform properly, and be funded, without performing a street outreach function. The other commenter suggested that the definition include, as one outreach service purpose, providing information about housing options and family reunification.

Response: We think that both commenters raise good points but the first does not distinguish between the definition of a function and the obligations of grantees. Our definitions are not intended to prescribe the obligations of grantees, but simply to describe the function or service to reduce ambiguity. Regarding the first comment, while many grantees may perform both drop-in center and outreach functions, our rules do not require that all grantees perform both functions. These are distinct services. We do not prohibit outreach providers from giving additional information, beyond that which is part of the core function. Regarding the second comment, our standards for Street Outreach Program grantees require them to provide services that are designed to assist clients in leaving the streets, which may include housing or family reunification (see § 1351.27 of the final rule) as well as to perform outreach services. Accordingly, we have not changed the definition of outreach in the final rule.

Risk and Protective Factors

We include risk and protective factors under the list of technical assistance or short-term training that may be determined as necessary by HHS as a condition of funding. Therefore, we proposed a definition of risk and protective factors to read: 'Risk and protective factors mean those factors that are measureable characteristics of a youth that can occur at multiple levels, including biological, psychological, family, community, and cultural levels, that precede and are associated with an outcome. Risk factors are associated with higher likelihood of problematic outcomes, and protective factors are associated with lower likelihood of problematic outcomes. While we received no comments on this change, it was deemed appropriate to frame protective factors as positive impact outcomes and so we have made minor wording changes to reflect that protective factors are associated with a higher likelihood of positive outcomes. We made other minor changes in order to mirror the definition used across the

federal government and on the *Youth.gov* Web site.

Runaway Youth

Another core statutory term is runaway youth. We proposed to update the existing definition to reflect the Act (section 387(4)) and to read: Runaway youth means an individual under 18 years of age who absents himself or herself from home or a place of legal residence without the permission of a parent or legal guardian.

Comment: We received one comment on the proposed definition. This comment, representing the views of many individuals and organizations, supported our proposed definition but asked whether it limited the ability of grantees to serve youth who leave their place of legal residence at the behest of a parent or legal guardian.

Response: We appreciate the importance of this question, since it is vital that the program serve youth who are forced or coerced to leave their homes. The answer, however, is not to change the definition of runaway youth, but to recognize that the program serves both runaway and homeless youth, and that the latter group includes those who have lost their family home, such as through physical or verbal pressure from parents or guardians. Therefore, we have left this definition unchanged in this final rule.

Runaway and Homeless Youth Project

We received no comments on the proposed definition and it is unchanged in the final rule.

Safe and Appropriate Exits

We proposed to add a definition of Safe and Appropriate Settings When Exiting Basic Center Program Services or Transitional Living Program Services. The proposed definition said that Safe and Appropriate Settings When Exiting Basic Center Program Services or Transitional Living Program Services means settings that reflect achievement of the intended purposes of the Basic Center and Transitional Living Programs as outlined in section 382(a) of the Act. Safe and appropriate settings when exiting Basic Center Program Services or Transitional Living Program Services are *not* exits:

- To another shelter;
- to the street;
- to a private residence, other than a youth who is staying stably with family, if the youth is not paying rent;
- to another residential program if the youth is not paying rent or if the youth's transition to the other residential program was unplanned;
- to a correctional institute or detention center if the youth became involved in activities that lead to this exit after entering the program;
- to an unspecified other living situation; or
- to a living situation that is not known.

By defining ''Safe and Appropriate Settings when exiting Basic Center Program services or Transitional Living Program services,'' our intent was to move the field beyond just finding a place for the youth to stay. However, as discussed in the following responses to the several dozen comments we received, all requesting clarifications or changes to the proposed definition, we have made significant changes to the definition in the final rule. Almost all commenters found the proposed limitations on safe and appropriate settings to be inconsistent with commonly used best practices and some desirable outcomes. Some of these commenters also raised concerns about achieving performance standards with such restrictions in the definition.

Comment: We received many unique comments arguing that in some situations a youth may need to go to another shelter, including shelters that provide for special needs. Most of these commenters pointed out that a minor is allowed to stay in a Basic Center for 21 days, and if not unified with this family or placed in Foster Care in that period of time might appropriately go to a Transitional Living Program, which provides services up to 21 months. Also, one commenter pointed out 21 days is often not enough time to resolve issues and transition to a stable family arrangement.

Response: We agree. Indeed, one of the appropriate exits from the Basic Shelter Program is to the Transitional Living Program. We have revised the final rule to delete ''another shelter'' from the list of unsafe exits.

Comment: Many unique comments addressed the clause concerning exit to a private residence. Most of these pointed out that the private residence of a friend might not involve rent payment and might be an appropriate exit, that in most cases minors will not be able to sign a lease and pay rent, and that some programs such as Job Corps, Foster Care, and Transitional Living do not charge rent. Several commenters pointed out subsidized housing sometimes involves rent-free accommodation until the renter has income. These commenters recommended that we delete this prohibition on the use of free rental housing. Some commenters also recommended that we redefine family to include unrelated individuals thought of as family by the youth.

Response: We agree that payment of rent is not a useful demarcation and have modified the definition accordingly, both as it applies to private residences and other residential programs. We also agree that there are cases where stays with an adult relative who is not a member of the immediate family (*e.g.,* grandparent, aunt, or uncle), with an adult family friend, or with an adult friend, would be appropriate exits. Accordingly, we have modified the clause on private residences to allow for such situations, where they involve a stable arrangement. To address the recommendations about unrelated individuals, we revised the rule to allow for placement with unrelated individuals in some cases.

Comment: Several commenters addressed other possible safe exits that were not clearly addressed under the clauses on either private housing or other residential programs. The commenters who raised the issue about supportive housing (rent free or not rent-free) also implicitly made the point that some older homeless youth will be placed into their own housing units, without any other resident. One commenter asserted that the proposed clause concerning other residential programs did not clearly include Child Welfare Services.

Response: We agree that the pertinent clauses under the definition as proposed were ambiguous as to supportive housing as well as Foster Care or other Child Welfare Services. We have revised the clause on other residential programs to more clearly include such programs. In particular, our recognition of planned exits to other residential programs as being safe is intended to cover exits to permanent housing and to permanent supportive housing, as well as to foster home placement.

Comment: Several commenters recommended that we drop from the list of unsafe exits the case where a youth's activities after entering the program lead to placement in a correctional institute or detention center. The commenters argued that clearing up prior warrants might lead to jail time, or that this could create barriers to serving youth with many prior law enforcement encounters, such as human trafficked youth. One commenter was concerned that it could count against discharge rates for shelter providers.

Response: We do not agree that clearing up warrants that apply to actions before the youth entered the program come within this definition. The proposed definition was worded to

exclude such actions. We do not believe distinguishing prior and new law enforcement encounters and issues will be difficult for grantees or will create barriers. Within the Runaway and Homeless Youth Program, we are committed to building capacity amongst RHY providers to identify and assist trafficking victims through training and funding opportunity announcements. We are also running a demonstration program initiative with our RHY and family violence program to expand outreach to service providers that may have contact with domestic victims of human trafficking. Since many programs for human trafficking victims are run by law enforcement, we have slightly refined our definition of exits that are not safe and appropriate.

Comment: One commenter asked that we exempt an exit to a living situation that is not known by short stay residents who leave the program after fewer than seven days of residence.

Response: We agree that transitory stays are a problem. Nonetheless, those that result in exits to unknown destinations must be characterized as unsuccessful. We have not accepted the proposed change.

Comment: One commenter asked that we delete ''unplanned'' exits to another residential program from the list of unsafe exits.

Response: We agree that there are cases in which the needs assessment, counseling, and guidance provided by the program will not have identified some particular option that would be beneficial. Indeed, the client himself may find that option, or learn of it from other sources to which he had been referred. We have changed the language to refer to ''inconsistent with the youth's needs.''

Comment: We received several comments arguing that it would be better to define safe and appropriate exits in terms of those that are safe rather than those that are not, or alternatively as those that are both. One listing of safe exits included independent living, residential apprenticeships, higher education, family, mental health or substance abuse program, military service, or any other planned residential program.

Response: We agree that defining safe and appropriate exits in terms of those that are safe and are not safe is a good approach and have changed this in the final regulatory text. We have crafted language in an effort to demonstrate what safe and appropriate exits generally look like and have incorporated some of the concepts suggested so that a safe and appropriate exit will include: (1) To the private residence of a parent, guardian, another adult relative, or adult family friend that has the youth's best interest in mind and can provide a stable arrangement; (2) to another residential program if the youth's transition to the other residential program is consistent with the youth's needs; or (3) to independent living if that is consistent with the youth's needs and abilities. In addition, we note that in comments received, commenters referred to ''safe and appropriate exits'' instead of the longer title proposed that read ''safe and appropriate settings when exiting Basic Center Program services or Transitional Living Program services.'' For this reason, we have shortened the definition to only refer to ''safe and appropriate exits'' in this final rule.

Service Plan or Treatment Plan

We also proposed to define a service plan, sometimes called a treatment plan, to read: Service plan or treatment plan means a written plan of action based on the assessment of client needs and strengths and engagement in joint problem solving with the client that identifies problems, sets goals, and describes a strategy for achieving those goals. To the extent possible, the plan should incorporate the use of evidence-based or evidence-informed interventions.

Comment: We received two unique comments on this proposed definition. One commenter asked whether training and technical assistance will include information on evidence-based practices. The other comment (joined by many individuals and organizations) pointed out that the preamble text, but not the regulatory text, included the concept of safety planning. That comment also asked that safety planning include suicide prevention and other mental health crises.

Response: FYSB will provide training and technical assistance to grantees by sharing evidence-based service planning practices. As to safety planning, we acknowledge the oversight and have added safety planning to the regulatory definition in the final rule. We have revised the proposed definition to include, in the final rule, ''As appropriate, the service and treatment plans should address both physical and mental safety issues.'' This covers all such issues, but does not require that plans explicitly address every unforeseen circumstance.

Short-Term Training

We received no comments and the final rule contains the proposed definition unchanged.

State

We did not receive any comments and have left this definition unchanged in the final rule.

Street Youth

We proposed to define street youth to read: 'Street youth means an individual who is a runaway youth or an indefinitely or intermittently homeless youth who spends a significant amount of time on the street or in other areas that increase the risk to such youth for sexual abuse, sexual exploitation, prostitution, or drug and/or alcohol abuse. For purposes of this definition, youth means an individual who is age 21 or less.' This definition reflects the statutory language from the Act (section 387(6)).

Comment: We received one comment, which asked why we used age 21 or less in the definition.

Response: The statute defines street youth to include a runaway youth or indefinitely or intermittently homeless youth. The statutory definition of homeless youth as defined in section 387(3) states that youth must be less than 22 years old. Accordingly, we have made no change in the final rule.

Supervised Apartments

We received no comments on the definition of 'supervised apartments' and have left the regulatory text unchanged in this final rule.

Technical Assistance

We received no comments on this definition and have left it unchanged in the final rule.

Temporary Shelter

Finally, we proposed to update the definition of temporary shelter to read: 'Temporary shelter means all shelter settings in which runaway and homeless youth are provided room and board, crisis intervention, and other services on a 24-hour basis for up to 21 days.'

Comment: We received three unique comments on the proposed definition. One commenter said that 21 days was too short and should be extended to 30 days. One said that the definition should say explicitly up to 21 days ''or until such time as the statute allows.'' One said that the federal rule should allow longer periods of stay ''where permitted by state law.''

Response: We appreciate these suggestions. Regarding the 21 day time limit, the Act is explicit at § 311(a)(2)(B) that services provided through the Basic Center Program shall include ''safe and appropriate shelter provided for not to exceed 21 days.'' As to state law,

nothing precludes a state or private organization from subsidizing longer stays with state or private funding. We have modified the definition to make clear that 21 days is a restriction on the use of RHY funds through the Basic Center Program, not a restriction on the length of stay permitted by the facility. Temporary shelter is now defined as all Basic Center Program shelter settings in which runaway and homeless youth are provided room and board, crisis intervention, and other services on a 24-hour basis for up to 21 days. The 21 day restriction is on the use of RHY funds through the Basic Center Program, not a restriction on the length of stay permitted by the facility.

We also received a number of comments suggesting that we add definitions to the final rule. We address these suggestions below.

Culturally and Linguistically Appropriate Services

Comment: One comment endorsed by about 50 individuals and organizations recommended that we add a definition for ''culturally and linguistically appropriate services.'' This comment acknowledged that throughout the proposed rule ACYF had demonstrated a clear intent that grantees provide services that are culturally sensitive and that meet the needs of diverse youth. The commenters suggested that this obligation be defined and that the definition include as its only substantive content reference to a set of service and governance standards that are promoted by the U.S. Public Health Service for use in health care settings (these standards are titled ''Culturally and Linguistically Appropriate Standards in Health and Health Care,'' and abbreviated CLAS). In effect, the commenters proposed that we make CLAS a binding standard for our grantees.

Response: Though this final rule does not adopt the CLAS standards, it maintains the proposed rule's intent that grantees provide culturally and linguistically sensitive services and we include training on this for grantees in § 1351.23(a) of this final regulation.

Family

Comment: One commenter asked that we add a definition for ''family,'' pointing out that many LGBTQ youth have adopted ''families of choice'' with adults or caregivers other than their parents or legal guardians. Other commenters made similar points in comments on specific definitions or requirements that referred to families.

Response: We appreciate and agree with the underlying concern. In key places in the proposed and final rule, we make clear that while family reunification with the legal parents or guardian is the preferred option and in most cases in the best interest of youth, we allow for exceptions. While we are not defining the term ''family'', we have revised language throughout this final rule to allow for flexibility in instances where it may not be safe or appropriate for the grantee to contact a client's parents or legal guardians.

Supportive Housing

Comment: We received one comment requesting that we add a definition for supportive housing.

Response: In as much as supportive housing is not a service provided through these grants, we see no need to define it or any other type of non-time-limited housing. Aftercare plans can, as appropriate, address this or any other service.

Subpart B. Runaway and Homeless Youth Program Grants

The previous rule contained a number of sections dealing with the purposes of the program, eligibility for grants, priority for grants, matching requirements, the period of grant awards, allowable costs, application procedures, criteria for grant funding decisions, and additional information for grantees. We proposed revisions to all of these sections as well as to the title of the subpart to be Runaway and Homeless Youth Program Grants. These sections apply to all grants under the program.

Purpose

Currently § 1351.10 asks, ''What is the purpose of the Runaway and Homeless Youth Program grant?'' We proposed to re-title this section ''What is the purpose of Runaway and Homeless Youth Program grants?'' This change in title reflects the growth of the program over time from the core Basic Center Program to a broader range of grant types and purposes. Relatedly, we proposed to amend the statement of purpose to emphasize not only transitional living services and other services added in recent years, but also the increasing emphasis on prevention and identifying the vulnerability of these youth. Under the proposal, the purpose of Runaway and Homeless Youth Program grants would be to establish or strengthen community-based projects to provide runaway prevention, outreach, shelter, and transition services to runaway, homeless, or street youth or youth at risk of running away or becoming homeless. We stated that youth who have become homeless or who leave and remain away from home without parental permission are disproportionately subject to serious health, behavioral, and emotional problems.[1] [2] They lack sufficient resources to obtain care and may live on the street for extended periods, unable to achieve stable, safe living arrangements, during which they may be in danger.[3] [4] Many are urgently in need of temporary shelter and services,[5] including services that are linguistically appropriate, responsive to their complex social identities (*i.e.,* race, ethnicity, nationality, age, religion/spirituality, gender identity/expression, sexual orientation, socioeconomic status, physical ability, language, beliefs, values, behavior patterns, or customs), and acknowledge the environment they come from. We proposed that services should have a positive youth development approach that ensures a young person has a sense of safety and structure; belonging and membership; self-worth and social contribution; independence and control over one's life; skills to develop plans for the future and set goals; and, closeness in interpersonal relationships.[6] To make a successful transition to adulthood, runaway youth, homeless youth, and other street youth also need opportunities to complete high school or earn a general equivalency degree, learn job skills, and obtain employment. HHS operates three programs to carry out these purposes through direct local services: The Basic Center Program, the Transitional Living Program (including Maternity Group Homes), and the Street Outreach Program. HHS conducts three additional activities to support achievement of these purposes: Research, evaluation, and service projects; a national communications system to assist runaway and homeless youth in communicating with service providers; and technical assistance and

[1] Whitbeck, LB; Johnson, KD; Hoyt, DR & Cauce, AM. (2004). Mental disorder and comorbidity among runaway and homeless adolescents. *Journal of Adolescent Health.* 35(2): 132.

[2] Cauce, AM, et al. (2000). The characteristics and mental health of homeless adolescents. *Journal of Emotional and Behavioral Disorders.* 8(4):230.

[3] Whitbeck, LB; Chen, X; Hoyt, DR; Tyler, KA & Johnson, KD. (2004). Mental disorder, subsistence strategies, and victimization among gay, lesbian, and bisexual homeless and runaway adolescents. *The Journal of Sex Research.* 41(4):329.

[4] Greene, JM; Ennet, ST & Ringwalk, CL. (1999). Prevalence and correlates of survival sex among runaway and homeless youth. *American Journal of Public Health.* 89(9):1406.

[5] Clark, R. & Robertson, M.J. (1996). *Surviving for the Moment: A Report on Homeless Youth in San Francisco.* Berkeley: Alcohol Research Group.

[6] Taylor-Seehafer, MA. (2004). Positive youth development: Reducing the health risks of homeless youth. *MCN, American Journal of Maternal Child Nursing.* 29(1):36.

training. The proposed rule covers all of these activities.

Comment: We received several comments on the purpose of the program. Two commenters praised the proposed text for its inclusion of LGBTQ in its statement of the need to serve all runaway and homeless youth. One commenter praised the statement of purpose and proposed that we adopt the U.S. Public Health Service's guidelines of Culturally and Linguistically Appropriate Services in Health Care (CLAS) as standards. A third commenter stated that we should add ''trauma-informed care'' as one of two practice frameworks for youth intervention to this section.

Response: As previously explained, though this final rule does not adopt the CLAS standards, it maintains the proposed rule's intent that grantees provide culturally and linguistically sensitive services and we include training on this for grantees in § 1351.23(a) of this final regulation. As to ''trauma-informed care,'' we believe that the statement of purpose already encompasses this and other practices on dealing with the traumatic circumstances that affect runaway and homeless youth. The proposed text is adopted virtually without change (or with only stylistic changes) to the final rule.

Eligibility for Grants

The existing rule asks in § 1351.11 ''Who is eligible to apply for a Runaway and Homeless Youth Program grant?'' The eligibility requirements of the program have not changed significantly over the years but we proposed changes to this section to conform the regulatory language to the current statute. We proposed to state that all 'public (state and local) and private non-profit entities, and coordinated networks of such entities, are eligible to apply for a Runaway and Homeless Youth Program grant unless they are part of the law enforcement structure or the juvenile justice system.' While specific regulatory language is not needed, we pointed out that most faith-based organizations meet the regulatory definition of non-profit. We received no comments on this section. However, because we are removing the definition of ''law enforcement structure'' in this final rule, we have deleted the reference to ''law enforcement structure'' in this section.

Priority for Awards

The existing regulation addresses priority for awards. In consideration of the numerous comments and varying points of view on these issues, we proposed significant and streamlined changes to the language regarding grant award priorities in § 1351.12. We received more than a half dozen unique comments on the proposed priorities and on ways to improve or refine them.

Comment: Several commenters stated that our proposed language did not clearly show consistency with the statutory preference for awarding grants to applicants with past experience in serving runaway or otherwise homeless youth and recommended regulatory language to say this. One commenter suggested preference for grantees seeking continuation funding. One commenter gave specific recommendations for the amount of preference, *e.g.,* 1 to 2 points for 10 years of successful experience. Another commenter recognized that the language did allow credit for experience but asked what objective measures or weights could be used. Several commenters recommended that points be given for successful monitoring visits. One of these stated that his project had been funded annually since 1986 but was dropped from funding despite successful performance and excellent monitoring scores. This commenter argued there should be an appeal process in case of mistakes in the award process.

Response: With respect to the comments raising the issue of the statutory preference for prior experience, it is important to note that the proposed regulatory text mirrors the statutory language exactly. We note that the statute itself does not require us to give preference to an applicant with prior experience who has not performed as well as other applicants are likely to perform. The RHY statute requires that performance standards are incorporated into grantmaking, monitoring, and evaluation. For clarity and consistency, this requirement was added to the regulatory text. As to those comments proposing specific weights for our priorities or asking that those weights be included in the final rule, or suggesting other priorities for existing grantees, we are also not making those suggested changes. Annual funding opportunity announcements (FOAs) provide far more flexibility than codified regulations to enable HHS to tailor detailed rating factors or their weights to best accommodate the needs of the particular activities. We will, however, consider the specific proposals we received in modifying our priorities and rating methods in the next round of FOAs.

Comment: A number of commenters addressed our proposed preference for applications costing $200,000 or less. Most of these commenters noted that the statute imposes this dollar limit only on the Basic Center Program. Some commenters also criticized what one called a ''flat cap'' on a funding preference for Street Outreach and Transitional Living projects with budgets of $200,000 or less, and expressed concern that this is an absolute priority. One commenter pointed out that the proposed preference would reduce incentives to obtain other public or private resources, and recommended that at the very least the preference not include in-kind resources. This same commenter also argued that larger organizations with multiple grants could use creative accounting techniques to allocate overhead costs. Several of the commenters on this issue also pointed out that this priority would penalize more effective programs with higher budgets. Some of these commenters also suggested that the dollar limit created adverse incentives with respect to hard to serve youth or the most disadvantaged youth, such as many LGBTQ youth.

Response: We agree with comments that pointed out that the statutory limit relates only to the Basic Center Program and have revised the regulatory text in paragraph (a) to follow section 313(b)(2) of the Act which only applies a preference for applications less than $200,000 to Basic Center grants. We have added a clause to this provision to say that the preference will be for applications less than $200,000 ''or such figure as Congress may specify'' to account for future statutory changes. In addition, we have added in statutory language for prioritizing other types of RHY grants.

In paragraph (b), for the Transitional Living Program, we added language from section 322(b) of the Act for prioritizing grants which says ''[i]n selecting eligible applicants to receive grants under this part, the Secretary shall give priority to entities that have experience in providing to homeless youth shelter and services of the types described in subsection (a)(1)'', which references Transitional Living Programs.

In paragraph (c), we have added language from section 351(b) of the Act which says that in selecting applicants to receive grants under the Street Outreach Program, the Secretary shall give priority to public and nonprofit private agencies that have experience in providing services to runaway and homeless and street youth.

In paragraph (d), for the national communications system, we have added language that follows section 331 of the Act with a slight modification. The

current statutory requirement is that the ''Secretary shall give priority to grant applicants that have experience in providing telephone services to runaway and homeless youth.'' To account for changes in technology, in this final rule we will prioritize grantees who have experience providing ''electronic communications services'' to runaway and homeless youth, including telephone, Internet, mobile applications, and other technology-driven services. This change is in keeping with the purposes of the provision and advances those purposes. We note that section 303 of the Act authorizes the Secretary to issue rules she considers necessary or appropriate to carry out the purposes of the Act.

In paragraph (e), to prioritize grants for research, evaluation, demonstration and service projects, we added language to this section in accordance with section 343(b) and (c) of the Act.

In paragraph (f), we added language to specify that the performance standards will be integrated into the grantmaking, monitoring, and evaluation processes for the Basic Center Program, Transitional Living Program, and the Street Outreach Program. We also indicated that specific details about how performance standards will be considered, along with examples of performance documentation, will be provided in the annual funding opportunity announcements.

To be clear, a grant application in an amount larger than $200,000 from a project with demonstrated or likely superior performance can indeed receive an award.

We also understand that serving disadvantaged youth can require additional financial investment. We want to emphasize our dedication to ensuring that all youth are served, including LGBTQ youth (as noted by the commenter) and youth who have experienced adverse circumstances, including physical and mental abuse, drug use, human trafficking, and other circumstances. We will address additional criteria for prioritizing grants to serve these vulnerable young people within our annual FOAs.

Comment: One commenter recommended that funding priority under § 1351.12 be given to applicants currently accredited by a national accrediting body.

Response: Accreditation is another example of a possible future criterion for use in setting priorities or rating factors in annual FOAs. From currently available evidence, we do not have a sufficient basis to justify including such preference in a codified rule.

Comment: A commenter endorsed by many individuals and organizations argued a priority be added to § 1351.12 for applicants providing services without discrimination on the basis of sexual orientation or gender identity and that can best provide services meeting the needs of LBGT youth. This commenter also suggested adoption of ''culturally and linguistically appropriate'' (CLAS) services as a priority, and for adoption of nondiscrimination requirements at 42 U.S.C. 18116 (section 1557 of the Affordable Care Act).

Response: These civil rights issues are dealt with elsewhere in this final rule preamble and in sections of the final rule text. For example, see §§ 1351.20 through 1351.22 which discuss additional requirements for RHY grantees.

Based on comments received and for clarity, we have revised the final rule language in this section to mirror the language in the Act.

Matching Requirements

We proposed a change to § 1351.13 regarding matching share. The previous regulatory language conflicted with the updated statute on the amount of funding required by grantees to satisfy the match requirement. The previous language required a non-federal match amount which was at least equal to 10 percent of the federal funds received. To align the statute and the regulations, we proposed that the federal share of the project represents 90 percent of the total project cost supported by the federal government, thus the remaining 10 percent represents the required project match cost by the grantee. This may be a cash or in-kind contribution.

We note that the language of the statute is phrased in terms implying an exact 10 percent matching share, but HHS has always taken the position that the language should not be interpreted to prevent grantees from spending additional funds from their own resources. We received no comments on these proposed changes and have left them unchanged in the final rule.

Project Period

We did not propose changes to § 1351.14, providing that the period for which a grant will be awarded is generally one year, renewable annually. We received no comments on this section and have left it unchanged.

Supportable Costs

We proposed minor changes to update the language under § 1315.15 to more fully describe costs allowed under Runaway and Homeless Youth Program grants. Costs that can be supported include, but are not limited to, staff training and core services such as outreach, intake, case management, data collection, temporary shelter, transitional living arrangements, referral services, counseling services, and aftercare services. We proposed to retain the existing prohibition against acquisition or renovation costs that exceed 15 percent of the grant award, subject to potential waiver. We also proposed adding language that clarifies that research and evaluation, communications, and technical assistance grants are allowable costs that pertain to their unique purposes.

Comment: We received one comment on these provisions. That commenter recommended that the list of supportable costs be amended to include transition to permanent housing. Examples were suggested, including first month of rent, move in costs, or utility fees.

Response: The proposed definition excluded no reasonable costs related to achieving the goals of the program, other than a few specific limitations and those listed in costs not allowable. It used the phrase ''include, but are not limited to.'' Hence, in some circumstances we may pay for costs related to transition to permanent housing. It would be inappropriate, however, to pay for costs that are the legal obligation of another program. We have not changed the language in the final rule.

Costs Not Allowable

We proposed a change to the language under § 1351.16, now § 1351.16(a) of the final rule, that currently states only that capital costs for new facilities are not allowed under Runaway and Homeless Youth Program grants. We proposed retaining this prohibition and also explicitly prohibiting payment for the operating costs of existing community centers or other facilities that are used partially or incidentally for services to runaway or homeless youth clients. This does not mean that a reasonable fraction of utility or other overhead costs could not be charged to our grant when a facility provides multiple services, but it does mean that such fraction would have to be based on a reasonable cost allocation method approved by HHS, such as proportion of square footage devoted exclusively to each service in the facility. Separable costs of the Runaway and Homeless Youth project are, of course, fully reimbursable. The reason for this clarification is that we have seen proposed project budgets that include disproportionate allocations of facility-wide or overhead costs to

Runaway and Homeless Youth projects that use only a small portion of the facility. We received no comments on this section and have left it unchanged in the final rule.

However, we have revised the final rule by adding a new § 1351.16(b) that states, ''A Runaway and Homeless Youth Program grant does not cover any treatment or referral to treatment that aims to change someone's sexual orientation, gender identity or gender expression.'' This is further discussed later in the preamble.

Application Procedures

The current rule under § 1351.17 provides that HHS will publish program announcements of availability of grant funds annually in the **Federal Register**, and includes specific but outdated procedures for obtaining announcements and submitting applications. We proposed to change § 1351.17 to address three changes since the rule was last revised. First, proposed paragraph (a) recognized that we now rely primarily on the Internet (rather than the **Federal Register**) for publication of our funding opportunity announcements. Second, under proposed paragraph (b) we allowed for electronic submission of completed grant applications through the federal government's *http://www.grants.gov* Web site. We would continue to allow for paper applications for grants. Third, our proposed language said that we will publish such announcements periodically rather than annually. The timing and frequency varies by type of grant and has changed over time. We received no comments on these proposed changes but are seeking to maximize flexibility as technology and procedures change in the future. Therefore, we have changed the language to say that an applicant should follow instructions included in funding opportunity announcements, which describe procedures for receipt and review of applications.

Funding Criteria

Under existing § 1351.18 we listed a number of criteria that we use for deciding which grant applications to fund. We proposed small technical changes to these criteria.

Under paragraph (a) we proposed to retain the criteria that proposed projects meet funding priorities. We also added a clause making specific reference to our use of FOAs to establish specific details of the broad requirements, standards, and evaluation criteria contained in the proposed rule. Under the proposal, in reviewing applications, HHS would take into consideration whether the grant application meets the particular priorities, requirements, standards, or evaluation criteria established in funding opportunity announcements. We renumbered these criteria accordingly.

In paragraph (b), we proposed to modify and combine the current requirements of paragraphs (b) and (c) for demonstrating ''need'' to require that the likely estimated number of unserved runaway and homeless youth in the area exceed the capacity of existing services. That is, we would not require a census-like count of such youth, but merely a reasonable estimate that the number of such youth exceeds the capacity of existing services.

We received no comments on subsections (a) or (b) and the proposed text in these subsections are unchanged in the final rule.

Under proposed paragraph (c), we proposed to retain the existing requirement that runaway and homeless youth centers maintain a minimum residential capacity of four and a maximum of 20 youth in a single structure (except where the applicant assures that the state where the center or locally controlled facility is located has a state or local law or regulation that requires a higher maximum to comply with licensure requirements for child and youth serving facilities as authorized in § 312(b)(2) of the Act) for all youth residing at the shelter on any given night. We proposed to clarify that the capacity standards apply only to grants that include such centers. We also proposed to revise the regulation to require centers to have the number of staff sufficient to assure adequate supervision of and treatment for the number of clients served rather than a mandatory ratio of staff to clients. This change is for consistency with the statute at section 312(b)(2)(B) of the Act. While we are not aware of any uniform best practice for establishing such a ratio, an agency would refer to state laws and licensing regulations as they pertain to runaway and homeless youth shelters for guidelines. If no runaway and homeless youth shelter laws and licensing regulations have been established in a state, the agency would refer to state child welfare laws and regulations for youth. Agencies would be required to cite the guidelines they are following for the staff ratios they deem to be appropriate. To clarify this, we have added language to paragraph (c) to say that criteria used when determining which grant applications to fund must consider the guidelines followed for determining the appropriate staff ratio.

Comment: We received one comment on proposed § 1351.18(c) on residential capacity, asking whether there should be a minimum number of youth to be served by host family homes (such as 4) and when federal requirements take precedence over state or local licensing requirements.

Response: We do not believe there should be any minimum number of youth served in host family homes. Some of the best domiciles may involve room for, or willingness to supervise and host, just one youth. Our residential capacity requirements are not intended to preempt state or local rules in any way, and we specifically allow state or local licensure requirements to impose higher maximum standards.

Under paragraph (d), we proposed to slightly modify the criteria under current paragraph (e) removing the language concerning the 72-hour timeframe from admission for the program to make contact with family. The requirement is contained in Subpart C, at new § 1351.24(e).

We received six unique comments on this section, and address the concerns of these commenters separately below.

Comment: Section 1351.18(d) of our funding criteria contains our proposed provision on making ''best interest of the child'' an important requirement. Several comments on other sections had mentioned a concern over making that criterion clear. One commenter recommended that this term also be incorporated into the definitions of counseling services, health care services, and home-based services; addressed or added in three paragraphs of this section, and added to sections on requirements for Basic Center projects and performance standards for these grantees. Two other commenters on best interest of the child also suggested amending the proposed language dealing with alternative living arrangements.

Response: We placed this important requirement in our section on overall criteria for funding priorities, a core section of the rule. We agree that the best interest of the child will in some cases prevent either counseling with or reunification with the family. In some cases (*e.g.,* involving sexual orientation or gender identity) the family will have forced the youth to leave and be unwilling to discuss the matter, and in some cases physical abuse or other criminal behaviors will prevent family involvement. We appreciate that there are many other specific provisions where we could add requirements or references to best interest of the child and we do reference the best interest of the child consistently throughout this

rule. It is in this section that we explicitly make best interest of the child one of the major priorities to be addressed in all funding awards and all runaway and homeless youth services. Our proposed language explicitly conditioned joint involvement of youth and family to cases ''when possible.'' We did not intend ''possible'' to mean only literal impossibility (though this will sometimes be the case), but ''reasonably possible,'' and taking into account the circumstances of each case and the best interest of the client youth. We have revised the rule to reflect this. Consistent with section 312 of the statute, our proposed language also required that grantees develop adequate ''plans,'' which includes in this context carefully considered methods and procedures for handling the most difficult circumstances and situations where family involvement may not be reasonably possible. We think that the proposed rule language provides a clear ''best interest'' policy applicable to all services for the client youth, and have not revised either this section or other sections in response to these comments.

As for the comments suggesting that we revise the text concerning best interest of the child to more clearly indicate that alternative living arrangements (not just to return home or to law enforcement) are an option that will sometimes be in the best interest of the child, we agree that alternative living arrangements should be considered when developing plans for Basic Center grantees. We have modified the language to cite the statute more closely, which says in section 312(b)(3) that such grantees ''shall develop adequate plans for contacting the parents or other relatives of the youth and ensuring the safe return of the youth according to the best interests of the youth, for contacting local government officials pursuant to informal arrangements established with such officials by the runaway and homeless youth center, and for providing for other appropriate alternative living arrangements.''

We proposed to retain the language in paragraphs (f) through (h) of the previous version of this regulation and renumber them (e) through (g). This language ensures that HHS criteria for deciding which RHY grant applications to fund include:

(e) Plans for the delivery of aftercare or counseling services to runaway or otherwise homeless youth and their families;

(f) Whether the estimated cost to HHS for the Runaway and Homeless Youth project is reasonable considering the anticipated results; and

(g) Whether the proposed personnel are well qualified and the applicant agency has adequate facilities and resources.

We added a new paragraph (h) to ensure that HHS criteria for deciding which RHY grant applications to fund includes past performance on a RHY grant, including but not limited to program performance standards. In fact, paragraph (h) clearly states our intent to consider a grantee's past performance, including measures associated with the performance standards outlined in §§ 1351.30, 1351.31, and 1351.32, when deciding which RHY grantee applications to fund.

Paragraphs (i) and (j) outline funding criteria for whether the proposed project design, if well executed, is capable of attaining program objectives. The paragraphs also outline funding criteria for whether the grant application is consistent with the provisions of the Act and these regulations. These paragraphs were unchanged. A new paragraph (k) was proposed to include other factors as outlined in the funding opportunity announcements.

Comment: One commenter discussing § 1351.18 argued for adding a reference to a new civil rights law, and for requiring ''culturally and linguistically appropriate services'' in five separate paragraphs within this section. This same commenter argued for adding such a reference or requirement in many other sections of the rule.

Response: The final rule maintains the proposed rule's intent that grantees provide culturally and linguistically sensitive services. See § 1351.23(a) of this final regulation.

Comment: One commenter asked that we include appeals procedures to deal with mistakes in the review process and involve regional staff in the grant review process to § 1351.18.

Response: This rule governs primarily the operation of the Runaway and Homeless Program by grantees, and does not address or govern the internal administrative processes of the federal government. Hence, while we appreciate the suggestions as to the grant review process, we do not address them in the final rule. We will take them into account in our internal decision making. We note that we already involve regional staff in the grant review process, since they bring unique expertise and knowledge of local conditions and grantees to that process. In addition, in accordance with the HHS Grants Policy Statement, ''The decision not to award a grant, or to award a grant at a particular funding level, is discretionary and is not subject to appeal to any OPDIV or HHS official or board.''

Comment: Two commenters asked that we add as a criterion to § 1351.18 ''demonstrated engagement in efforts with the local Continuum of Care'' activity and one of these suggested adding partnerships with adult homeless agencies as a requirement. One of these commenters also recommended that grant applicants should show that they are integrating Runaway and Homeless Youth Management Information System (RHYMIS) reporting with the HUD Homeless Management Information System (HMIS) reporting.

Response: Coordination with other agencies and programs is very important to the program, both to improve outcomes and to reduce wasted or duplicative effort. Continuum of Care is one of the most important of these in many areas served by our grantees. We have chosen not to make such coordination a criterion for funding decisions on individual grant awards, but have instead included it in our additional requirements, discussed in our response to comments on the next section of the rule. As for program reporting, the integration of these two systems is proceeding and once completed will be enforced under § 1351.23(c) of the final rule. See our subsequent discussion of that subsection.

Other Federal Requirements and Program Policies

After reviewing comments, the final rule has expanded upon § 1351.19 of the proposed rule to provide clarity by separating the section into §§ 1351.20 through 1351.22 in subpart A of the final rule. This is discussed in detail below. Under the previous rule, § 1351.19 contains a list of other rules and regulations that apply to applicants for, or recipients, of program funds. These include, for example, regulations concerning civil rights obligations of recipients and regulations concerning fraud, waste, and abuse. We proposed amending that rule to include additional rules that also are specifically intended to apply to all HHS grantees or, in some cases, to all federal grantees.

The expanded list under proposed paragraph (a) included rules related to civil rights requirements, to other client protections, to administrative requirements in HHS grant programs, and to preventing fraud or abuse. This expanded list does not attempt to list all of the federal laws and regulations (*e.g.,* provisions of the Internal Revenue Code regarding non-profit status, minimum wage requirements, and numerous

others) that pertain to organizations that may be grant applicants or awardees. The provisions we listed here are not for the most part administered through either the Administration for Children and Families or its Runaway and Homeless Youth Program (though the agency may in some instances assist in their enforcement), but by other HHS components or by other federal agencies that set the conditions and enforcement mechanisms that apply to those provisions, and that determine whether and in what circumstances grant-related penalties may apply. For example, the HHS Office for Civil Rights enforces civil rights protections. This section already contains in paragraph (b) several additional provisions, mainly client confidentiality protections, that we did not propose to change, as well as new and expanded protections concerning protection of youth and providing non-discriminatory services that comprehensively address individual needs. In paragraph (c), we proposed to update our reference to the Act as defined in the proposed rule. We also proposed to amend the title of the section to include ''other Federal Requirements'' in the title. We received no comments on many of these subsections and have left the language of those subsections unchanged in the final rule.

Comment: We received several comments on § 1351.19 suggesting that we add a civil rights law, 42 U.S.C. 18116, enacted as section 1557 of the Affordable Care Act (ACA), to the list of applicable rules in subsection (a). This statute prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities, including those funded by federal grants or established under Title I of ACA. Existing laws and regulations already prohibit most of these types of discrimination, at least for federal grantees and in some cases for all or most service providers, whether or not involving health. The most notable addition in the recently enacted statute is the prohibition against sex discrimination in the provision of health care services. Current sex discrimination regulations applicable directly to grantees cover only those grantees providing education services (of course, there also exist employment-related prohibitions on sex discrimination by private or public employers that are enforced by yet other agencies, such as the Equal Employment Opportunity Commission, regardless of grantee status). Some persons, including these commenters, hope or expect that this new and far broader prohibition on sex discrimination will extend to sexual orientation and gender identity.

Response: Section 1351.22 has been added to address discrimination in RHY grantee programs and facilities. The new language added in § 1351.22(a) prohibits discrimination on the basis of sex, sexual orientation, and gender identity and expression. This section clarifies the intent of the section as initially written in the notice of proposed rulemaking (NPRM). To be clear, the rule does not bar grantees from considering the needs of each applicant and the health and safety of other beneficiaries when determining eligibility for programs, activities, or services. Language has been added in § 1351.22 making this part of coordinated entry explicitly permissible.

A preceding clause at § 1351.20 includes references to 45 CFR part 86 and 92, both which prohibit discrimination on the basis of sex, which includes gender identity. The former rule, at 45 CFR 86.31, applies to education programs or activities that are carried out under various HHS-funded grant programs including RHY grants. The latter rule, at 45 CFR part 92, applies to the provision of mental health counseling and other health activities carried out by the RHY programs.

Section 1351.20 of the final rule lists fourteen codified regulations that apply or potentially apply to all federal grantees (as applicable). Title 42 U.S.C. 18116 was enacted in 2010 and conforming regulations were issued on May 18, 2016 at 45 CFR part 92, entitled ''Nondiscrimination in Health Programs and Activities,'' which implements the prohibition of discrimination under section 1557 of the Affordable Care Act (ACA) of 2010. These regulations prohibit discrimination on the basis of sex, including gender identity in HHS-funded health programs or activities. To the extent that an RHY grantee operates health programs or activities, any part of which receives federal financial assistance, section 1557 and the corresponding regulations under 45 CFR part 92 will apply to that health program or activity.

For these reasons we revised our list of regulations that apply or potentially apply to Runaway and Homeless Youth Program grantees to include 45 CFR part 92.

Comment: Another commenter asked that we apply the language of a New York State nondiscrimination statute to Runaway and Homeless Youth grantees, on behalf of LGBTQ youth. The commenter stated that the New York law explicitly prohibits programs, program staff, and program volunteers from engaging in or condoning discrimination or harassment on the basis of race, creed, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. Other commenters asked that we not merely require that our grantees be responsive to the needs of LGBTQ youth, but also prohibit discrimination against such youth.

Response: We have included language in § 1351.22 of the final rule that requires service delivery and staff training to comprehensively address the individual strengths and needs of youth as well as be language appropriate, gender appropriate (interventions that are sensitive to the diverse experiences of male, female, and transgender youth), and culturally sensitive and respectful of the complex social identities of youth (*i.e.,* race, ethnicity, nationality, age, religion/spirituality, gender identity/expression, sexual orientation, socioeconomic status, physical or cognitive ability, language, beliefs, values, behavior patterns, or customs). No runaway youth or homeless youth shall, on any of the foregoing bases, be excluded from participation in, be denied the benefits of, or be subject to discrimination under, any program or activity funded in whole or in part under the Act. Additionally, after publication of this rule, we will produce a best-practices guide focused on sheltering and serving LGBTQ youth. This document will serve as a tool for grantees and will include information about how to create safe and affirming spaces for transgender youth.

Comment: One commenter asked that we specifically prohibit for LGBTQ youth so-called ''conversion therapy,'' meaning ''[a]ny treatment or referral to treatment that aims to change someone's sexual orientation, gender identity or gender expression.''

Response: We are not aware of any instance where an RHY grantee has used ''conversion therapy'' or ''reparative therapy'' to aim to change an individual's sexual orientation or gender identity. However, we agree it would be wholly inappropriate for this to take place and are amending this final rule to explicitly exclude, by definition, conversion therapy from allowable counseling services and health care services. Additionally, we have revised the final rule by adding a new § 1351.16(b) that states, ''A Runaway and Homeless Youth Program grant does not cover any treatment or referral to treatment that aims to change someone's sexual orientation, gender identity, or gender expression.''

Additionally, we have revised ''counseling services'' and ''health care

services'' in § 1351.1 to specifically exclude conversion therapy by adding language at the end of the definition that says ''[a]ny treatment or referral to treatment that aims to change someone's sexual orientation, gender identity or gender expression is prohibited.''

Conversion therapy is a controversial practice and a number of states, including Oregon, California, New Jersey and Washington, DC, have passed laws in recent years banning it. In 2001, U.S. Surgeon General issued a report stating that ''there is no valid scientific evidence that sexual orientation can be changed.'' [7] Over recent years, the Pan American Health Organization, American Psychological Association and other organizations have concluded that the practice is unethical and should be banned.[8] [9] [10] [11]

Comment: Another commenter argued that we should point out the recent issuances of the Department of Education (ED) stating that the protections of title IX of the Education Act extend to gender identity and expression.

Response: We agree that title IX of the Education Amendments of 1972 is an important statute. While the recent guidelines from ED are a new interpretation under the statute, title IX applies only to education programs. Services provided under Runaway and Homeless Youth grants in the three main service programs are not considered education programs, and therefore, title IX will rarely, if ever, apply to Runaway and Homeless Youth Programs. Title IX applies to the education programs (typically public or private schools, colleges, and universities receiving federal grants from the Department of Education) to which runaway or homeless youth are sometimes referred. Therefore, we did not make changes in response to this comment.

Comment: Six commenters addressed the confidentiality and information disclosure requirements proposed in § 1351.19(b)(1). We had proposed this language unchanged from the present rule. Most of these commenters addressed potential disclosure to state law enforcement authorities or pursuant to court order, and argued that this would reduce the protection afforded to youth. Most commenters argued for eliminating or reducing the scope of our proposed language, which created an exception for cases in which release is ''compelled by a court or statutory mandate.'' These commenters seemed to assume that this would place youth in danger, and asserted that youth would be dissuaded from seeking help by what they perceived as weakened privacy protections. One of these commenters asked whether a subpoena would apply. Yet another commenter suggested that we create a different standard for youth served in the Basic Center and Transitional Living Programs, because the statutory text differs as to parental consent and whether consent must be informed.

Response: We very much appreciate these thoughtful responses, which we have used to make important changes to the proposed language. Based on the comments received, we have modified the regulatory text to reflect the different statutory standards for youth served in the Basic Center and Transitional Living Programs, and to interpret confidentiality requirements more narrowly.

With respect to the Basic Center Program, section 312(b)(7) of the Act is clear that grantees ''shall keep adequate statistical records profiling the youth and family members whom it serves (including youth who are not referred to out-of-home shelter services), except that records maintained on individual runaway and homeless youth shall not be disclosed without the consent of the individual youth and parent or legal guardian to anyone other than another agency compiling statistical records or a government agency involved in the disposition of criminal charges against an individual youth. Reports or other documents based on such statistical records shall not disclose the identity of individual runaway and homeless youth.''

For youth in Transitional Living Programs, section 322(a)(13) of the Act requires grantees ''not to disclose records maintained on individual homeless youth *without the informed consent of the individual youth* to anyone other than an agency compiling statistical records.'' Specific to Transitional Living Programs, the Act only requires consent from the youth to release records, which is different from the Basic Center Programs which require informed consent from the individual youth and their legal guardian.

Section 384 of the Act reads: ''Records containing the identity of individual youth pursuant to this Act may under no circumstances be disclosed or transferred to any individual or to any public or private agency.'' It is important to note that there are exceptions to this provision. For example, as noted previously, records may be released after proper consent of youth or parent/guardian. Further, de-identified information can be released for research purposes. De-identified is a technical term that applies to methods commonly used in sensitive research to prevent identification of individuals from a dataset. For example, names might be replaced by numbers (often much more complex steps need to be taken as well). This is further explained in the response to the comment below. We have changed the regulatory text to reflect these statutory requirements.

Comment: Another commenter asked whether de-identified information could be released for purposes of program evaluation or academic research, pointing out that research using such information is essential to improving the quality of services over time.

Response: The Act allows and requires research on service effectiveness (section 343), which normally cannot be measured without records on individual outcomes, but specifically prohibits disclosure or release of ''records containing the identity of individual youth'' to ''any individual or any public or private agency'' (section 384). In other places, the Act requires shelter grantees to ''keep adequate statistical records'' and allows their use in reports ''based on such statistical records'' (section 312(b)(7) for Basic Center grants; similar language applies to other services). In the light of these provisions, we interpret the statute to state that research, evaluation, and statistical reports funded by grants provided under section 343 of the Act are allowed to be based on individual data but only if such data are de-identified in ways that preclude disclosing identifiable information on individuals. We have added language in § 1351.21(a)(3) to codify this interpretation.

Comment: Several other unique comments pointed out that requiring consent of both the youth and the family will not always be appropriate or consistent with state law, or consistent with the emancipated status of many

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[7] [b] *The Surgeon General's call to Action to Promote Sexual Health and Responsible Sexual Behavior'', A Letter from the Surgeon General U.S. Department of Health and Human Services,* U.S. Department of Health and Human Services.

[8] Jason Cianciotto and Sean Cahill (2006). Youth in the crosshairs: The third wave of ex-gay activism. New York: National Gay and Lesbian Task Force Policy Institute.

[9] ''Statement of the American Psychological Association (PDF).*http://web.archive.org/web/20110806095055/http://www.apa.org/pi/lgbt/resources/policy/ex-gay.pdf APA.org.* American Psychological Association. 10 August 2006. Archived

[10] ''Therapies to change sexual orientation lack medical justification and threaten health''. Pan American Health Organization (PAHO). Retrieved 26 May 2012.Archived

[11] Pan American Health Organization, Regional Office of the World Health Organization; Press release May 17, 2012 ''*Therapies*'' *to change sexual orientation lack medical justification and threaten health http://www.webcitation.org/67xKQyixE.*

youth served. One commenter pointed out that the statutory requirements for consent to release of information differ for Basic Center and Transitional Living Programs.

Response: We appreciate commenters bringing these issues to our attention. We agree that for the Transitional Living Program, only the individual youth's informed consent is required under section 322(a)(13) of the Act. In addition, the Basic Center grant has different disclosure criteria under section 312(b)(7) of the Act. For Basic Center Programs, youth and parents must provide consent. We have revised the regulatory text in § 1351.21(a)(1) to reflect the statute accordingly.

We did not receive any comments on paragraphs (a)(2) through (a)(4) and therefore did not make any changes to the proposed text in this final rule.

Section 1351.19(b)(5) proposed requirements that grantees serve, in a non-discriminatory fashion, individual needs of youth without regard to language, gender, or LGBTQ status, and to be ''culturally sensitive and respectful of the complex social identities of youth,'' including ''religion/spirituality, gender identity/expression, sexual orientation, socioeconomic status, disability, language, beliefs, values, behavior patterns, or customs'' as well as race and physical abilities. The inclusion of the term ''behavior patterns'' in this section will of course not prevent grantees from determining ineligible for services youth with a history or criminal record that poses a potential safety risk to other youth in the grantee's care.

Comment: We received six comments regarding proposed § 1351.19(a)(5), now § 1351.22(a), concerning ''non-discriminatory services and training'' and ''culturally sensitive'' services. The comments principally requested that the rule establish a new legal right of individuals for protection against discrimination aimed at them personally, or including such terms as ''cultural and linguistically appropriate'' throughout the rule.

Response: In response, § 1351.22 has been added, addressing discrimination in RHY grantee programs and facilities. We are changing the title of subsection (a) to clarify that this section does require that runaway and homeless youth services and training must be both ''non-discriminatory and culturally and linguistically sensitive.'' We believe it is important that all grantees and other stakeholders understand that our practice and intent is to hold grantees to practices that meet individual needs, regardless of racial, sexual orientation, cultural, or other diverse backgrounds.

We specifically do not intend this change to reference the CLAS voluntary guideline standards of the U.S. Public Health Service, which as previously explained are inappropriate for a number of reasons (*e.g.,* intended only for health care programs and conflicting in some respects with the requirements of the Act and best practices for runaway and homeless youth). We will continue to provide appropriate guidance to grantees on our approach through training and technical assistance. For example, there are differences among Native American tribes and some immigrant groups as to whether the locus of family authority is patrilineal or matrilineal. This should influence the practices that grantees use to approach and counsel certain families and youth they serve. We believe that our grantees generally understand these nuances quite well, since they have significant experience working with these populations.

We emphasize that the language of this final rule is in no way intended to create new individual rights. Civil rights for individuals served by HHS programs are enforced through the Office for Civil Rights under its regulations and guidance and in compliance with federal civil rights law. Grantees who are unfamiliar with these laws and regulations should review our list of civil rights and other regulations that apply to HHS grantees but that are administered by other agencies.

Comment: One commenter pointed out that often the provision of gender appropriate services is a matter of allowing a youth to participate in programming that is appropriate for their gender identity, or with the gendered group where they feel most safe and supported. The commenter also highlighted that the provision of gender appropriate services requires sensitivity to the diverse experiences of youth, and the process of determining what services are appropriate for a transgender youth may require individualized consultation with the youth, rather than a blanket determination of what services are necessary or appropriate based on their gender identity, sex assigned at birth, gender expression, or the status of their identity documents.

Response: We agree. Section 1351.22(a) of this final regulation includes a provision to require that service delivery and staff training comprehensively address the individual strengths and needs of youth, including the youth's gender and gender identity. We note that best practices in this area include asking transgender, questioning and intersex clients to identify their gender and to assign them housing based on their gender self-identification. Technical assistance to grantees will be provided on this issue.

Comment: One commenter mentioned a recent HUD rule adding a new non-discrimination right for LGBTQ adults participating in subsidized housing programs and recommended including an explicit nondiscrimination provision into these rules to harmonize the requirements applicable to the many grantees receiving funding from both HUD and HHS.

Response: The HUD rule mentioned is grounded in the applicable housing statutes. Therefore, we did not add these specific provisions to the rule. However, § 1351.22 of the final rule was added to address discrimination in RHY grantee programs and facilities. This section includes strong non-discrimination standards for LGBTQ individuals.

Comment: Two commenters argued that our use of the term ''gender specific'' might be misinterpreted as requiring segregation, such as segregation of transgender youth from their male or female peers, or separate programming on the basis of gender.

Response: The full phrasing in the proposed rule stated that gender specific meant ''interventions that are sensitive to the diverse experiences of male, female, and transgender youth'' and ''respectful of the complex social identities of youth'' including ''gender identity/expression'' and ''sexual orientation.'' However, to ensure that our language is not misunderstood we have changed the term ''gender specific'' to ''gender appropriate'' in the final rule, as suggested.

Comment: One commenter recommended that education, age, cognitive ability, and physical ability be added to the list of ''complex social identities of youth in § 1351.19(b)(5)'' of the proposed rule.

Response: We have reviewed these suggestions. We do not believe that ''education'' is needed on a list of ''complex social identities of youth,'' as education is not part of a youth's social identity and is instead something that a youth achieves.

However, we do agree that ''age'' and ''cognitive'' ability, as well as ''physical ability,'' should be included in paragraph (a). We have made these changes in the final rule.

Subpart C. Additional Requirements

As discussed in the previous section of this preamble, the final rule expands on § 1351.19 of the proposed rule and provisions of this section have been reorganized in §§ 1351.20 through 1351.22 to address, ''What Government-

wide and HHS-wide regulations apply to these programs?,'' ''What confidentiality requirements apply to these programs?,'' and ''What additional requirements apply to these programs?,'' respectively, and these sections are now included in subpart C of the final rule. Additional changes to subpart C of the proposed rule are discussed below.

We requested comments on whether there is substantial evidence that these or any other requirements not proposed here would improve program outcomes, either overall or for each type of grant, at reasonable effort and cost. We also requested comment on whether placing either the proposed standards or additional standards in funding opportunity announcements rather than in regulations would allow sufficient flexibility to grantees or would hinder our ability to use targeted initiatives to improve program practices.

Under § 1351.20(a), we proposed revising the language requiring grantees to participate in technical assistance and training in order to allow flexibility in which techniques will be used, and proposed clarifying that grantees must also accept monitoring. This list of technical assistance and training options reflected primarily the evolution and expansion over the years of the training and technical assistance program, and the items listed are all conducted currently under the program. Requirements we proposed to add are core competencies for youth workers, core support services, cultural and linguistic diversity, background checks, ethics, and staff safety. In particular, we proposed positive youth development as a priority area for training or technical assistance. Under our proposal, grantees would participate in technical assistance or short-term training as a condition of funding, as determined necessary by HHS, in areas such as, but not limited to:

- Aftercare services or counseling;
- Background checks;
- Core competencies of youth workers;
- Core support services;
- Crisis intervention techniques;
- Cultural and linguistic diversity;
- Development of coordinated networks of private nonprofit agencies and/or public agencies to provide services;
- Ethics and staff safety;
- Fiscal management;
- Low cost community alternatives for runaway or otherwise homeless youth;
- Positive youth development;
- Program management;
- Risk and Protective Factors related to youth homelessness;
- Screening and assessment practices;
- Shelter facility staff development;
- Special populations (tribal youth; LGBTQ; intersex youth; youth with disabilities; youth victims of trafficking, sexual exploitation or sexual abuse),
- Trauma and the effects of trauma on youth;
- Use of evidence-based and evidence-informed interventions;
- Youth and family counseling; and
- Confidentiality policies and protocols.

This is a substantial addition but one that we believe is useful to reflect the current set of policy and program priorities as set forth in the Act and in the program solicitations and management improvements that have been made in the overall program in recent years. Virtually all of these proposed provisions were derived from specific statutory mandates and are already part of standard operating procedures. Many participants in our consultative process also suggested most of these items, reflecting the general consensus as to their importance in operating effective services. We received six comments on this subsection.

Comment: Several comments were supportive and raised no questions. Several comments posed questions about the training requirements. Four commenters asked whether all individuals on grantee staff would have to receive training or technical assistance, or if this requirement could be applied to certain grantee staff but not all, particularly when staff members are not regularly in contact with youth. One commenter asked whether all individuals would have to receive all types of training, or whether training could be tailored to each individual's role in providing services. Several commenters asked that only individuals in contact with youth more than 10 hours a week be required to participate in training. Another commenter asked who would decide what technical assistance is needed and who will provide it. One commenter asked whether new hires would have to be trained before employment begins. Yet another commenter asked several questions about whether grantees could provide their own training or whether the federal government would provide the curriculum.

Response: First, the new language would not require every single individual to participate in every kind of training.

To clarify this provision further, we have added a sentence at the end of paragraph (a) that highlights that this it is not a requirement that every staff person receive training in every subject but all youth-serving workers on staff should receive training sufficient to meet the stated core competencies of youth workers. This training is offered by ACF.

ACF will provide the development of the curriculum for all training and technical assistance as well as provide access to courses and materials. The vast majority of these trainings will be available on the internet. We hope that this will provide the greatest flexibility for our grantees.

If for any reason, a staff member is not able to participate in the training from the federal government, the grantee can provide its own training based on the ACF materials.

Additionally, grantees are expected to provide in-house training to new hires on some of the most critical responsibilities, without waiting for the next available Runaway and Homeless Youth Training and Technical Assistance Center (RHYTTAC) course. Some kinds of training or technical assistance, beyond core competencies, may be mandated for all grantees in funding opportunity announcements, in other cases only for those identified as needing help.

In still other cases, grantees will request help in particular areas. ACF offers different formats and levels of training within a variety of subjects, allowing quick training for many and in-depth training for few. More information about these resources is available at our online Runaway and Homeless Youth Training and Technical Assistance Center (see: *http://www.rhyttac.net/about/what-rhyttac*).

Comment: One commenter asked us to add ''secondary trauma and self-care'' to our list of required subjects in § 1351.20(a) of the proposed rule.

Response: We agree that trauma is an extremely important issue and think that proposed list of training and technical assistance sufficiently addresses trauma and the effects of trauma on youth. We encourage grantees to include secondary trauma in their training when discussing the effects of trauma on youth. Grantees are welcome and encouraged to train staff beyond requirements listed in this regulation. In addition, there are multiple ways to propose changes as identified on the RHYTTAC Web site, including contacting RHYTTAC leadership, membership on or contact with the National Advisory Board, using the RHYTTAC Community of Practice, participating in workshops, or contacting subject matter experts.

Comment: One commenter asked us to change ''cultural and linguistic diversity'' in paragraph (a) to ''culturally

and linguistically appropriate.'' This commenter also asked that we clarify that crisis intervention techniques be interpreted to include knowledge and learning for suicide prevention and crisis intervention.

Response: We agree and have made the change to ''culturally and linguistically sensitive services'' in the final rule. We agree that crisis intervention techniques include suicide prevention. No change is needed in the wording of the final rule, however, on this latter point.

Under § 1351.20(b), we proposed minor technical revisions to update the existing provision requiring coordination with the National Runaway Safeline. Under our proposal, grantees shall coordinate their activities with the 24-hour national toll-free communication system, which links Runaway and Homeless Youth projects and other service providers with runaway or otherwise homeless youth, as appropriate to the specific activities provided by the grantee. At present, this system is called the National Runaway Safeline, its Web site is *www.1800runaway.org,* and the toll-free number is 1–800–RUNAWAY. We received no comments on this provision and the language is unchanged in the final rule.

Under § 1351.20(c), we proposed a technical revision to the reporting provision to require grantees to submit statistical reports that profile the clients served and that provide management and performance information in accordance with guidance provided by HHS. Such data submission was handled through the Runaway and Homeless Youth Management Information System (RHYMIS) and is now being handled through an integrated RHYMIS/HUD Management Information System (HMIS). While these information systems are a major innovation and improvement tool in program data collection, updating the regulatory reference is a minor change from a regulatory perspective. The existing rule quotes specific statutory language in place when the rule was written. The Act now contains additional requirements (see in particular sections 312(b)(7) and (8), and section 322(a)(9)). For example, it explicitly states that Runaway and Homeless Youth projects ''shall keep adequate statistical records profiling the youth and family members whom it serves,'' that grantees ''shall submit annual reports to the Secretary detailing how the center has been able to meet the goals of its plans,'' and that grantees shall submit ''statistical summaries describing . . . the number and characteristics of the runaway and homeless youth . . . who participate . . . and the services provided to such youth.'' We proposed to revise this section to require appropriate reporting and to delete specific quotations from the Act.

Comment: We received two comments directly on § 1351.20(c). One commenter argued for acceptance of data from a system called Child and Adolescent Needs and Strengths (CANS) in RHYMIS. One commenter quoted several research studies in arguing that the RHYMIS data significantly understate the number of LBGT youth who are homeless and recommended improving grantee recording of such information through technical assistance and training.

Response: We are continually working to improve our data collection system. We will continue to work to improve data reporting and will consider these comments under the integrated HMIS system, which has now incorporated RHYMIS. The Office of Management and Budget (OMB) Control Number for RHYMIS is 0970–0123, which has a current expiration date of February 28, 2018. We are looking to revise data standards to reduce the burden associated with filling out the data for the RHY program by the Spring of 2017, with the effective date of October 1, 2017.

Comment: Six comments on either the preamble or this provision recommended that RHYMIS be coordinated or combined with the HMIS system used in HUD's homeless programs. Several of these commenters also mentioned the Point In Time (PIT) counts used by HUD to estimate the number of homeless. One commenter pointed out that it is essentially forced to use three database systems: Its own internal system, RHYMIS, and HMIS.

Response: We agree and as noted, ACF and HUD are coordinating the integration of the RHYMIS with HMIS systems. Specific information about the integration process and the data standards grantees are required to comply with has been and will continue to be provided to grantees in separate guidance from FYSB.

Comment: One unique comment recommended that client confidentiality be protected under the merged system.

Response: We agree and the confidentiality standards set forth in the Act will apply to access to information in the integrated system.

We proposed adding a new regulatory requirement for outreach for the three major grant programs. Outreach is a key statutory requirement of these programs. We proposed in § 1351.20(d) that grantees perform outreach to locate runaway and homeless youth, and to coordinate activities with other organizations serving the same or similar clients.

Comment: We received several comments on these provisions. One commenter was strongly supportive and raised no issues. One commenter asked what expectation we had for Basic Center grantees. One commenter pointed out that outreach efforts are needed to ensure that vulnerable youth, including LGBTQ youth, are made aware of available services, and that training related to special populations such as these that is culturally and linguistically appropriate is important. Another commenter suggested coordinated outreach and services with Continuums of Care, child welfare, and law enforcement.

Response: While the roles and level of effort of each type of grantee will differ, the Basic Center, Transitional Living and Street Outreach Program grantees are all expected to perform at least some outreach services. We point out that local coordination is also part of this requirement, and that for this as well there will be differences among types of grantees as to how that is performed and the appropriate level of effort. With regards to the question of what expectations for outreach will be for Basic Center grantees, under section 312(c) and (e) of the Act, Basic Center grantees must outreach to youth if the grantees are providing street-based or drug abuse services. Beyond these statutory requirements, outreach by Basic Centers grantees is appropriate in other circumstances as well. Therefore, we maintained this requirement for Basic Center Programs. Additionally, in the final rule, based on comments related to coordination of activities and services, we specified that coordination should occur with organizations, such as child welfare agencies, juvenile justice systems, schools, and Continuums of Care, as defined by HUD.

We requested comments on the following two proposed requirements. First, under paragraph (e), we proposed that grantees shall develop and implement a plan for addressing youth who have run away from foster care placement or correctional institutions and for returning those youth appropriately to the responsible organizations, in accordance with federal, state, or local laws or regulations that apply to these situations.

Second, under § 1351.20(f) of the proposed rule, we proposed that grantees take steps to ensure that youth who are under the legal jurisdiction of

the juvenile justice or child welfare systems receive services from those systems until such time as they are released from the jurisdiction of those systems. The purpose of these provisions is to provide a clear demarcation between services that are the legal and financial responsibility of other programs, and services that are the responsibility of the Runaway and Homeless Youth Program.

Comment: We received six comments on § 1351.20(e) and (f). One commenter asked what federal, state, and local laws we were referencing. One commenter questioned whether returning a child to foster care or the criminal justice system would always be in the best interest of the child. The commenter proposed language that essentially said the return need not be immediate, but that grantees had to act in accordance with applicable laws. Another commenter asked about the case where a youth might be eligible for child welfare services but was not currently enrolled.

Response: Regarding applicable laws, the federal law likely to apply in such cases is title IV–B and IV–E of the Social Security Act, implemented through regulations at 45 CFR parts 1355 through 1357. The programs authorized by these statutes are operated through the states and tribes. There are various state and local juvenile justice and foster care laws in all states and some older youth may also be subject to laws that apply to adults. In addition to federal law, grantees are expected to know the applicable laws and systems in their own jurisdictions and to coordinate with the responsible agencies. One specific example of a possible problem given by the commenter was of a child fleeing from an abusive foster home. In such cases, the foster care agency would be legally responsible for finding an alternative, safe foster home placement. As to the criminal justice system, grantees that failed to act in accordance with state law (*e.g.,* regarding escapees from correctional institutions) could find themselves in violation of criminal statutes. We have not changed our proposed language to address these suggestions in the final rule because, as a practical matter, RHY grantees have little or no discretion in such situations. However, in paragraph (e) we have incorporated the statutory requirement in section 312(b)(4) of the Act which requires Basic Center grantees to develop a plan that ensures the return of youth who have run away from correctional institutions to those institutions. In all cases, grantees are responsible for seeking outcomes that are in the best interest of the child and are expected to do so within the legal and regulatory frameworks in which they operate. This includes, for example, seeking to place youth into child welfare systems if reuniting the family is not reasonably possible. All of these steps are relevant to the aftercare requirement that follows.

We proposed to codify three provisions focused on the need to serve youth outside the program, which have previously been included in RHY funding opportunity announcements. Under proposed § 1351.20(g), which in the final rule is § 1351.26(a), grantees shall develop and implement an aftercare plan, covering at least six months, to stay in contact with youth who leave the program in order to ensure their ongoing safety. A youth's individual aftercare plan shall outline what services were provided, including appropriate referrals for needed health care services, the youth's housing status, and the rate of participation and completion of the services in the plan at three months and at six months after exiting the program. In § 1351.20(h), which in the final rule is § 1351.26(b), we proposed that grantees shall develop and implement a plan for health care service referrals for youth during the service and aftercare periods. Under proposed § 1351.20(i), which in the final rule is § 1351.26(c), we proposed that grantees shall assist youth to stay connected with their schools or to obtain appropriate educational services. This includes coordination with McKinney-Vento school district liaisons, designated under the McKinney-Vento Homeless Assistance Act, to assure that runaway and homeless youth are provided information about the services available under that Act. Under that law, which is the primary piece of federal legislation dealing with the education of homeless children in U.S. public schools, school districts are required to provide equal access to the same free, appropriate public education provided to other children and youth and to undertake additional steps as needed for such access. For example, school districts must identify potential barriers to the education of homeless youth, and homeless youth may not be segregated from other students. We received almost 24 unique comments on these proposed requirements, some of which represented individuals, while others represented several hundred individuals and/or organizations.

Comment: More than six unique comments raised an issue as to whether it is appropriate under § 1351.20(g) of the proposed rule to require Street Outreach Program grantees to provide aftercare plans. Several commenters noted that the Act does not include such a requirement for these grantees. Commenters argued that these grantees rarely had more than brief contact with youth, and were expected to refer them to other service providers (including Basic Center and Transitional Housing grantees) who would be both qualified and responsible for developing such plans.

Response: We agree that this requirement should not apply to the Street Outreach Program and have revised the final rule to exclude those grantees from its coverage.

Comment: Another six unique commenters, some of which represent numerous individuals and organizations, on § 1351.20(g) of the proposed rule, which in the final rule is § 1351.26(a), stated that six months was far too long to continue a youth's aftercare plan and to stay in contact with youth who leave the program. Commenters expressed concern that youth would no longer be participating in the program and it would be difficult or impossible to contact them six months after exiting the programs. One commenter suggested limiting the aftercare requirement to two months.

Response: In response to comments raising concerns as to whether most youth can be contacted in six months, we have modified the final rule to provide for such contacts and documentation of service completion at three months after exiting the BCP and TLP programs. Three months will provide youth the time they need to transition out of the RHY program and adjust to their new housing arrangement while avoiding the challenges associated with the longer six month timeframe. While a two month after care plan was also proposed by one commenter, we did not feel this was enough time to allow youth to fully adjust after their participation in an RHY program.

Comment: More than six unique commenters, all from service providers or organizations representing service providers, on § 1351.20(g) of the proposed rule, which in the final rule is § 1351.26(a), stated that the overall requirement of providing aftercare services for six months after a child's exit from the program was unduly burdensome and cost prohibitive to meet. Several of these pointed out that such follow-up would be impossible in several common situations that affect many of those served. For example: Youth cannot be located after leaving program; youth can be located but refuse to stay in contact; foster care agencies taking over service planning

and refusing to share information or allow contact; or parental refusal to allow further contact. Several suggested that the requirement be limited to those clients who were in contact with the program for some minimum length of stay, such as two weeks for the Basic Center Program and three months for the Transitional Living Program. These same commenters suggested that the requirement be limited to those clients who requested and consented to follow-up. One commenter endorsed the requirements of the proposed rule and argued it should be even stronger, by incentivizing programs to build strong relationships with other service providers in the community and leverage those to better client outcomes. One commenter said this was an important area for improvement, but that ''we struggle with keeping track of youth after they leave our program,'' a problem cited in a number of comments. One commenter suggested that the requirement be changed to offering youth aftercare services and documenting those actually provided, with ratings only on participation rates. Another commenter said that the grantee calls all youth and their guardians at four to six weeks post-exit, but is able to locate only about 25 percent due to ''ever changing residences and cell phone numbers.'' Yet another comment in the same vein said that its success rate in contacting youth was only about 5 percent at six months, and that those who actually needed assistance generally contacted the center themselves. Finally, one commenter questioned whether grantees had the resources to follow the youth into such systems or upon release from such systems.

Response: We are persuaded by these comments that the requirement as proposed was unrealistically burdensome. The revisions to exclude the Street Outreach Program and to require contact only after three months will reduce the burden substantially. We have revised the final rule to require that such plans be developed for all BCP and TLP youth, and included in exit counseling, covering at least three months after the youth leaves the program. Grantees should follow up with youth during and at the end of the three month timeframe. We understand that it may be difficult to contact 100 percent of youth, but grantees should attempt to contact all youth within this period.

In addition, we have added the requirement in section 312(b)(5) of the Act that, as possible, Basic Center program grantees should provide counseling and aftercare services to youth who are returned beyond the state in which a runaway and homeless youth services is located, as possible.

Comment: Three commenters suggested that the requirement in § 1351.20(h) of the proposed rule regarding access to health care services also include connecting youth with organizations that assist in enrolling in public or private health insurance. One commenter asked how health care would be paid for and objected to the expense of a new health care service plan. One commenter said that the text of this provision should not include aftercare, since that was covered under the previous provision, arguing that this was duplicative, confusing, and potentially very costly if it were read to require a detailed referral plan for each client's specific services. Another commenter said that the aftercare requirement should include not only health care services, but also health insurance.

Response: We think the idea of including referrals for health insurance advice (where appropriate) in the health services plan is a useful addition to the planning requirement. Many sources of information which can assist in providing insurance information are available to youth. Key among these resources are the state Medicaid agency and local Navigators and Application Assisters established under the Affordable Care Act (ACA). Some youth will be insured under an existing parental plan funded through employer insurance (such plans cover some families). In all states, youth are eligible for Medicaid if they are in a household with income below 133 percent of the federal poverty level (FPL) and meet other non-financial eligibility requirements, such as citizenship or eligible immigration status and state residence. It is also important to note that most states cover children under 19 at higher income levels. Youth over 19 may be eligible for Medicaid coverage in a variety of eligibility categories; their eligibility for Medicaid may also depend on whether they live in a state that has chosen to expand Medicaid for adults age 19 to 65. In addition, some youth may have sufficient income (above 100% of the FPL) to receive financial assistance to purchase coverage through the Health Insurance Marketplace. We are not asking grantees to plan specific services for each youth, but to plan for and, as appropriate, provide referrals to health care providers, such as health centers and other service providers for low-income and vulnerable patients, with or without insurance. Grantees should also consider additional referrals as appropriate. We are also not asking grantees to manage or finance the provision of health care. Accordingly, we have revised the final rule text to include health insurance referrals in the health services plan. In most cases, this would be handled through family counseling and reunification services since the great majority of parents have family insurance. In this regard, we note that the great majority of family health insurance policies now cover children up to age 26. Also, youth under 26 who age-out of Foster Care and are enrolled in Medicaid at the time that they age out are eligible for Medicaid from their state, with no income eligibility requirements. We did not eliminate the reference to aftercare in the rule, as we consider it critical that referrals to health services should extend into the aftercare period. We have also revised the text to exempt Street Outreach Program grantees from this requirement, per the discussion above.

Comment: We received several comments on § 1351.20(i) of the proposed rule regarding schooling and education. One commenter asked that we add a mandated service linkage to employment and training programs, since these provide a path towards economic self-sufficiency. Two commenters asked that we add college as an option and specifically referenced grantees making youth aware of the Free Application for Federal Student Aid (FAFSA) service. The commenter noted that FAFSA does not necessarily require parental tax information precisely because it recognizes that there are situations where that is not feasible.

Response: These are valid suggestions. While returning to school will be the typical pathway for runaway and homeless youth, some of them (particularly older youth) will prefer job training or employment and some will have already graduated from high school. Many federally-funded and state and local job placement and training programs are aimed at school dropouts or recent graduates. College is an obvious option for many youth. For many, employment and education can often be managed together, to the benefit of youth with little or no other source of income. We have modified the text of the final rule to cover these options. We have also changed the text to exempt Street Outreach Program grantees from this requirement, and to make the language parallel with the language on health care services.

The Act, at sections 312(b)(13) and 322(a)(16), specifically requires grantees to develop emergency plans. We proposed to adopt this requirement under § 1351.20(j) of the proposed rule by requiring that grantees develop and

document plans that address steps to be taken in case of a local or national situation that poses risk to the health and safety of staff and youth. Emergency preparedness plans should, at a minimum, include routine preventative maintenance of facilities (*e.g.,* fire extinguishers and alarms checked, furnace serviced) as well as preparedness, response, and recovery efforts. The plan should contain strategies for addressing evacuation, security, food, medical supplies, and notification of youths' families, as appropriate. In the event of an evacuation due to specific facility issues, such as a fire, loss of utilities, or mandatory evacuation by the local authorities, an alternative location needs to be designated and included in the plan. Grantees must immediately provide notification to their project officer and grants officer when evacuation plans are executed. ACF has an Office of Human Services Emergency Preparedness and Response that can provide technical assistance, in collaboration with FYSB/ACYF and the ACF Regions, to support grantee development of emergency preparedness plans.

Comment: One commenter asked that we include suicide prevention and post-intervention plans in the requirement for emergency planning under § 1351.20(j) of the proposed rule.

Response: We did not make this change because this provision is intended to cover emergencies that affect entire facilities or all or most clients, not individual health crises. We already require that individual client treatment plans cover both physical and mental health, which is inclusive of suicide prevention.

In § 1351.20(k), which is numbered § 1351.23(h) in this final rule, we clarify that shelters operated by grantees must meet any applicable state or local licensure requirements, and that grantees determine that any shelters to which they regularly refer clients also meet such requirements. We did not propose to establish as a federal requirement that grantees meet any other state or local laws.

Comment: One comment stated that ACF should develop guidance for cases where such licensure requirements conflicted with nondiscrimination or other standards established by these rules or other HHS requirements.

Response: In the event there appears to be a conflict between federal law or regulations and state or local licensing standards, we will handle these on a case-by-case basis through monitoring and regular contact with grantees, since licensing laws differ in every state and jurisdiction. Based on this case-by-case approach, we did not amend the final rule to respond to this comment.

Comment: One commenter asked how we proposed to monitor the requirement of § 1351.20(k) that shelters operated by grantees meet any applicable state or local licensure requirements, and that grantees determine that any shelters to which they regularly refer clients also meet such requirements. The commenter also asked how the federal government would know whether a state requirement existed or had been met.

Response: Our regional staff will review licensure issues as part of their compliance reviews and monitoring visits. FOAs may include requiring an agency to provide documentation of a valid license, as well as coordination with the state or local agency when licensing is in question. In addition, if a facility is found by a state or local agency to fail licensure requirements, the state or local agency will presumably act to impose proper sanctions. Likewise, grantees themselves have huge incentives to meet state licensure requirements not only to remain open, but also because that is a condition of grant award and there are sanctions that can be levied for non-compliance, including loss of funding and debarment from future awards (see non-procurement debarment, which is second on our list of applicable federal regulations).

We have revised the regulatory language to require grantees to report to HHS instances when they fail to meet licensing requirements or lose their license. The rule now states, ''grantees shall promptly report to HHS instances in which shelters are cited for failure to meet licensure or related requirements, or lose licensure. For grantee-operated facilities, failure to meet any applicable state or local legal requirements as a condition of operation may be grounds for grant termination''.

Under § 1351.20(l), which is numbered § 1351.23(j) in this final rule, we initially proposed to require that all employees and volunteers be subject to a broad range of background checks for criminality and suitability (see the definition of background check). We also proposed to require that all adult host homes occupants be subjected to criminal and child abuse checks.

Comment: One commenter suggested adding consultants as individuals who should be subject to background checks. Several commenters objected to subjecting volunteers to the same check as employees (*e.g.,* why employment records or driving records for volunteers?) or argued that the proposed definition was ambiguous as to what was required for volunteers. In particular, several commenters pointed out that many volunteers may be one-time attendees at particular events that some staff and volunteers may not work directly with youth, that some volunteers may not have unsupervised contact with youth, and recommended exemptions in cases such as these. As examples, volunteers might be used to cook hot meals on holidays, might be guest speakers, or might visit as members of a community group.

Response: We agree with these points. We have modified the text of the final rule, as described below, to clarify that for volunteers, employees, consultants, and contractors, who have regular unsupervised contact with individual youth, and all adults who reside in or operate host homes, a background check includes an examination of criminal records, sex offender registries, a request for child abuse and neglect history, and any other checks required under state or tribal law.

Comment: Several commenters asked whether the driving record check would apply only to those who transport youth. One commenter pointed out that some kinds of criminal backgrounds do not pose serious risks of harm to the grantee or clients, and asked for clarification that employment of such persons (who might have committed minor crimes as youth) not be prohibited. Several commenters noted that there was ambiguity as to what kind of national check might be required and several pointed out that at least one state performed an out-of-state check only for states in which the person has recently lived.

Response: We agree that most of these comments raise valid points and have made several changes in the final rule. First, we have revised the text at § 1351.22(j) in this final rule to read that grantees shall have a plan, procedures, and standards for ensuring background checks on all employees, contractors, volunteers and consultants who have regular and unsupervised private contact with youth served by the grantee, and on all adults who reside in or operate host homes. The plans, procedures and standards must identify background check findings that would disqualify an applicant from consideration for employment to provide services for which assistance is made available in accordance with this part. This provides grantees' discretion for the kinds of volunteer help that the commenters identified, and discretion to reduce the scope of the background check for those volunteers who do not work directly with youth. It also gives

flexibility to grantees to avoid the time and trouble of background checks for job applicants who will not be offered employment for other reasons. We agree with the commenter who pointed out that consultants may take on duties similar to employees, perhaps involving unsupervised contact with youth, and should therefore be subject to background checks. We also added new provisions to § 1351.23(j) to clarify that programs are required to obtain state or tribal criminal history records with fingerprint checks, federal criminal history records with fingerprints (to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award), a sex offender registries check, and a child abuse and neglect registry check (to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award).

We point out that the rule also requires training in a number of subjects, including the administration and use of background checks that will cover cases such as these. Also, while we note that the requirement in the rule does not propose a specific standard or criterion for ''passing'' a background check, grantees should have a set of ''passing'' criteria in place. In this regard, we note there are issues of fiduciary stewardship such as potential embezzlement, not just crimes such as rape or assault that may be identified by background checks.

In the final rule, we did not limit background checks to the state of the grantee, as suggested by several commenters. Instead we are requiring state or tribal criminal history records including fingerprint checks as well as Federal Bureau of Investigation criminal history records including fingerprint checks, to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award. The federal background check will provide RHY providers with critical information about both in-state and out-of-state histories of prospective employees and volunteers. Criminal activity may not be limited to one state, and not all states share information through reciprocal agreements. As such, limiting a background check to only a single state could miss important criminal history. We also are aware that there may be complications or challenges with securing federal background checks. The background check requirements also include a child abuse and neglect state registry check (to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award), sex offender registries checks, and other checks required by state or local law. The essence of the final requirement is that grantees are responsible for developing plans and procedures that reasonably protect youth while minimizing unnecessary costs and burden while allowing for effective services.

Under proposed § 1351.20(m), which is numbered § 1351.23(a) in this final rule, positive youth development (PYD), which has been a central framework of the program for years, would be required. PYD emphasizes:

- Healthy messages to adolescents about their bodies, behaviors, interpersonal relationships, and interactions;
- Safe and structured places for teens to study, recreate, and socialize;
- Strong relationships with adult role models;
- Skill development in literacy competence, work readiness, and social skills; and
- Opportunities for youth to serve others and build self-esteem.

Runaway and Homeless Youth projects that adopt these principles provide the youth they serve with opportunities for positive use of time, for positive self-expression and self-development, and for constructive civic and social engagement. Accordingly, we proposed under this section to require PYD on a program-wide basis. Under this paragraph, grantees must utilize and integrate into the operation of their projects the principles of positive youth development, including healthy messages, safe and structured places, adult role models, skill development, and opportunities to serve others.

Comment: We received one comment on this section. That commenter praised this provision but pointed out that LGBTQ youth were at greater risk than heterosexual peers for a variety of physical and mental problems, and could therefore benefit disproportionately from skills and messages associated with positive youth development services. This comment asked that ACF provide additional non-regulatory guidance on messaging to assist such youth in developing identity formation and acceptance.

Response: Our Runaway and Homeless Youth Training and Technical Assistance Center provides extensive tools and technical assistance, including those aimed at LGBTQ youth (see, for example, our recent ''Research Review of Evidence-Based Practices for RHY in the Doman of LGBTQ'' at *http://www.rhyttac.net/sites/default/files/resources/EBP%20Literature%20Review%20for%20LGBTQ%20Services.pdf*). We will continue to work with stakeholders and researchers to develop information and guidance to improve services to these youth. We have made no changes to this provision.

We preface § 1351.23(a) of this final rule with the statement that there are numerous other possible requirements related to positive youth development that could have been included in this section of the final rule. We did not propose such additional requirements for three reasons. First, it is difficult to craft requirements that do not unduly constrain grantee flexibility by imposing a ''one size fits all'' approach that does not in fact reasonably apply to particular grantees, particular situations, or particular staff. Second, such requirements almost by necessity create burdens, *e.g.* for recordkeeping or reporting to demonstrate that grantees meet the requirement. Third, we use funding opportunity announcements to further clarify requirements and guidance for particular grant recipients. These announcements provide the flexibility to add particular requirements (including temporary priorities) without going through a rulemaking process and, more importantly, allow far more flexibility to adapt as needed over time. For instance, the 2014 funding opportunity announcement for the Basic Center Program (*http://www.acf.hhs.gov/grants/open/foa/view/HHS-2014-ACF-ACYF-CY-0792*) gives examples of practices to follow or services that agencies can provide. This language allows grantees the option to provide most but not all of these services. This would allow, for example, for the situation in which another agency provides a key service and the grantee can use referral arrangements. Particularly in a program dealing with such complex problems, and given the extreme variation in service availability from other providers in particular localities, we believe that funding opportunity announcements are often a preferable vehicle for encouraging certain practices and partnerships.

To this end, we have included language in § 1351.22(l) in this final rule, stating that grantees must provide such other services and meet such additional requirements as HHS determines are necessary to carry out the purposes of the statute, as appropriate to the services and activities for which they are funded. These services and requirements will be articulated in the funding opportunity

announcements and other guidance issued by FYSB. This includes operational instructions and standards of execution determined by the Secretary or Secretarial designees to be necessary to properly perform or document meeting the requirements applicable to particular programs or projects. We received no comments on this provision, and it is retained unchanged in the final rule.

Language has been moved from § 1351.22(b) to § 1351.23(m) as it applies to all programs, stating that nothing in this rule gives the federal government control over staffing and personnel decisions. This will be interpreted to mean that FYSB will not make direct hiring decisions. At the same time, rules regarding nondiscrimination and background checks, and other requirements still apply.

In addition to the requirements that all RHY grantees must meet, there are additional requirements specific to each of the three core RHY programs which stem from the Act and the unique purposes of each program.

We proposed to create a new § 1351.21 ''What are the additional requirements that the Basic Center Program grantees must meet?'' This section addresses the additional program specific requirements that are central to the purposes of the Basic Center Program. First, we proposed under paragraph (a) that all Basic Center grantees shall have an intake procedure that is available 24 hours a day and 7 days a week to all youth seeking services and temporary shelter. The intake process must, at all hours, enable staff to address and respond to young people's immediate needs for crisis counseling, food, clothing, shelter, and health care services. The second proposed requirement under paragraph (b) describes the primary function described under the Act for Basic Center grantees, requiring that grantees shall provide, either directly or through arrangements, access to temporary shelter 24 hours a day and 7 days a week. Any grantee that did not provide temporary living services to eligible youth would not be meeting an essential function of the program (section 311(a)(2) of the Act). Note that this requirement allows for a combination of facilities that are directly operated by the grantee, operated by others, or accessible through referral. Third, under paragraph (c), we proposed to require that Basic Center grantees provide case management, counseling and referral services that meet client needs and that encourage, when in the best interests of youth particularly with regard to safety, the involvement of parents or legal guardians. Under paragraph (d), we proposed to require that grantees provide additional core support services to clients both residentially and non-residentially, as appropriate. The core services must include case planning, skill building, recreation and leisure activities, and aftercare. Again, this is an essential function of the program established by the Act and codification in this final rules does not require changes in program operations. Under paragraph (e), we proposed to require that grantees make contact with the parent(s), legal guardian or other relatives of each client within 72 hours of entering the program with a ''best interest of the youth'' exception allowed for disclosure of the location if additional information is needed to ensure the safety of the youth. The ''best interest of the youth'' would be defined by the state child welfare legal requirements with respect to child protective services and law enforcement mandated reporting. Finally, under paragraph (f), we proposed that grantees be subject to any additional requirements that are included in the FOA. We received several comments on these proposals and made revisions as appropriate.

Comment: We received two comments on the proposed requirement in § 1351.21(a) and (b) of the proposed rule for 24/7 assistance to youth seeking shelter, crisis counseling, shelter, health care, and other services. One commenter strongly endorsed the proposal. One commenter on crisis counseling asked for clarification to indicate that this should be interpreted broadly to include immediate needs for suicide prevention counseling and treatment as well as other immediate mental health crises.

Response: ''Health care services'' as proposed covers both physical and mental health needs and services, whether related to suicide prevention or to other physical or mental problems. The final rule text is unchanged from the proposal.

Comment: We received two comments on the proposed requirement in § 1351.21(c) of the proposed rule for referral services that meet client needs and that encourage the involvement of parents or legal guardians when in the best interests of the child, particularly taking into account safety. One commenter endorsed the proposal and pointed out that a youth may change his mind on parental contact, recommended use of best practices, and suggested that child welfare be contacted before parents to be sure no safety or other issues existed. The other commenter also endorsed the proposal and requested clarification that safety address not only physical but also mental health, arguing that parental involvement may create a hostile environment detrimental to LGBTQ youth.

Response: This requirement deals with both physical and mental safety, for both LGBTQ clients and all other clients where safety threats may exist. As to contacting child welfare before the parents, that will sometimes be appropriate but will depend on the judgment of the staff according to individual cases (indeed, in some cases law enforcement systems will need to be contacted first). Normally, parental involvement will be first. We agree that the situation can be fluid and that the views of the youth can change. Again, staff will have to make case-by-case judgments over time. The final rule text is unchanged.

Comment: We received one comment on § 1351.21(c) of the proposed rule asking that the term ''trauma-informed'' be added as a specific reference to counseling under the Basic Center grantee requirements. This same comment was made on the corresponding provisions for Street Outreach, Transitional Living, and Maternity Group Homes (MGH) Program grantees.

Response: Counseling is understood to deal with any serious issues facing each youth, including trauma, among others, and we agree with the comment that programs should use a trauma informed and evidenced-based approach when such evidence is reliably available. Additionally, we require training and technical assistance materials be very clear on this point and that they provide guidance on trauma issues. We also note that our definition of screening and assessment refers specifically to trauma and the potential need for in-depth diagnostic assessments and services. We have revised paragraph (c) to include an emphasis on trauma-informed care and evidenced-based approaches that must be part of the core services provided. In addition to this requirement, we added a corresponding performance standard designed to measure each grantee's ability to ensure that youth receive counseling services that are trauma informed and match their individual needs.

We received no comments on § 1351.21(d) of the proposed rule and have left it unchanged in this final rule.

Comment: We received two comments on § 1351.21(e) of the proposed rule. One commenter argued against creating the 72-hour standard and recommended that we defer to state law in deciding whether or when to contact parents.

This commenter also argued that missing children's databases, including the National Center for Missing and Exploited Children, should be checked within 72 hours of the youth entering the program. This commenter pointed out that fear of contact with child welfare, law enforcement, or parents is a major barrier to youth seeking services, and that one research study found it to be the most important barrier. The other commenter raised three concerns. First, the proposed language does not deal with cases where the parent cannot be located or will not respond. Second, the comment argues, we should defer to state law both as to timing of parental notification and also as to the ''best interest'' decision. Third, the commenter disagreed with preamble language stating, ''best interest of the youth would be defined by the state child welfare legal requirements with respect to child protective services and law enforcement mandated reporting.'' This commenter gave examples where ''best interest'' cases might arise even when mandatory reporting to state agencies is not required, such as threats of harm to the youth.

Response: As these comments demonstrate, this issue area is complex as well as important. Section 312(b)(3) of the Act says that Basic Center grantees ''shall develop adequate plans for contacting the parents or other relatives of the youth and ensuring the safe return of the youth according to the best interests of the youth.'' To align better with the statute and to address the comments raised in the proposed rule, we are amending the proposed rule language to say that grantees ''shall, as soon as feasible and no later than 72 hours of the youth entering the program, contact the parents, legal guardians or other relatives of each youth according to the best interests of the youth. If a grantee determines that it is not in the best interest of the client to contact the parents, legal guardian or other relatives of the client, they must (i) inform another adult identified by the child, (ii) document why it is not in the client's best interest to contact the parent, legal guardian or other relative and (iii) send a copy of the documentation to the regional program specialist for review.''

Additionally, if the grantee is unable to locate, or the youth refuses to disclose the contact information of, the parent(s), legal guardian or other relative of the client within 72 hours of entering the program the grantee will follow the protocols set forth in paragraph (e).

Examples of when it would not be in the best interest of the child to contact the parents include instances of severe physical or emotional abuse, or fear of harm to the child.

Regarding the 72-hour timeframe, based on the past practice of our grantees, it has been determined that making a notification within 72 hours allows grantees time to assess whether contacting parents will be in the best interest of a child. However, we encourage grantees to contact parents or guardians sooner if appropriate and possible.

Comment: We received one comment on § 1351.21(f) regarding our intention to use FOAs to impose any additional requirements. The commenter expressed concern over possible misinterpretations of intent by grant application reviewers.

Response: The proposed rule language is retained in the final rule without changes because FOAs are routinely updated and grant application reviewers are fully trained on new provisions in a systematic way. Additionally, contact information for RHY program staff is provided on each FOA and grantees are always encouraged to ask questions about the announcement. While ACF/FYSB may not necessarily provide individual responses to every inquiry, responses, when provided, will be posted and made available to all applicants. Responses may be given if information is included the FOA. However, if questions do not pertain to information found in the FOA, ACF has a policy of not providing direct guidance or instruction in the development and writing of an application.

We also proposed a new § 1351.22 ''What are the additional requirements that the Transitional Living Program and Maternity Group Home grantees must meet?'' to include specific requirements for core services to be provided by the programs. Under paragraph (a), we proposed requiring that grantees provide transitional living arrangements and additional core services including case planning/management, counseling, skill building, consumer education, referral to needed social and health care services, and education, recreation and leisure activities, aftercare, and, as appropriate to grantees providing maternity-related services, parenting skills, child care, and child nutrition. Additionally, under paragraph (b), we proposed requiring that Transitional Living Program and Maternity Group Home grantees be subject to any additional requirements included in the FOA. We received no comments on this section and make no changes in the final rule.

We proposed to create a new § 1351.23 ''What are the additional requirements that the Street Outreach Program grantees must meet?'' The proposed requirements were specific to the purposes of the Street Outreach Program. We proposed under paragraph (a) to require that SOP grantees provide services designed to assist clients in leaving the streets, in making healthy choices, and in building trusting relationships in areas where targeted youth congregate. Under paragraph (b), we proposed to require SOP grantees provide directly or by referral other core services to their clients. Finally, under paragraph (c), we proposed to require that SOP grantees be subject to any additional requirements included in the FOA. We received no comments on this section other than those previously addressed, and make no changes in the final rule.

Subpart D. What are the Runaway and Homeless Youth Program-specific standards?

Section 386A of the Act requires performance standards be established for Basic Center, Transitional Living and Street Outreach Programs. In addition to requirements that apply to all Runaway and Homeless Youth Programs, we proposed to establish a new Subpart that creates specific standards for each major type of local services grant, with a focus on performance-based standards. Performance standards focus directly on program outcomes. More specifically, we explained that performance standards are focused on four core outcomes: (1) Social and emotional well-being; (2) permanent connections; (3) education or employment; and (4) stable housing. Research indicates that improvements on risk and protective factors can serve as pathways to get to better outcomes in these four core areas.[12] [13] [14] These four core outcomes are expected to lead to healthy and productive transitions to adulthood for homeless youth. In the proposed rule, some of the performance standards included specific quantifiable metrics.

Comment: We received several comments regarding difficulties with requiring grantees to contact the parent(s), legal guardian, or other relatives of clients within 72 hours of

[12] Kidd, S., & Shahar, G. (2008). Resilience in homeless youth: The key role of self-esteem. *American Journal of Orthopsychiatry, 78* (2), 163.

[13] Milburn, N.G., Jane Rotheram-Borus, M., Batterham, P., Brumback, B., Rosenthal, D., & Mallett, S. (2005). Predictors of close family relationships over one year among homeless young people. *Journal of Adolescence, 28*(2), 263–275.

[14] Milburn, N., Liang, L., Lee, S., Roteram-Borus, M., Rosenthal, D., Mallett, S., et al. (2009). Who is doing well? A typology of newly homeless adolescents. *Journal of Community Psychology, 37* (2), 135–147.

entering the program to inform them that the youth is safe, with a determination to be made on a case-by-case basis of whether it is in the best interests of the youth to notify the parent(s), legal guardian or other relatives of the location of the youth until further information has been gathered to assure safety.

Response: After reviewing these comments and the entire final rule, we decided to remove the 72-hour requirement from the performance standards since it is already included in § 1351.24(e). It was clear that this was duplicative and unnecessary since the same language was already included in the Basic Center Program requirements.

Comment: We received two comments related to health care services. One commenter asked that we add health insurance to this section. The other commenter asked that we revise the proposed language to clarify that the referral plan is for the program as a whole, not for each individual client.

Response: We have revised the language to make clear that a referral plan shall, as appropriate, cover referral for insurance services as well as for health care services. Individualized plans are required. We have, however, modified the language to make clear that the grantee responsibility is to make referrals, not to arrange or monitor the actual provision of specific medical care services, insurance, or insurance coverage. Those functions are the responsibility of the health care providers themselves, and the youth who are their patients, not of our grantees.

The regulatory provisions concerning pre-natal care, well-baby exams, and immunizations for Maternity Group Home grantees are fully adopted without changes in this final rule.

Comment: Almost all commenters addressing performance standards for the Basic Center Program welcomed the idea of performance standards but criticized the proposed 90 percent standard in § 1351.30(b) for youth transitioning to safe and appropriate settings when exiting Basic Center Program settings. Many commenters said that 90 percent was an unrealistically high goal, and proposed lower standards, such as 75 percent. One commenter mentioned the option of a corrective action plan at the lower percent level. Another suggested imposing the standard only for youth who stay enrolled for more than seven days. Another pointed out that some youth would leave as soon as they are informed of mandatory reporting to state agencies. One commenter said it was not within the grantee's control if youth simply run from the center to an unknown destination. One commenter questioned whether the preamble was accurately describing past achievement rates near 90 percent. Several commenters were concerned that the proposed standard would reduce the willingness of grantees to enroll the hardest to serve clients, and suggested adjusting performance measures based on participant characteristics to create incentives to target services to the most vulnerable youth. Several commenters said that without more flexible standards for safe exits, the proposed standard would be impossible to achieve. Several commenters said that without better exit criteria the performance standard should be lowered to 60 percent. Several commenters pointed out that for very small centers the 90 percent standard could be missed by a change of just one or two youth making a different decision.

We received almost twenty unique comments on the proposed performance standards for the Transitional Living Program. Essentially the same group of commenters as commented on the quantitative performance criteria for the Basic Center Program commented on these criteria for the Transitional Living Program.

These commenters made similar or identical arguments, especially against the 90 percent standard for exit to safe and appropriate settings. Some also addressed the 45 percent standard for community service, and one of these criticized that standard as somewhat inconsistent with the program's goals of securing education, employment, and safe housing. This comment suggested conceptually different measures, such as providing youth the opportunity to perform community service once a month.

Several comments to the proposed performance criteria for the Street Outreach Program criticized our proposal to count total contacts as ambiguous. For example, would contacting the same youth multiple times count the same as contacting multiple youth once each? One comment suggested that it might be possible to develop a good performance measure from the percentage of youth contacted that accepted shelter, case management, or other services. Another comment asked about the dividing line between a youth who was a contact and a youth who was a client. Another comment suggested that any such measure would be skewed downward in cases where the same youth was contacted multiple times but only accepted housing after the final encounter. Several comments criticized the total contacts measure as meaningless given the different sizes of Street Outreach Program service areas and the different sizes of individual programs. Two of these comments recommended that we adjust the measure by the population of the service area or by population density; the latter reflecting the presumably greater difficulty of reaching youth in rural areas.

A third said the total contacts measure should be used as a reporting requirement, but dropped as a performance measure. One commenter praised the proposed numeric standard in § 1351.32 and suggested no specific change. One commenter proposed broader measures such as comparing the number contacted to the estimated universe of runaway and homeless youth in the service area. One commenter suggested comparing the number contacted to the total population in the service area. This commenter also recommended that HHS convene SOP grantees to collaboratively determine what standards should be used. One commenter suggested collecting data on the immediate outcomes of outreach contacts, but not setting specific performance standards. One commenter mentioned the option of comparing the total number of youth contacted to the number accepting services and criticized it because contacting a single youth many times, such as 20 times, followed by that youth finally accepting shelter, would lead to a misleading 5 percent effectiveness figure.

Response: Based on the feedback received, we have revised the performance standards for the Basic Center, the Transitional Living, and Street Outreach Programs. For the Basic Center and Transitional Living Programs, the performance standards are focused on outcomes: (1) Social and Emotional Well-being; (2) Permanent Connections; (3) Education or Employment; and (4) Stable Housing. We also included definitions of these terms in Subpart A of this rule. These definitions were derived directly from the U.S. Interagency Council on Homelessness (USICH) Federal Framework to End Youth Homelessness. The Street Outreach Program performance standards maintain a focus on the number of youth contacts completed.

We have decided to remove the numerical metrics from the regulatory language for Basic Center, Transitional Living, and Street Outreach Programs. Specific numeric metrics based on the performance standards will be outlined

in future Funding Opportunity Announcements. These numeric metrics will be developed using RHYMIS and HMIS data collected under existing data collection systems such as RHYMIS and HMIS (OMB Control Number 0970–0123) and its successors, as well as performance progress reports (OMB control number 0970–0406) and its successors. This will give FYSB flexibility to analyze data reported by grantees and set realistic benchmarks over time through existing data collection and grant reporting methods.

For the Street Outreach Program performance standards, we interpret the standard as allowing each contact with the same youth on later occasions to count as a new contact, but see no need to amend the language. Youth receiving services should be counted as clients rather than contacts. We will make these points clear in training and technical assistance materials and in the HMIS system's reporting directions. Finally, we appreciate the conceptual improvement of a percentage measure related to acceptance of services, but think that it would be very difficult to measure accurately in practice. We will explore that idea further in consultations with grantees and stakeholders, as a possible future improvement.

After careful consideration of the various criticisms of and suggestions for improving the performance standard, we have added language to the end of this Street Outreach Program performance standards section that will determine appropriate proportions of contacts based on grantee staff size through existing data collection and grant reports. Specific numeric metrics will be outlined in future Funding Opportunity Announcements. FYSB will provide more specific guidance and training and technical assistance to grantees on collection and reporting data.

In the final rule, we also added language that reinforces that grantees need to report data about each of the performance standards. This language was inconsistently incorporated into the proposed rule. To ensure clarity, the final rule explicitly includes language related to reporting within each performance standard subparagraph.

We did not propose performance standards for technical assistance and other grants that do not provide direct services. We do not believe that support grants such as these lend themselves to across-the-board, outcome-oriented performance standards such as those proposed here.

Revising Performance Standards

We proposed to create a new § 1351.33 ''How and when will performance standards for the Runaway and Homeless Youth Program be revised?'' We stated that for those performance standards for which benchmarks would not be set in the codified rule, benchmarks might be set in the coming years as data are collected. Additionally, we said that as grantees improve performance, it might be necessary to adjust the benchmark on a given performance standard in the coming years. Furthermore, we stated that as more is learned about how to improve outcomes, performance standards themselves might need to be modified or added. The rulemaking process is not conducive to making quick or on-going adjustments.

We did not receive comments on this section but have determined since publishing the proposed rule that this section is not needed because it does not directly relate to the responsibilities of the grantees. Therefore, we have deleted this section in the final rule text.

Effective Dates

We proposed to create a new § 1351.34 ''When Are Program-Specific Requirements Effective?'' We proposed that grantees shall meet program specific requirements, as applicable, upon the effective date of this final rule, or starting at the beginning of the next budget period for the grant, whichever comes later. Since most budget periods begin on October 1 of each year, this means that grantees would have however many days there are between the issuance of final regulations and that date, but never less than 30 days.

While we received no comments on this newly created section, we acknowledge the effective date is included as part of the regulations publication in the **Federal Register**, so there is no reason to add a specific section for this purpose. The section has been deleted from the final rule.

VII. Impact Analysis

Paperwork Reduction Act

This final rule contains no new information collection requirements because all information required in the performance standards has been collected by RHYMIS. The OMB Control Number for RHYMIS is 0970–0123, which has a current expiration date of February 28, 2018. We are looking to revise data standards to reduce the burden associated with filling out the data for the RHY program by the Spring of 2017, with the effective date of October 1, 2017.

Regulatory Flexibility Act

The Secretary certifies that this final rule will not result in a significant economic impact on a substantial number of small entities. We have not imposed any new requirements that will have such an effect. This final rule conforms to the existing statutory requirements and existing practices in the program. In particular, we have imposed only a few new processes, procedural, or documentation requirements that are not encompassed within the existing rule, existing FOAs, or existing information collection requirements. None of these will impose a consequential burden on grantees. Accordingly, a Regulatory Flexibility Analysis is not required.

Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. HHS has determined that this final rule is consistent with these priorities and principles. The Executive Order requires a Regulatory Impact Analysis for proposed or final rules with an annual economic impact of $100 million or more. Nothing in this final rule approaches effects of this magnitude. This rule has been reviewed by the Office of Management and Budget.

Congressional Review

This rule is not a major rule (economic effects of $100 million or more) as defined in the Congressional Review Act.

Federalism Review

Executive Order 13132, Federalism, requires that federal agencies consult with state and local government officials in the development of regulatory policies with federalism implications. This rule will not have substantial direct impact on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with the Executive Order we have determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Family Impact Review

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub L. 105–277) requires federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This

rule would not have any new or adverse impact on the autonomy or integrity of the family as an institution. Like the existing rule and existing program practices, it directly supports family well-being, for example supporting reunification and ongoing family counseling to prevent homelessness wherever safe and feasible. Since we made no changes that would affect this policy priority, we have concluded that it is not necessary to prepare a Family Policymaking Assessment.

List of Subjects in 45 CFR Part 1351

Administrative practice and procedure, Grant programs—social programs, Homeless, Reporting and recordkeeping requirements, Technical assistance, Youth.

(Catalog of Federal Domestic Assistance Program Numbers 93.550, Transitional Living for Homeless Youth; 93.557, Education and Prevention Grants to Reduce Sexual Abuse of Runaway, Homeless and Street Youth; and 93.623, Basic Center Grants for Runaway Youth)

Mark H. Greenberg,

Acting Assistant Secretary for Children and Families.

Approved: March 16, 2016.

Sylvia M. Burwell,

Secretary.

Editorial note: This document was received at the Office of the Federal Register on December 12, 2016.

■ For the reasons set out in the preamble, title 45 CFR part 1351 is revised as follows:

PART 1351—RUNAWAY AND HOMELESS YOUTH PROGRAM

■ 1. The authority citation for part 1351 continues to read as follows:

Authority: 42 U.S.C. 5701.

Subpart A—Definition of Terms

■ 2. Revise § 1351.1 to read as follows:

§ 1351.1 Significant Terms.

For the purposes of this part:

Act means the Runaway and Homeless Youth Act as amended, 42 U.S.C. 5701 *et seq.*

Aftercare means additional services provided beyond the period of residential stay that offer continuity and supportive follow-up to youth served by the program.

Background check means the review of an individual employee's or employment applicant's personal information, which shall include State or Tribal criminal history records (including fingerprint checks); Federal Bureau of Investigation criminal history records, including fingerprint checks, to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award; a child abuse and neglect registry check, to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award; and a sex offender registry check for all employees, consultants, contractors, and volunteers who have regular, unsupervised contact with individual youth, and for all adult occupants of host homes. As appropriate to job functions, it shall also include verification of educational credentials and employment experience, and an examination of the individual's driving records (for those who will transport youth), and professional licensing records.

Case management means identifying and assessing the needs of the client, including consulting with the client, and, as appropriate, arranging, coordinating, monitoring, evaluating, and advocating for a package of services to meet the specific needs of the client.

Client means a runaway, homeless, or street youth, or a youth at risk of running away or becoming homeless, who is served by a program grantee.

Congregate care means a shelter type that combines living quarters and restroom facilities with centralized dining services, shared living spaces, and access to social and recreational activities, and which is not a family home.

Contact means the engagement between Street Outreach Program staff and youth who are at risk of homelessness or runaway status or homeless youth in need of services that could reasonably lead to shelter or significant harm reduction. Contact may occur on the streets, at a drop-in center, or at other locations known to be frequented by homeless, runaway, or street youth.

Core competencies of youth worker means the ability to demonstrate skills in six domain areas:

(1) Professionalism (including, but not limited to, consistent and reliable job performance, awareness and use of professional ethics to guide practice);

(2) Applied positive youth development approach (including, but not limited to, skills to develop a positive youth development plan and identifying the client's strengths in order to best apply a positive youth development framework);

(3) Cultural and human diversity (including, but not limited to, gaining knowledge and skills to meet the needs of clients of a different race, ethnicity, nationality, religion/spirituality, gender identity/expression, sexual orientation);

(4) Applied human development (including, but not limited to, understanding the developmental needs of those at risk and with special needs);

(5) Relationship and communication (including, but not limited to, working with clients in a collaborative manner); and

(6) Developmental practice methods (including, but not limited to, utilizing methods focused on genuine relationships, health and safety, intervention planning).

Counseling services means the provision of guidance, support, referrals for services including, but not limited to, health services, and advice to runaway or otherwise homeless youth and their families, as well as to youth and families when a young person is at risk of running away, as appropriate. These services are provided in consultation with clients and are designed to alleviate the problems that have put the youth at risk of running away or contributed to his or her running away or being homeless. Any treatment or referral to treatment that aims to change someone's sexual orientation, gender identity or gender expression is prohibited.

Drop-in center means a place operated and staffed for runaway or homeless youth that clients can visit without an appointment to get advice or information, to receive services or service referrals, or to meet other runaway or homeless youth.

Drug abuse education and prevention services means services to prevent or reduce drug and/or alcohol abuse by runaway and homeless youth, and may include: (1) Individual, family, group, and peer counseling; (2) drop-in services; (3) assistance to runaway and homeless youth in rural areas (including the development of community support groups); (4) information and training relating to drug and/or alcohol abuse by runaway and homeless youth for individuals involved in providing services to such youth; and (5) activities to improve the availability of local drug and/or alcohol abuse prevention services to runaway and homeless youth.

Education or employment means performance in and completion of educational and training activities, especially for younger youth, and starting and maintaining adequate and stable employment, particularly for older youth.

Health care services means physical, mental, behavioral, and dental health

services. It includes services provided to runaway and homeless youth and in the case of Maternity Group Homes also includes services provided to a pregnant youth and the child(ren) of the youth. Where applicable and allowable within a program, it includes information on appropriate health related services provided to family or household members of the youth. Any treatment or referral to treatment that aims to change someone's sexual orientation, gender identity or gender expression is prohibited.

Home-based services means services provided to youth and their families for the purpose of preventing such youth from running away or otherwise becoming separated from their families and assisting runaway youth to return to their families. It includes services that are provided in the residences of families (to the extent practicable), including intensive individual and family counseling and training relating to life skills and parenting.

Homeless youth means an individual who cannot live safely with a parent, legal guardian, or relative, and who has no other safe alternative living arrangement. For purposes of Basic Center Program eligibility, a homeless youth must be less than 18 years of age (or higher if allowed by a state or local law or regulation that applies to licensure requirements for child- or youth-serving facilities). For purposes of Transitional Living Program eligibility, a homeless youth cannot be less than 16 years of age and must be less than 22 years of age (unless the individual commenced his or her stay before age 22, and the maximum service period has not ended).

Host family home means a family or single adult home or domicile, other than that of a parent or permanent legal guardian, that provides shelter to homeless youth.

Intake means a process for gathering information to assess eligibility and the services required to meet the immediate needs of the client. The intake process may be operated independently but grantees should, at minimum, ensure they are working with their local Continuum of Care Program to ensure that referrals are coordinated and youth have access to all of the community's resources.

Juvenile justice system means agencies that include, but are not limited to, juvenile courts, correctional institutions, detention facilities, law enforcement, training schools, or agencies that use probation, parole, and/or court ordered confinement.

Maternity group home means a community-based, adult-supervised transitional living arrangement where client oversight is provided on site or on-call 24 hours a day and that provides pregnant or parenting youth and their children with a supportive environment in which to learn parenting skills, including child development, family budgeting, health and nutrition, and other skills to promote their long-term economic independence and ensure the well-being of their children.

Outreach means finding runaway, homeless, and street youth, or youth at risk of becoming runaway or homeless, who might not use services due to lack of awareness or active avoidance, providing information to them about services and benefits, and encouraging the use of appropriate services.

Permanent connections means ongoing attachments to families or adult role models, communities, schools, and other positive social networks which support young people's ability to access new ideas and opportunities that support thriving, and they provide a social safety net when young people are at-risk of re-entering homelessness

Risk and protective factors mean those factors that are measureable characteristics of a youth that can occur at multiple levels, including biological, psychological, family, community, and cultural levels, that precede and are associated with an outcome. Risk factors are associated with higher likelihood of problematic outcomes, and protective factors are associated with higher likelihood of positive outcomes.

Runaway youth means an individual under 18 years of age who absents himself or herself from home or place of legal residence without the permission of a parent or legal guardian.

Runaway and Homeless Youth project means a community-based program outside the juvenile justice or child welfare systems that provides runaway prevention, outreach, shelter, or transition services to runaway, homeless, or street youth or youth at risk of running away or becoming homeless.

Safe and appropriate exits means settings that reflect achievement of the intended purposes of the Basic Center and Transitional Living Programs as outlined in section 382(a) of the Act. Examples of Safe and Appropriate Exits are exits:

(1) To the private residence of a parent, guardian, another adult relative, or another adult that has the youth's best interest in mind and can provide a stable arrangement;

(2) To another residential program if the youth's transition to the other residential program is consistent with the youth's needs; or

(3) To independent living if consistent with the youth's needs and abilities.

Safe and appropriate exits are not exits:

(1) To the street;

(2) To a locked correctional institute or detention center if the youth became involved in activities that lead to this exit after entering the program;

(3) To another residential program if the youth's transition to the other residential program is inconsistent with the youth's needs; or

(4) To an unknown or unspecified other living situation.

Screening and assessment means valid and reliable standardized instruments and practices used to identify each youth's individual strengths and needs across multiple aspects of health, wellbeing and behavior in order to inform appropriate service decisions and provide a baseline for monitoring outcomes over time. Screening involves abbreviated instruments, for example with trauma and health problems, which can indicate certain youth for more thorough diagnostic assessments and service needs. Assessment, which is used here to mean assessment more broadly than for the purposes of diagnosis, involves evaluating multiple aspects of social, emotional, and behavioral competencies and functioning in order to inform service decisions and monitor outcomes.

Service plan or *treatment plan* means a written plan of action based on the assessment of client needs and strengths and engaging in joint problem solving with the client that identifies problems, sets goals, and describes a strategy for achieving those goals. To the extent possible, the plan should incorporate the use of trauma informed, evidence-based, or evidence-informed interventions. As appropriate, the service and treatment plans should address both physical and mental safety issues.

Short-term training means the provision of local, state, or regionally-based instruction to runaway or otherwise homeless youth service providers in skill areas that will directly strengthen service delivery.

Social and emotional well-being means the development of key competencies, attitudes, and behaviors that equip a young person experiencing homelessness to avoid unhealthy risks and to succeed across multiple domains of daily life, including school, work, relationships, and community.

Stable housing means a safe and reliable place to call home. Stable housing fulfills a critical and basic need for homeless youth. It is essential to

enabling enable functioning across a range of life activities.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States.

Street youth means an individual who is a runaway youth or an indefinitely or intermittently homeless youth who spends a significant amount of time on the street or in other areas that increase the risk to such youth for sexual abuse, sexual exploitation, prostitution, or drug and/or alcohol abuse. For purposes of this definition, youth means an individual who is age 21 or less.

Supervised apartments mean a type of shelter setting using building(s) with separate residential units where client supervision is provided on site or on call 24 hours a day.

Technical assistance means the provision of expertise or support for the purpose of strengthening the capabilities of grantee organizations to deliver services.

Temporary shelter means all Basic Center Program shelter settings in which runaway and homeless youth are provided room and board, crisis intervention, and other services on a 24-hour basis for up to 21 days. The 21 day restriction is on the use of RHY funds through the Basic Center Program, not a restriction on the length of stay permitted by the facility.

■ 3. Revise the Subpart B heading to read as follows:

Subpart B—Runaway and Homeless Youth Program Grants

■ 4. Revise § 1351.10 to read as follows:

§ 1351.10 What is the purpose of Runaway and Homeless Youth Program grants?

(a) The purpose of Runaway and Homeless Youth Program grants is to establish or strengthen community-based projects to provide runaway prevention, outreach, shelter, and transition services to runaway, homeless, or street youth or youth at risk of running away or becoming homeless.

(b) Youth who have become homeless or who leave and remain away from home without parental permission are disproportionately subject to serious health, behavioral, and emotional problems. They lack sufficient resources to obtain care and may live on the street for extended periods, unable to achieve stable, safe living arrangements that at times put them in danger. Many are urgently in need of shelter, which, depending on the type of Runaway and Homeless Youth project, can include host family homes, drop-in centers, congregate care, or supervised apartments, and services, including services that are linguistically appropriate, responsive to their complex social identities (*i.e.,* race, ethnicity, nationality, religion/spirituality, gender identity/expression, sexual orientation, socioeconomic status, physical ability, language, beliefs, values, behavior patterns, or customs), and acknowledge the environment they come from. Runaway and Homeless Youth grant services should have a positive youth development approach that ensures a young person has a sense of safety and structure; belonging and membership; self-worth and social contribution; independence and control over one's life; skills to develop plans for the future and set goals; and closeness in interpersonal relationships. To make a successful transition to adulthood, runaway youth, homeless youth, and street youth also need opportunities to complete high school or earn a general equivalency degree, learn job skills, and obtain employment. HHS operates three programs to carry out these purposes through direct local services: The Basic Center Program; the Transitional Living Program (including Maternity Group Homes); and the Street Outreach Program. HHS operates three additional activities to support achievement of these purposes: Research, evaluation, and service projects; a national communications system to assist runaway and homeless youth in communicating with service providers; and technical assistance and training.

■ 5. Revise § 1351.11 to read as follows:

§ 1351.11 Who is eligible to apply for a Runaway and Homeless Youth Program grant?

Public (state and local) and private non-profit entities, and coordinated networks of such entities, are eligible to apply for a Runaway and Homeless Youth Program grant unless they are part of the juvenile justice system.

■ 6. Revise § 1351.12 to read as follows:

§ 1351.12 Who gets priority for the award of a Runaway and Homeless Youth Program grant?

(a) In selecting applications for grants under the Basic Center Program the Secretary shall give priority to—

(1) Eligible applicants who have demonstrated experience in providing services to runaway and homeless youth; and

(2) Eligible applicants that request grants of less than $200,000 or such figure as Congress may specify.

(b) In selecting applications for grants under the Transitional Living Program, the Secretary shall give priority to entities that have experience in providing to homeless youth shelter (such as group homes, including maternity group homes, host family homes, and supervised apartments) and services (including information and counseling services in basic life skills which shall include money management, budgeting, consumer education, and use of credit, parenting skills (as appropriate), interpersonal skill building, educational advancement, job attainment skills, and mental and physical health care) to homeless youth.

(c) In selecting applicants to receive grants under the Street Outreach Program, the Secretary shall give priority to public and nonprofit private agencies that have experience in providing services to runaway and homeless, and street youth.

(d) In selecting grants for the national communication system to assist runaway and homeless youth in communicating with their families and with service providers, the Secretary shall give priority to grant applicants that have experience in providing electronic communications services to runaway and homeless youth, including telephone, Internet, mobile applications, and other technology-driven services.

(e) In selecting grants for research, evaluation, demonstration and service projects, the Secretary shall give priority to proposed projects outlined in section 343(b) and (c) of the Act.

(f) The Secretary shall integrate the performance standards outlined in §§ 1351.30, 1351.31, or 1351.32 into the grantmaking, monitoring, and evaluation processes of the Basic Center Program, Transitional Living Program, and Street Outreach Program. Specific details about how performance standards will be considered, along with examples of performance documentation, will be provided in the annual funding opportunity announcements.

■ 7. Revise § 1351.13 to read as follows:

§ 1351.13 What are the Federal and non-Federal match requirements under a Runaway and Homeless Youth Program grant?

The federal share of the project represents 90 percent of the total project cost supported by the federal government. The remaining 10 percent represents the required project match cost by the grantee. This may be a cash or in-kind contribution.

■ 8. Revise § 1351.15 to read as follows:

§ 1351.15 What costs are supportable under a Runaway and Homeless Youth Program grant?

(a) For all grant programs, costs that can be supported include, but are not limited to, staff training and core services such as outreach, intake, case management, data collection, temporary shelter, transitional living arrangements, referral services, counseling services, and aftercare services. Costs for acquisition and renovation of existing structures may not normally exceed 15 percent of the grant award. HHS may waive this limitation upon written request under special circumstances based on demonstrated need.

(b) For grants that support research, evaluation, and service projects; a national communications system to assist runaway and homeless youth in communicating with service providers; and for technical assistance and training grants; costs that can be supported include those enumerated above as well as services such as data collection and analysis, telecommunications services, and preparation and publication of materials in support of the purposes of such grants.

■ 9. Revise § 1351.16 to read as follows:

§ 1351.16 What costs are not allowable under a Runaway and Homeless Youth Program grant?

(a) A Runaway and Homeless Youth Program grant does not cover the capital costs of constructing new facilities, or operating costs of existing community centers or other facilities that are used partially or incidentally for services to runaway or homeless youth clients, except to the extent justified by application of cost allocation methods accepted by HHS as reasonable and appropriate.

(b) A Runaway and Homeless Youth Program grant does not cover any treatment or referral to treatment that aims to change someone's sexual orientation, gender identity or gender expression.

■ 10. Revise § 1351.17 to read as follows:

§ 1351.17 How is application made for a Runaway and Homeless Youth Program grant?

An applicant should follow instructions included in funding opportunity announcements, which describe procedures for receipt and review of applications.

■ 11. Revise § 1351.18 to read as follows:

§ 1351.18 What criteria has HHS established for deciding which Runaway and Homeless Youth Program grant applications to fund?

In reviewing applications for a Runaway and Homeless Youth Program grant, HHS takes into consideration a number of factors, including, but not limited to:

(a) Whether the grant application meets the particular priorities, requirements, standards, or evaluation criteria established in funding opportunity announcements;

(b) A need for Federal support based on the likely number of estimated runaway or otherwise homeless youth in the area in which the Runaway and Homeless Youth project is or will be located exceeding the availability of existing services for such youth in that area;

(c) For runaway and homeless youth centers, whether there is a minimum residential capacity of four (4) and a maximum residential capacity of twenty (20) youth in a single structure (except where the applicant assures that the state where the center or locally controlled facility is located has a state or local law or regulation that requires a higher maximum to comply with licensure requirements for child and youth serving facilities), or within a single floor of a structure in the case of apartment buildings, with a number of staff sufficient to assure adequate supervision and treatment for the number of clients to be served and the guidelines followed for determining the appropriate staff ratio;

(d) Plans for meeting the best interests of the youth involving, when reasonably possible, both the youth and the family. For Basic Center grantee applicants, the grantee shall develop adequate plans for contacting the parents or other relatives of the youth and ensuring the safe return of the youth according to the best interests of the youth, for contacting local government officials pursuant to informal arrangements established with such officials by the runaway and homeless youth center, and for providing for other appropriate alternative living arrangements;

(e) Plans for the delivery of aftercare or counseling services to runaway or otherwise homeless youth and their families;

(f) Whether the estimated cost to HHS for the Runaway and Homeless Youth project is reasonable considering the anticipated results;

(g) Whether the proposed personnel are well qualified and the applicant agency has adequate facilities and resources;

(h) Past performance on a RHY grant, including but not limited to program performance standards;

(i) Whether the proposed project design, if well executed, is capable of attaining program objectives;

(j) The consistency of the grant application with the provisions of the Act and these regulations; and

(k) Other factors as outlined in funding opportunity announcements.

§ 1351.19 [Removed]

■ 12. Remove § 1351.19.

■ 13. Revise Subpart C to read as follows:

Subpart C—Additional Requirements

Sec.

Subpart C—Additional Requirements

§ 1351.20 What Government-wide and HHS-wide regulations apply to these programs?

A number of other rules and regulations apply or potentially apply to applicants and grantees. These include:

(a) 2 CFR part 182—Government-wide Requirements for Drug Free Workplace;

(b) 2 CFR part 376—Nonprocurement Debarment and Suspension

(c) 45 CFR part 16—Procedures of the Departmental Grant Appeals Board;

(d) 45 CFR part 30—Claims Collection;

(e) 45 CFR part 46—Protection of Human Subjects;

(f) 45 CFR part 75—Uniform Administrative Requirements, Cost principles, and Audit Requirements for HHS Awards, including nondiscrimination requirements.

(g) 45 CFR part 80—Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health and Human

Services Effectuation of Title VI of the Civil Rights Act of 1964;

(h) 45 CFR part 81—Practice and Procedure for Hearings Under part 80;

(i) 45 CFR part 84—Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance;

(j) 45 CFR part 86—Nondiscrimination on the Basis of Sex in Education Programs or Activities receiving Federal Financial Assistance;

(k) 45 CFR part 87—Equal Treatment for Faith Based Organizations;

(l) 45 CFR part 91—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance;

(m) 45 CFR part 92—Nondiscrimination in Health Programs and Activities; and

(n) 45 CFR part 93—New Restrictions on Lobbying.

§ 1351.21 What confidentiality requirements apply to these programs?

Several program policies regarding confidentiality of information, treatment, conflict of interest and state protection apply to recipients of Runaway and Homeless Youth Program grants. These include:

(a) Confidential information. Pursuant to the Act, no records containing the identity of individual youth, including but not limited to lists of names, addresses, photographs, or records of evaluation of individuals served by a Runaway and Homeless Youth project, may be disclosed or transferred to any individual or to any public or private agency except:

(1) For Basic Center Program grants, records maintained on individual runaway and homeless youth shall not be disclosed without the informed consent of the individual youth and parent or legal guardian to anyone other than another agency compiling statistical records or a government agency involved in the disposition of criminal charges against an individual runaway and homeless youth;

(2) For Transitional Living Programs, records maintained on individual homeless youth shall not be disclosed without the informed consent of the individual youth to anyone other than an agency compiling statistical records;

(3) Research, evaluation, and statistical reports funded by grants provided under section 343 of the Act are allowed to be based on individual data, but only if such data are de-identified in ways that preclude disclosing information on identifiable individuals; and

(4) Youth served by a Runaway and Homeless Youth project shall have the right to review their records; to correct a record or file a statement of disagreement; and to be apprised of the individuals who have reviewed their records.

(b) State law protection. HHS policies regarding confidential information and experimentation and treatment shall not apply if HHS finds that state law is more protective of the rights of runaway or otherwise homeless youth.

(c) Procedures shall be established for the training of project staff in the protection of these rights and for the secure storage of records.

§ 1351.22 What additional requirements apply to these programs?

(a) *Non-discriminatory and culturally and linguistically sensitive services and training.* Service delivery and staff training must comprehensively address the individual strengths and needs of youth as well as be language appropriate, gender appropriate (interventions that are sensitive to the diverse experiences of male, female, and transgender youth and consistent with the gender identity of participating youth), and culturally sensitive and respectful of the complex social identities of youth (*i.e.,* race, ethnicity, nationality, age, religion/spirituality, gender identity/expression, sexual orientation, socioeconomic status, physical or cognitive ability, language, beliefs, values, behavior patterns, or customs). No runaway youth or homeless youth shall, on any of the foregoing bases, be excluded from participation in, be denied the benefits of, or be subject to discrimination under, any program or activity funded in whole or in part under the Runaway and Homeless Youth Act.

(1) The criteria that grantees adopt to determine eligibility for the program, or any activity or service, may include an assessment of the needs of each applicant, and the health and safety of other beneficiaries, among other factors.

(2) [Reserved]

(b) *Medical, psychiatric or psychological treatment.* No youth shall be subject to medical, psychiatric, or psychological treatment without the consent of the youth and, for youth under the age of emancipation in their state of residence, consent of a parent or guardian, if required by state law.

(c) *Conflict of interest.* Employees or individuals participating in a program or project under the Act shall not use their positions for a purpose that is, or gives the appearance of being, motivated by a desire for private gain for themselves or others, particularly those with whom they have family, business or other ties.

§ 1351.23 What are the additional requirements that apply to the Basic Center, Transitional Living and Street Outreach Program grants?

To improve the administration of these Runaway and Homeless Youth Programs by increasing the capacity of Runaway and Homeless Youth projects to deliver services, by improving their performance in delivering services, and by providing for the evaluation of performance:

(a) Grantees shall participate in technical assistance, monitoring, and short-term training as a condition of funding, as determined necessary by HHS, in such areas as: Aftercare services and counseling; background checks; core competencies of youth workers; core support services; crisis intervention techniques; culturally and linguistically sensitive services; participation in or development of coordinated networks of private nonprofit agencies and/or public agencies to provide services; ethics and staff safety; fiscal management; low cost community alternatives for runaway or otherwise homeless youth; positive youth development; program management; risk and protective factors related to youth homelessness; screening and assessment practices; shelter facility staff development; special populations (tribal youth; lesbian, gay, bisexual, transgender, questioning (LGBTQ), and intersex youth; youth with disabilities; youth victims of trafficking, sexual exploitation or sexual abuse); trauma and the effects of trauma on youth; use of evidence-based and evidence-informed interventions; and youth and family counseling. It is not a requirement that every staff person receives training in every subject but all staff members who work directly with youth should receive training sufficient to meet the stated core-competencies of youth workers.

(b) Grantees shall coordinate their activities with the 24-hour National toll-free and Internet communication system, which links Runaway and Homeless Youth projects and other service providers with runaway or otherwise homeless youth, as appropriate to the specific activities provided by the grantee.

(c) Grantees shall submit statistical reports profiling the clients served and providing management and performance information in accordance with guidance provided by HHS.

(d) Grantees shall perform outreach to locate runaway and homeless youth and to coordinate activities with other organizations serving the same or similar client populations, such as child welfare agencies, juvenile justice

systems, schools, and Continuums of Care, as defined by HUD.

(e) Grantees shall develop and implement a plan for addressing youth who have run away from foster care placement or correctional institutions, in accordance with federal, state, or local laws or regulations that apply to these situations. In accordance with section 312(b)(4) of the Act, Basic Center grantees must also develop a plan that ensures the return of runaway and homeless youth who have run away from the correctional institution back to the correctional institution.

(f) Grantees shall take steps to ensure that youth who are or should be under the legal jurisdiction of the juvenile justice or child welfare systems obtain and receive services from those systems until such time as they are released from the jurisdiction of those systems.

(g) Grantees shall develop and document plans that address steps to be taken in case of a local or national situation that poses risk to the health and safety of staff and youth. Emergency preparedness plans should, at a minimum, include routine preventative maintenance of facilities as well as preparedness, response, and recovery efforts. The plan should contain strategies for addressing evacuation, security, food, medical supplies, and notification of youths' families, as appropriate. In the event of an evacuation due to specific facility issues, such as a fire, loss of utilities, or mandatory evacuation by the local authorities, an alternative location needs to be designated and included in the plan. Grantees must immediately provide notification to their project officer and grants officer when evacuation plans are executed.

(h) Grantees shall ensure that all shelters that they operate are licensed and determine that any shelters to which they regularly refer clients have evidence of current licensure, in states or localities with licensure requirements. Grantees shall promptly report to HHS instances in which shelters are cited for failure to meet licensure or related requirements, or lose licensure. For grantee-operated facilities, failure to meet any applicable state or local legal requirements as a condition of operation may be grounds for grant termination.

(i) Grantees shall utilize and integrate into the operation of their projects the principles of positive youth development, including healthy messages, safe and structured places, adult role models, skill development, and opportunities to serve others.

(j) No later than October 1, 2017, grantees shall have a plan, procedures, and standards for ensuring background checks on all employees, contractors, volunteers, and consultants who have regular and unsupervised private contact with youth served by the grantee, and on all adults who reside in or operate host homes. The plans, procedures, and standards must identify the background check findings that would disqualify an applicant from consideration for employment to provide services for which assistance is made available in accordance with this part.

(1) Required background checks include:

(i) State or tribal criminal history records, including fingerprint checks;

(ii) Federal Bureau of Investigation criminal history records, including fingerprint checks, to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award;

(iii) Child abuse and neglect state registry check, to the extent FSYB determines this to be practicable and specifies the requirement in a Funding Opportunity Announcement that is applicable to a grantee's award;

(iv) Sex offender registry check; and,

(v) Any other checks required under state or tribal law.

(2) Programs must document the justification for any hire where an arrest, pending criminal charge or conviction, is present.

(k) Grantees shall provide such other services and meet such additional requirements as HHS determines are necessary to carry out the purposes of the statute, as appropriate to the services and activities for which they are funded. These services and requirements are articulated in the funding opportunity announcements and other instructions issued by the Secretary or secretarial designees. This includes operational instructions and standards of execution determined by the Secretary or secretarial designees to be necessary to properly perform or document meeting the requirements applicable to particular programs or projects.

§ 1351.24 What are the additional requirements that the Basic Center Program grantees must meet?

(a) Grantees shall have an intake procedure that is available 24 hours a day and 7 days a week to all youth seeking services and temporary shelter that addresses and responds to immediate needs for crisis counseling, food, clothing, shelter, and health care services.

(b) Grantees shall provide, either directly or through arrangements, access to temporary shelter 24 hours a day and 7 days a week.

(c) Grantees shall provide trauma-informed case management, counseling and referral services that meet client needs and that encourage, when in the best interests of the youth particularly with regard to safety, the involvement of parents or legal guardians.

(d) Grantees shall provide additional core support services to clients both residentially and non-residentially as appropriate. The core services must include case planning, skill building, recreation and leisure activities.

(e) Grantees shall, as soon as feasible and no later than 72 hours of the youth entering the program, contact the parents, legal guardians or other relatives of each youth according to the best interests of the youth. If a grantee determines that it is not in the best interest of the client to contact the parents, legal guardian or other relatives of the client, or if the grantee is unable to locate, or the youth refuses to disclose the contact information of, the parent, legal guardian or other relative of the client, they must:

(1) Inform another adult identified by the child;

(2) Document why it is not in the client's best interest to contact the parent, legal guardian or other relative, or why they are not able to contact the parent, legal guardian or other relative; and

(3) Send a copy of the documentation to the regional program specialist for review.

(f) Additional requirements included in the funding opportunity announcement.

§ 1351.25 What are the additional requirements that the Transitional Living Program and Maternity Group Home grantees must meet?

(a) Grantees shall provide transitional living arrangements and additional core services including case planning/management, counseling, skill building, consumer education, referral to needed social and health care services, and education, recreation and leisure activities, aftercare and, as appropriate to grantees providing maternity-related services, parenting skills, child care, and child nutrition.

(b) Additional requirements included in the funding opportunity announcement.

§ 1351.26 What are the additional requirements that both the Basic Center and Transitional Living Program grantees must meet?

(a) Basic Center and Transitional Living grantees shall develop and implement an aftercare plan, covering at least 3 months, to stay in contact with youth who leave the program in order to ensure their ongoing safety and access to services. A youth's individual aftercare plan shall outline what services were and will be provided as well as the youth's housing status during and after the program. The plan shall be provided to the youth in exit counseling or before. Follow-up efforts shall be made for all youth. For those contacted after 3 months, the plan shall be updated to record the rate of participation and completion of the services in the plan at 3 months after exiting the program. In accordance with section 312(b)(5) of the Act, as possible, Basic Center grantees shall also provide a plan for providing counseling and aftercare services to youth who are returned beyond the state in which the runaway and homeless youth service is located.

(b) Basic Center and Transitional Living grantees shall develop and implement a plan for health care services referrals for youth during the service and aftercare periods. Such referral plans shall include health care services and referrals and counseling on insurance coverage through family health insurance plans, or to agencies that assist in enrolling persons in Medicaid or in insurance plans offered under Affordable Care Act exchanges.

(c) Basic Center and Transitional Living grantees shall develop and implement a plan to assist youth to stay connected with their schools or to obtain appropriate educational services, training, or employment services. This includes coordination with McKinney-Vento school district liaisons, designated under the McKinney-Vento Homeless Assistance Act, to assure that runaway and homeless youth are provided information about the services available under that Act. This also includes coordination with local employment and employment training coordinating agencies or programs, coordination with local college placement services, and providing access to the Free Application for Federal Student Aid (FAFSA) application.

§ 1351.27 What are the additional requirements that the Street Outreach Program grantees must meet?

(a) Grantees shall provide services that are designed to assist clients in leaving the streets, making healthy choices, and building trusting relationships in areas where targeted youth congregate.

(b) Grantees shall directly or by referral provide treatment, counseling, prevention, and education services to clients as well as referral for emergency shelter.

(c) Additional requirements included in the funding opportunity announcement.

■ 14. Add Subpart D to read as follows:

Subpart D—What are the Runaway and Homeless Youth Program-specific performance standards?

Sec.

Subpart D—What are the Runaway and Homeless Youth Program-specific performance standards?

§ 1351.30 What performance standards must Basic Center Program grantees meet?

(a)(1) Grantees shall consistently enhance outcomes for youth in the following four core areas:

(i) Social and Emotional Well-being;

(ii) Permanent Connections;

(iii) Education or Employment; and

(iv) Stable Housing.

(2) Each grantee shall report data related to these outcomes, using existing data collection processes found under PRA OMB Control Numbers 0970–0406 and 0970–0123, and their successors.

(b) Grantees shall ensure that youth receive counseling services that are trauma informed and match the individual needs of each client. Data shall be reported by each grantee on the type of counseling each youth received (individual, family and/or group counseling), the participation rate based on a youth's service plan or treatment plan, and the completion rate based on a youth's service plan or treatment plan, where applicable.

(c) Grantees that choose to provide street-based services, home-based services, drug and/or alcohol abuse education and prevention services, and/or testing for sexually transmitted diseases (at the request of the youth) shall ensure youth receive the appropriate services. Data shall be reported on the completion rate for each service provided based on the youth's service or treatment plan.

(d) Grantees shall ensure that youth have safe and appropriate exits when leaving the program. Each grantee shall report data on the type of exit experienced by each young person departing a Basic Center Program.

§ 1351.31 What performance standards must Transitional Living Program grantees, including Maternity Group Homes, meet?

(a)(1) Grantees shall consistently enhance outcomes for youth in the following four core areas:

(i) Social and Emotional Well-being;

(ii) Permanent Connections;

(iii) Education or Employment; and

(iv) Stable Housing.

(2) Each grantee shall report data related to these outcomes, using existing data collection and reporting processes, in accordance with the Paperwork Reduction Act and the Office of Management and Budget Control Numbers 0970–0406 and 0970–0123, and their successors.

(b) Grantees shall ensure youth are engaged in educational advancement, job attainment skills or work activities while in the program. Each grantee shall report data on the type of education or job-related activities that each youth is engaged in.

(c) Grantees shall ensure and report that youth receive health care referrals, including both services and insurance, as determined within their health care referral plan.

(d) Maternity Group Home Grantees shall ensure and report that youth receive consistent pre-natal care, well-baby exams, and immunizations for the infant while in the program.

(e) Grantees shall ensure that youth have safe and appropriate exits when leaving the program. Each grantee shall report data on the type of exit experienced by each young person departing a Transitional Living Program.

§ 1351.32 What performance standards must Street Outreach Program grantees meet?

Grantees shall contact youth who are or who are at risk of homeless or runaway status on the streets in numbers that are reasonably attainable for the staff size of the project. Grantees with larger staff will be expected to contact larger numbers of youth in approximate proportion, as determined by HHS, to the larger number of staff available to provide this service. Each grantee shall report data related to this outcome, using existing data collection and reporting processes, in accordance with the Paperwork Reduction Act and the Office of Management and Budget Control Numbers 0970–0406 and 0970–0123, and their successors.

[FR Doc. 2016–30241 Filed 12–19–16; 8:45 am]

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Part IV

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 701, 773, et al.
Stream Protection Rule; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827

[Docket ID: OSM–2010–0018; S1D1S SS08011000 SX064A000 178S180110; S2D2S SS08011000 SX064A000 17X501520]

RIN 1029–AC63

Stream Protection Rule

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE or OSM), are revising our regulations, based on, among other things, advances in science, to improve the balance between environmental protection and the Nation's need for coal as a source of energy. This final rule will better protect water supplies, surface water and groundwater quality, streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining operations and provide mine operators with a regulatory framework to avoid water pollution and the long-term costs associated with water treatment. We have revised our regulations to define ''material damage to the hydrologic balance outside the permit area'' and require that each permit specify the point at which adverse mining-related impacts on groundwater and surface water would reach that level of damage; collect adequate premining data about the site of the proposed mining operation and adjacent areas to establish an adequate baseline for evaluation of the impacts of mining and the effectiveness of reclamation; adjust monitoring requirements to enable timely detection and correction of any adverse trends in the quality or quantity of surface water and groundwater or the biological condition of streams; ensure protection or restoration of perennial and intermittent streams and related resources; ensure that permittees and regulatory authorities make use of advances in science and technology; ensure that land disturbed by mining operations is restored to a condition capable of supporting the uses that it was capable of supporting before mining; and update and codify the requirements and procedures for protection of threatened or endangered species and designated critical habitat. Approximately thirty percent of the final rule consists of editorial revisions and organizational changes intended to improve consistency, clarity, accuracy, and ease of use.

DATES: This rule is effective January 19, 2017.

FOR FURTHER INFORMATION CONTACT: *For the final rule:* Dennis G. Rice, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–208–2829. Kathleen G. Sheehan, Esq., Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 3 Parkway Center, 2nd Floor, Pittsburgh, Pennsylvania 15220. Telephone: 412–937–2829.

For the final environmental impact statement: Robin T. Ferguson, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–208–2802.

For the final regulatory impact analysis: Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–208–2716.

For information collection matters: John A. Trelease, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240. Telephone: 202–208–2716.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

Significant advances in scientific knowledge and in mining and reclamation techniques have occurred in the more than 30 years that have elapsed since the enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) [1] and the adoption of federal regulations implementing that law. This rule acknowledges the advancements in science, technology, policy, and the law that impact coal communities and natural resources, based on our experience and engagement with state regulatory authorities, industry, non-governmental organizations, academia, citizens, and other stakeholders.

The rule has the following seven major elements:

- First, the rule defines the term ''material damage to the hydrologic balance outside the permit area'' and requires that each permit establish the point at which adverse mining-related impacts on groundwater and surface water reach an unacceptable level; *i.e.,* the point at which adverse impacts from mining would cause material damage to the hydrologic balance outside the permit area.
- Second, the rule sets forth how to collect adequate premining data about the site of the proposed mining operation and adjacent areas to establish a comprehensive baseline that will facilitate evaluation of the effects of mining operations.
- Third, the rule outlines how to conduct effective, comprehensive monitoring of groundwater and surface water during and after both mining and reclamation and during the revegetation responsibility period to provide timely information documenting mining-related changes in water quality and quantity. Similarly, the rule addresses the need to require monitoring of the biological condition of perennial and certain intermittent streams during and after mining and reclamation to evaluate changes in aquatic life. Proper monitoring will enable timely detection of any adverse trends and allow timely implementation of any necessary corrective measures.

[1] 30 U.S.C. 1201 *et seq.*

• Fourth, the rule promotes the protection or restoration of perennial and intermittent streams and related resources, especially the headwater streams that are critical to maintaining the ecological health and productivity of downstream waters.

• Fifth, the rule ensures that permittees and regulatory authorities make use of advances in information, technology, science, and methodologies related to surface and groundwater hydrology, surface-runoff management, stream restoration, soils, and revegetation, all of which relate directly or indirectly to protection of water resources.

• Sixth, the rule ensures that land disturbed by surface coal mining operations is restored to a condition capable of supporting the uses that it was capable of supporting before mining or to higher or better uses of which there is reasonable likelihood. Soil characteristics and the degree and type of revegetation have a significant impact on surface-water runoff quantity and quality as well as on aquatic life and the terrestrial ecosystems dependent upon perennial and intermittent streams. The rule also requires use of native species to revegetate reclaimed mine sites unless and until a conflicting postmining land use, such as intensive agriculture, is implemented.

• Seventh, the rule updates measures to protect threatened and endangered species and designated critical habitat under the Endangered Species Act of 1973.[2] It also better explains how the fish and wildlife protection and enhancement provisions of SMCRA should be implemented.

This rule more completely implements SMCRA's permitting requirements and performance standards and provides regulatory clarity to operators and stakeholders while better achieving the purposes of SMCRA as set forth in section 102 of the Act.[3] In particular, the rule more completely realizes the purposes in paragraphs (a), (c), (d), and (f) of that section, which include establishing a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations and assuring that surface coal mining operations are conducted in an environmentally protective manner and are not conducted where reclamation is not feasible. Furthermore, the rule addresses court decisions and strikes the appropriate balance between environmental protection, agricultural productivity and the Nation's need for coal as an essential source of energy, while providing greater regulatory certainty to the mining industry.

Summary of Benefits and Costs

The final regulatory impact analysis (RIA) for this rule contains a detailed discussion of the rule's benefits and costs. We estimate that, among other things, the rule's benefits to streams and forests between 2020 and 2040 will include—

• Restoration of 22 miles of intermittent and perennial streams per year.

• Improved water quality in 263 miles of intermittent and perennial streams per year downstream of minesites.

• Four miles of intermittent and perennial streams per year not being covered by excess spoil fills or coal mine waste facilities.

• Improved reforestation of 2,486 acres of mined land per year.

• Avoidance by mining operations of eight acres of forest per year.

In terms of economic impacts, we estimate that the rule will result in an average annual employment gain of 156 fulltime equivalents between 2020 and 2040. This estimate includes an average annual reduction of 124 fulltime equivalents in employment related to coal production and an average annual gain of 280 fulltime equivalents in industry employment related to implementation of the rule.

We estimate that the rule will result in an average annual 0.08% reduction in coal production between 2020 and 2040, which equates to 0.7 million tons of coal. That amount includes 0.2 million tons produced by surface mining methods (0.04% of the total amount produced by surface mining methods) and 0.5 million tons produced by underground mining methods (0.14% of the total amount produced by underground mining methods). The final RIA projects that this reduction in production will be accompanied by an increase in average annual coal prices ranging from 0.2% in the Powder River Basin to 1.3% in Central Appalachia and the Illinois Basin.

We estimate that total industry compliance costs per year during 2020–2040 would average $81 million, which is 0.1% or less of aggregate annual industry revenues, ranging from an additional one cent per ton of longwall-mined coal on the Colorado Plateau to an additional $1.40 per ton for surface-mined coal in the Illinois Basin. Of the $81 million in increased annual costs to industry, surface mining operations will bear an estimated $71 million, while underground mining operations will absorb $10 million. In the aggregate, state regulatory authorities will incur estimated additional costs of $0.5 million per year between 2020 and 2040.

Implementation of this rule will result in reductions in greenhouse gas emissions from coal production. Expressed in terms of carbon dioxide equivalents, we project that those reductions will total 2.6 million short tons in 2020. ''Carbon dioxide equivalent'' is a unit used to describe the impact of different greenhouse gases on a comparative basis by expressing the impact in terms of the amount of carbon dioxide that would have the same global warming impact as the type and amount of greenhouse gases at issue. We also project that implementation of the final rule will result in the annualized benefit of $57 million due to the reduced carbon dioxide emissions from fossil fuel consumption across the timeframe of the analysis (2020—2040).

II. Why are we revising our regulations?

Our primary purpose in adopting this rule is to strike a better balance between ''protection of the environment and agricultural productivity and the Nation's needs for coal as an essential source of energy.'' [4] Specifically, the rule is designed to minimize the adverse impacts of surface coal mining operations on surface water, groundwater, and site productivity, with particular emphasis on protecting or restoring streams, aquatic ecosystems, riparian habitats and corridors, native vegetation, and the ability of mined land to support the uses that it was capable of supporting before mining. The final rule reflects our experience during the more than three decades since adoption of the existing regulations, as well as advances in scientific knowledge and mining and reclamation techniques during that time and consideration of the comments that we received on the proposed rule. The final rule more completely implements sections 515(b)(24) and 516(b)(11) of SMCRA, which provide that, to the extent possible using the best technology currently available, surface coal mining and reclamation operations must be conducted to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and to achieve enhancement of those resources where practicable.[5] It also updates our regulations concerning compliance with

[2] 16 U.S.C. 1531 *et seq.*

[3] 30 U.S.C. 1202.

[4] 30 U.S.C. 1202(f).

[5] *See* 30 U.S.C. 1265(b)(24) and 1266(b)(11).

the Endangered Species Act of 1973.[6] In addition, as proposed, we have revised and reorganized our regulations for clarity, to make them more user-friendly, to remove obsolete and redundant provisions, and to implement plain language principles.

The preamble to the proposed rule sets forth the detailed rationale for adoption of this rule and the history of prior rulemaking and litigation concerning stream buffer zones and stream protection. *See* 80 FR 44436–44585 (Jul. 27, 2015).

Final Environmental Impact Statement (EIS)

The final EIS for this rule contains an expanded discussion of the impacts of mining on the environment. Almost all the literature surveys and studies reviewed for this rulemaking process have been published since the adoption in 1983 of our principal regulations concerning protection of the hydrologic balance [7] and protection of fish, wildlife, and related environmental values,[8] which underscores the need to update our regulations to reflect new scientific understanding of impacts associated with coal mining.

III. What opportunity did we provide for public comment on the proposed rule and supporting documents?

On July 16, 2015, we announced that the proposed rule, draft environmental impact statement (DEIS), and draft regulatory impact analysis (DRIA) were available for review at *www.regulations.gov*, on our Web site (*www.osmre.gov*), and at selected OSMRE offices. On July 17, 2015, we published a notice in the **Federal Register** announcing the availability of the DEIS for the proposed rule. *See* 80 FR 42535–42536. The notice reiterated that the DEIS was available for review at *www.regulations.gov*, *www.osmre.gov*, and the OSMRE offices listed in the notice. The comment period for the DEIS was originally scheduled to close on September 15, 2015. On July 27, 2015, we published the proposed stream protection rule in the **Federal Register**. *See* 80 FR 44436–44698. That document reiterated that the proposed rule, DEIS, and DRIA were available for review at *www.regulations.gov*, *www.osmre.gov*, and the OSMRE offices listed in the notice. The comment period for the proposed rule and DRIA was originally scheduled to close on September 25, 2015. In response to requests for additional time to review and prepare comments on all three documents, we extended the comment period for the proposed rule, DEIS, and DRIA through October 26, 2015. *See* 80 FR 54590–54591 (Sept. 10, 2015).

During the public comment period, we held six public hearings on the proposed rule in Golden, Colorado (September 1, 2015); Lexington, Kentucky (September 3, 2015); St. Charles, Missouri (September 10, 2015); Pittsburgh, Pennsylvania (September 10, 2015); Big Stone Gap, Virginia (September 15, 2015); and Charleston, West Virginia (September 17, 2015). In addition to the testimony offered at the hearings and meetings, we received approximately 94,000 written or electronic comments on the proposed rule. In developing the final rule, we considered all comments that were germane to the proposed rule. In the remainder of this preamble, we summarize the comments received and discuss our disposition of those comments and how and why the final rule differs from the proposed rule.

IV. What general comments did we receive on the proposed rule?

A. We Should Reopen the Comment Period To Allow Adequate Time for Public Review and Comment

Many commenters contended that we should have extended the time for public review and comment on the proposed rule and supporting documents. These commenters generally raised objections about the amount of material, primarily the proposed rule and its preamble, the DEIS, and the DRIA, all of which were lengthy. The commenters noted that we cited many studies, reports and supporting documents, which would take time to locate and review. Some commenters claimed that they lacked staff to review the material and provide meaningful comments within the time provided. These commenters stated that the 102 days we provided for review was too short, particularly in contrast to the time it took us to prepare and propose a rule.

As described in Part III of this preamble, the stream protection rule has been the subject of robust public involvement, starting in 2009. During that year, we published an advance notice of proposed rulemaking,[9] conducted 15 stakeholder outreach meetings, held nine public scoping meetings, and provided two public comment periods totaling 76 days on scoping for the DEIS. The scoping process generated over 20,500 comments, including input from state regulatory authorities.

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Interested parties, therefore, received a total of 102 days to review the proposed rule and supporting documents. During that time, we also held six public hearings in Colorado, Kentucky, Missouri, Pennsylvania, Virginia, and West Virginia. We received approximately 95,000 comments from all sources on the proposed rule, DEIS, and DRIA.

The proposed rule, DEIS, and DRIA included citations to references that we relied upon in developing the documents. These reference citations were available from the time of publication of the proposed rule, DEIS, and the DRIA in the **Federal Register**. We used these references in discussing both specific components of the rule and our analysis, as well as for support of our discussion on more general concepts. We did not receive any requests for copies of these references during the comment period. However, in response to language that Congress included in a report accompanying the Consolidated Appropriations Act of 2016, Public Law 114–113, we placed all publicly-available references on *www.regulations.gov*. Copyright-protected materials are easily obtainable through state or university libraries or the publisher. We were not able to provide copyright-protected items to

[6] 16 U.S.C. 1531 *et seq.*

[7] 48 FR 43956 (Sept. 26, 1983).

[8] 48 FR 30312 (Jun. 30, 1983).

[9] 74 FR 62664–64668 (Nov. 30, 2009).

requesters directly because doing so might violate copyright laws. We also scheduled meetings between us and state technical personnel to discuss the scientific studies and other reference documents on two dates (April 14 and 21, 2016). The meetings were held simultaneously in Denver, Colorado; Alton, Illinois; and Pittsburgh, Pennsylvania. Staff from six state regulatory authorities participated in the meeting on April 14, 2016, and staff from five state regulatory authorities participated in the meeting on April 21, 2016.

The comment period we provided fully complies with the Administrative Procedure Act, 5 U.S.C. 553, which does not set a minimum public comment period for a proposed rule. We also exceeded the 60-day minimum comment period recommended by Section 6(a)(1) of Executive Order 12866 for meaningful public participation. This time is comparable to the comment periods for similar regulations that we have issued in the past. For example, the now-vacated 2008 stream buffer zone rule was subject to a 90-day comment period,[10] while the comment period for the 1978 proposed rule containing most of the original permanent regulatory program regulations was 71 days.[11]

It is also noteworthy that many commenters, primarily environmental groups, opposed our 30-day extension of the comment period. They maintained that 60 days was sufficient to review the materials and provide meaningful comment. These and other commenters, including state regulatory authorities, were able to provide extensive, detailed, meaningful comments on the proposed rule in the comment period provided.

B. We Should Further Engage the State Regulatory Authorities Before Finalizing the Rule

Most state and industry commenters urged us to refrain from finalizing the proposed rule at this time. Instead, these commenters requested that we engage in additional meaningful collaboration with the state regulatory authorities. Many of these commenters stated that we could benefit further from the insight, experience, and practices of the state regulatory authorities when developing the regulatory text, final EIS, and final RIA. According to the commenters, we did not provide the regulatory authorities and other state agencies that had agreed to be cooperating agencies in the National Environmental Policy Act of 1969 (NEPA) process with the opportunity for meaningful engagement. The commenters expressed their belief that we had not acted in accordance with the terms of the memoranda of understanding describing the roles and responsibilities for the effort. The commenters noted that, as a consequence, all but one of those regulatory authorities had terminated their cooperating agency status.

We have substantially engaged with stakeholders, including the regulatory authorities. The rulemaking process began with an advance notice of proposed rulemaking, 15 stakeholder outreach meetings, nine public scoping meetings, and two public comment periods on the scoping for the DEIS. The scoping process generated over 20,500 comments, including input from the states. A number of state agencies, including state SMCRA regulatory authorities, participated as cooperating agencies in the early development of the DEIS for the stream protection rule. As of November, 2010, we had sent Chapters 1, 2, 3 and 4 of the DEIS to all cooperating agencies. Chapters 1–4 are the heart of an EIS. Those chapters include the statement of purpose and need, a description of the alternatives considered, a description of the affected environment, and an analysis of the environmental consequences of the alternatives. The cooperating agencies provided meaningful input and comments. We used this information to prepare the DEIS. In response to this and other feedback, we revised the DEIS over the next several years. Shortly before we announced the availability of the DEIS for public comment, all but one of the state regulatory authorities voluntarily terminated their role as cooperating agencies.

We made the DEIS available on July 16, 2015, to all cooperating agencies and the public to review and provide input on during the public comment period. We subsequently extended the public comment period to provide interested parties, including the states, more time to review and comment on the DEIS. We conducted six public hearings in Colorado, Kentucky, Missouri, Pennsylvania, Virginia and West Virginia during the public comment period. Although not required to do so, in a letter dated October 7, 2015, prior to the close of the public comment period on October 26, 2015, we invited the former cooperating state agencies to re-engage as cooperating agencies under NEPA. None accepted this invitation. Ultimately, OSMRE received approximately 95,000 comments, including hundreds of pages of comments from state SMCRA regulatory authorities, on the DEIS, DRIA, and the proposed stream protection rule. We considered these comments in developing this final rule, the final EIS, and the final RIA.

The Department's Assistant Secretary for Land and Minerals Management, the Director of OSMRE, and other OSMRE officials continued to meet with representatives of states after the close of the comment period, consistent with congressional direction in a report accompanying the Consolidated Appropriations Act of 2016, Public Law 114–113. In addition to meetings with state SMCRA regulatory authorities in conjunction with Interstate Mining Compact Commission meetings, Department of the Interior and OSMRE representatives have either met with or held telephone or video conferences with 14 different state regulatory authorities since the proposed rule was published. We also scheduled meetings of OSMRE and state technical personnel to discuss the scientific studies and other reference documents on two dates (April 14 and 21, 2016). The meetings were held simultaneously in Denver, Colorado; Alton, Illinois; and Pittsburgh, Pennsylvania. Staff from six state regulatory authorities participated in the meeting on April 14, 2016, and staff from five state regulatory authorities participated in the meeting on April 21, 2016. Notice of the Final Environmental Impact Statement was published in the **Federal Register** on November 16, 2016 (81 FR 80592 and 81 FR 80664), by OSMRE and the U.S. Environmental Protection Agency, respectively.

We understand the state regulatory authorities wanted more input, not only in the EIS, but also in the rule and the RIA. However, through this extensive outreach we have met our obligations as set forth in the Administrative Procedure Act, NEPA, and the pertinent executive orders and have sought the input from state regulatory authorities at crucial junctures in the development of the rule—early in the rulemaking process and after publication of the proposed rule. These are the points where their insights could best shape the proposal and refine the final rule without impinging on our deliberative process and our ability to craft a rule to meet our purpose and need. The final regulations that we are publishing today have been shaped by this direct input as well as by the information we have gleaned through our oversight of the state programs.

[10] 72 FR 48890 (Aug. 24, 2007); 72 FR 57504 (Oct. 10, 2007).

[11] 44 FR 14902, 14908 (Mar. 13, 1979).

C. We Have Not Accorded Sufficient Deference to Principles of Cooperative Federalism and the Primacy of States With Approved Regulatory Programs

According to numerous commenters, the proposed rule impinges on the concepts of cooperative federalism and state primacy in SMCRA. Because of this alleged impingement on states' rights under SMCRA, many of these commenters asserted that the proposed rule exceeds our statutory authority and contravenes the Tenth Amendment to the U.S. Constitution. They also charged that it ''flips the central SMCRA mandate of state primacy on its heads.''

We disagree with these commenters. While it is true that primacy states play a key role in enforcing SMCRA, it is also true that we maintain a role in the implementation and oversight of SMCRA. *See, e.g., Hodel* v. *Virginia Surface Mining and Reclamation Ass'n Inc.,* 452 U.S. 264, 289 (1981) (''The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, *within limits established by federal minimum standards,* to enact and administer their own regulatory programs, structured to meet their own particular needs.'' (Emphasis added.) These federal standards ''provide [a] blueprint against which to evaluate [a] state's program.'' [12] The U.S. Supreme Court has held this statutory scheme to be a proper exercise of Congressional power under the U.S. Constitution. *Hodel,* 452 U.S. at 290–291.

We have clear authority to issue regulations such as this rule to establish federal minimum standards. Section 102 of SMCRA sets forth thirteen purposes of the Act.[13] The first of these purposes is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' [14] Several other purposes are related to assuring that surface coal mining operations are conducted in a manner that protects the environment.[15] This authority also contains a purpose unique to SMCRA: ''whenever necessary, exercise the full reach of Federal constitutional powers to ensure the protection of the public interest through effective control of surface coal mining operations.'' [16] SMCRA then vests the authority to carry out these purposes with us; specifically, under section 201(c)(2), we have clear authority to ''publish and promulgate such rules and regulations as may be necessary to carry out the purposes of the Act.'' [17] Our strong federal role, which includes updating the federal minimum standards, ensures that regulation of surface coal mining and reclamation operations remains environmentally protective and is not plagued by many of the problems that led to the enactment of SMCRA in the first place. *See, e.g.,* H.R. Rep. No. 95–218, at 90 (''For a number of predictable reasons—including insufficient funding and the tendency for State agencies to be protective of local industry—State enforcement has in the past [*i.e.,* prior to the passage of SMCRA in 1977] often fallen short of the vigor necessary to assure adequate protection of the environment.''). This rule, therefore, is a valid exercise of our authority to update the federal minimum standards to reflect 30 years of scientific development and 30 years of experience in implementing SMCRA.

Contrary to the contention of some commenters, we are not abrogating primacy. Nor are we creating a rigid one-size-fits-all rule. Primacy states can and should tailor their state laws and regulations implementing this rule to local conditions as long as they meet minimum federal standards and are no less effective than the federal rules in meeting the requirements of SMCRA. In addition, the final rule provides discretion to the regulatory authority in certain areas, including, but not limited to, the following examples:

- Final § 773.15(j): Compliance with the Endangered Species Act. Provides the permit applicant and the regulatory authority with several options for demonstrating compliance with the Endangered Species Act of 1973.
- Final § 780.16(d): Potential Enhancement Measures. The regulatory authority has the discretion to determine the type, scope, and location of fish and wildlife enhancement measures.
- Final § 780.19(a): Information on Hydrology, Geology, and Aquatic Biology, Baseline Information. The regulatory authority has the discretion to determine what constitutes ''sufficient detail'' with respect to the information required in this section, including the location and number of monitoring locations.
- Final § 780.19(b)(6)(ii): Groundwater Information. The regulatory authority has the discretion to determine the baseline groundwater quality and quantity sampling protocol and subsequent analyses of these data.
- Final § 780.19(c)(5): Precipitation Measurements. The regulatory authority has the flexibility to determine whether the permit applicant must prepare a hydrologic model of the proposed mine site.
- Final § 780.19(c)(6)(vii): Assessing the biological condition of intermittent and perennial streams. The regulatory authority has the flexibility to choose from available scientifically defensible protocols, including indices of biological integrity, to determine the biological condition of streams.
- Final § 780.21(b)(7): Evaluation Thresholds. The regulatory authority has the flexibility to determine the parameters it will use as evaluation thresholds.
- Final § 780.27(b)(2): What Permitting Requirements Apply to Proposed Activities in or Through Ephemeral Streams? The regulatory authority has the flexibility to approve a drainage pattern that differs from the premining pattern based upon a variety of site specific conditions.
- Final § 780.28(c)(2): Proposed Activities In, Through, or Adjacent to Perennial and Intermittent Streams. The regulatory authority has the flexibility to approve a drainage pattern or stream-channel configuration that differs from the premining pattern based upon a variety of site-specific conditions.
- Final § 780.28(e)(2): Conversion of Streams. The regulatory authority has the flexibility to approve limited stream flow regime conversions on a case-by-case basis as long as certain criteria are satisfied.
- Final § 780.28(g)(1): Standards for the Restoration of Ecological Function to Perennial or Intermittent Streams. The regulatory authority has discretion to establish objective criteria for determining the standards for restoring the ecological function of a reconstructed perennial or intermittent stream.

The underground mining counterparts to these surface mining provisions offer the same flexibilities to the regulatory authority.

D. We Did Not Adequately Demonstrate a Need for This Rulemaking

Many commenters stated that we have neither provided sufficient rationale for the development of this rule nor any evidence to support what many commenters consider a complete rewrite of the federal regulations implementing SMCRA. A number of commenters also raised concerns about whether the proposed rule articulated a legally

[12] *Bragg* v. *W. Va. Coal Ass'n,* 248 F.3d 275, 289 (4th Cir. 2001).

[13] 30 U.S.C. 1202.

[14] 30 U.S.C. 1202(a)

[15] *See, e.g.,* 30 U.S.C. 1202(d) and (f).

[16] 30 U.S.C. 1202(m).

[17] 30 U.S.C. 1211(c)(2); *See also, id* at 1251(b) (''[T]he Secretary shall promulgate and publish . . . regulations covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and conforming to the provisions of Title V . . . .'').

adequate justification for a nationwide rulemaking on issues related to stream protection. In particular, some commenters noted that the June 11, 2009, Memorandum of Understanding (MOU) among the U.S. Department of the Army, the U.S. Department of the Interior, and EPA implementing the interagency action plan on Appalachian surface coal mining was limited to six states in Appalachia and primarily focused on issues related to steep-slope mining. The commenters questioned our decision to propose a nationwide rule in response to the MOU, which, by its own terms, was designed to significantly reduce the harmful environmental consequences of surface coal mining operations in Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia and ensure that future mining is conducted consistent with federal law. The 2009 MOU provided impetus and support for this rulemaking, but it is not the sole reason for the rulemaking. After extensive outreach, we determined that development of a comprehensive, nationally applicable, stream protection rule would be the most appropriate and effective method of achieving the purposes and requirements of SMCRA, as well as meeting the goals set forth in the MOU. Streams are important components of the hydrologic regime everywhere that streams are found, so there is no scientific reason to limit stream protection efforts to one region of the country or to steep-slope mining. In addition, it is not clear that we have authority under SMCRA to conduct rulemaking on a regional basis. Section 101(g) of SMCRA [18] provides that ''surface coal mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders.'' The implication is that the surface coal mining and reclamation standards to which it refers must be national in scope. In addition, section 102(a) of SMCRA [19] provides that one of the purposes of SMCRA is to ''establish a *nationwide* program to protect society and the environment from the adverse effects of surface coal mining operations.'' (Emphasis added.)

Our primary purpose in adopting this final rule is to strike a better balance between ''protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy,'' which section 102(f) of SMCRA [20] lists as one of the purposes of SMCRA. Specifically, this final rule will better protect the water resources needed by current and future generations for drinking, recreation, and wildlife from the adverse effects of coal mining, while balancing protection of those resources with the Nation's energy needs.

The final rule published today reflects advances in science and technology, updates 30-year-old regulations, and addresses important stream protection and related issues in a manner consistent with SMCRA, while providing regulatory certainty to operators. State and industry practices helped shape this rule. Many commenters supported the proposed rule and encouraged us to proceed with a final rule.

SMCRA recognizes the importance of nationwide minimum standards for the hydrologic balance by not limiting the provisions related to the hydrologic balance to any particular types of mining or areas of the country as it did with other provisions. *Compare, e.g.,* Section 510(b)(3) [21] (no permit may be issued unless the operation has been ''designed to prevent material damage to the hydrologic balance outside the permit area'') *with* Section 510(b)(5) [22] (alluvial valley floor protections apply only west of the one hundredth meridian west longitude). We have never issued regulations that expressly apply only to a portion of the country without specific statutory language authorizing or mandating adoption of regulations with a geographically-restricted scope. SMCRA provisions with a geographically-restricted scope include sections 510(b)(5) (alluvial valley floors west of the one hundredth meridian west longitude), 527 [23] (special bituminous coal mines west of the one hundredth meridian west longitude), 529 [24] (anthracite coal mines regulated by a state), and 708 [25] (coal mines in Alaska, for a limited time only).

As stated in our analysis in the final EIS, the need for this final rule is to improve implementation of SMCRA, ensure protection of the hydrologic balance, and reduce impacts of surface coal mining operations on streams, fish, wildlife, and related environmental values. The final rule will provide major benefits to water resources, not just in the Appalachian Basin, but also in the Illinois Basin. In addition, this rule will provide moderate benefits to water resources in three other regions—the Colorado Plateau, the Gulf Coast, and the Northern Rocky Mountains and Great Plains.[26] Even if these were the only benefits of the rule, and they are not, the benefits to water resources alone are sufficient to support and justify a nationwide rulemaking.

As we set forth in the proposed rule and in documents in support of the proposed rule, SMCRA provides us with the authority to protect the hydrologic balance from coal mining operations nationwide. Despite that fact and the benefits that could be realized nationwide, some commenters cite data contained in our annual evaluation reports of state regulatory programs in an attempt to show that there is no nationwide problem. According to these commenters, our annual evaluation reports ''show that 90 percent of operations were free of any offsite impacts'' and ''routinely include highly positive narrative reviews of each state's SMCRA program.''

While it is true that our annual evaluation reports routinely do not indicate problems with the states' implementation of their programs, we disagree with the conclusion the commenters attempt to draw from this information, *i.e.,* that our experience does not show that there is a problem that this rule is designed to address. OSMRE inspections and other oversight activities in primacy states, including the annual evaluation reports, focus on the success of state regulatory authorities in achieving compliance with the approved regulatory program for the state. Directive REG–8,[27] which establishes policy and procedures for the evaluation of state regulatory programs, specifies that the offsite impacts identified in annual evaluation reports do not include impacts from mining and reclamation that are not regulated or controlled by the state program. In other words, the annual evaluation reports generally do not identify or discuss situations in which the existing regulations provide inadequate protection. While Directive REG–8 provides discretionary authority for evaluations of impacts that are not prohibited by the regulatory program, that authority may be exercised only if both OSMRE and the state agree to do so, and if they are not characterized as

[18] 30 U.S.C. 1201(g).

[19] 30 U.S.C. 1202(a).

[20] 30 U.S.C. 1202(f).

[21] 30 U.S.C. 1260(b)(3).

[22] 30 U.S.C. 1265(b)(5).

[23] 30 U.S.C. 1277.

[24] 30 U.S.C. 1279.

[25] 30 U.S.C. 1298.

[26] FEIS at Chapter 1—Sections 1.1 and 1.2, Table 4.2–15.

[27] Directive REG–8. ''Oversight of State and Tribal Regulatory Programs,'' Transmittal No. 967, January 31, 2011.

offsite impacts. Historically, that discretionary authority has not been exercised. Thus, annual reports are of little assistance in assessing how the existing minimum federal standards that are incorporated into the approved state programs could be improved to better implement SMCRA. Part II of the preamble summarizes the water quality and land reclamation problems that developed under the previous rules. In addition, speakers at the public hearings described their experiences with dewatering of streams as a result of subsidence from underground mining operations.

E. We Should Limit the Final Rule to the Effects of Surface Mining Operations and Not Underground Mining Operations

Several commenters requested that we limit the rule to the effects of surface mining operations and not the effects of underground operations. These commenters often questioned the adequacy of our support for extending stream protections to the areas overlying underground mine workings. According to the commenters, the rule would make some methods of underground mining operations impractical and would effectively prohibit underground mining using longwall technology.

Part IV.K. of this preamble summarizes the principal provisions of this rule that directly impact underground mining. The final rule does not preclude any specific method of underground mining either directly (*e.g.,* a prohibition of underground mining) or indirectly (*e.g.,* make underground mining uneconomical or impossible). Our primary focus in the proposed rule was to clarify our position that the obligation to prevent material damage to the hydrologic balance outside the permit area applied to areas overlying the underground workings of an underground mine, which is part of the adjacent area as that term is defined in § 701.5 of our regulations. As explained in more detail in the portion of this preamble that discusses the definition of ''material damage to the hydrologic balance outside the permit area'' in § 701.5 of our regulations, we have always considered the area overlying the underground workings of an underground mine to be part of the evaluation for prevention of material damage to the hydrologic balance outside the permit area. Although this has been our longstanding position and is clearly mandated by SMCRA, the definition of material damage to the hydrologic balance outside the permit area that we are finalizing today removes any of the ambiguity that may have resulted in this comment. In addition, to address concerns that requiring underground operations to prevent material damage to the hydrologic balance outside the permit area would effectively preclude any underground mining likely to result is subsidence, we have clarified that temporary impacts resulting from subsidence are allowed provided they do not rise to the level of material damage to the hydrologic balance outside the permit area. This issue is discussed in more detail in Part IV, section K of this preamble.

F. We Underestimated the Costs and Regulatory Burden of the Proposed Rule to State Regulatory Authorities and Industry

Numerous commenters expressed concern that the proposed rule would impose significant additional costs on the industry and state regulatory authorities. Many of these commenters alleged that the costs of the proposed rule were grossly understated in the DRIA. Appendix I of the final RIA provides responses to all specific comments on the DRIA.

In response to comments received on the DRIA, as well as in response to recent changes in the coal market, we revised the DRIA to ensure that the final RIA better reflects current circumstances. These changes include:

- *Updated coal market baseline:* Since the DRIA was developed conditions in the coal market have changed considerably. As a result, we updated the baseline coal production forecast for the final RIA, which resulted in an almost 20 percent decrease in the level of coal demand and production forecasted under the baseline.
- *Updated regulatory baselines.* Since the DRIA was developed, changes to the regulatory environment have occurred, including but not limited to the finalization of the Clean Power Plan and ratification of the Paris Agreement made at the 21st Conference of the Parties of the United Nations Framework Convention on Climate Change. Additional climate policy proposals have been advanced that are anticipated to have an effect on coal production nationwide. As a result, we updated the final RIA.
- *Clarified potential impacts of the rule on longwall mining:* A number of commenters misinterpreted the proposed rule's impacts on longwall mining. The commenters thought longwall mining would be impossible under the proposed rule, which would result in devastating economic impacts to the underground mining industry. The final rule clarifies that the rule does not prohibit temporary impacts to streams and other water resources as a result of longwall mining as long as those impacts do not rise to the level of material damage to the hydrologic balance outside the permit area. The final RIA continues to reflect the fact that the final rule will not prohibit longwall mining.
- *Incorporated economic impact of bonding requirements:* The DRIA did not include costs associated with bonding requirements for restoration of the ecological function of perennial and intermittent streams that are mined through. While the bonding requirements for stream restoration have been revised, the final rule is nonetheless anticipated to result in some additional costs to operators associated with this requirement that were not captured in the DRIA. These additional costs are reflected in the final RIA.
- *Revised administrative costs:* A number of commenters remarked that the administrative costs of the proposed rule to industry and state regulatory authorities appeared to be underestimated in the DRIA. Upon further review, we determined that the industry and state regulatory authority administrative costs estimated in the DRIA were not consistent with OSMRE's Paperwork Reduction Act analysis. As a result of updating the RIA to be consistent with the Paperwork Reduction Act calculations, administrative costs for industry and the state regulatory authorities have increased in the final RIA. As discussed below, we also made some changes to the final rule that reduced administrative costs to the state regulatory authorities as well as to industry.
- *Corrected width of streamside vegetative corridor:* Some commenters questioned whether the engineering analysis had correctly interpreted the width of the riparian corridor, known as the streamside vegetative corridor in the final rule, which is required to be established adjacent to perennial, intermittent, and ephemeral streams that are mined through under certain circumstances. Upon further review, we determined that the engineering analysis incorrectly assumed that a 100-foot riparian corridor was interpreted as being 50 feet on either side of a restored stream rather than 100 feet on each side. Correction of this incorrect assumption resulted in a modest increase in model mine costs.
- *Revised impacts to small businesses analysis:* The Regulatory Flexibility Act

analysis has been revised in the final RIA to reflect the recent changes to the small business size thresholds identified by the Small Business Administration for coal mining companies.

• *Incorporated the social cost of carbon:* In response to comments, the final RIA includes an estimate of the benefits related to the social costs of carbon of the final rule.

In summary, compared with the DRIA, the final RIA forecasts lower baseline coal production and increased industry compliance costs. Lower baseline coal production means that the final rule will have fewer adverse impacts to production-related employment and fewer benefits to streams and forests.

The final rule also differs from the proposed rule in several ways that should reduce costs and the regulatory burden on state regulatory authorities and on the industry. The following list provides examples of cost-saving or potentially cost-saving provisions:

• *Applicability to existing operations:* We added a new section, 30 CFR 701.16, specifying when the stream protection rule would take effect and to which operations and permit applications it would apply. Existing permits will not be subject to the rule unless they either add acreage or revise the permit to add a new excess spoil fill, coal mine waste refuse pile, or coal mine waste slurry impoundment or move or expand the location of an approved excess spoil fill or coal mine waste facility.

• *Permit application format:* We deleted the proposed requirement in 30 CFR 777.11 that permit applicants submit their applications in electronic form. Regulatory authorities and mining companies expressed concern about the expense. Furthermore, we cannot guarantee the availability of grant funds to cover installation of electronic permitting systems by states. However, transition to electronic permitting systems ultimately will result in cost savings and greater efficiencies.

• *Baseline data and monitoring:* First, we are not adopting the proposed requirement in 30 CFR 780.19(b) and (c) that the regulatory authority extend the baseline data collection period if the Palmer Drought Severity Index for that period exceeded certain values. The regulatory authority has the discretion to determine whether and how long to extend the baseline data collection period under conditions of extreme drought or abnormally high precipitation. Second, under 30 CFR 780.19(b) and (c), the regulatory authority may modify the interval or the 12-consecutive-month sampling requirement for groundwater and surface water if adverse weather conditions make travel to the sampling location hazardous or if the water at that location is completely frozen. Third, in 30 CFR 780.19, we deleted six baseline data parameters (ammonia, arsenic, cadmium, copper, nitrogen, and zinc) upon which coal mining typically has little impact. Fourth, we added 30 CFR 783.26 and 784.40, which provide that the regulatory authority may allow permittees to submit baseline data and development of water monitoring plans for areas overlying proposed underground mine workings in increments. This will ensure more up-to-date information and avoid unnecessarily high data collection and analysis costs at the time of the initial permit application. It also will reduce monitoring costs.

• *Mining in or near Streams and Excess Spoil:* First, we revised the definitions of ephemeral, intermittent, and perennial streams in 30 CFR 701.5 to clarify that only conveyances with channels that have both a bed-and-bank configuration and an ordinary high water mark will be classified as streams. Second, final 30 CFR 780.19(c)(3) and 780.20(a)(5)(iv) do not include the proposed requirements for baseline data and analysis of peak flow magnitude and frequency, actual and anticipated usage, and seasonal flow variations for ephemeral streams. Third, final 30 CFR 780.19(c)(6) does not include the proposed requirement to assess the biological condition of ephemeral streams within the proposed permit and adjacent areas. It also modifies the proposed requirement to assess the biological condition of intermittent streams within the proposed permit and adjacent areas. In the final rule, assessment of the biological condition of intermittent streams within the proposed area and the adjacent area is required if a scientifically defensible protocol has been established for assessment of intermittent streams in the state or region in which the stream is located. But, if a scientifically defensible bioassessment protocol has not been developed in the relevant state or region, a description of the biology of each intermittent stream would be required to determine the biological condition of the intermittent stream. Fourth, final 30 CFR 780.28(g) specifies the best technology currently available for assessment of the restoration of the ecological function of intermittent streams for which no scientifically defensible protocol exists consists of the establishment of standards that rely upon restoration of the form, hydrologic function, and water quality of the stream and reestablishment of streamside vegetation as a surrogate for the biological condition of the stream. Finally, the excess spoil fill construction requirements in final 30 CFR 816.71(k) require only one certified report per calendar quarter and to provide an alternative to daily examinations by an engineer or other specialist.

• *Soils and Revegetation:* First, the final rule does not include a provision in proposed 30 CFR 779.19(a) that would have required descriptions of vegetative communities in the adjacent area. In addition, the final rule does not include the requirement in proposed 30 CFR 816.116(b) that revegetation success standards demonstrate restoration of the capability of the land to support all uses that it was capable of supporting before mining.

G. Whether We Should We Revise the Rule To Provide for Direct Enforcement of Water Quality Standards

Section 816.42 in our previous regulations required that discharges of water from areas disturbed by surface mining activities be made in compliance with all applicable state and federal water quality laws and regulations and with the effluent limitations for coal mining operations set forth in 40 CFR part 434. Proposed § 816.42 contained five paragraphs. Proposed paragraph (a) incorporated previous § 816.42 and clarified that permittees must comply with all water quality laws, including effluent limitations in the applicable NPDES permit. Proposed paragraph (b) explicitly incorporated the longstanding requirement for permittees to comply with section 404 of the Clean Water Act[28] if they sought to discharge overburden (including excess spoil), coal mine waste, and other materials into waters of the United States. Proposed paragraphs (c) through (e) established enforceable performance standards requiring proper operation and maintenance of water treatment facilities and environmentally appropriate disposition of precipitates from those facilities.

In the preamble to the proposed rule, we requested comment on whether proposed § 816.42(b) should be informational or directly enforceable under SMCRA.[29] As mentioned, this paragraph required that discharges of overburden (including excess spoil), coal mine waste, and other materials into waters of the United States be made in compliance with section 404 of the Clean Water Act and its implementing

[28] 33 U.S.C. 1344.

[29] 80 FR 44549 (Jul. 27, 2015).

regulations. Commenters were divided on the merits of this issue. Several environmental groups and citizens asked us to make standards under both sections 402 and 404 of the Clean Water Act directly enforceable under SMCRA. These commenters typically suggested changes to proposed § 816.42 to clarify that water quality standards established under the Clean Water Act are directly enforceable under SMCRA. According to these commenters, section 702(a) of SMCRA [30] and prior preamble statements concerning § 816.42 provide authority for direct enforcement of water quality standards under SMCRA. Similarly, these commenters asked us to clarify whether proposed § 816.71(a)(7) (excess spoil) and 816.57(b) (mining in, through, or adjacent to perennial and intermittent streams) require operators to comply with water quality standards and, if so, whether the SMCRA regulatory authorities will directly enforce these water quality standards. Some commenters asked us to provide for direct enforcement of Clean Water Act water quality standards through citizen suits under section 520 of SMCRA.

In contrast, other commenters considered § 816.42 to be unnecessary and duplicative of the Clean Water Act. Some commenters detailed the Clean Water Act's own ''robust, but carefully tailored, enforcement scheme[,]'' which includes both direct enforcement by the state Clean Water Act authority of any aspect of the Clean Water Act that it has been delegated, enforcement by the U.S. Environmental Protection Agency, enforcement by the U.S. Army Corps of Engineers, and enforcement by citizen suits under the Clean Water Act. These commenters noted that the Clean Water Act does not confer authority on other agencies, such as us or state SMCRA regulatory authorities, to enforce the Clean Water Act, and the SMCRA regulatory authorities are not equipped to do so. Moreover, some commenters claimed that making the provisions of the Clean Water Act directly enforceable under SMCRA would directly conflict with the Clean Water Act because it would give a state with SMCRA primacy the direct authority to enforce violations of the Clean Water Act—even where that state does not have full delegation to administer Clean Water Act programs. These commenters generally urged us to consider this paragraph as informational or to remove it altogether.

In developing the approach we adopted in the final rule about the direct enforcement of Clean Water Act provisions under SMCRA, we considered the applicable requirements of SMCRA in light of an overarching purpose of SMCRA: To protect society and the environment from the adverse effects of coal mining operations.[31] Section 510(b)(3) of SMCRA specifically provides that coal mining operations must be designed to prevent material damage to the hydrologic balance outside the permit area.[32] Likewise, section 508(a)(9) of SMCRA provides that a permit application must include ''the steps to be taken to comply with applicable air and water quality laws and regulations[,]'' [33] and section 702(a) of SMCRA provides that nothing in SMCRA ''shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act or any rule or regulation promulgated under the Clean Water Act.[34] Thus, while we cannot supersede the Clean Water Act, under SMCRA, regulatory authorities do have a duty to ensure that surface coal mining operations are permitted, operated, maintained, and reclaimed in a manner that complies with the Clean Water Act, which includes, but is not limited to, compliance with NPDES permits and water quality standards.

Section 816.42 of the final rule is the primary regulation that sets forth the duty under SMCRA for coal mining operations to comply with the Clean Water Act. This regulation is tailored to accomplish this objective while avoiding conflicts between SMCRA regulatory authorities and Clean Water Act authorities about what constitutes a Clean Water Act violation. In particular, final § 816.42(a) clarifies that neither this section of the final rule, nor any action taken pursuant to it, supersedes or modifies the authority or jurisdiction of federal, state, or tribal agencies responsible for administration, implementation, and enforcement of the Clean Water Act including decisions that those agencies make pursuant to the authority of the Clean Water Act. This includes decisions on whether a particular set of facts constitutes a violation of the Clean Water Act.

With regard to enforcement under SMCRA, final rule § 816.42(b)(1) retains our longstanding regulatory requirement that coal mining operations must comply with all applicable water quality laws and regulations, including the effluent limitations set by Clean Water Act authorities in NPDES permits under section 402 of the Clean Water Act.[35] Since our final rulemaking in 1982 was promulgated to be consistent with effluent limits established by the U.S. Environmental Protection Agency, our regulations have required that discharges from coal mining operations be in accordance with a valid NDPES permit and that this is a performance standard directly enforceable under SMCRA.[36] This approach has been upheld by the Interior Board of Land Appeals and has been expressly incorporated by several regulatory authorities.[37] Direct enforcement of the NPDES effluent limitations typically begins with an inspector for the SMCRA regulatory authority conducting a routine inspection.[38] During these inspections, water samples are taken from sediment pond discharges to verify compliance with the SMCRA permits, which incorporates the NDPES effluent limitations by reference. When violations of those standards are found, a SMCRA notice of violation is issued requiring the violation to be corrected.

With the final rule, we are changing this process slightly. In response to Federal agency comments, we have revised final § 816.42(b)(1) to require the SMCRA regulatory authority to add an additional step to the end of the process: Notification of the appropriate Clean Water Act authority of any notice of violation issued under SMCRA for a violation of an effluent limit. We also added a provision requiring the SMCRA regulatory authority to coordinate with the Clean Water Act authority whenever necessary to determine if a violation exists. This provision is intended to address those situations where there may be some uncertainty as to whether in fact a violation exists. In addition to ensuring that there is no ambiguity about the requirement for a permittee to comply with NPDES effluent limits under SMCRA, we have added paragraph (i) to final rule § 773.17, which requires the regulatory authority to condition every permit on compliance with all effluent limitations and conditions in any NDPES permit issued by the Clean Water Act authority.

With regard to enforcement of water quality standards, § 816.42(b)(2) was also added to make it clear that coal mining operations cannot cause or contribute to a violation of any applicable water quality standards. In addition, in response to comments, we

[30] 30 U.S.C. 1292(a).

[31] *See, e.g.,* 30 U.S.C. 1201(d); 1201(j), 1202(a), 1202(c), 1202(d), 1202(f), and 1202(m).

[32] 30 U.S.C. 1260(b)(3).

[33] 30 U.S.C. 1258(a)(9).

[34] 30 U.S.C. 1292(a)(3).

[35] 33 U.S.C. 1342.

[36] 47 FR 47220 (Oct. 22, 1982).

[37] *West Virginia Highlands Conservancy* et al.,152 IBLA 196 (2000); *see also,* Ohio Division of Reclamation Policy/Procedure Directive 95–2; June 1, 1995.

[38] Active mining operations require complete inspections quarterly and partial inspections monthly.

have added language similar to that contained in § 816.42(b)(2) to final § 816.57(a)(2) to clarify that activities in, near, or through streams may not cause or contribute to a violation of applicable water quality standards. Similarly, in response to comments, we adopted a provision in final § 816.71(a)(7) which provides that the permittee or operator must place excess spoil in a manner that will ensure that the fill will not cause or contribute to a violation of applicable water quality standards adopted under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), for surface water downstream of the toe of the fill.

In addition § 816.42(c) of the final rule mirrors proposed paragraph (b) and provides that discharges of overburden, coal mine waste, and other materials into waters subject to the jurisdiction of the Clean Water Act, must be made in compliance with section 404 of the Clean Water Act.[39]

In order to better ensure compliance with sections 508(a)(9), 510(b)(3), and 702(a)(3) of SMCRA and address concerns about the role of the regulatory authority in assessing violations related to water quality standards and section of the Clean Water Act, we added final rule § 816.42(d). This provision requires that the regulatory authority investigate any situation in which it has information indicating that mining activities may be causing or contributing to a violation of the water quality standards to which paragraph (b)(2) of this section refers, or to a violation of section 404 of the Clean Water Act to which paragraph (c) refers. When conducting an investigation the SMCRA regulatory authority will coordinate with the appropriate Clean Water Act authority. The purpose of the coordination is to ensure that both agencies assess the most appropriate course of corrective action to remedy any confirmed violation. However, nothing in this section precludes the SMCRA regulatory authority from initiating enforcement action independently of the Clean Water Act authority. In fact, because the SMCRA regulatory authority is statutorily obligated to take immediate enforcement action when any ''permittee is in violation of any requirement of this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources'' [40] it may be necessary for the SMCRA regulatory authority to act, at least initially, independently of the Clean Water Act authority. In such a situation, after coordination with the Clean Water Act authority additional enforcement action may be necessary by the SMCRA regulatory authority, the Clean Water Act authority, or both. This process of coordination more fully satisfies the mandates of section 702(a) of SMCRA.[41]

Some commenters also requested that we explicitly allow citizens to enforce water quality standards through citizen suits. In our proposed rule, we did not propose any changes or ask for comment on the enforcement of water quality standards through SMCRA citizen suits. Nothing in the proposed or final rule was intended to alter or inhibit the ability to initiate citizen suits under SMCRA,[42] the Clean Water Act,[43] or the Endangered Species Act.[44] Moreover, we consider any questions about the extent of enforcement under the citizen suit provision of SMCRA to be beyond the scope of this rule.

H. We Should Define ''Existing Uses'' To Be Consistent With Clean Water Act Terminology

The proposed rule contained numerous regulations that refer to ''existing uses'' in the context of uses of groundwater and surface water. With respect to surface water, the regulations at 40 CFR 131.3(e) implementing the Clean Water Act defines ''existing uses'' as ''those uses actually attained in a waterbody on or after November 28, 1975, whether or not they are included in the water quality standards.'' We did not propose to define ''existing uses'' in the proposed rule, but we stated in the preamble that we interpret the term ''existing uses'' as meaning those uses in existence at the time of preparation of the permit application, regardless of whether those uses are designated uses under section 303(c) of the Clean Water Act.[45] *See* 80 FR 44475 (Jul. 27, 2015). We also stated in the preamble that, alternatively, we might replace the term ''existing uses'' with ''premining uses'' for purposes of clarity. *Id.* We invited comment on which course of action we should take.

One commenter stated that the term ''existing uses'' is acceptable as long as we distinguish between existing uses and designated uses. Another commenter found our de facto definition (''those uses in existence at the time of the preparation of the permit application'') to be potentially less protective than, and therefore inconsistent with, the Clean Water Act definition of ''existing uses'' at 40 CFR 131.3(e). The commenter asserted that, in the context of a permit application prepared in 2016 for a watershed that had no mining activity before November 28, 1975, the existing uses in 2016 likely would be more impaired than the existing uses before November 28, 1975. Preserving the ''existing uses'' at the time of the new 2016 mining application might simply perpetuate the existing level of impairment caused by prior mining in the same watershed. The commenter argued that our rules must provide at least the same level of protection as the Clean Water Act definition. The commenter recommended that our rules use the term ''premining uses'' and that we interpret that term as meaning all uses in existence at the time of the enactment of SMCRA. According to the commenter, the statutory mandate to prevent material damage to the hydrologic balance outside the permit area means that the rule must extend protection to all water sources impaired by mining since SMCRA was enacted in 1977.

Our rule implements SMCRA, not the Clean Water Act, so we are under no obligation to adopt the same definition of ''existing uses'' that has been adopted under the Clean Water Act, especially when our definition pertains to a term (material damage to the hydrologic balance outside the permit area) that does not appear in the Clean Water Act. We also have not discovered any support for the commenter's assertion that Congress intended that we look back to the baseline conditions on the date of enactment of SMCRA (August 3, 1977) to determine whether an operation is preventing material damage to the hydrologic balance outside the permit area. In addition to the practical difficulty of determining the baseline condition of water bodies on a date almost four decades ago, there is no statutory support for viewing the date that SMCRA was enacted as the baseline for determining whether an operation will prevent material damage to the hydrologic balance outside the permit area. To the contrary, SMCRA indicates that such a finding should be made at the time of permit application. For instance, section 510(b)(3) of SMCRA [46] provides that the regulatory authority *may not approve any application for a*

[39] 33 U.S.C. 1344.

[40] 30 U.S.C. 1271(a)(2).

[41] 30 U.S.C. 1292(a).

[42] 30 U.S.C. 1271.

[43] 33 U.S.C.1365.

[44] 16 U.S.C.1531.

[45] 33 U.S.C. 1313(c).

[46] 30 U.S.C. 1260(b)(3).

permit or permit revision unless the regulatory authority finds that *the proposed operation* has been designed to prevent material damage to the hydrologic balance outside the permit area. Thus, this section implies that the finding on material damage to the hydrologic balance outside the permit area should be based upon the assessment of the cumulative hydrologic impact of all anticipated mining in the watershed. That assessment looks forward to future impacts, not backward to impacts that have occurred since 1977.

To avoid confusion with the term ''existing uses'' as employed under the Clean Water Act, however, we have decided to replace the term ''existing uses'' with ''premining uses.'' We intend no change in practical effect by this change in terminology because ''premining uses'' are the uses in existence at the time of preparation of the permit application or, in other words, the conditions in existence before the proposed or current operation. There are some places in the regulations, primarily related to approximate original contour, where we address conditions in existence before any mining activities. In those instances, we do not use the term premining. Instead, we refer to conditions ''prior to any mining'' or ''before any mining''. For consistency in terminology, we are making these changes with respect to both groundwater and surface water.

I. We Should Remove Provisions That Are Duplicative of or Inconsistent With the Clean Water Act

Several commenters asserted that the proposed rule was inconsistent with SMCRA and would conflict with or duplicate the requirements of other federal laws—primarily the Clean Water Act. As support, many of these commenters cited Section 702 of SMCRA, which provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing . . . any of the following Acts or with any rule or regulation promulgated thereunder, including, but not limited to . . . [t]he Federal Water Pollution Control Act, as amended, the State laws enacted pursuant thereto, or other Federal laws relating to the preservation of water quality.'' [47] They also cited *In re Surface Mining Regulation Litigation,* 627 F.2d 1346 (D.C. Cir. 1980) where the court held that we exceeded our authority by issuing effluent limitations more stringent than those issued by EPA under the Clean Water Act. *Id.* at 1366–1367.

These commenters typically failed to appreciate the significance of the court's further holding in that case: ''where the [Clean Water Act] and its underlying regulatory scheme are silent so as to constitute an 'absence of regulation' or a 'regulatory gap', *the Secretary may issue effluent regulations without regard to EPA practice so long as he is authorized to do so under the Surface Mining Act.*'' *Id.* at 1367 (emphasis added). Thus, the court expressly held that we, under the authority of SMCRA, could issue regulations to address the hydrologic impacts of coal mining operations that are not adequately addressed under the Clean Water Act. In this final rule, consistent with this ruling, we are using our SMCRA authority to fill many of the very regulatory gaps that the Court mentioned in *In re Surface Mining Regulation Litigation. See, e.g., id.* (gaps in the Clean Water Act include, but are not limited to, ''discharges from abandoned and underground mines or from nonpoint sources'' and the ability ''to establish standards ''requiring comprehensive preplanning and designing for appropriate mine operating and reclamation procedures 'to ensure protection of public health and safety and to prevent the variety of other damages to the land, the soil, the wildlife, and the aesthetic and recreational values that can result from coal mining.' '').

Several commenters argued that this rule was not, in fact, filling regulatory gaps, but instead was creating a regime that would be inconsistent with the Clean Water Act and associated water quality laws and would improperly require SMCRA regulatory authorities to set water quality standards and enforce the Clean Water Act. We disagree. The Clean Water Act is designed to cover many industries and activities. SMCRA, by contrast, is designed to regulate the environmental impacts of one specific industry. This distinction is significant because the later-enacted statute, SMCRA, unlike the Clean Water Act, provides for the regulation of the environmental impacts, including the hydrologic impacts, of all phases of mining operations—design, operation, and reclamation. Absent SMCRA, coal mining operations that impact waters outside the permit area would be subject only to the limited regulation authorized by the Clean Water Act. By including requirements in SMCRA to regulate the effects of coal mining on water and hydrologic balance,[48] Congress clearly indicated that it intended to go beyond the protections it had afforded in the Clean Water Act. In SMCRA, Congress required the development of focused design requirements and performance standards for surface coal mining operations, including numerous standards related to water and the hydrologic balance. Thus, as long as these SMCRA standards do not conflict with the Clean Water Act, regulation under SMCRA will complement the Clean Water Act standards and requirements, which means that the final rule legitimately fits within the confines of what Congress intended.

Although nothing in the proposed rule conflicts with the Clean Water Act, because of commenters' concerns and to better effectuate our intent to improve coordination with Clean Water Act authorities, we modified the proposed rule in several key respects. We discuss these changes in more detail in the section-by-section analysis of the final rule.[49]

Some commenters alleged that our proposed rule would conflict with the Clean Water Act because it does not afford the same degree of flexibility that the statute does. However, our rule does not reduce the flexibilities afforded to operators under the Clean Water Act. Under our final rule, mining operations may not preclude attainment of any designated uses under the Clean Water Act, if such uses have been established. Precluding such designated uses would constitute material damage to the hydrologic balance outside the permit area under SMCRA. However, if no designated use exists, the standard becomes whether the operation is precluding any premining use of surface water outside the permit area.

One commenter asserted that designated uses under the Clean Water Act are ''aspirational and cannot be met due to ambient values or nonpoint sources'' and requested that we better explain what should occur in such situations. Another commenter raised similar concerns about how this proposed rule would account for the ''flexible and adaptive implementation'' of Clean Water Act standards. This commenter cited use attainability analysis, variances, and compliance

[47] 30 U.S.C. 1292(a)(3).

[48] *See, e.g.,* 30 U.S.C. 1201(c), 1260(b)(3), 1265(b)(2), 1265(b)(10), 1265(b)(24), 1266(b)(4), 1266(b)(9), 1266(b)(11), 1266(b)(12), 1266(c).

[49] *See, e.g.,* § 780.21(b)(6)(i) (removing the requirement that parameters of concern used to assess the potential for material damage to the hydrologic balance be expressed in numerical terms in the CHIA); 773.15(e)(3); and § 701.5 (definition of parameters of concern).

schedules and deadlines as examples of the flexible implementation inherent in Clean Water Act implementation. To the extent that the Clean Water Act provides flexibility, this final rule does not supersede, amend, modify, repeal, or otherwise conflict with the Clean Water Act. In addition, contrary to comments made by other commenters, SMCRA allows for some environmental impacts caused by mining; however, these are not without limitation. For example, section 515(b)(10) of SMCRA [50] requires that surface coal mining and reclamation operations minimize disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and groundwater systems, which means that some damage is permissible. However, section 510(b)(3) of SMCRA [51] effectively prohibits approval of a permit application unless the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

J. We Should Remove the Provisions That Grant ''Veto Power'' Over SMCRA Permits to the U.S. Fish and Wildlife Service

Multiple commenters alleged that the proposed rule gave the U.S. Fish and Wildlife Service (FWS) ''veto power'' over issuance of SMCRA permits. Specifically, the commenters expressed concern that proposed §§ 779.20(d)(2)(iv) and 780.16(e)(2)(iv), would subordinate state permitting authority to the FWS because those provisions specified that the regulatory authority may not approve a permit application until all issues related to the Endangered Species Act of 1973 [52] are resolved and the regulatory authority has received written documentation from the FWS that all such issues have been resolved.

In the final rule, we replaced proposed §§ 779.20(d)(2)(iv) and 780.16(e)(2)(iv) with a single consolidated provision in § 780.16(b)(2). That provision specifies that the regulatory authority may not approve a permit application before it finds that there is a demonstration of compliance with the Endangered Species Act through one of the mechanisms listed in § 773.15(j) of the final rule.

Nothing in SMCRA supersedes the Endangered Species Act or exempts surface coal mining operations from compliance with applicable provisions of that law and the implementing regulations. Sections 7(a)(1), (2) and (4) of the Endangered Species Act of 1973 provide authority for adoption of the regulations referenced above, which are intended to ensure that surface coal mining and reclamation operations conducted under approved state and federal SMCRA regulatory programs avoid violations of the Endangered Species Act. Section 7(a)(1) of the Endangered Species Act [53] directs federal agencies to use their authorities to further the purposes of the Endangered Species Act. Section 7(a)(2) of the Endangered Species Act [54] requires all federal agencies, in consultation with FWS or the National Marine and Fisheries Service,[55] to ensure that their actions are not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. Section 7(a)(4) of the Endangered Species Act [56] requires federal agencies to confer with the FWS on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed. Other sources of authority for this rule are sections 515(b)(24), 515(b)(10), 515(b)(17), and 201(c)(2) of SMCRA.[57]

Section 4 of the Endangered Species Act directs the Secretary of the Interior, through the FWS, to list threatened or endangered species of fish and wildlife or plants and to designate critical habitat for those species.[58] The Endangered Species Act prohibits the unauthorized ''take'' of listed species,[59] a prohibition that applies to all persons and entities, including coal mine permittees and state regulatory authorities.[60]

The Endangered Species Act provides several routes by which applicants may demonstrate compliance. An applicant may demonstrate that the proposed actions would have no effect on listed species. If the proposed action may affect a listed species or destroy or cause adverse modifications to designated critical habitat, the applicant must consult with the FWS under section 7 [61] of the Endangered Species Act for federal permits or for mining plan approvals involving leased federal coal. Alternatively, the applicant may utilize the procedures of section 10 [62] of the Endangered Species Act for state permits on non-federal lands. Some applicants have obtained incidental take coverage by complying with the terms of a biological opinion that establishes a process for obtaining incidental take coverage that is significantly less time-consuming and less resource-intensive than the individual section 7 or section 10 processes. An applicant seeking to obtain incidental take coverage under a biological opinion, must comply with all the procedures, terms, and conditions of the biological opinion. We do not, however, require an applicant to use a biological opinion to obtain coverage. A biological opinion merely provides one avenue by which an applicant may obtain the coverage it needs against civil or criminal liability [63] for unauthorized take of threatened or endangered species in violation of the Endangered Species Act.

Paragraphs (j)(1) through (4) of final § 773.15 list four pathways by which the applicant and the regulatory authority may document compliance with the Endangered Species Act for surface coal mining and reclamation operations conducted under a SMCRA regulatory program. Paragraph (j)(1) applies when the applicant can document that the proposed surface coal mining and reclamation operations would have no effect on species listed or proposed for listing as threatened or endangered or on designated or proposed critical habitat. The joint U.S. Fish and Wildlife Service and National Marine Fisheries Service ''Final Endangered Species Act Section 7 Consultation Handbook'' (March 1998) states that the term ''effect'' means any impact, regardless of the severity or whether the impact is positive or negative.[64] Further, the implementing Endangered Species Act regulations found at 50 CFR 402.02, define ''effects of the action'' in relevant part as ''the direct and indirect effects of an action on the species or critical

[50] 30 U.S.C. 1265(b)(10).

[51] 30 U.S.C. 1260(b)(3).

[52] 16 U.S.C. 1531 *et seq.*

[53] 16 U.S.C. 1536(a)(1).

[54] 16 U.S.C. 1536(a)(2).

[55] The Secretaries of the Department of the Interior and Commerce (Secretaries) have the responsibility for administering the Endangered Species Act, and have delegated this responsibility to the FWS and National Marine Fisheries Service (NMFS), respectively. 16 U.S.C. 1533. The FWS manages and administers most ESA-listed species except marine species, including some marine mammals, and anadromous fish, which are the responsibility of NMFS. *Id.* We determined that this rulemaking will not impact any of the species under the jurisdiction of the NMFS. However, we included the NMFS in all sections of our rule relating to the Endangered Species Act to insure that, in the unlikely circumstance that a coal mining operation may impact an ESA-listed species or its habitat under the jurisdiction of NMFS, the applicant and regulatory authority coordinate with the appropriate NMFS office.

[56] 16 U.S.C. 1536(a)(4).

[57] 30 U.S.C. 1265(b)(24), 1265(b)(10), 1265(b)(17), and 1211, respectively.

[58] 16 U.S.C. 1533.

[59] 16 U.S.C. 1538(a).

[60] 16 U.S.C. 1532(13).

[61] 16 U.S.C. 1536.

[62] 16 U.S.C. 1539.

[63] 16 U.S.C. 1540.

[64] Final ESA Section 7 Consultation Handbook, March 1998 (pg. xii–xiii).

habitat, together with the effects of other activities that are interrelated or interdependent with that action.''

Paragraphs (j)(2) through (4) apply when the proposed surface coal mining and reclamation operations may have an effect on species listed or proposed for listing as threatened or endangered or on designated or proposed critical habitat for those species. Paragraph (j)(2) allows an applicant to obtain protection against liability for incidental take of a threatened or endangered species by documenting compliance with a valid biological opinion that covers issuance of permits for surface coal mining operations and the conduct of those operations under the applicable regulatory program. Through the process of completing a section 7 consultation on the continuation of existing permits and the approval and conduct of future surface coal mining and reclamation operations under both state and federal regulatory programs adopted pursuant to SMCRA, as modified by this rule, OSMRE and the U.S. Fish and Wildlife Service entered into a Memorandum of Understanding to improve interagency coordination and cooperation to ensure that proposed, threatened, and endangered species and proposed and designated critical habitat are adequately protected for all surface coal mining and reclamation permitting actions, including exploration operations, initial permit issuance, renewals, and significant revisions. The MOU complements the U.S. Fish and Wildlife Service's 2016 programmatic Biological Opinion. Thus, compliance with the terms of that biological opinion and the MOU would satisfy final paragraph (j)(2).

Final paragraph (j)(3) applies where we are the regulatory authority or where a mining plan is required under part 746 of our regulations to mine leased federal coal. This provision specifies that the applicant may provide documentation that interagency consultation under section 7 of the Endangered Species Act has been completed for the proposed operation. The provision may also apply in the case where other federal permits are required for the proposed operation, depending upon the scope of the formal consultation. Paragraph (j)(4) provides an alternative that applies where a state regulatory authority is responsible for permitting actions and the proposed operation does not involve leased federal coal, and the operator does not utilize paragraph (j)(2) or (j)(3), where applicable. It specifies that the applicant may provide documentation that the proposed operation is covered under a permit issued pursuant to section 10 of the Endangered Species Act of 1973.

K. We Should Better Explain How the Definitions of ''Material Damage'' and ''Material Damage to the Hydrologic Balance Outside the Permit Area'' Apply to Underground Mining Operations

Section 701.5 contains definitions of both ''material damage'' and ''material damage to the hydrologic balance outside the permit area.'' Many commenters asked that we make revisions to better distinguish between the definitions and clarify how they apply to underground mining operations. These commenters correctly note that section 510(b)(3) of SMCRA requires mine operators to prevent ''material damage to the hydrologic balance outside the permit area'' but section 516(b)(1) of SMCRA requires prevention of ''material damage'' caused by subsidence from underground operations to the extent technologically and economically feasible.[65] As specified in its definition, the term ''material damage'' applies only to our subsidence control provisions at §§ 784.30 and 817.121, which are applicable to underground mining operations.

As finalized, the definition of the term ''material damage to the hydrologic balance outside the permit area'' applies generally to ''an adverse impact . . . resulting from surface coal mining and reclamation operations, underground mining activities, or subsidence associated with underground mining activities.'' These two definitions are intended to ensure that all provisions of SMCRA are given effect—material damage to the hydrologic balance outside the permit area is prevented while material damage caused by subsidence is minimized to the extent technologically and economically feasible.

Numerous commenters expressed concern about the potential implications of applying the term ''material damage to the hydrologic balance outside the permit area'' to underground mining activities and subsidence. These commenters objected to application of the definition of ''material damage to the hydrologic balance outside the permit area'' to areas overlying the underground workings, which are part of the ''adjacent area'' as defined in § 701.5. They indicated that subsidence can cause a range of different impacts on water quantity and quality, including loss of flow through surface fracturing of the stream bed, loss of recharge due to a drop in the groundwater table below the stream bed elevation, loss of water supply sources like springs and seeps, and increased pollutant loadings; *e.g.,* iron, aluminum, and sulfate, caused by fracturing of the overburden. They noted that these types of hydrologic impacts are often temporary. According to the commenters, if the rule categorically required the prevention of temporary and permanent hydrologic impacts, some types of underground mining, such as longwall mining or other methods using planned subsidence, could not occur because those hydrologic impacts cannot be completely prevented.

We find that many of the concerns raised in the comments are overstated.

As noted previously, section 510(b)(3) of SMCRA[66] requires mine operators to prevent ''material damage to the hydrologic balance outside the permit area'' but section 516(b)(1) of SMCRA[67] requires prevention of ''material damage'' caused by subsidence from underground operations to the extent technologically and economically feasible. In keeping with these different and distinct provisions of SMCRA we clarified that not all of the impacts that the commenters described would necessarily rise to the level of material damage to the hydrologic balance outside the permit area. The regulatory authority is required to make a determination whether a permittee's proposed operation is designed to prevent material damage to the hydrologic balance outside the permit area. If the regulatory authority determines that it does cause material damage to the hydrologic balance outside the permit area, a permit will not be issued. Such a situation would occur whenever an adverse impact from subsidence permanently diminishes flow (*i.e.,* dewaters) of an intermittent or perennial stream to the extent that applicable water quality standards would not be met, or if no water quality standard has been established, the premining use would not be attained. However, a regulatory authority may determine that proposed subsidence-related material damage to surface water or groundwater can and will be repaired so that it still meets applicable water quality standards, or, if no water quality standard exists or is applicable, it still attains its premining use. Diminished flow within a short section of a stream segment over a longwall panel that recovers within a brief period of time or is repairable may have no discernible impact on attainment of water quality

[65] 30 U.S.C. 1266(b)(1).

[66] 30 U.S.C. 1260(b)(3).

[67] 30 U.S.C. 1266(b)(1).

standards or premining uses and therefore may not constitute material damage to the hydrologic balance outside the permit area. The regulatory authority will make a determination on whether subsidence damage to wetlands, streams, or other water bodies that can be corrected, or that will recover naturally, constitutes material damage to the hydrologic balance outside the permit area; if it does not rise to the level of material damage to the hydrologic balance outside the permit area, it may be allowed.

We have clarified and revised language in the final rule to ensure that longwall mining and other underground mining methods that use planned subsidence would not be prohibited, and that temporary impacts are allowed so long as they do not rise to the level of material damage to the hydrologic impacts outside of the permit area. SMCRA is clear that the regulatory authority may not approve any permit application for a surface coal mining operation, including one that involves underground mining activities, unless the application affirmatively demonstrates, consistent with final rule § 773.15, and the regulatory authority finds, in writing, that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.[68] Any material damage to the hydrologic balance outside the permit area is unacceptable, including damage from subsidence, even if it is temporary. As mentioned above, such a situation could occur, for example, when subsidence causes a stream to dewater to the point that the stream can no longer support its water quality standard, or if no water quality standard exists, its premining use. If it is determined that a proposed operation would have this result, the operational plan would need to be modified to prevent subsidence of the stream. That modification could include the use of underground mining technology that prevents subsidence, such as room-and-pillar mining, for that portion of the operation. In order to clarify the obligation of the permittee to prevent material damage to the hydrologic balance outside the permit area, while recognizing that temporary subsidence-related material damage is almost certain to occur at planned subsidence operations, we have added new language to § 817.34(a)(2). This new language makes it clear that while underground operations must prevent material damage to the hydrologic balance outside the permit area, temporary subsidence related material damage that can be repaired or recover naturally may be allowed under § 817.121(c). As noted previously, however, given the different requirements of section 510(b)(3) and section 516(b)(1) of SMCRA,[69] the obligation to prevent material damage to the hydrologic balance outside the permit area, as required at section 510(b)(3) of SMCRA is not subject to the provision at section 516(b)(1) of SMCRA which requires prevention of material damage from subsidence to the extent technologically and economically feasible. An operator will not be granted an exemption from complying with material damage to the hydrologic balance outside the permit area based upon technological and economic feasibility where subsidence damage will result in material damage to the hydrologic balance outside the permit.

We have also addressed comments about the effects of subsidence on land and waters overlying underground mine workings by revising our proposed definition of ''material damage'' and our subsidence control provisions at § 784.30 (previously located at § 784.20), and § 817.121. In addition to addressing concerns raised by commenters about the magnitude and longevity of subsidence-related impacts to streams, these changes will help reduce the confusion identified by one commenter regarding the application of material damage to certain features in the subsidence context.

The definition of ''material damage'' in § 701.5 of the final rule applies only in the context of the subsidence control provisions of §§ 784.30 and 817.121. Among other things, the definition as adopted in this final rule specifies that material damage includes ''[a]ny functional impairment of surface lands, features (including wetlands, streams, and bodies of water), structures, or facilities.'' Under § 784.30(c), mining may still occur when those features exist or may be materially damaged, provided that the applicant submits a subsidence control plan and the regulatory authority approves that plan. Among other requirements, the subsidence control plan must describe the anticipated effects of planned subsidence on wetlands, streams, and water bodies and the measures to be taken to mitigate or remedy any subsidence-related material damage to those features.[70] In addition, pursuant to § 817.121(c) and (g), the underground mine operator must repair damage to surface land and waters, including wetlands, streams, and water bodies, to a condition capable of maintaining the value and reasonably foreseeable uses that the land was capable of supporting before subsidence damage occurred unless the regulatory authority determines that restoration is not technologically or economically feasible. If those repairs will not be implemented within 90 days, the permittee must bond the area as discussed in the preamble to final § 817.121(g)(3)(i).

These revisions are consistent with our longstanding position about subsidence-related material damage. For instance, in our final rule addressing the subsidence provisions of the Energy Policy Act of 1992,[71] we stated:

> The term material damage, in the context of §§ 784.20 and 817.121 of this chapter, means any functional impairment of surface lands, features, structures or facilities. The material damage threshold includes any physical change that has a significant adverse impact on the affected land's capability to support any current or reasonably foreseeable uses, or that causes significant loss in production or income, or any significant change in the condition, appearance or utility of any structure or facility from its pre-subsidence condition. It would also include any situation in which an imminent danger to a person would be created.[72]

Nothing in this final rule alters the meaning of the term ''functional impairment'' in the context of subsidence-related material damage. In addition, the preamble to the 1995 rules states that ''[t]he definition of 'material damage' covers damage to the surface and to surface features, such as wetlands, streams, and bodies of water, and to structures or facilities.'' [73] Consistent with that preamble description, the addition of the phrase ''wetlands, streams, and water bodies'' to our material damage definition should help clarify the applicability of the definition to hydrologic features in the subsidence context and ensure those damages are corrected in accordance with § 817.121.

The final rule includes language that requires the regulatory authority, when reviewing the determination of the probable hydrologic consequences of the operation in accordance with § 784.20 and the hydrologic reclamation plan in accordance with § 784.22, to (i) make a reasonable effort to assess the potential effects of subsidence from the proposed underground mining activities on streams and (ii) include remedial measures for any predicted diminution of streamflow as a result of subsidence. In summary, the final rule allows

[68] 30 U.S.C. 1260(b)(3).

[69] 30 U.S.C. 1260(b)(3) and 1266(b)(1).

[70] 784.30(c)(2)(vi) and (c)(2)(viii).

[71] Public Law 102–486 (Oct. 24, 1992).

[72] 60 FR 16722 (Mar. 31, 1995).

[73] *Id.*

material damage to wetlands, streams, and water bodies to occur so long as the permittee follows the subsidence control provisions in §§ 784.30 (subsidence control plan), 817.40 (water supply replacement), and 817.121 (subsidence prevention and control and correction of damage resulting from subsidence). Following these regulations means that water supplies will be replaced and that, to the extent technologically and economically feasible, wetlands, streams, and water bodies will be restored. In addition, we added § 817.121(c)(2), which requires that the permittee implement fish and wildlife enhancement measures, as approved by the regulatory authority in a permit revision, to offset subsidence-related material damage to wetlands or a perennial or intermittent stream when correction of that damage is technologically and economically infeasible. As long as these regulations are followed, subsidence damage from an underground mining operation that does not rise to the level of material damage to the hydrologic balance outside the permit area is allowed.

L. We Should Specify the Location Where an Operation Must Prevent Material Damage to the Hydrologic Balance Outside the Permit Area

A commenter suggested that we provide guidance on the location of the point of compliance for determining material damage to the hydrologic balance. Section 510(b)(3) of SMCRA [74] prohibits the approval of a permit application unless the application demonstrates and the regulatory authority finds in writing that the proposed operation has been designed to prevent material damage to hydrologic balance outside the permit area. Our existing definition of ''permit area'' in § 701.5 of our regulations provides that the permit area means ''the area of land, indicated on the approved map submitted by the operator with his or her application, required to be covered by the operator's performance bond under subchapter J of this chapter and which shall include the area of land upon which the operator proposes to conduct surface coal mining and reclamation operations under the permit, including all disturbed areas; provided that areas adequately bonded under another valid permit may be excluded from the permit area.'' [75] Our existing regulations in § 701.5 define ''disturbed area'' to mean ''an area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations.'' [76] When the definition of ''material damage to the hydrologic balance outside the permit area'' that we are finalizing today is read in conjunction with the existing definitions of ''permit area'' and ''disturbed area,'' it is clear that the point of compliance for preventing material damage to the hydrologic balance outside the permit area is any point outside those areas of the permit boundary as indicated on the approved permit application map. The area inside the permit boundary where overburden is removed or where other mining activities occur that are required to be bonded for reclamation comprise the limits of the disturbed area. Any discharge, including those inside the permit area, must be in compliance with applicable Clean Water Act provisions as provided in § 816.42 of our final regulations; in addition, such discharges must not be comprised of toxic mine drainage and cannot result in material damage to the hydrologic balance outside the permit area.

The areas outside the permit area that may be impacted by mining activities are within the ''adjacent area'' as that term is defined in § 701.5. Generally, paragraph (1) of the definition of ''adjacent area'' includes the area outside the proposed or actual permit area within which there is a reasonable probability of adverse impacts from surface coal mining operations or underground mining activities. Moreover, the area comprised within this term will vary with the context in which a regulation uses this term. For example, the nature of the resource or resources addressed by a regulation in which the term ''adjacent area'' appears will determine the size and other dimensions of the adjacent area for purposes of that regulation.

For underground mines, paragraph (2) of the definition specifies that the adjacent area includes, ''at a minimum, the area overlying the underground workings plus the area within a reasonable angle of dewatering from the perimeter of the underground workings.'' Thus, surface water and groundwater outside the permit area, but within the adjacent area, must be protected from material damage to the hydrologic balance outside the permit area. We discuss other issues pertaining to the term ''material damage to the hydrologic balance outside the permit area'' in the preamble to the definition of that term.

M. What is the relationship among material damage thresholds, evaluation thresholds, and water monitoring requirements?

Material Damage Thresholds

Section 510(b)(3) of SMCRA [77] provides that the regulatory authority may not approve a permit application unless the application affirmatively demonstrates and the regulatory authority finds in writing that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The regulatory authority must base this finding on an ''assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance.'' Our rules refer to that assessment as the cumulative hydrologic impact assessment (CHIA). *See, e.g.,* 30 CFR 780.21. Our rules also designate the area for which the CHIA is prepared as the ''cumulative impact area,'' which section 701.5 of this final rule defines generally as any area within which impacts resulting from a surface or underground coal mining operation may interact with the impacts of all existing and anticipated surface and underground coal mining on surface-water and groundwater systems, including the impacts that existing and anticipated mining will have during mining and reclamation until final bond release.

The regulatory authority prepares the CHIA after technical review of the permit application is complete, using both the information in the application and other available data about the cumulative impact area. The application components most critical to preparation of the CHIA are the baseline data on surface water and groundwater; the ''determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site,'' required by section 507(b)(11) of SMCRA; [78] which we generally refer to as the PHC determination, and the hydrologic reclamation plan required by section 508(a)(13) of SMCRA.[79] Section 780.20 of this final rule includes requirements for the PHC determination, while § 780.22 contains requirements for the hydrologic reclamation plan.

Section 780.21(b)(6) of this final rule provides that the regulatory authority must identify site-specific numeric or narrative material damage thresholds for each permit as part of the CHIA and include those thresholds as a condition

[74] 30 U.S.C. 1260(b)(3).

[75] 30 CFR 701.5.

[76] *Id.*

[77] 30 U.S.C. 1260(b)(3).

[78] 30 U.S.C. 1257(b)(11).

[79] 30 U.S.C. 1258(a)(13).

of the permit. These material damage thresholds will become the basis for the regulatory authority to objectively determine if a mining operation has prevented material damage to the hydrologic balance outside the permit area.

In developing thresholds to define when material damage to the hydrologic balance outside the permit area would occur in connection with a particular permit, final § 780.21(b)(6)(i) specifies that the regulatory authority will, in consultation with the Clean Water Act authority, as appropriate, undertake a comprehensive evaluation that considers the baseline data collected under § 780.19 of the final rule, the probable hydrologic consequences determination prepared under § 780.20 of the final rule, applicable water quality standards adopted under the authority of section 303(c) of the Clean Water Act,[80] applicable state or tribal standards for surface water or groundwater, ambient water quality criteria developed under section 304(a) of the Clean Water Act,[81] the biological requirements of any species listed as threatened or endangered under the Endangered Species Act of 1973,[82] and other pertinent information and considerations to identify the parameters for which thresholds are necessary and what numeric or narrative thresholds to use. Final § 780.21(b)(6)(ii) specifies that the regulatory authority must, after consulting with the Clean Water Act authority, use numeric material damage thresholds when possible for contaminants that have water quality criteria set by the Clean Water Act.[83] For contaminants, that do not have water quality criteria set, the material damage thresholds can be either numeric or narrative.

Final § 780.21(b)(6)(iii) requires that the regulatory authority identify the portion of the cumulative impact area to which each material damage threshold applies. This provision recognizes that the parameters selected and material damage threshold levels may vary within the cumulative impact area when appropriate, based upon differences in watershed characteristics and variations in the geology, hydrology, and biology of the cumulative impact area. For instance, if the operation would create point-source or nonpoint-source discharges to more than one receiving stream, material damage thresholds for surface water may vary from one watershed within the cumulative impact area to another, taking into consideration differences in watershed characteristics. Similarly, material damage thresholds for groundwater may vary from one part of the cumulative impact area to another to reflect variations in the geology or subsurface hydrology of the cumulative impact area. Regulatory authorities should closely coordinate with the relevant state agencies in identifying appropriate material damage thresholds for groundwater.

Material damage thresholds apply at all points outside the permit area. Final § 780.21(b)(6)(iv), therefore, provides that in the CHIA, the regulatory authority, must identify the points within the cumulative impact area at which the permittee will monitor the impacts of the operation on surface water and groundwater outside the permit area and explain how those locations will facilitate timely detection of the impacts of the operation on surface water and groundwater outside the permit area.

Evaluation Thresholds

In the preamble to the proposed rule,[84] we invited comment on whether the final rule should require that the regulatory authority establish corrective action thresholds. We explained that corrective action thresholds would consist of values for water quality or quantity that, while not constituting material damage to the hydrologic balance outside the permit area, provide reason for concern that such damage may occur in the future if no corrective action is taken. We received comments both supporting and opposing the development of corrective action thresholds. After considering the comments received, we decided to include a requirement in this final rule for thresholds of this nature, for the reasons discussed in the preamble to § 780.21(b)(7).

However, the final rule uses the term ''evaluation thresholds'' rather than ''corrective action thresholds'' because exceedance of this type of threshold does not necessarily require initiation of corrective action. Instead, an evaluation threshold identifies the point at which the regulatory authority must investigate the cause of an adverse trend in water quality or quantity outside the permit area. If the investigation finds that the mining operation is responsible for the adverse trend and that the adverse trend is likely to continue in the absence of corrective action, § 780.21(b)(7)(ii) of the final rule requires that the regulatory authority issue a permit revision order under § 774.10. That order must require that the permittee reassess the adequacy of the PHC determination prepared under § 780.20 and the hydrologic reclamation plan approved under § 780.20 and develop appropriate measures to minimize the possibility that the operation could cause material damage to the hydrologic balance outside the permit area in the future. The purpose of setting evaluation thresholds and establishing monitoring points is to detect impacts and provide an early warning system to alert both the permittee and the regulatory authority of adverse trends that, left uncorrected, would result in material damage to the hydrologic balance outside the permit area if the trajectory of the trend remains unaltered. Early detection of adverse trends and timely implementation of corrective measures benefits both the environment and the permittee by preventing the development of water quality or quantity problems that may be difficult, expensive, or impossible to correct. Use of evaluation thresholds also may assist in avoiding SMCRA permit violations.

Section 780.21(b)(7) of the final rule requires that the regulatory authority identify evaluation thresholds for critical water quality and quantity parameters. These critical parameters are characterized as those that could rise to the level of material damage. We expect that the regulatory authority will use best professional judgment in determining which parameters are critical. The final rule does not dictate how the regulatory authority must identify appropriate evaluation thresholds for critical parameters, which means that the regulatory authority has considerable flexibility. For example, the regulatory authority may decide to apply an across-the-board percentage reduction from the corresponding material damage thresholds or it may decide to determine evaluation thresholds on a case-by-case basis.

An exceedance of an evaluation threshold is not itself a violation under SMCRA or the SMCRA permit because evaluation thresholds are not incorporated as a condition of the permit and do not constitute enforceable standards. Moreover, exceedances of evaluation thresholds may not necessarily be the result of the mining operation. For that reason, an exceedance of an evaluation threshold only triggers a requirement under final § 780.21(b)(7) that the regulatory authority determine the cause of the exceedance in consultation with the Clean Water Act authority, as appropriate. If the mining operation is

[80] 33 U.S.C. 1313(c).

[81] 33 U.S.C. 1314(a).

[82] 16 U.S.C. 1531 *et seq.*

[83] 33 U.S.C. 1251 *et seq.*

[84] 80 FR 44436, 44502 (Jul. 27, 2015).

responsible for the exceedance and if the adverse trend is likely to continue in the absence of corrective action, final § 780.21(b)(7) provides that the regulatory authority must issue a permit revision order under § 774.10. The order must require that the permittee reassess the adequacy of the PHC determination prepared under § 780.20 and the hydrologic reclamation plan approved under § 780.22 and develop measures to prevent material damage to the hydrologic balance outside the permit area. Section 780.21(c)(1) of the final rule provides that, upon receipt of an application for a significant permit revision, the regulatory authority must determine whether there is a need for a new or updated CHIA.

We encourage the permittee to identify any exceedance of an evaluation threshold as part of its review of water monitoring records and notify the regulatory authority, which will then determine how to proceed with determining the cause of the exceedance. Additionally, the SMCRA inspector will, as part of each complete inspection conducted on a quarterly basis, review water monitoring records to determine if an evaluation threshold has been exceeded. If the inspector identifies an exceedance, the regulatory authority, in consultation with the Clean Water Act authority, as appropriate, will then determine the cause of the exceedance and, if necessary, issue an order requiring that the permittee submit a permit revision application, as discussed above. In addition, § 780.21(c)(2) of the final rule provides that the regulatory authority must reevaluate the CHIA at intervals not to exceed three years to determine whether the CHIA remains accurate and whether the material damage and evaluation thresholds in the CHIA and the permit are adequate to ensure that material damage to the hydrologic balance outside the permit area will not occur. This review must consider all biological and water monitoring data from all surface coal mining and reclamation operations within the cumulative impact area.

We are the regulatory authority in Tennessee. We have used evaluation thresholds successfully in our Knoxville Field Office (KFO) for many years, resulting in cost-effective and practical improvements to water quality. For example, KFO routinely uses an evaluation threshold of 1.0 mg/l for iron in a receiving stream. Water monitoring data for a site subsequently documented an exceedance of that threshold after the surface mining operation disturbed flooded abandoned underground mine workings. The permittee had attempted to divert the flow from those workings to a pond for treatment. However, the diversion was not fully successful, and some of the water entered the receiving stream without treatment. KFO required the permittee to construct a three-cell wetland treatment system and divert all water from the underground workings to that system, which is successfully treating the water. This corrective action prevented material damage to the hydrologic balance from occurring. KFO conducted the investigation jointly with the Tennessee Clean Water Act permitting authority.

Monitoring

Final rule § 780.23(a) and (b) require that each permit application include plans to monitor both surface water and groundwater. Those paragraphs also provide that the plans must be adequate to evaluate the impacts of the mining operation on surface water and groundwater in the proposed permit and adjacent areas and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area. Among other things, the final rule requires that the plans include monitoring points at the locations specified in the CHIA prepared by the regulatory authority under § 780.21(b)(6)(iv) of the final rule.

Paragraphs (a)(1)(iii) and (b)(1)(iv) of final § 780.23 require that the permittee establish a sufficient number of appropriate monitoring locations to evaluate the accuracy of the findings in the PHC determination, to identify adverse trends, and to determine, in a timely fashion, whether corrective action is needed to prevent material damage to the hydrologic balance outside the permit area. Under final § 780.23(b)(1)(iv)(B), the surface water monitoring plan must include upgradient and downgradient monitoring locations in each perennial and intermittent stream within the proposed permit and adjacent areas, with the exception that no upgradient monitoring location is needed for a stream when the operation will mine through the headwaters of that stream. Similarly, under final § 780.23(a)(1)(iii)(A), the groundwater monitoring plan must include monitoring wells or equivalent monitoring points located upgradient and downgradient of the proposed operation. That requirement applies to each aquifer above or immediately below the lowest coal seam to be mined.

Paragraphs (a)(2)(i) and (b)(2)(i) of final § 780.23 specify that, at a minimum, the surface water and groundwater monitoring plans must provide for the monitoring of those parameters for which evaluation thresholds exist under § 780.21(b)(7). In addition, paragraphs (a)(2)(ii) and (b)(2)(ii) of final § 780.23 require analysis of each sample for the baseline parameters listed in § 780.19(a)(2) and for all parameters for which evaluation thresholds exist under § 780.21(b)(7).

Final § 816.35(a)(2) requires that the permittee conduct groundwater monitoring through mining, reclamation, and the applicable revegetation responsibility period under § 816.115 of the final rule for the monitored area. The permittee must continue to monitor groundwater beyond that date for any additional time needed for monitoring results to demonstrate that the criteria of § 816.35(d)(1) and (2) have been met, as determined by the regulatory authority. Paragraphs (d)(1) and (2) of § 816.35 establish the conditions under which the regulatory authority may approve modification of the groundwater monitoring requirements, including the parameters monitored and the sampling frequency. For example, the regulatory authority may reduce the frequency of groundwater monitoring from quarterly to annual if it determines that the reduced frequency will be adequate to detect adverse trends in a timely manner, based on the rate of groundwater movement.

Specifically, paragraphs (d)(1) and (2) of final § 816.35 provide that the permittee may request, and the regulatory authority may approve, modification of the groundwater monitoring plan based on a demonstration that, with respect to the parameter or parameters affected by the proposed modification, future adverse changes in groundwater quantity or quality are unlikely to occur and the operation has—

- Minimized disturbance to the hydrologic balance in the permit and adjacent areas;
- Prevented material damage to the hydrologic balance outside the permit area;
- Preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas for which baseline biological condition data was collected under § 780.19(c)(6)(vi) when groundwater from the permit area provides all or part of the base flow of those streams;
- Maintained or restored the availability and quality of groundwater to the extent necessary to support the approved postmining land uses within the permit area; and

• Protected or replaced the water rights of other users.

Nothing in § 816.35(d)(1) and (2) authorize complete discontinuance of monitoring at any monitoring location (except as approved under § 784.40 for certain underground mines) or discontinuance of monitoring of all parameters for the entire operation before expiration of the applicable revegetation responsibility period under § 816.115 for the monitored area. Given the typically slow rate of groundwater movement and the length of time needed to reestablish the water table in the backfilled area, discontinuance of monitoring before expiration of the applicable revegetation responsibility period under § 816.115 likely would result in discontinuance of groundwater monitoring before groundwater within the reclaimed permit area has reached equilibrium with groundwater in the adjacent area. That result would negate the purposes of the monitoring program, one of which is to evaluate whether the operation has caused material damage to the hydrologic balance outside the permit area.

Final § 816.36 contains identical requirements for surface water monitoring, with the exception that paragraph (a)(2) requires that surface water monitoring continue through mining and during reclamation until the regulatory authority releases the entire bond amount for the monitored area under §§ 800.40 through 800.43. This difference reflects the fact that surface water monitoring, unlike groundwater monitoring, does not involve wells that the permittee must seal or transfer under § 816.13 of the final rule before applying for final bond release. In addition, final § 816.36(d)(2) contains one additional requirement for modification of the surface water monitoring plan for a permit: The permittee must demonstrate that the operation has not precluded attainment of any designated use of surface water under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

Paragraph (c) of final section 780.23 further requires that the permit application include a plan for monitoring the biological condition of each perennial and intermittent stream within the proposed permit and adjacent areas for which baseline biological condition data was collected under § 780.19(c)(6)(vi). The plan must be adequate to evaluate the impacts of the mining operation on the biological condition of those streams and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area.

N. What effect will the final rule have on proposed operations in impaired watersheds?

Each Clean Water Act authority is required to conduct an assessment of each stream within state borders to determine if the water is meeting all state and federal water quality criteria. If a stream is not meeting all state and federal water quality criteria, it is considered to be impaired. Under section 303(d) of the Clean Water Act, each state is required to submit a list of these impaired waters to the Environmental Protection Agency ''from time to time'' (but at least every three years). Section 303(d) of the Clean Water Act also requires each state to prioritize the waters on the impaired waters list and develop a plan to rehabilitate the stream so that it is able to meet all state and federal water quality criteria. This plan involves estimating the total maximum daily load (TMDL) of various water quality parameters from all known and reasonably foreseeable sources (point and non-point sources) that an impaired stream is expected to contain while moving along its flow path. The plan's objective is to decrease the pollutant load and enable the stream to meet all state and federal water quality standards. These TMDLs serve as a blueprint to ensure that an impaired stream meets all state and federal water quality criteria and achieves its highest designated use.

TMDLs can be calculated to implement a narrative stream condition or to focus on a specific parameter.[85] Once the TMDL is calculated, each new individual point-source discharge is assigned a waste load allocation based on its estimated discharge flow rate and parameter concentration. The Clean Water Act authority may adjust effluent limitations in existing NPDES permits to reflect the waste load allocation for each parameter under consideration in the TMDL. When the waste load allocations are implemented as concentration-based limits in NPDES permits, the limits are derived from the calculated waste load allocation for the outfall and an assumed flow rate. This concentration limit is expressed in concentration units applicable to each specific parameter and is normally given as a mass/volume (*e.g.,* mg/L). Waste load allocations are often implemented in NPDES permits as mass-based limits and expressed as pounds per day.

Both the applicant and the regulatory authority need to carefully consider the impact of a proposed operation on the impaired hydrologic conditions in a watershed with a 303(d)-listed water. Under section 510(b)(3) of SMCRA and § 773.15(e) of this final rule, the SMCRA regulatory authority may not approve a permit application unless the applicant demonstrates, and the regulatory authority finds, that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Before making this finding, the SMCRA regulatory authority must prepare a cumulative hydrologic impact analysis (CHIA) that identifies and analyzes the cumulative impacts of all anticipated mining, including the proposed operation, on the hydrologic balance in the cumulative impact area, including impacts on the water quality and biology of the receiving stream. *See* final paragraphs (a) and (b) of § 780.21. Both the definition of ''material damage to the hydrologic balance outside the permit area'' in § 701.5 of this final rule and the CHIA regulations that we are adopting in § 780.21(b)(6) of this final rule provide that the regulatory authority must consult with the Clean Water Act authority, as appropriate, in determining whether the proposed operation would cause material damage to the hydrologic balance outside the permit area.

O. Should ephemeral streams receive the same protections as intermittent and perennial streams?

Scientific studies completed since the enactment of SMCRA and the adoption of our existing rules have documented the importance of headwater streams in maintaining the ecological health and function of streams down gradient of headwater streams. Headwater streams include all first-order and second-order streams without regard to whether those streams are perennial, intermittent, or ephemeral. In 2015, U.S. Environmental Protection Agency published a report summarizing the findings of peer-reviewed studies of headwater streams and wetlands and the impact they have on the physical, chemical, and biological integrity of downstream

[85] For example, if the Clean Water Act authority determined that a stream was impaired because of excess sediment, it would calculate the sediment load the stream could assimilate from all point and non-point sources while maintaining its designated use. That TMDL for sediment would be expressed numerically (*e.g.,* 1000 pounds of suspended sediment per day). The Clean Water Act authority would then allocate a portion of that TMDL amount among all known and reasonably foreseeable NPDES permits and non-point sources that do not have an NPDES permit.

waters.[86] The studies and the report generally do not differentiate among perennial, intermittent, and ephemeral streams, but the report emphasizes that ephemeral streams are an important component of headwater streams and that they have an effect on the form and function of downstream channels and aquatic life. The report states that the evidence unequivocally demonstrates that the stream channels, riparian wetlands, floodplain wetlands, and open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity.[87] According to the report, the body of literature documenting connectivity and downstream effects is most abundant for perennial and intermittent streams and for riparian and floodplain wetlands.[88] The report further states that, although less abundant, the evidence for connectivity and downstream effects of ephemeral streams is strong and compelling, particularly in context with the large body of evidence supporting the physical connectivity and cumulative effects of channelized flows that form and maintain stream networks.[89]

The report identifies five principal contributions of ephemeral streams: (1) Providing streamflow to larger streams; (2) conveying water into local storage compartments such as ponds, shallow aquifers, or streambanks that are important sources of water for maintenance of the baseflow in larger streams; (3) transporting sediment, woody debris, and nutrients; (4) providing the biological connectivity that is necessary either to support the life cycle of some invertebrates or to facilitate the transport of terrestrial invertebrates that serve as food resources in downstream communities; and (5) influencing fundamental biogeochemical processes such as the assimilation and transformation of nitrogen that may otherwise have detrimental impacts on downstream communities. In addition, headwater streams, including ephemeral and intermittent streams, shape downstream channels by accumulating and gradually or episodically releasing stored materials such as sediment and large woody debris.[90] These materials help structure stream and river channels by slowing the flow of water through channels and providing substrate and habitat for aquatic organisms.[91]

Our previous rules included no protections for ephemeral streams. Consistent with the findings of the U.S. Environmental Protection Agency report and other studies, our proposed rule included some protections for ephemeral streams, tailored to their hydrologic and ecological functions. We also invited comment on whether we should extend equal protection to all streams, without regard to whether the stream is perennial, intermittent, or ephemeral. *See* 80 FR 44451 (Jul. 27, 2015).

We received numerous comments from environmental groups advocating that ephemeral streams be protected in the same manner as perennial and intermittent streams. One commenter stated: ''OSMRE's analysis should start from a presumptive rule of equal protection for all streams, and any assertion of countervailing business impacts should be considered only if it is backed by evidence included in the administrative record.'' Many environmental commenters asserted that a strong stream protection rule must include protection of ephemeral streams because they are an essential element of the hydrologic balance.

In contrast, industry commenters opposed affording ephemeral streams the same protections as intermittent and perennial streams. This paragraph summarizes some of those arguments:

- The U.S. Army Corps of Engineers, an agency with considerable expertise on the subject of streams, rarely requires returning all ephemeral features to the postmining landscape.
- Some ephemeral streams are the result of anthropogenic activities and may be undesirable.
- Many ephemeral streams will find their own way back onto the landscape, depending on many factors including the final configuration of the reclamation. Restoring these lesser drainages is a waste of effort when nature will do it better.
- Disallowing the placement of sediment ponds in ephemeral drainages would result in logistically difficult or impossible situations or at least a greatly increased disturbance from additional ditching and a larger number of ponds.
- It makes no sense and is counterproductive to reconstruct erosional features when reclamation provides the opportunity to reshape the landscape to reduce erosion.
- Ephemeral streams have minimal if any biological components.
- In Wyoming's Powder River Basin, extending protection to ephemeral streams could result in 2,800 tons of coal per foot of channel being left unmined. This equates to 15 million tons of coal sterilized for every mile of channel that could not be mined. Surface coal mines in Wyoming can have upwards of 100 miles of ephemeral channels within the permit boundary. If all of the channels were to become unmineable, approximately 1.5 billion tons of coal for each mine would be sterilized.
- Typical mining techniques in the Powder River Basin utilize draglines and truck shovels. Efficient dragline operations require long linear pits. If ephemeral streams become unmineable, these types of operations will no longer be economic or efficient because of the number of ephemeral channels that bisect these pits.
- The Bureau of Land Management requires that a bonus bid be paid at the time a federal coal lease is awarded. To date, coal underlying ephemeral stream channels has been considered recoverable, which means that companies have paid bonus bids ranging from $0.85 to $1.35 per ton for coal underlying ephemeral streams in leases awarded during the past 5 years. If ephemeral channels are considered unmineable, this will create a significant economic hardship for the mining companies. Federal and state governments also will experience a loss of revenue.

Many commenters thought that the term ''ephemeral stream'' included all conveyances that were not either perennial or intermittent streams. However, the definition of ''ephemeral stream'' that we are adopting in § 701.5 as part of this final rule addresses this issue by providing that ephemeral streams include only those conveyances with channels that display both a bed-and-bank configuration and an ordinary high water mark.

After evaluating the comments, reviewing the scientific literature, and weighing potential costs and benefits, we decided not to extend the same protections to ephemeral streams that we do to intermittent and perennial streams.

However, as part of this final rule, we adopted most of the added protections for ephemeral streams that we included in our proposed rule. The final rule will protect the important role that ephemeral streams perform within watersheds including providing

[86] U.S. Environmental Protection Agency. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report).* U.S. Environmental Protection Agency, Washington, DC. EPA/600/R–14/47F, 2015. Available at *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=62302143&CFTOKEN=44785139* (last accessed October 26, 2016).

[87] *Id.* at ES–7.

[88] *Id.*

[89] *Id.*

[90] *Id.* at ES–8.

[91] *Id.*

protection and maintenance of downstream uses, ecological services, and the hydrologic balance of larger streams because of the impact ephemeral streams have on the form and function of downstream channels and aquatic life. Adopting these protections should ensure that ephemeral streams on reclaimed mine sites continue to provide the ecological services identified in the U.S. Environmental Protection Agency report while not unduly restricting mining through those streams. This approach is consistent with the purposes of SMCRA, as enumerated in section 102 of the Act.[92] In particular, it will protect society and the environment from the adverse effects of surface coal mining operations, as provided in paragraph (a); assure that surface coal mining operations are conducted so as to protect the environment, as provided in paragraph (d); and strike a balance between environmental protection and the Nation's energy needs, as provided in paragraph (f). Although only certain requirements apply to ephemeral streams, as discussed in final rule § 780.27, these requirements minimize impacts to ephemeral streams.

Proposed §§ 780.19(c)(6) and 784.19(c)(6) required that the permit applicant identify and map all ephemeral streams within the proposed permit and adjacent areas. Those proposed rules also required that the applicant describe the physical and hydrologic characteristics of those streams in detail, as well as any associated vegetation in the riparian zone if one exists. In addition, they required that the applicant assess the biological condition of a representative sample of those ephemeral streams. The final rule applies these proposed requirements only to ephemeral streams within the proposed permit area because those are the only ephemeral streams that the proposed operation would disturb and for which the operation would incur reclamation requirements. Requiring this information for ephemeral streams within the adjacent area would be costly and time-consuming and would not assist the regulatory authority in reviewing the permit application because no performance standards apply to ephemeral streams in the adjacent area. In addition, the final rule does not include the proposed requirement for baseline information on the biological condition of ephemeral streams because no scientifically defensible protocol currently exists for use in ephemeral streams for that purpose.

Proposed §§ 780.20, 780.21, 784.20, and 784.21 required that the determination of the probable hydrologic consequences of mining (PHC determination) and the cumulative hydrologic impact assessment (CHIA) include consideration of impacts on the biological condition of ephemeral streams. Those sections of the final rule do not include this proposed requirement because established and scientifically defensible protocols do not currently exist for use in determining the biological condition of ephemeral streams.

Proposed §§ 780.19(c)(3), 780.20(a)(5)(iv), 784.19(c)(3), and 784.20(a)(5)(iv) included peak flow baseline data collection and analysis requirements for ephemeral streams within the proposed permit and adjacent areas. The final rule does not include these requirements because this information is unnecessary for the analysis of the proposed operation's impacts on flooding that the PHC determination must contain. The baseline precipitation data required by final §§ 780.19(c)(5) and 784.19(c)(5) in combination with the description of the general stream-channel configuration of ephemeral streams within the proposed permit area required by final §§ 780.19(c)(6) and 784.19(c)(6) will provide all necessary information needed for that analysis, given that ephemeral streams flow only in direct response to precipitation events.

Proposed §§ 780.12(d)(1) and 784.12(d)(1) required that the backfilling and grading plan in the reclamation plan include contour maps, cross-sections, or models that show in detail the anticipated final surface configuration, including drainage patterns, of the proposed permit area. The final rule adopts those provisions as proposed. Final §§ 780.12(b)(3) and 784.12(b)(3) also provide that the reclamation timetable must include establishment of the surface drainage pattern and stream-channel configuration approved in the permit, including construction of appropriately-designed perennial, intermittent, and ephemeral stream channels to replace those removed by mining. Proposed §§ 780.28(c)(1) and 784.28(c)(1) required that the postmining drainage pattern, including ephemeral streams, be similar to the premining drainage pattern, with limited exceptions. Sections 780.27(b) and 784.27(b) of the final rule adopt these provisions in revised form for ephemeral streams. They allow variances from the premining drainage pattern when the regulatory authority finds that a different pattern or configuration is necessary or appropriate to ensure stability; prevent or minimize downcutting or widening of reconstructed stream channels and control meander migration; promote enhancement of fish and wildlife habitat; accommodate any anticipated temporary or permanent increase in surface runoff as a result of mining and reclamation; accommodate the construction of excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures; replace a stream that was channelized or otherwise severely altered prior to submittal of the permit application with a more natural, relatively stable, and ecologically sound drainage pattern or stream-channel configuration; or reclaim a previously mined area.

Proposed §§ 780.28(b)(3) and 784.28(b)(3) provided that, after mining through an ephemeral stream, the permittee must plant native species within a 100-foot corridor on both sides of the reconstructed stream. Sections 780.27(c), 784.27(c), 816.57(d), and 817.57(d) of the final rule adopt this requirement with some revisions. The streamside vegetative corridor must be consistent with natural vegetation patterns. The streamside vegetative corridor requirement would not apply to prime farmland or when establishment of a corridor comprised of native species would be incompatible with an approved postmining land use that is implemented before final bond release. Establishment of a streamside vegetative corridor is critical to ensuring restoration of the nutrient and organic matter transport functions of ephemeral streams.

P. The Rule Should Not Require the Use of Multimetric Bioassessment Protocols To Establish Baseline Ecological Stream Function and Stream Restoration Criteria

Proposed §§ 780.19(e)(2) and 784.19(e)(2) would have required the use of multimetric bioassessment protocols to assess the baseline ecological function of perennial, intermittent, and ephemeral streams and to establish stream restoration criteria (*i.e.,* the point at which ecological function will be considered restored) for perennial and intermittent streams. Proposed §§ 780.23(c) and 784.23(c) also would have required use of these protocols to monitor the biological condition of intermittent and perennial streams during mining and reclamation.

We received comments both in support of and in opposition to the use of macroinvertebrate sampling and associated indexes for those purposes.

[92] 30 U.S.C.1202.

Some comments were general, while others singled out the use of an index of biological integrity (IBI) for baseline stream assessment and monitoring during mining and reclamation when discussing support or opposition to this requirement. The proposed rule required IBIs to include macroinvertebrate sampling. The IBIs would be used to develop a value that would provide an objective measure to describe various ecological characteristics found during the field surveys. This value would then be compared to an index that is established for designated uses under the Clean Water Act to assess the quality of the stream before, during, and after mining. This IBI system is a well-tested and robust tool to identify impacts on the health of perennial streams. IBIs and other scientifically defensible protocols are becoming more widely established for intermittent streams, but are not yet widely used across the nation. IBIs and other scientifically defensible protocols for assessing ephemeral streams have not been widely used to date, and when they have been, they have been most often used to characterize biological differences among ephemeral, intermittent, and perennial streams or biological changes with varying hydrological conditions. The proposed rule would have required the establishment of separate IBI protocols for all three types of streams: Perennial, intermittent, and ephemeral.

As discussed in Part IV, section O of this preamble, several commenters criticized our proposal to treat ephemeral streams in the same manner as intermittent and perennial streams. These commenters strongly encouraged us to remove requirements to assess the baseline condition of ephemeral streams using bioassessment protocols that sample macroinvertebrate populations within ephemeral streams. They claimed it would yield no valid data for assessing the baseline condition of SMCRA-related activities and would be unduly costly. We agree. The final rule does not include assessment of biological condition requirements related to ephemeral streams.

In addition, commenters suggested that there are other scientifically valid protocols that should be included as options for baseline stream assessment and monitoring. According to these commenters, these other protocols are also robust, scientifically defensible methods developed and applied by states, territories, and tribes. They include predictive and discriminant modeling approaches. We agree and have added these as acceptable methods in the final rule.

In light of the comments received, we identified and analyzed other options that commenters suggested for assessing the baseline condition of and monitoring streams: The Rapid Bioassessment Protocol III (RBPIII), which is set out in the 1989 EPA Publication, ''Rapid Bioassessment Protocols for Use in Streams and Rivers;'' the Before-After-Control-Impact design (BACI); and hydrogeomorphic sampling protocols. We also considered using IBIs that were designed for perennial streams to assess the baseline condition of and monitor intermittent and ephemeral streams (as is occasionally done by Clean Water Act authorities).

Our analysis identified some positive attributes of the RBPIII protocol. It would provide a more thorough baseline assessment of the ecological function and biological condition of the premining site than some other methods. It would demonstrate with greater certainty whether or not the permittee had minimized the adverse effects of coal mining on upstream and downstream waters. It is based on sound scientific principles (quantitative or semi-quantitative designs that can be analyzed statistically). Finally the RBPIII is relatively easy to use and can be rapidly deployed. However, the RBPIII also has significant drawbacks. It would require the regulatory authority or the permittee to establish, assess, and monitor a set of reference streams on a permit-by-permit basis. This in turn would pose an issue of statistical validity: The variability between the relatively small number of reference streams and the streams potentially affected by the permitted operation could be great enough to mask significant impacts that mining might have on the affected streams. Differences in methodology (*e.g.,* sample collection protocols, data analysis, etc.) mean that the RPBIII may not be comparable with the scientifically defensible protocols such as the IBI that we proposed to evaluate perennial streams. Using two different protocols, moreover, would significantly increase time and costs associated with assessing the baseline condition of and monitoring the effects of mining on streams. Finally, the RBPIII protocol is over 20 years old. This in and of itself is not a reason to eliminate this protocol; however, since its first publication, it has been updated twice to reflect a focus on national standardization, not to small-scale projects as originally designed and its suggested use by the commenters.

Our analysis also showed positive and negative aspects to using the BACI protocols. On the positive side, BACI analysis would be specific to each permit area or even each particular stream and would allow the regulatory authority to tailor monitoring and baseline assessment to each permit. This could allow for variances from the kind of state or regional standard that an IBI or other larger-scale protocols might impose. BACI analysis could be less costly than some other approaches because the regulatory authority can perform one analysis that evaluates multiple streams, including every stream in the permit area. Under this kind of analysis one premining sampling event and additional postmining samplings would result in a statistically valid analysis. On the negative side, the BACI analysis requires use of control sites. This could create a number of problems in the context of SMCRA permits. First, if the control site is not selected correctly, it could result in a skewed analysis or a situation in which an analysis may not be possible after mining is complete. Second, under this kind of analysis, the control sites must remain in their original condition for the duration of the mining operation. This may not be practicable because those sites might be beyond the permittee's control. They also could be affected by activities other than mining, such as industrialization, logging, or urbanization within the watershed. Third, while the BACI protocol may be cheaper than some alternatives, permittees still would incur additional costs for sampling not only baseline and impacted streams but the control streams. Fourth, additional control streams might have to be incorporated into the permit area if enough suitable control streams are not present in the initially designed permit area. This could lead to additional costs and permitting delays. Fifth, control sites would have to be identified and monitored for each individual permit. This would increase costs and might lead to permitting delays. Finally, one of the greatest drawbacks of the BACI analysis is that, although it can assess large changes to biological condition and ecological function, it may miss smaller changes. Indeed, this kind of analysis might not be any more protective than the previous regulations.

We found no benefit to using hydrogeomorphic protocols. Although they are easy to implement, they do not require macroinvertebrate sampling. In general, they provide no greater benefit than the types of analysis that have been used in connection with our previous regulations.

Finally we determined that it is not currently appropriate to use protocols

developed for perennial streams to assess the baseline condition of and to monitor intermittent streams. As commenters pointed out, some Clean Water Act authorities, in the exercise of their professional judgment, have occasionally done this. We have concluded, however, that this approach has not been used enough to justify requiring it in our rule.

In sum, after consideration of these other methods, as provided in final §§ 780.19(c)(6)(vii) and 784.19(c)(6)(vii), we determined that the best technology currently available for baseline assessment and monitoring purposes for perennial streams is the use of IBIs or other equally scientifically defensible stream assessment protocols developed and applied by states, territories, and tribes. These other scientifically defensible stream assessment protocols would include predictive and discriminant modeling approaches, such as those in place in many western states. The final rule requires use of these methods and protocols for all perennial streams within and adjacent to the proposed permit area. Some states and regions have developed indices of biotic integrity or bioassessment protocols for intermittent streams. In those instances, final §§ 780.28(g)(3)(iii) and 780.19(c)(6)(vii) and their counterparts in §§ 784.28 and 784.19 require use of those protocols to assess the baseline condition of and to monitor intermittent streams. Requiring these types of baseline assessments and monitoring protocols instead of the RBPIII, BACI, hydrogeomorphic protocols, and instead of using perennial stream indices for intermittent and ephemeral streams will encourage the further development of scientifically defensible methods and protocols.

We realize, however, that at present few scientifically defensible protocols have been established for bioassessments of intermittent streams. In the final rule, we do not require that SMCRA regulatory authorities develop new protocols for this purpose, but we do require them to reevaluate the best technology currently available for intermittent streams every 5 years and make any appropriate adjustments to account for new protocols that may have been developed. *See* § 780.28(g)(3)(iv)(B). Until scientifically defensible protocols are developed for intermittent streams, we are requiring baseline assessment and monitoring of these streams using a description of the water quality, water quantity, stream channel configuration, a quantitative assessment of the streamside vegetation, and an initial cataloging of the stream biota. For further detail, please see our discussions of §§ 780.19, 780.27, 780.28, 816.56, and 816.57 in this preamble.

Q. Restoration of the Ecological Function of Perennial and Intermittent Streams Is Not Possible or Feasible

Many commenters argued that there is no scientific support, in the form of published peer-reviewed studies, for the proposition that reconstructed streams can effectively replace streams that existed before mining, especially in regard to ecological function and premining biology. In a similar vein, some commenters urged us to prohibit mining activities within areas in which streams occur because stream restoration is unattainable. For example, one commenter stated: ''[T]he unproven ability to fully restore the functions and uses of streams damaged by subsidence necessitates that the rule require avoidance of such damage as a primary consideration.'' According to commenters, we did not provide sufficient evidence that the ecological condition of streams could be restored with the available technology and science. They alleged that our rule created an impossible standard of reclamation, a standard that had not been demonstrated to be achievable by operators or enforceable by regulatory authorities.

Some industry commenters agreed that full restoration of perennial and intermittent streams is not attainable. According to those commenters, we should not adopt a rule that establishes an unattainable standard.

We agree that full restoration of the biology and ecological function of mined-through streams is not always possible and that restoration of those streams has often fallen short of goals. However, our experience indicates that restoration of impaired streams is possible after mining. Streams that were not attaining their designated aquatic life use have been shown to improve enough, through restoration techniques, to be removed from the section 303(d) [93] list of impaired waters.[94]

In addition, standards to assess and monitor ecological function are both established and currently in use to regulate activities within streams and reclamation projects across the United States. When consistent with SMCRA, we incorporated those standards into the final rule. In addition, we analyzed the shortcomings of past efforts to restore streams to determine how this rule could improve the results. Recent literature advocates a watershed approach to determining the restoration capacity of degraded, or potentially degraded, streams.[95] This includes assessing the various resources that have been identified as determining success or failure of previous restoration projects. These include the condition of upstream habitats and water resources, the potential change in the quality and quantity of water present in the stream or the watershed, the amount and type of vegetation along the banks and buffer zones of streams, the reestablishment potential of appropriate stream channel habitat within the reconstructed stream to recolonize the stream via emigration, the potential for the adjacent streams and upstream habitats to serve as a source for emigration into the reconstructed stream (*i.e.,* the species pool for successful recolonization), and the return of naturally occurring leaf litter and other organic matter to the area.

This final rule improves our stream assessment and restoration requirements and analyzes these resources listed in the above paragraph, beginning at the application process. Upstream habitat and water quantity and quality will be assessed as part of the baseline data required in a permit application. Under the final rule, streambank and buffer zone vegetation will receive greater protection or restoration, including using native species (*i.e.*, naturally occurring leaf litter and other organic matter). The implementation of the final

[93] 33 U.S.C. 1313(d).

[94] *See generally,* U.S. Environmental Protection Agency. *Nonpoint Source Success Stories,* U.S. Environmental Protection Agency Web page found at *https://www.epa.gov/polluted-runoff-nonpoint-source-pollution/nonpoint-source-success-stories.* (last accessed October 5, 2016). U.S. Environmental Protection Agency. 2011. Document #EPA841-R-11-003. FY2010 *Assessment of Improving and Recovered Waters with Total Maximum Daily Loads (TMDLs).* Office of Water, U.S. Environmental Protection Agency, Washington DC. Available online at *http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/results_index.cfm* 4 pp.

[95] Barbara Doll, et al., *Identifying Watershed, Landscape, and Engineering Design Factors that Influence the Biotic Condition of Restored Streams.* Water, 8(4), p.151 (2016).

Derek B. Booth, et al., *Integrating Limiting-Factors Analysis with Process-Based Restoration to Improve Recovery of Endangered Salmonids in the Pacific Northwest,* USA. Water, 8(5), p.174 (2016).

Eric R. Merriam & J. Todd Petty, *Under siege: Isolated tributaries are threatened by regionally impaired metacommunities.* 560 Science of The Total Environment, 170–178 (2016).

Moritz Leps et al., 2016. *Time is no healer: Increasing restoration age does not lead to improved benthic invertebrate communities in restored river reaches.* 557 Science of The Total Environment, 722–732 (2016).

Jennifer J. Follstad Shah et al., 2007. *River and riparian restoration in the Southwest: Results of the National River Restoration Science Synthesis Project.* 15 (3) Restoration Ecology, 550–562 (2007).

S.W. Miller et al., 2010. *Quantifying Macroinvertebrate Responses to In-Stream Habitat Restoration: Applications of Meta-Analysis to River Restoration.* 18(1) Restoration Ecology, 8–19 (2010).

rule will also increase the amount of reforested habitat, which should improve watershed quality. Baseline data will contain information on streams potentially affected by the proposed operation, including bioassessments of perennial and some intermittent streams that regulatory authorities can use to determine the potential of these streams to provide biological emigrants (plants, animals, fungi, etc.) to reconstructed segments of connected streams. This is not to say that the reclamation of all streams is now possible or will now become a timely and precise exercise; careful consideration will need to be taken to understand the potential for restoration of each stream, and the economic and biological cost associated with these determinations.

This final rule is intended to increase protection or restoration of perennial and intermittent streams and related environmental resources, as well as to ensure that permittees and regulatory authorities make use of advances in science and technology. The final rule provides that restoration of ecological function does not mean that the restored stream must precisely mirror the premining condition. For example, as section 780.28(g)(3)(ii)(A) of our final rule states, a demonstration of ecological function does not require that the reconstructed stream have precisely the same biological condition or biota as the stream segment did before mining. This is consistent with current, scientifically defensible bioassessment protocols used throughout a wide range of regulatory arenas, which allow for a natural range in variation of reference sites to which the assessments are compared.[96] These bioassessment protocols use genus-level identification counts of macroinvertebrates to determine biological condition, where available, and to calculate values derived from measures such as species richness, composition, tolerance, feeding, and habitat measures that determine stream quality. Assessment of the biological condition of these streams is based on these values, not directly on the species that were first sampled. This change allows for some variation from the initial stream compared to the reconstructed stream as long as the reconstructed stream is within a suitable range according to the results of the bioassessment protocol used.

[96] For example: Michael T. Barbour et al. *Rapid bioassessment protocols for use in wadeable streams and rivers. Periphyton, Benthic Macroinvertebrates, and Fish* (2nd edn.). U.S. Environmental Protection Agency, Office of Water, Washington, DC EPA (1999).

We recognize that stream restoration and creation is an emerging area of scientific study and that in some cases the reconstruction of functional stream channels on mined land can be difficult. It may be impossible in some cases to precisely mirror the ecological function that was there before mining. However, as we have just discussed, that is not what our rule requires. We also note, however, that one of the purposes of SMCRA is to ensure that ''surface mining operations are not conducted where reclamation as required by this Act is not feasible'' and that SMCRA therefore requires a permit applicant to demonstrate that ''reclamation as required [by SMCRA] and the State or Federal program can be accomplished under the reclamation plan contained in the permit application[.]'' If analysis of the baseline data and other information in the application indicates restoration of a stream cannot be accomplished through use of conventional mining and reclamation technology, the applicant will need to adjust the proposed operation and reclamation plan to either avoid that stream or take other measures (*e.g.*, the construction of aquitards in the backfill) to ensure restoration of a stream's water quality and quantity and aquatic life after the completion of mining.

R. We Should Apply the 1983 Stream Buffer Zone Rule To Effectively Prohibit Mining Activities Within 100 Feet of Streams

Numerous commenters urged us to promulgate a rule consistent with their interpretation of the 1983 stream buffer zone rule as prohibiting all mining activities in or within 100 feet of a perennial or intermittent stream. They argued that the proposed rule weakens this interpretation of the 1983 rule by ''placing more emphases on mitigation of impacts on streams than on protection and prevention.'' They claim that the lack of science on successful restoration of stream form and function renders the proposed rule less protective than their interpretation of the 1983 rule and allows for the continued destruction of streams. Other commenters maintain that the proposed rule is inconsistent with section 515(b)(24) of SMCRA,[97] which requires, in relevant part, that, to the extent possible, surface coal mining and reclamation operations use the best technology currently available to minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values. According to the commenters, the best technology currently available to protect fish, wildlife, and related environmental values from the adverse impacts of coal mining is a prohibition on mining in or within 100 feet of a perennial or intermittent stream. The commenters recognize that such a prohibition would reduce minable acres, but they contend it is reasonable and practicable, given the decline in the demand for coal resources.

[97] 30 U.S.C. 1265(b)(24).

The preamble to our proposed rule discusses the history of the 1983 stream buffer zone rule in significant detail (*see* 80 FR 44447–44451, Jul. 27, 2015). It includes the following statement: ''Historically, we and some state regulatory authorities applied the 1983 stream buffer zone rule in a manner that allowed the placement of excess spoil fills, refuse piles, slurry impoundments, and sedimentation ponds in intermittent and perennial streams within the permit area.'' The specific language of the 1983 rule allowed the regulatory authority to authorize mining activities within the stream buffer zone upon finding that ''[s]urface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream.'' As discussed in the preamble, that provision has been subject to numerous court challenges and was substantially revised by the now-vacated 2008 stream buffer zone rule. The 1983 rule will remain the standard applied by state regulatory authorities until the provisions of our final rule have been adopted by those individual regulatory programs.

While we have not adopted a strict prohibition standard for mining activities within the stream buffer zone, we have in our final rule required that certain conditions be met in order for the regulatory authority to authorize such activities. The final rule allows mining activities in or within 100 feet of an intermittent or perennial stream only if the permit applicant makes certain demonstrations and the regulatory authority makes certain findings. When the applicant proposes to mine through a perennial or an intermittent stream, these required findings include the ability of the permittee to actually restore the form, hydrologic function, and ecological function of the stream as part of the reclamation process. We intend these requirements to ensure that the reconstructed stream will actually have sufficient base flow, water quality, and an aquatic community similar to that which existed prior to mining. As discussed more comprehensively in

final rule § 780.28, in general, mining activities in, through, or adjacent to perennial or intermittent streams must not: cause or contribute to a violation of water quality standards; cause material damage to the hydrologic balance outside the permit area; result in conversion of a stream segment from perennial to intermittent, perennial to ephemeral, or intermittent to ephemeral; and must be designed to minimize adverse impacts on fish, wildlife and related environmental values to the extent possible using the best technology currently available.

The final rule allows burial of intermittent or perennial streams with excess spoil or coal mine waste only if the permit applicant demonstrates and the regulatory authority finds that the loss of resources associated with the burial of a stream will be offset through fish and wildlife enhancement measures commensurate with the magnitude of the adverse impacts from burial of the stream. In addition, the area where proposed enhancement activities are to occur must be incorporated into the permit and bonded for reclamation. In approving a plan that provides for the appropriate level of enhancement, the regulatory authority also must establish standards for determining when reclamation bonds can be released for such areas. This regulatory approach ensures that the desired results are actually achieved, and, if they are not, the regulatory authority will be in a position to use the proceeds from forfeiture of the reclamation bonds to accomplish the desired objective of the approved reclamation plan.

V. Explanation of Organizational Changes and Plain Language Principles

The final rule includes organizational changes for clarity. Those changes serve several purposes, including—

- Breaking up overly long sections and paragraphs into multiple shorter sections and paragraphs for ease of reference and improved comprehension.
- Renumbering sections in the underground mining rules to align their numbering with the corresponding sections in the surface mining rules. This change improves ease of reference and the user-friendliness of our rules.
- Moving permitting requirements from subchapter K (performance standards) to subchapter G to consolidate permitting requirements in subchapter G.
- Restructuring subchapter G to better distinguish between baseline information requirements and reclamation plan requirements.
- Removing redundant, suspended, and obsolete provisions.

In general, we drafted the final rule using plain language principles, consistent with section 501(b) of SMCRA, 30 U.S.C. 1251(a), which provides that regulations must be ''concise and written in plain, understandable language,'' and Executive Order 13563, which provides that our regulatory system ''must ensure that regulations are accessible, consistent, written in plain language, and easy to understand.'' [98] In addition, a June 1, 1998, Executive Memorandum on Plain Language in Government Writing [99] requires the use of plain language in all proposed and final rulemaking documents published after January 1, 1999. The Office of the Federal Register also encourages the use of plain language in writing regulations, as set forth in detail at *www.plainlanguage.gov* and associated links.

Plain language requirements vary from one document to another, depending on the intended audience. Plain language documents have logical organization and easy-to-read design features like short sections, short sentences, tables, and lots of white space. They use common everyday words (except for necessary technical terms), pronouns, the active voice, and a question-and-answer format when feasible.

The final rule text and preamble use the pronouns ''we,'' ''us,'' and ''our'' to refer to OSMRE, and the pronouns ''I,'' ''you,'' and ''your'' to refer to a permit applicant or permittee. We avoid use of the word ''shall'' in the rule text and preamble, except in quoted material. Instead, we use ''must'' to indicate an obligation, ''will'' to identify a future event, and ''may not'' to convey a prohibition.

VI. How do our final regulations differ from our proposed regulations?

Except as otherwise discussed in the preamble to this final rule, we are adopting the regulations as proposed on July 27, 2015, for the reasons set forth in the preamble to the proposed rule. In this portion of the preamble to the final rule, we explain our responses to the comments that we received on the text of the proposed regulations. We also discuss how we revised the proposed regulations in response to those comments and other considerations. However, in general, we do not discuss syntax improvements, plain language changes, and other revisions of a minor nature.

[98] 76 FR 3821 (Jan. 21, 2011).

[99] 63 FR 31883–31886 (Jun. 10, 1998).

This discussion refers to previous, existing, proposed, and final rules and regulations. In general, we use ''previous'' when we refer to regulations that will no longer exist once this final rule is effective. We use ''existing'' to describe regulations that are unaffected by this rulemaking. ''Proposed'' regulations are the regulations set forth in our July 27, 2015, proposed rule. The term ''final'' refers to the regulations that we are adopting today, including existing regulations that are redesignated in this rulemaking.

A. Part 700—General

Section 700.11: What coal exploration and coal mining operations are subject to our rules?

Final Paragraph (d): Termination and Reassertion of Jurisdiction

We proposed to revise § 700.11(d) to add clarity to the regulations, to conform them with proposed revisions to 30 CFR part 800 concerning financial assurances for treatment of long-term discharges, and to add provisions consistent with a court decision that resulted from a previous rulemaking. The rationale for the proposed revisions is set forth at 80 FR 44436, 44466–44467 (Jul. 27, 2015). We received no comments specific to proposed paragraphs (d)(1) and (4), so they are not discussed below.

Final Paragraph (d)(2): Termination of Jurisdiction for Permanent Regulatory Program Sites

One commenter expressed concern that replacement of the term ''increment'' with ''portion'' in the introductory language of paragraph (d)(2) implies that a permittee may apply for bond release on a portion of a permit that has not been separately bonded as an increment. According to the commenter, bonds and jurisdiction apply to the entire permit or to the permit increment for which bond is posted. The commenter stated that our permitting, bonding, and termination of jurisdiction regulations need to use the same terminology so that regulators and the public can easily discern which sections of a mine are active or in reclamation and which sections are eligible for release and eventual termination of jurisdiction.

Our regulations restrict termination of jurisdiction to those areas for which bond has been fully released, but otherwise, we do not agree that our permitting, bonding, and termination of jurisdiction regulations must use the same terminology or that the boundaries of each original permit increment must remain inviolate. Under § 800.13(b),

with the approval of the regulatory authority, we have always allowed clearly defined portions of the permit area requiring extended liability to be separated from the original area and bonded separately. The change in terminology from ''increment'' to ''portion'' in our termination of jurisdiction regulations as part of this final rule is consistent with both the language and approach outlined in § 800.13(b). The public should have no difficulty identifying the portions of the permit area for which bond has been released and jurisdiction has been terminated because § 800.13(b) requires that the boundaries of each portion be clearly defined.

One commenter opposed the proposed revisions to this paragraph because, in the commenter's opinion, they would require that, even in primacy states, bond release and termination of jurisdiction be based upon 30 CFR part 800 rather than the provisions of the applicable regulatory program. That was not the intent of our proposed revisions. To avoid this misinterpretation, final paragraph (d)(2)(ii) provides for termination of jurisdiction whenever the regulatory authority has made a final decision to fully release the performance bond or financial assurance in accordance with the applicable regulatory program. The revised language is similar to the language of paragraph (d)(2)(i) in this respect.

The commenter also alleged that proposed paragraph (d)(2)(ii)(B), which concerns sites with postmining discharges requiring long-term treatment, provided confirmation that we intend to retain jurisdiction in perpetuity. That was not the intent of the proposed provision, but we understand how it could be misinterpreted. We have determined that proposed paragraph (d)(2)(ii)(B) is unnecessary because it essentially duplicates § 800.18(i) and because proposed paragraph (d)(2)(ii)(A) refers to financial assurances as well as performance bonds. Therefore, we are not adopting proposed paragraph (d)(2)(ii)(B). Final paragraph (d)(2)(ii) includes only proposed paragraph (d)(2)(ii)(A) and is renumbered to accommodate the removal of proposed paragraph (d)(2)(ii)(A).

Final Paragraph (d)(3): Reassertion of Jurisdiction

Several commenters opposed this paragraph as unreasonable. Others alleged that it was illegal because it would apply retroactively. Others alleged that it would be inconsistent with SMCRA because it would result in the permittee having an eternal possibility of reassertion of jurisdiction. Several commenters asserted that SMCRA provides no authority for the assertion of jurisdiction over mining operations that have obtained bond release.

These comments reflect a perspective on the principle of reassertion of jurisdiction under SMCRA, which is now a matter of settled law. In 1991, the U.S. Court of Appeals for the District of Columbia Circuit upheld the 1988 termination of jurisdiction rules at 30 CFR 700.11(d), which include a similar provision requiring reassertion of jurisdiction under specified circumstances. *See Nat'l Wildlife Fed'n v Lujan,* 950 F.2d 765, 770 (D.C. Cir. 1991). Specifically, with respect to the reassertion of jurisdiction under SMCRA, the court held that:

> The question is whether the effect of the regulation comports with the statutory scheme. We believe that it does in light of the language of the regulation and the interpretation provided in both the preamble and the Secretary's brief here.
>
> The preamble adopts an objective standard, stating that jurisdiction must be re-asserted whenever ''any reasonable person could determine'' that fraud, collusion or misrepresentation had occurred. [53 FR 44359] (1988). The Secretary's brief not only adopts this standard but also clarifies its scope:
>
> It is important to note in this connection that the filing of an application for bond release is in itself a representation that the operator has satisfied his reclamation obligations since an operator is not entitled to release from the bond unless he has met those obligations. . . . If an operator applies for release but has not fulfilled his obligations, he is guilty of misrepresentation by the very fact of making an application.
>
> Brief for the Secretary at 27 n.11. This is a reasonable way of implementing the Act's condition ''[t]hat no bond shall be fully released until all reclamation requirements of this chapter are fully met.'' 30 U.S.C.[] 1269(c)(3). The condition implies that after reclamation requirements are met, the bond may be ''fully released.'' *Id.* When it turns out that the operator had in fact not fulfilled its reclamation obligations at the time of release, the Secretary's interpretation of ''misrepresentation'' ensures that jurisdiction ''shall'' be reasserted. 30 [CFR] 700.11(d)(2).[100]

Therefore, we made no changes in response to these comments.

However, final paragraph (d)(3) differs somewhat from the proposed rule in that we added paragraphs (d)(3)(i) and (ii) and placed most of proposed paragraph (d)(3) in paragraph (d)(3)(iii). Under the final rule, reassertion of jurisdiction is required only if all three factual situations identified in paragraphs (d)(3)(i) through (iii) exist. Paragraph (d)(3)(i) specifies that the conditions that develop after termination of jurisdiction must constitute a violation of the reclamation requirements of the applicable regulatory program. Paragraph (d)(3)(ii) specifies that the conditions that develop after termination of jurisdiction must be the result of surface coal mining operations for which jurisdiction was terminated. The addition of paragraphs (d)(3)(i) and (ii) is consistent with the preamble to the 1988 rules, which provides that ''it would not be appropriate for the regulatory authority to reassert jurisdiction under the approved program'' if ''the problem was not caused by the permittee's violation of the regulatory program.'' [101]

Several commenters asserted that paragraph (d)(3) would require reassertion of jurisdiction on sites where third-party disturbances created the conditions resulting in the need for reassertion of jurisdiction. The rule does not require reassertion of jurisdiction when the impact is a result of a third-party disturbance. Instead, the rule applies only to impacts resulting from the mining operation. We have added language at paragraph (d)(3)(ii) that clarifies this point.

One commenter opposed the rule because it provides no discretion to the regulatory authority in deciding whether to reassert jurisdiction and does not provide an endpoint for reassertion of jurisdiction. The final rule that we are adopting today, like the proposed rule and the 1988 rule, does not provide discretion to the regulatory authority or an endpoint (equivalent to a statute of limitations) because neither is appropriate if bond release and termination of jurisdiction were based upon fraud, collusion, or misrepresentation of a material fact.

One commenter alleged that adding ''intentional or unintentional'' as an adjective modifying ''material misrepresentation of a material fact'' would increase long-term liability and result in additional litigation by nongovernmental organizations, as would the provision requiring reassertion of jurisdiction for postmining discharges requiring treatment. Neither of the added provisions represents a substantive change in policy or regulation. Therefore, we find no basis for the commenter's allegation. Another commenter opposed adding ''intentional or unintentional'' as a modifier for

[100] *Nat'l Wildlife Fed'n* v. *Lujan,* 950 F.2d 765, 770 (D.C. Cir. 1991).

[101] 53 FR 44356, 44359 (Nov. 2, 1988).

''misrepresentation of a material fact,'' alleging that it was unnecessary. This phrase is helpful to clarify circumstances to which it can be applied and better informs the reader of how the rule is to be interpreted and applied. No changes have been made as in response to these comments.

Several commenters alleged that adoption of the provisions discussed in the preceding paragraph would mean that a permittee would never have the certainty that it has fulfilled all obligations for a permitted site. According to the commenters, this result would infringe upon the permittee's ability to conduct business and could adversely impact the availability of surety bonds. As discussed in the preceding paragraph, neither of the added provisions represents a substantive change in policy or regulation. Therefore, we have no reason to anticipate that the outcome feared by the commenter will develop. Even if it did, that outcome would not justify allowing a termination of jurisdiction based on fraud, collusion, or misrepresentation of a material fact to stand if the mining operation has resulted in a situation that constitutes a violation of SMCRA or the applicable regulatory program.

One commenter opined that the rule would penalize successful operators because operators exiting the coal business would not be subject to this rule. Both the 1988 rule and this final rule apply to the permittee in existence at the time of termination of jurisdiction. If reassertion of jurisdiction is necessary, the regulatory authority must require that the permittee implement corrective measures regardless of whether the permittee has exited the coal business.

Similarly, another commenter expressed concern that the regulatory authority might be held responsible if the permittee could not be located or was no longer a viable business entity. Nothing in the proposed or final rules would support this outcome.

One commenter asserted that the proposed rule is unworkable because it is not clear how it will be enforced. The final rule will be implemented in the same manner as the 1988 rules. The preamble to the 1988 rules provides the following explanation of how the regulatory authority may become aware of a situation involving fraud, collusion, or the intentional or unintentional misrepresentation of a material fact:

> Liability under the approved program for a failure of reclamation, however, may be the subject of a Secretarial or regulatory authority inquiry or a civil suit in the courts pursuant to section 520 of the Act. Such liability would depend upon whether the reclamation failure was caused by a violation by the operator of the regulatory program.[102]

The regulatory authority inquiry to which this paragraph refers may be the result of information supplied by the public, information gleaned from the news media, or observations by regulatory authority personnel in the course of inspecting nearby mine sites.

One commenter asked whether the permittee or the regulatory authority would be required to conduct water sampling on sites for which bond has been fully released. The answer is no. There is no authority under SMCRA to impose such a requirement. In addition, it would defeat one of the purposes of termination of jurisdiction; *i.e.,* to determine when monitoring and inspection under SMCRA are no longer necessary.

One commenter implied that the rule should specify that the need for reassertion of jurisdiction will be determined using only the bond release standards in effect at the time of termination of jurisdiction. We find that no such provision is necessary because the rule already provides that reassertion of jurisdiction is required only if the regulatory authority becomes aware that the bond release was based upon fraud, collusion, or the intentional or unintentional misrepresentation of a material fact. This sentence refers to decisions in which the regulatory authority released bond fully but would not have done so if the information provided by the permittee had not been tainted by the fraud, collusion, or misrepresentation of a material fact at that time. Paragraph (d)(3) neither mentions nor provides a basis for reasserting jurisdiction whenever the regulatory authority adopts revised bond release criteria. Unless otherwise specified in the rulemaking adopting those criteria, the revised criteria would apply only prospectively. In any event, they could not be used to reassert jurisdiction over permits with bond released before the effective date of the revised criteria because the adoption of revised bond release criteria would not be considered fraud, collusion, or misrepresentation of a material fact.

Several commenters opposed paragraph (d)(3) because, in their view, it would require reassertion of jurisdiction for any error or mistake in a document submitted as part of the bond release process, no matter how minor the error or mistake. We disagree. Both the 1988 rule and final paragraph (d)(3) require reassertion of jurisdiction only for fraud, collusion, or misrepresentation of a material fact. Clerical errors and other minor mistakes would not meet this threshold because they would not be considered misrepresentation of a material fact. The adjective ''material'' means the fact must be critical to the decision to release bond. In other words, misrepresentation of a material fact refers to a situation in which, in the absence of the misrepresentation, the regulatory authority would not have released the bond. However, in response to these and other comments, we have added paragraphs (d)(3)(i) and (ii) to specify that reassertion of jurisdiction is required only when conditions exist that would constitute a violation of the reclamation requirements of the applicable regulatory program and those conditions are the result of surface coal mining operations for which jurisdiction was terminated. This limitation is consistent with the preamble to the 1988 rules, which provides that ''it would not be appropriate for the regulatory authority to reassert jurisdiction under the approved program'' if ''the problem was not caused by the permittee's violation of the regulatory program.'' [103]

Two commenters asserted that the rule is unnecessary because some states have a fund to address post-bond release problems. We find that this comment is not germane because, in 1988, we determined that there was a need for a rule providing for both termination of jurisdiction and reassertion of jurisdiction. The proposed rule did not propose to alter that determination nor did we request comment on that possibility.

One commenter suggested that, in lieu of adopting this rule, we establish a fund similar to the Abandoned Mine Reclamation Fund that would cover problems that arise after termination of jurisdiction. We have no authority to establish such a fund or assess the fees that would be required to operate it.

One commenter took issue with the statement in the preamble to the proposed rule at 80 FR 44436, 44467 that the intentional or unintentional misrepresentation of a material fact includes the ''subsequent discovery of a discharge requiring treatment.'' The commenter noted that this language differs slightly from the proposed text of the regulation, which did not use the term ''subsequent''. According to the commenter, reassertion of jurisdiction for a discharge that was undiscoverable at the time of the application for bond release would be inconsistent with

[102] 53 FR 44356, 44358 (Nov. 2, 1988).

[103] *Id.* at 44359.

language and reasoning in *NWF* v. *Lujan.*

We do not agree. Nothing in the court decision says that the discharge must be discoverable at the time of bond release to be considered a misrepresentation of a material fact. Instead, the court decision focuses on section 519(c)(3) of SMCRA,[104] which, in relevant part, provides that ''no bond shall be fully released until all reclamation requirements of the Act are fully met.'' We anticipate that there would be very few cases in which a discharge was not discoverable at the time of bond release. However, should an unanticipated mining-related discharge requiring treatment develop after bond release, the final rule would require reassertion of jurisdiction because the conditions resulting in formation of the discharge were present at the time of bond release. Therefore, development of a discharge requiring treatment after bond release means that the permittee's certification that all reclamation requirements were met ultimately proved to be a misrepresentation of a material fact.

One commenter opposed our proposed addition of the sentence establishing discovery of a discharge requiring treatment of parameters of concern after termination of jurisdiction as a misrepresentation of material fact. According to the commenter, addition of this sentence would be inconsistent with the preamble to the 1988 rule, which states that the discovery of an acid seep subsequent to bond release would not automatically require reassertion of jurisdiction:

> [T]he occurrence of an acid seep subsequent to bond release does not, by itself, establish the cause of the seep, whether reclamation had been completed, whether intervening events occurred, or the circumstances surrounding bond release.[105]

There is a distinct difference between the situation described in the 1988 preamble and the sentence that we proposed to add to our rules and that we are adopting in revised form as part of this final rule. The sentence in our proposed and final rules applies to a discharge for which a treatment need has already been established, while the seep cited in the 1988 preamble is a newly discovered seep for which there has been no determination whether the seep is a discharge that will require treatment or whether it is the result of the surface coal mining operations for which jurisdiction was terminated. As noted in the preamble, these factual questions need to be answered before a determination can be made on reassertion of jurisdiction. Although not expressly stated in the preamble, we would anticipate that reassertion of jurisdiction would be required under the 1988 rule if the questions are answered in the affirmative. Therefore, we find no inconsistency between the 1988 preamble and our final rule. For added clarity, as discussed below, we have revised the pertinent sentence in the proposed rule by adding a proviso that reassertion of jurisdiction is required only if the conditions creating the need for treatment of the discharge are the result of the mining operation.

In final paragraph (d)(3)(iii), we removed the phrase ''if it is demonstrated that'' found in (d)(3) in the proposed rule. The language in the proposed rule is somewhat confusing because it did not address what a demonstration must include or who must make the demonstration. The preamble to the proposed rule describes proposed paragraph (d)(3) as meaning that ''the regulatory authority must reassert jurisdiction if the termination was based upon fraud, collusion, or misrepresentation of a material fact.'' [106] The language of the final paragraph (d)(3)(iii) more effectively conveys this meaning. In addition, it is consistent with the preamble to the 1988 rule, which states that the regulatory authority would have to reassert jurisdiction ''[i]f following final bond release, any reasonable person could determine that the bond release was based upon fraud, collusion, or a misrepresentation of a material fact at the time of release. . . .'' [107]

In paragraph (d)(3)(iii), we also revised the language in proposed paragraph (d)(3) pertaining to the discovery of discharges requiring treatment by deleting the reference to mining-related parameters of concern and by adding a proviso that the conditions creating the need for treatment must be the result of the mining operation. The revised language focuses simply on whether the discharge requires treatment and whether the need for treatment is a result of the mining operation. There is no need for use of the new term ''parameters of concern'' in this context.

Coal Exploration

We received a few comments in response to our statement in the preamble to the proposed rule that we intended to correct an oversight in the 1988 final rule text by applying the termination of jurisdiction provisions to coal exploration and surface coal mining and reclamation operations, not just surface coal mining and reclamation operations. The comments that we did receive generally opposed this extension. One commenter alleged that including coal exploration in the termination of jurisdiction rules would impose an undue burden on operators and regulatory authorities and would discourage future exploration. Another commenter noted that SMCRA provides only minimal requirements for coal exploration and that it neither mandates inspections nor notification of citizens or opportunity for citizens to comment upon or appeal critical regulatory decisions on coal exploration. According to the commenter, the issue of when SMCRA jurisdiction terminates in the context of coal exploration rarely arises. The commenter suggested that it might be appropriate to leave this issue to the discretion of individual regulatory programs.

After evaluating the comments, we have decided not to proceed with our proposal to revise § 700.11(d) to apply to coal exploration. Our regulations at Part 772 do not require a permit or regulatory authority approval for coal exploration unless the exploration involves the removal of more than 250 tons of coal or will take place on lands designated as unsuitable for surface coal mining operations. Therefore, there are no permit boundaries or defined endpoints. In the absence of a permit, there is no bond, so bond release cannot be used as a determinant for termination of jurisdiction. As one commenter suggested, we will rely upon the discretion of each regulatory authority to determine when termination of jurisdiction is appropriate for coal exploration.

B. Part 701—Permanent Regulatory Program

Section 701.5: Definitions

Acid Drainage or Acid Mine Drainage

A commenter asserted that normal rainfall can have a pH of less than 6.0 as a result of the presence of carbon dioxide in the atmosphere. In addition, the commenter claimed that, historically, some of the lowest pH in rainfall occurs over the Appalachian Region, where, in 2012, pH reported in proximity to the intersection of West Virginia, Pennsylvania, and Ohio, was approximately 4.5 based on National Trends Network trend maps between 1986 and 2012. The commenter also opined that assigning a pH level of less than 6.0 was arbitrary and could result in a situation where acid rainfall in some regions could cause an operator to be in violation of the rule. We reject the

[104] 30 U.S.C. 1269(c)(3).

[105] 53 FR 44356, 44361 (Nov. 2, 1988).

[106] 80 FR 44436, 44467 (Jul. 27, 2015).

[107] 53 FR 44356, 44359 (Nov. 2, 1988).

commenter's arguments for a number of reasons. First, we did not arbitrarily select the pH value used in our definition of acid drainage or acid mine drainage, and it is not a new specification in this rule. The definition for acid drainage was codified in our regulation in March, 1979. In the preamble to that regulation, we explained that we selected a pH of less than 6.0 for the definition because the U.S. Environmental Protection Agency set that level as the minimum for its effluent limitations and because pH values outside the range of 6.0–8.5 in natural waters are indicative of stress.[108] Second, our definition contains another condition that must be met before we consider water draining from a mining area with a pH of less than 6.0 to be acid drainage or acid mine drainage: total acidity must exceed total alkalinity. Sometimes a stream under natural conditions can have pH values of less than 6.0, but its acidity will not exceed its alkalinity. In addition, an applicant reports baseline data, including pH level, for both groundwater and surface water as part of the permit application required by final rule § 780.19. This baseline data provides site specific information to the regulatory authority so that rainfall impacts or other existing conditions affecting the pH of water at the site are known prior to mining. Thus, we decline to make changes to the definition based on this comment and are adopting the proposed rule definition without modification.

Adjacent Area

As discussed in the preamble to the proposed rule, we proposed to modify our existing definition of ''adjacent area''.[109] *See* 80 FR 44467–44468 (Jul. 27, 2015). After evaluating the comments we received, we are adopting the definition as proposed, with exceptions.

First, we proposed to revise the basic definition of ''adjacent area'' to encompass the area outside the proposed or actual permit area when there is a reasonable ''possibility'' of adverse impacts from surface coal mining operations or underground mining activities, as determined by the regulatory authority. This portion of the proposed definition was substantively identical to the existing definition except that the existing definition included only the area in which impacts are reasonably ''probable'' rather than the area in which impacts are reasonably possible. Several commenters objected to the proposed change as overly expansive. After evaluating those comments, we have decided not to make the proposed change. We agree that collection of baseline data from the area in which impacts are reasonably probable will provide sufficient basis for evaluation of the permit application and design of the proposed operation. Similarly, we agree with the commenters that limiting monitoring outside the permit area to the area in which impacts are reasonably probable will provide sufficient data to detect and evaluate the impacts of mining and reclamation in a timely manner. Expanding baseline data collection and monitoring to areas in which impacts are reasonably possible, but not reasonably probable, would increase cost with little benefit.

As we explained in the preamble to the proposed rule, the definition of ''adjacent area'' depends on the nature of the resource and the context in which the regulations use the term.[110] In response to a comment from another federal agency, we modified final paragraph (1) to clarify that, in the context of the Endangered Species Act, ''adjacent area'' includes areas outside of the proposed or actual permit area where surface coal mining operations or underground mining activities may affect a species listed or proposed for listing as endangered or threatened, or having designated or proposed critical habitat under the Endangered Species Act. This modification, found at final rule paragraph (1)(ii), is to ensure protection is extended to proposed or listed species under the Endangered Species Act, as well as proposed or designated critical habitats listed under the Endangered Species Act that may be impacted by the proposed mining activity. Any impact to a proposed or listed species or proposed or designated critical habitat, whether adverse or beneficial, should be included within the definition of adjacent area.

We have also made a change to paragraph (b) of the proposed definition of ''adjacent area,'' now final paragraph (2). This paragraph clarifies the previous definition by specifying that the adjacent area includes the area of probable impacts from underground workings. We proposed to revise the definition to state that the adjacent area includes the area overlying the underground workings plus the area encompassed by a reasonable angle of draw from the perimeter of the underground workings. Several commenters questioned the application of the phrase ''reasonable angle of draw'' in paragraph (b) of the proposed rule, and noted that it should instead be based on the hydrologic regime. As pointed out by several commenters, the angle of draw is a term more appropriate for defining the limits of surface subsidence impacts that could occur adjacent to an area of high extraction mining. Commenters pointed out that hydrologic impacts to surface water and groundwater related to dewatering caused by high extraction mining may extend significantly beyond the limits of direct subsidence impacts as measured by the angle of draw. Therefore, these commenters suggested we adopt a term that more accurately addresses the potential limits of dewatering. We acknowledge that dewatering impacts may extend beyond the limits defined by the angle of draw; therefore, we are replacing the term ''angle of draw'' with the term ''angle of dewatering''. As the commenters recognized, the actual zone of hydrologic impacts to surface water and groundwater caused by subsidence induced dewatering will be highly site specific depending of lithology, depth of coal seam, aquifer characteristics and the extent to which groundwater contributes to surface flow of streams. Due to the variability of these impacts and the site specific nature of the data needed to accurately determine the angle of dewatering we are not placing a specific limits on this area; instead, we are defining the term ''angle of dewatering'' to mean, ''the angle created from a vertical line drawn from the outer edge or boundary of high-extraction underground mining workings and an oblique line drawn from terminus of the vertical line at the mine floor to the farthest expected extent that the mining will cause dewatering of groundwater or surface water.'' This definition,[111] or similar variations, has been in use for many years, and is commonly used in defining the potential impact area for stream dewatering and other adverse impacts to surface water and groundwater.

We also received several comments on this proposed definition that we are not adopting. A couple of commenters expressed concern regarding the potential inability to access the ''adjacent area'' because of a lack of landowner consent. We acknowledge that lack of landowner consent may restrict data collection. However, the regulatory authority needs sufficient data about the adjacent area to properly evaluate the permit application and

[108] 44 FR 14919 (Mar 13, 1979).

[109] 80 FR 44436, 44467–44468 (Jul. 27, 2015).

[110] 80 FR 44436, 44467 (Jul. 27, 2015).

[111] D.Y. Dixon and H.W. Rauch, *The Impact of Three Longwall Coal Mines on Streamflow in the Appalachian Coalfield,* In the Proceedings of the 9th International Conference on Ground Control in Mining, Morgantown, W.V.,169–182 (1990).

prepare the cumulative hydrologic impact assessment. If one landowner refuses access, one solution could be to expand the initial ''adjacent area'' to include land further away for which access can be obtained. We encourage permit applicants to work with the regulatory authority to determine an appropriately-sized ''adjacent area'' with sufficient sampling points to satisfy all planning and regulatory needs.

Additionally, several commenters opined that the proposed definition of ''adjacent area'' would result in an expanded permit area to secure access and result in increased costs. In some cases the permit area may coincide with the extent of probable impacts; however, that is the exception. Most of the time the permit area is smaller than the ''adjacent area''; therefore, we do not believe this definition will impact the size of the permit area.

One commenter proposed adoption of the adjacent area definition used by the Wyoming Department of Land Quality. That definition provides that ''[a]djacent area means land located outside the permit area upon which air, surface water, groundwater, fish, wildlife, or other resources protected by the Act may reasonably be expected to be adversely impacted by mining or reclamation operations. Unless otherwise specified by the Administrator, this area shall be presumptively limited to lands within (one-half mile) of the proposed permit area.'' This suggestion was not accepted because of the one-size-fits-all minimum application of ''one-half mile.'' We have no indication that this size limitation would ensure the inclusion of all areas where there is the reasonable probability of adverse impacts.

One commenter alleged that the proposed rule inappropriately assumes that adjacent waters are inextricably linked to, what the commenter referred to as, ''the core/jurisdictional waters.'' This commenter explains that adjacent waters may have little, if any, biological connection to ''the core/jurisdictional waters;'' they may contain two distinct, functionally independent communities that may only interact slightly. We disagree that the rule assumes a biological connection between two adjacent water bodies. The rule at section 780.19 requires the operator to collect geologic, hydrologic, and biologic data in the permit area and adjacent area. To the extent that distinct, functionally independent communities exist in adjacent areas, the baseline data collection will document that fact. This information will then assist the operator and the regulatory authority to better understand the potential cumulative impact on the hydrologic and biologic environment in the permit and adjacent areas from the proposed operation.

Paragraph (c) [112] of the proposed definition established what the term ''adjacent area'' means with respect to underground mine pools. Two commenters questioned the need for including paragraph (c) within the definition of adjacent area. One of the two commenters asserted that the requirements in the existing paragraph (c) are adequately addressed and there is no need for revision and the other commenter asserted that the requirements are sufficiently discussed in paragraph (a), now final paragraph (1). Final paragraph (c), now final paragraph (3), is retained because it highlights the importance of ensuring that areas that might be affected physically or hydrologically by the dewatering of a mine pool or areas that may develop mine pools will be included in the adjacent area because of the long-term cost associated with remediation and treatment of discharges that could continue in perpetuity. Inclusion of these areas ensures that sufficient groundwater data will be collected to assist the regulatory authority to determine what, if any, impacts the mine operation will have on areas that mine pools could adversely impact.

In conjunction with the comments listed above, both commenters recommended, that if proposed paragraph (c), now final paragraph (3), is retained, that we replace the words ''might be affected'' in the final rule language. One commenter suggested replacing the words ''might be affected'' with ''may realize physical or hydrological adverse impacts.'' This phrase does not afford the regulatory authority sufficient flexibility in making determinations about areas that may be affected by dewatering. The other commenter suggested we replace ''might be affected'' with ''could reasonably be significantly affected, based on the professional judgment of a professional hydrologist within the regulatory authority.'' This phrase is too vague and subjective, particularly since the commenter does not explain what the term ''reasonably be significantly affected'' means. Therefore, we are retaining the words ''might be affected'' in the final rule text within final paragraph (3) and adopting paragraph (c), as proposed, with the exception of renumbering it as final paragraph (3).

In the preamble to the proposed rule, we invited comment on whether the definition of ''adjacent area'' should prescribe the Hydrologic Unit Code (HUC) 12 watershed or a more appropriate minimum watershed size for the adjacent area for surface water resources. Several commenters supported inclusion of at least the next higher order drainage area for baseline surface water characterization where dewatering of streams by longwall or other high-extraction mining may occur as a mechanism to define adjacent area. In contrast, another commenter strongly opposed an approach of using the next higher order drainage area to determine ''adjacent area''. That commenter stated that using the definition of ''adjacent area'' as the drainage area of the operation and at least the next higher order drainage area could result in several thousand acres and associated stream lengths being added to the stream mapping and monitoring requirements. We agree with this commenter and have not changed the definition for two reasons. Changing the definition to include a specific watershed would create fixed boundaries for the ''adjacent area'' and may not be adequate to capture all areas with probable impacts on resources. In addition, the fixed area may be larger than necessary, which may result in collection of data with little or no value for evaluation of the impacts of mining and reclamation.

Angle of Dewatering

In response to numerous comments, we are adding the definition of ''angle of dewatering'' to the final rule. As we discussed in the definition of ''adjacent area'' we are defining the term ''angle of dewatering'' to mean, ''the angle created from a vertical line drawn from the outer edge or boundary of high-extraction underground mining workings and an oblique line drawn from the terminus of the vertical line at the mine floor to the farthest expected extent that the mining will cause dewatering of groundwater or surface water.'' This definition,[113] or similar variations, has been in use for many years, and is commonly used in defining the potential impact area for stream dewatering and other adverse impacts to surface water and groundwater as a result of underground mining. As the commenters recognized, the actual zone of hydrologic impacts to surface water and groundwater caused by subsidence induced dewatering will be highly site specific; depending of lithology, depth of coal seam, aquifer characteristics, and

[112] 80 FR 44436, 44467–68 (Jul. 27, 2015).

[113] Dixon, supra at 169–182.

the extent to which groundwater contributes to surface flow of streams. Due to the variability of these impacts and the site specific nature of the data needed to accurately determine the angle of dewatering it is not possible to define one all-inclusive ''angle'' of dewatering. Therefore, we are identifying impacts to be expected within the ''angle of dewatering''. The permittee will be responsible for performing the necessary onsite investigation to estimate the ''angle of dewatering'', and to define the potentially affected surface area and groundwater resources.

Approximate Original Contour

We proposed to revise the definition of ''approximate original contour'' to clarify that the term refers to the general land configuration within the permit area as it existed before any mining and not to a configuration immediately prior to the current mining. As the preamble explained,[114] this approach is consistent with section 515(b)(2) of SMCRA,[115] which requires that surface coal mining and reclamation operations be conducted so as to ''restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining . . . .''. As the preamble also explained,[116] the U.S. District Court for the District of Columbia held that the word ''any'' used in this SMCRA section ''indicates that Congress intended the operator to restore the land to the condition that existed before it was ever mined.'' [117]

Numerous commenters took exception to the addition of the word ''any'' in front of the word ''mining'' in the definition of approximate original contour. One commenter contended that the current definition is clear and should not be changed and that the proposed change would conflict with the statutory definition at section 701(2) of SMCRA.[118] As stated above, and in the preamble to the proposed rule, the changes to this definition only clarify our longstanding policy that ''approximate original contour'' refers to the general land configuration within the permit area as it existed before any mining and not to a configuration immediately prior to the current mining. The use of the term ''original'' within the definition of approximate original contour supports the contention that restoration is based on the land's original or natural configuration, before any mining, and not on its altered contour as impacted by pre-SMCRA mining. The addition of the word ''any'' simply clarifies this point. Clearly, SMCRA did not intend previously mined landscapes with dangerous highwalls and ungraded spoil piles and ridges as an acceptable postmining topography when they are remined under SMCRA. The added language is intended to assure these lands will be reclaimed to eliminate as many of these adverse features and contours to the extent possible. During a nationwide evaluation of approximate original contour in 2010, we learned that certain state regulatory authorities were allowing pre-SMCRA abandoned mine land features, such as dangerous highwalls and ungraded spoil piles and ridges, to form the basis of postmining topography when they are remined under SMCRA. This practice is not allowed under SMCRA and the changes to this definition provide clarification but do not depart from, nor conflict with, the statutory definition, as suggested by the commenter.

Other commenters stated that it was not appropriate to require current mining operations to repair the damage caused by pre-law mine operations. Another commenter asked us to clarify when the new definition might be applied on previously mined areas permitted before or after the effective date of the new rule, as it could have major impact on staff resources to re-review previously approved plans. As mentioned above, the clarification that pre-SMCRA abandoned mine land features may not provide the basis for approximate original contour is not a new requirement. Therefore, all SMCRA permits should already contain reclamation plans that ensure that the land will be reclaimed to the general surface configuration of the land prior to mining, regardless of this rulemaking. Furthermore, as discussed below, it is common practice for remining operations to repair the damage caused by pre-law mine operations. While SMCRA does not limit operations to only remining operations, and does not require operators to reclaim abandoned mine land features outside of a permit disturbance boundary, any previously mined areas that are re-disturbed during the course of remining must be reclaimed according to all of the requirements of SMCRA. No changes were made as a result of these comments.

Other commenters not only objected to the addition of the word ''any'' before the word ''mining'' in the definition of approximate original contour at § 701.5, the commenters questioned our legal authority to make this modification to our regulations. These commenters contend that requiring operations to ensure that the reclaimed area closely resembles the general surface configuration prior to any mining, instead of the general surface configuration just prior to permit issuance, would impose an unachievable standard. However, the requirement that operations ensure that the reclaimed area closely resemble the general surface configuration prior to any mining is not a new requirement. In fact, SMCRA's legislative history shows that, except in limited circumstances, it was commonly understood that previously mined areas could and should be remined and reclaimed to achieve original contours. When testifying about Pennsylvania's surface coal mining law, the basis for SMCRA, Pennsylvania's Governor Milton J. Shapp testified that:

> Since our strip mining laws have been in effect, many coal operators have come back in the same area and are now digging the second seam; and, of course, as they do that, they are restoring the original contour, so that a large percentage of the scars of western Pennsylvania, where we has [sic] this double seam, have already been corrected . . . .

H.R. 2 Hearing Part II at 46. The addition of the word ''any'' is merely a clarification. Furthermore, commenters did not provide an explanation or an example to illustrate why this requirement is unachievable.

In support of their contention that we lack the legal authority to insert the word ''any'' into the definition of approximate original contour, commenters made three main arguments. First, commenters rely on two recent decisions from the Departmental Cases Hearings Division in the Department's Office of Hearings and Appeals, in which an administrative law judge allowed a mining company to model postmining surface configurations on pre-SMCRA abandoned mine land features. However, decisions of administrative law judges are not Departmental precedents and are not binding on the Interior Board of Land Appeals, other administrative law judges, the Office of Surface Mining, or Article III Courts. *West Cow Creek Permittees* v. *BLM,* 142 IBLA 224, 235 n.16 (1998). In fact, administrative decisions of this type are only binding on the parties if the decision is not appealed or if the decision is upheld upon appeal to the Interior Board of Land Appeal. In this case, both decisions have been appealed to the Interior Board of Land Appeals

[114] 80 FR 44436, 44468 (Jul. 27, 2015).

[115] 30 U.S.C. 1265(b)(2).

[116] *Id.*

[117] *In re Permanent Surface Mining Regulation Litigation. I, Round I (PSMRL I, Round I),* 1980 U.S. Dist. LEXIS 17722 at *95 (D.D.C. 1980).

[118] 30 U.S.C. 1291(2).

and are awaiting a decision. Finally, these decisions did not address our authority under SMCRA but were based on a state regulatory authority's interpretation of its regulations.

Second, commenters stated that it was incorrect for us to reference the postmining land use and backfilling and grading performance standards at Sections 515(b)(2) and (b)(3) of SMCRA in support of its clarification that postmining surface configuration should be based on contours prior to any mining. These commenters instead insist that we should only consider the statutory definition of approximate original contour at section 701(2) [119] in its analysis of whether approximate original contour should be based on the contours prior to any mining or whether it is appropriate to base postmining contours on pre-SMCRA abandoned mine land features present at the proposed mining site at permit issuance. We do not agree. Postmining land use and approximate original contour are closely linked and should not be artificially separated. The requirements at sections 515(b)(2) and (b)(3) [120] that land be backfilled and graded to ''restore the approximate original contour'' with all highwalls, spoil piles, and depressions eliminated and ''restore'' the land to the uses that ''it was capable of supporting *prior to any mining*'' complement each other, ensuring that the standard for reclamation is the condition of the land in its natural, or ''original'' condition, prior to any mining activities. Our longstanding understanding of this connectedness is evidenced in the fact that approximate original contour and postmining land use are listed together at 816.102(a) as requirements for backfilling and grading.

Third, a few commenters questioned whether requiring that approximate original contour be based on the condition of the land prior to any mining would preclude the beneficial practice of remining. We agree that section 102(h) of SMCRA [121] promotes the reclamation of pre-law sites that have been left in an environmentally degraded condition. However, these commenters may not be aware that our regulations already provide an approximate original contour exemption for previously mined areas ''where the volume of all reasonably available spoil is demonstrated in writing to the regulatory authority to be insufficient to completely backfill the reaffected or enlarged highwall.'' 30 CFR 816.106(b). In promulgating our regulation at § 816.106, we determined that no approximate original contour exception was necessary where a previously mined area has sufficient spoil to completely backfill the reaffected area or enlarged highwall. In those instances, there is no reason to treat the site any differently and the operator must follow the general backfilling and grading requirements at § 816.102. If approximate original contour were based on the surface configuration at permit issuance, instead of our longstanding policy of using the surface configuration prior to any mining, the exemption for previously mined areas would not be necessary because an applicant would always be able to base reclamation on any pre-SMCRA abandoned mine land features within a permit, such as orphan spoil piles, pits, and highwalls. This outcome would not result in the reclamation of previously mined areas. While encouraging remining is important, we have already provided an exemption for certain remining activities and do not believe that a greater exemption is necessary to encourage reclamation of pre-SMCRA abandoned coal mine sites through remining. For the preceding reasons, we find the arguments challenging our legal authority to make these changes unsupported and have not revised our definition.

One commenter expressed concern that the proposed changes could be interpreted to alter the core elements of approximate original contour. While this comment did not request a change to the definition, we can confirm that the changes do not alter the requirement that the reclaimed area must closely resemble the general surface configuration prior to any mining, must blend into and complement the drainage pattern of the surrounding terrains, and must contain no highwalls or spoil piles. These requirements apply, regardless of the presence or absence of abandoned mine land features, unless a separate exception applies.

Another commenter expressed concern that returning land to its approximate original contour would limit certain types of postmining land uses. Commenters did not provide any examples of situations where removal of pre-SMCRA abandoned mine land features would preclude any postmining land uses. We do not share the concern expressed by this commenter. In our experience, ensuring the elimination of pre-SMCRA abandoned mine land features only enhances the land's capability to support a wider variety of postmining land uses. Therefore, we do not believe that there is any need to make changes to the definition of approximate original contour based on these comments.

Several commenters stated that approximate original contour conditions before any mining might be difficult to determine because some sites may have been mined before the publication of United States Geological Survey quadrangle maps or were mined centuries ago. We do not believe that the lack of detailed USGS topographic maps or other information for very old pre-SMCRA mined areas should inhibit the ability to comply with this requirement. Considering the remining of previously mined sites requires an approximate restoration and not an exact restoration of contours, before any mining, general knowledge of the natural topography typical of the local area should be sufficient. We made no changes as a result of this comment.

Similarly, one commenter expressed concern that the changes in the language of the definition somehow altered the standard for requiring the restoration of land configuration from ''approximate'' to ''exact'' original contours. It is not our intent to require reclamation to achieve the ''exact'' original contour. The final rule reflects that changes in the surface configuration after mining compared to the land's configuration before any mining are allowed as long as the premining configuration closely resembles the post-mine configuration. Another commenter requested that we explain the meaning of the term ''approximate'' or ''closely resembles'' as it relates to the definition of approximate original contour. Such a discussion is not necessary as the use of these terms within the definition have not been proposed for change and maintain the same meaning as they had before this revised definition.

Some commenters expressed concern that the revised definition implies that soil resources from previously mined areas must be restored, and argued that soil resources at many pre-law sites were not protected and it would be unreasonable to impose such a requirement to fully reclaim them. We disagree that the revised definition of approximate original contour implies, or could reasonably require, permittees and mine operators to recreate soil resources that have been permanently lost. We fully recognize that previously mined areas commonly have significant limitations. At the same time, these limitations should not be used as an excuse to not make improvements, such as elimination of highwalls and spoil piles, and remediation of hazardous and environmentally degraded conditions. We also reject the comment that grading

[119] 30 U.S.C. 1291(a)(2).

[120] 30 U.S.C. 1265(b)(2) and (b)(3).

[121] 30 U.S.C. 1202(f).

of remined spoil piles to meet approximate original contour is technically and economically impossible. Most on-going remining operations currently comply with the requirement of § 816.102 and are already achieving approximate original contour. Where they have insufficient spoil to fully reclaim the highwall, § 816.106 provides an alternative option for reclamation. We therefore decline to make changes in this definition based on these comments.

Others commented that the changes to the approximate original contour definition appear to focus mainly on problems in Appalachia, where remining, thick overburden, and mountaintop removal are prevalent. While we agree that these conditions may be prevalent in Appalachia, sites with previously mined areas exist throughout the coal regions. For example, we noted problems with achieving approximate original contour in Oklahoma in a 2010 National Priority Review of approximate original contour. The clarifications provided in this final rule are applicable nationwide and will ensure that, unless an operation qualifies for an exemption from the requirement to achieve approximate original contour, such as the exemption for previously mined areas with insufficient spoil to completely reclaim the highwall under § 816.106, the reclamation will be based on contours present prior to any mining.

Several commenters advocated expanding the definition of approximate original contour to include the restoration of topography damaged by surface subsidence from underground mining, specifically longwall mining. Other commenters expressed opposition to the inclusion of such language and instead urged that subsidence from underground mining be specifically excluded from the definition of approximate original contour. After consideration of both positions, we have determined that these changes are not necessary because approximate original contour is not applicable to surface subsidence for underground mining. Pursuant to section 701(2) of SMCRA, the requirement to achieve approximate original contour is applicable to ''reclaimed areas, including any terracing or access roads,'' that are subject to ''backfilling and grading of the mined area.'' [122] As the area above underground mine works are not part of the mined area that are backfilled and graded, they are not subject to requirements of approximate original contour. Therefore, expanding the definition of approximate original contour to include the restoration of topography caused by settlement due to underground mine subsidence would be inappropriate. Furthermore, following the same logic, explicitly excluding underground mining subsidence impacts is unnecessary because approximate original contour already does not apply to these impacts.

One commenter alleged that the post mining configuration should only have to resemble the areas surrounding the permits and that the proposed addition of the phrase ''within the permit area'' to the definition of approximate original contour is unlawful and contrary to SMCRA. The commenter based this contention on one portion of the statutory definition of approximate original contour that references ''the surrounding terrain''. We did not adopt this comment as it does not fully reflect the definition as it appears in SMCRA. The full statutory definition reads '' 'approximate original contour' means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area . . . closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain. . . .'' [123] The interpretation urged by the commenter fails to give force to the beginning of the definition, which requires that the reclaimed area closely resemble the general surface configuration of the land prior to mining and misses the distinction between resembling the surface configuration and blending into the surrounding area. The purpose of blending the reclaimed mined area with surrounding terrain is to ensure that there is a topographic connection that avoids dangerous and abrupt topographic changes, often due to swell and bulking factors. Complementing the drainage patterns of the surrounding area is also necessary to ensure that surface water flows similarly to how it did before mining and that it does not cause pooling above the mine site or downstream off-site damage. Approximate original contour has never been based on restoring the configuration of the mined area to resemble the surrounding terrain, especially because, in some situations, the topographic differences can be significant. As an example, if the mined area were flat to gently rolling topographically before any mining and the surrounding area were naturally a much steeper topography, it would be inappropriate to reclaim the mined area with the intention of using the surrounding terrain as the approximate original contour model. In this example, to achieve the requirements of approximate original contour, the mined area that was topographically flat to gently rolling before any mining should be reclaimed to a flat to gently rolling topography.

Commenters alleged that our proposed change does not adequately consider the effects of swell or bulking factors on grading and that an unintended consequence of our proposed change might be the construction of more excess spoil fills. While the commenters did not clearly explain why they believed that changes to the approximate original contour definition would have this result, other commenters mistakenly believed that our changes were intended to require the sites to be returned to the ''exact'' premining contours, which would limit the amount of spoil that could be returned to the mined out area and increase the need for excess spoil fills. However, as we explained above, our rule change does not require a return to the exact premining contours and therefore we do not anticipate an increased demand for excess spoil fills. Therefore, we have not made any change to this definition in response to these commenters.

One commenter asserted that the proposed definition deletes the reference in the statutory definition to permanent water impoundments. That is not the case. The final definition, like the proposed definition, provides that the requirement to eliminate all highwalls and spoil piles does not prohibit ''the approval of permanent water impoundments that comply with §§ 816.49, 816.55, and 780.24(b) or §§ 817.49, 817.55, and 784.24(b) of this chapter.'' That provision is substantively identical to the previous definition in § 701.5.

Other commenters stated they were unclear as to whether the rule would allow the creation and approval of the type of impoundments frequently referred to as final-cut impoundments or final-cut lakes. Some of these commenters pointed out that impoundments can serve as an aquatic resource for fish and wildlife habitat and are often requested by landowners. We agree that permanent water impoundments, including properly constructed final-cut lakes, can provide valuable fish and wildlife habitat, recreational facilities, or water resource features. For that reason, our definition of ''land use'' in section 701.5 includes ''developed water resources'' as a specific land use category. As previously noted, the final definition of

[122] 30 U.S.C. 1291(2).

[123] 30 U.S.C. 1291(2).

''approximate original contour'' specifically allows permanent water impoundments that comply with §§ 816.49, 816.55, and 780.24(b) or § 817.49, 817.55, and 784.24(b). Sections 816.49(b) and 817.49(b) of our rules establish criteria for the approval of permanent impoundments, including final-cut impoundments. Paragraphs (b)(7) and (8) of those rules are particularly pertinent to final-cut impoundments. They require a demonstration that approval of the impoundment would not result in retention of spoil piles or ridges that are inconsistent with the definition of approximate original contour or the creation of an excess spoil fill elsewhere within the permit area.

A commenter approved of the clarification in the proposed rule [124] that coal refuse piles should be evaluated separately from the analysis of approximate original contour. As the commenter noted, requirements for the construction of permanent coal mine refuse piles are addressed separately from approximate original contour at 515(b)(11) and 516(b)(4) of SMCRA.[125] The regulations for coal waste are available at §§ 816.81, 816.83, 816.84, 816.87, 817.81, 817.83, 817.84, and 817.87. However, if coal refuse material is placed in the mined out area, the mined out area must still be returned to approximate original contour unless the regulatory authority has approved a coal refuse disposal area in that location. We have not made any changes to the proposed rule in response to this comment.

Backfill

We received no comments on this proposed definition, which we are adopting as proposed.

Bankfull Stage

We proposed to define ''Bankfull'' as the ''water level, or stage, at which a stream, river, or lake is at the top of its banks and any further rise would result in water moving into the flood plain.'' [126] We explained in the preamble to the proposed rule that the proposed definition paralleled the definition in the National Weather Service glossary and clarified the technical and scientific term that we use ''to more precisely fix the boundaries of stream buffer zones and riparian corridors in our proposed stream restoration requirements.'' [127] As explained below, we modified this definition in response to comments.

One commenter argued that the definition of ''bankfull'' should include a storm frequency interval to make the definition applicable to altered watersheds or systems that have experienced downcutting and are disconnected from floodplains. It was never our intent to except altered watersheds or systems that are disconnected from floodplains from this definition. We agree that streams, such as those with steep-sloped areas, that may be entrenched and lack a floodplain should be addressed by the definition because entrenched streams are commonly found within all of the coal regions of the United States. In consideration of this comment, we are adding the term ''stage'' to the term ''bankfull'' and revising the definition to include entrenched streams, rivers and lakes. The term ''bankfull stage'' is appropriate because experts generally use the term ''bankfull stage'' when describing high water events in streams, rivers, or lakes that have active flood plains or are entrenched. For entrenched streams, rivers, or lakes, experts define ''bankfull stage'' as the highest scour line, bench, or top of the point bar.[128]

Another commenter alleged that the proposed definition of ''bankfull'' is inconsistent with the definitions of leading experts such as Rosgen, the United States Geological Survey, and North Carolina University. The commenter argued that multiple other factors in the proposed rule—such as bankfull width, depth, and flood prone area—rely on a properly assessed ''bankfull stage'' and that an incorrect definition would lead to inaccurate data, which in turn would lead to improperly designed projects. In place of the ''bankfull'' definition, the commenter argued for consistent and clear terminology, such as the definition relied on by leading experts, to ensure that appropriate and accurate data are collected. Additionally, the commenter argued that the definition and proposed rule increased confusion because the agency did not provide guidance for the calculation of flood prone areas or include references to methods such as hydrologic modeling, Federal Emergency Management Agency flood maps, a standard distance from top of banks, or Rosgen's 2X maximum bankfull depth method. Calculation of flood prone areas is not germane to the definition of ''bankfull stage''; however we would expect that standard engineering practices would be used to calculate the flood prone areas. Our rule uses ''bankfull stage'' only for the purpose of determining the point from which the stream buffer zone must be measured and describing stream channel profiles. As we discuss above, we have revised the term from ''bankfull'' to ''bankfull stage'' and have more consistently aligned our proposed definition to the definition relied on by leading experts.

One commenter argued that a definition of ''bankfull'' is not necessary because most ephemeral streams do not have banks. We disagree. For the reasons explained later in this preamble, we modified the definition of ''ephemeral stream'' in the final rule to ''include[ ] only those conveyances with channels that display both a bed-and-bank configuration and an ordinary high water mark, and that have streambeds located above the water table year-round.'' Thus, if a conveyance lacks a bank, we would not classify the conveyance as a stream. As such, a definition of ''bankfull stage'' remains necessary to establish the boundaries of the streamside vegetative corridor for all stream types.

In the final rule, ''bankfull stage'' means the water level at which a stream, river, or lake begins to overflow its natural banks and enter the active floodplain or if the stream, river, or lake is entrenched, bankfull stage is identified as the highest scour line, bench, or top of the point bar. This term and definition applies to all streams, rivers, and lakes.

Biological Condition

We proposed to define ''biological condition'' as a measure of the ecological health of a stream or segment of a stream as determined by the type, diversity, distribution, abundance, and physiological state of aquatic organisms and communities found in the stream or stream segment. Some commenters expressed support for the proposed definition. Some commenters questioned how this term differed from another new term that we proposed to define, ''ecological function''. In response, we revised the definition of ''biological condition'' by deleting the statement that biological condition is a measure of the ecological health of a stream or segment of a stream. The final

[124] 80 FR 44436, 44468 (Jul. 27, 2015).

[125] 30 U.S.C. 1265(b)(11) and 1266(b)(4).

[126] 80 FR 44436, 44587 (July 27, 2015).

[127] *Id.* at 44469.

[128] *See, e.g.,* Dave Rosgen, *Applied river morphology,* Wildland Hydrology, Pagosa Springs, Colorado (1996); Cheryl Harrelson et al., *Stream channel reference sites: an illustrated guide to field techniques.* Gen Tech. Rep. RM–245, Fort Collins, Colorado (1994); U.S. Department of Agriculture, Forest Service, Rocky Mountain Forest and Range Experiment Station.; William A. Harmon, *Finding Bankfull Stage in North Carolina Streams,* Volume 590, Issue 3 of AG (Series) River course, North Carolina Cooperative Service Extension Service (2000).

definition clarifies that biological condition refers to the characteristics of the biota found in surface water bodies, including streams.

Several commenters requested we remove the term ''physiological state'' from the definition of biological condition because it refers to a condition that is difficult to measure and also implies that any change in this condition would prevent mining. We agree with this assessment. ''Physiological state'' may be unmeasurable and our concerns are effectively addressed by the rest of the definition of ''biological condition'' when it refers to the type, diversity, distribution, and abundance of aquatic organisms and communities found in a stream, stream segment, or other waters. Therefore, we have deleted ''physiological state'' in the definition of ''biological condition'' within the final draft rule.

One commenter expressed concern that the definition of ''biological condition'' coupled with the definition of ''parameters of concern'' would impose new and burdensome requirements. We disagree. We define ''parameters of concern'' as those chemical or physical characteristics and properties of surface water or groundwater that could be altered by surface or underground coal mining activities, including discharges associated with those activities, in a manner that would adversely impact the quality of groundwater or surface water, including adverse impacts on aquatic life. The definition of ''parameters of concern'' clarifies that these parameters may be of import because of potential impacts on biological conditions. Neither the definition of ''parameters of concern'' nor ''biological condition'' prescribe additional biological data collection beyond the requirements expressly defined elsewhere in the final rule.

Some commenters noted that gathering data on ''biological condition'' of streams would increase permitting and monitoring costs on the part of the operator and the burden of the regulatory authority to review the resulting data. We agree with the commenters and have made several changes to these requirements in relationship to ephemeral and intermittent streams. These changes can be found within final rule §§ 780.19(c)(6) and 784.19(c)(6), related to underground mining, formerly §§ 780.19(e) and 784.19(e) of the proposed rule. These changes will reduce the cost and time commitment of the operator and regulatory authority. However, as further described in the preamble discussion of final rule §§ 780.19(c)(6) and 784.19(c)(6), below, some of this information is necessary to adequately determine the condition of the stream premining, during mining, and after mining because these inventories and assessments provide crucial information on the function of these streams.

One commenter requested that we exclude ephemeral streams from the definition of ''biological condition'' because assessment of the biological condition of ephemeral streams is impractical and unreasonable due to inconsistent flows. We agree with the commenter's statement about the impracticality of assessing the biological condition of ephemeral streams. However, instead of revising the definition of biological condition, as explained above, we have revised our baseline data requirements. This revision to final § 780.19(c)(6)(vi), includes the elimination of the requirement that permit applications include baseline data on the biological condition of ephemeral streams.

We also revised the definition of ''biological condition'' by adding the phrase ''found in surface water bodies, including streams'' because biological condition assessments are not inherently limited to streams. This change was made to better tailor the definition to the manner in which the term is explained and used in a final report from the U.S. Environmental Protection Agency Practitioners Guide [129] stating, ''[a]s a practical matter, our rules use this term only in connection with perennial and intermittent streams, but there is no scientific basis for limiting the definition itself in that manner.''

Cumulative Impact Area

We are adopting the definition of ''cumulative impact area'' as proposed with the following exceptions. We have altered the nomenclature of this definition by modifying the paragraphs to conform to the rest of the rule. Instead of using (a) through (c) to designate paragraphs, as we did in the proposed rule, we use (1) through (3) to designate paragraphs in the final rule.

One commenter requested that, at a minimum, the eight or six digit hydrologic unit code be used to delineate the cumulative impact area to ensure the inclusion of all impacts from active, closed, and expired mines on downstream water quality. We are not modifying the final rule to accommodate this request. Regulatory authorities are required to assess the probable cumulative impacts of all anticipated mining in a given area, regardless of a specified hydrologic unit code (HUC), to assure the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Therefore, the region that needs to be included in an area may be larger or smaller than a HUC 6 or 8.

Numerous commenters asked us to consider deleting the requirement within the proposed rule of using a HUC–12 watershed size in delineating the ''cumulative impact area''. The commenters stressed that a HUC–12 watershed may be appropriate in some cases but would result in areas that are too broad or too restrictive in others. The commenters requested the proposed rule be revised to allow the regulatory authority flexibility in requiring a more suitably-sized watershed approach based on the permit area under consideration, existing and anticipated coal mining operations, and site and regional characteristics. We agree with the commenters and have revised the proposed definition to allow the use of a HUC–12 or a different-sized watershed deemed appropriate for purposes of preparation of the cumulative hydrologic impact assessment. This change will allow the regulatory authority to use a watershed size that is more appropriate to the area under evaluation.

In addition to this change we altered the definition of ''cumulative impact area'' within the final rule by renumbering the paragraphs and removing proposed paragraph (c)(6). Proposed paragraph (c)(6) specified that anticipated underground mining includes all areas of contiguous coal reserves adjacent to an existing or proposed underground mine that are owned or controlled by the applicant. This proposal was included because, barring significant changes in economic or regulatory conditions, the mine would reasonably be expected to extend into those reserves in the future. We received numerous comments requesting that we not adopt the proposed requirement that the cumulative impact area include all areas of contiguous coal reserves adjacent to an existing or proposed underground mine when the applicant owns or controls those reserves. Commenters stated that the requirement was too broad and unworkable and could result in an increased burden on industry and the regulatory authority. Commenters also stated that the information related

[129] U.S. Envtl. Prot. Agency, *A Practitioner's Guide to the Biological Condition Gradient: A Framework to Describe Incremental Change in Aquatic Ecosystems.* EPA–842–R–16–001. U.S. Envtl. Prot. Agency, Washington, DC (2016).

to coal reserves may be proprietary, and that the cumulative impact area should be defined based on potential impacts from approved operations and operations that are in some stage of the permit application process instead of resource control or ownership. For the reasons presented by the commenters, we agree that the inclusion of all continuous coal reserves adjacent to an existing or proposed underground mine in proposed paragraph (c)(6) is too speculative. Therefore, we have removed it from the final definition.

When neither baseline data nor analyses have been supplied by the applicant or permittee, a commenter claimed that it may not be technically feasible to assess the impacts of anticipated mining upon water resources during mining and reclamation and after final bond release. We agree that evaluation of potential impacts from areas of existing or anticipated mining on surface water and groundwater resources are not technically feasible in the absence of baseline or other data. This rule sets forth requirements for the collection and analysis of premining data about the site of the proposed mining operation and adjacent areas adequate to establish a comprehensive baseline that will facilitate evaluation of the effects of the proposed operation. If sufficient data is not available on areas of anticipated mining to allow for a meaningful analysis of potential impacts, the regulatory authority cannot approve the permit application in accordance with § 780.21 of this rule. In addition, the commenter continued that we should provide guidance on incorporating anticipated mining areas into the cumulative hydrologic impact assessment. We disagree. The concept of including anticipated mining as part of the cumulative impact area is not new and has been an integral component of the cumulative impact area since the early 1980s. Sections 507(b)(11) and 510(b)(3) of SMCRA [130] require that the regulatory authority prepare an assessment of the probable cumulative impact of all anticipated mining in the area upon the hydrology of the general area. In 1983, we adopted a definition of cumulative impact area to identify both the extent of the area that must be included in this evaluation and the scope of the term ''anticipated mining.'' Paragraphs (c)(1) through (3) of the proposed definition, now paragraphs (3)(i) through (iii) are substantively identical to paragraphs (a) through (c) of the previous definition. In addition, over the years, we have published several technical reference documents for the development of cumulative hydrologic impact assessments, including information on anticipated mining activities that provides guidance as requested by the commenter. Those documents are available on our home page on the internet (*www.osmre.gov*) or upon request.

Several commenters stated there was no justification for a requirement to analyze the anticipated impacts after final bond release and that any requirement to do so was beyond SMCRA authority. In response, we have decided that it is neither feasible nor practical to attempt to predict anticipated cumulative impacts following final bond release. The final definition that we are adopting does not require this analysis of potential impacts after final bond release.

One commenter disagreed with the inclusion of any proposed surface or underground coal mining operation for which a request for an authorization, certification, or permit has been submitted under the Clean Water Act as anticipated mining. We disagree with this comment. Inclusion of proposed operations in situations where the Clean Water Act authorization process has begun will result in preparation of a more comprehensive analysis by the permit applicant or permittee and the regulatory authority. Those operations are within the realm of anticipated mining because the permitting process for those mines has begun, albeit under the Clean Water Act rather than SMCRA. Nothing in section 507(b)(11) of SMCRA [131] limits ''anticipated mining'' to operations that have begun the SMCRA permitting process. Further, § 780.27(a), about permitting requirements that apply to proposed activities in or through ephemeral streams and § 780.28(a), about additional permitting requirements that apply to proposed activities in, through, or adjacent to a perennial or intermittent stream specifies that if the proposed permit area includes waters subject to the Clean Water Act, the regulatory authority must condition the permit to prohibit initiation of surface mining activities in or affecting those waters before the permittee obtains all necessary authorizations, certifications, and permits under the Clean Water Act.

Ecological Function

We proposed to define the ''ecological function'' of a stream as the role that the stream plays in dissipating energy and transporting water, sediment, organic matter, and nutrients downstream. The proposed definition included the ability of the stream ecosystem to retain and transform inorganic materials needed for biological processes into organic forms and to oxidize organic molecules back into elemental forms through respiration and decomposition. It further stated that the term includes the role that the stream plays in the life cycles of plants, insects, amphibians, reptiles, fish, birds, and mammals that either reside in the stream or depend upon it for habitat, reproduction, food, water, or protection from predators. Finally, the proposed definition stated that the biological condition of a stream can be used as one measure to infer the status of the stream's ecological function.

Various commenters found the definition to be overly broad, too vague, unclear, or lacking the specificity needed to establish standards for the restoration of ecological function. Other commenters opposed the definition based on the opinion that the definition relied too heavily on research in Appalachia and upon the U.S. Army Corps of Engineers guidance [132] referenced in the preamble to the proposed rule. Other commenters expressed concern that we are mandating specific metrics that may not be applicable to all regions of the country or that may be unreasonably expensive. In response to these comments, and others which voiced concern that compliance with this definition is critical to the determination of bond release, we conducted further analyses to determine how to make this definition more applicable to scientifically defensible standards and to be more clearly measurable, and thus capable of implementation in the context of bond release. Therefore, and for the reasons explained further below, we modified the final rule to define ecological function as ''the species richness, diversity, and extent of plants, insects, amphibians, reptiles, fish, birds, mammals and other organisms for which the stream provides habitat, food, water, or shelter. The biological condition of a stream is one way to describe its ecological function.'' This definition includes some characteristics of what is often referred to in scientific literature as ecological structure, which often encompasses the abundance and composition of species as a result of

[130] 30 U.S.C. 1257(b)(11) and 1261(b)(3).

[131] 30 U.S.C. 1257(b)(11).

[132] U.S. Army Corps of Engineers, *Operational Draft Regional Guidebook for the Functional Assessment of High-Gradient Ephemeral and Intermittent Headwater Streams in Western West Virginia and Eastern Kentucky*. ERDC/ELTR–10–11, July 2010, U.S. Army Engineer Research and Development Center, Vicksburg, MS., (Jul. 2010).

physical, chemical, and biological forces.[133] Our definition of ecological function includes this abundance and composition of species when it refers to the species richness, diversity, and extent of plants, insects, amphibians, reptiles, fish, birds, mammals and other organisms. We are including this characteristic of ecological structure in the final rule definition of ecological function because this rule at § 800.42(d)(2) requires restoration of ecological function in connection with Phase III bond release, and it is therefore necessary to have a definition that indicates the ways ecological function can be measured. The traditional bioassessment tools we require to assess and monitor perennial streams (and intermittent streams where scientifically defensible protocols exist) are appropriate to measure ecological function according to our definition. The last sentence of the definition of ''ecological function'' specifies that the biological condition of a stream is one way of describing its ecological function. Therefore, unless the regulatory authority determines additional criteria are necessary or appropriate, establishment of a standard based on biological condition (and scientifically defensible bioassessment protocols as described within the final rule within § 780.19(c)(6)) would suffice.

We designed the final definition to better support the various ways in which regulatory authorities throughout the United States will actually have to assess and monitor ecological function in the context of sampling organisms. Some commenters objected to including factors within the definition of ''ecological function'' that have no direct role in demonstrating the success of reclamation under SMCRA. For example, the commenters noted that the ecological role that a stream plays in transporting nutrients downstream, known as nutrient cycling, is included within the definition, but is not a criterion used in determining eligibility for bond release. Another commenter noted that there is no agreement on objective standards for many facets of the definition. In response to these comments, the final definition eliminates references to physical and chemical processes such as dissipating energy; transporting water, sediment, organic matter, and nutrients downstream; transforming inorganic materials needed for biological processes into organic forms; and oxidizing organic molecules back into elemental forms. We also removed the specific reference to salamanders because that reference could be considered regionally biased and is unnecessary, as salamanders are not part of the ecology of all streams.

Because we are requiring the reestablishment of ecological function as a condition for bond release, we have an obligation to both the permittees and the SMCRA regulatory authorities to provide enough information within the definition to allow for the creation of clear standards for purposes of bond release. This necessitates a definition that gives clear guidance to regulatory authorities on the meaning of ecological function but is still broad enough to allow them to assess and monitor organisms that these regulations do not specifically address. The final rule provides the regulatory authority with a practical definition of ''ecological function'' that will enable them to create specific standards for assessing ecological function in their various regions. The final definition does not mandate specific metrics, although it does specify that the biological condition of a stream is one way to describe its ecological function. Under this definition, regulatory authorities are free to develop specific standards related to various types of organisms or populations including the use of indirect ways to measure those organisms or populations, such as through leaf litter breakdown.[134] It also recognizes that the presence of various types of populations, such as periphyton, fish, soil microbes, and mammals, could provide support to a finding that ecological function has been restored. The final definition also is designed to allow for future innovations in measuring ecological function as they become available.

Some commenters opposed the proposed definition because of a fear that we (or a third party, pursuant to the citizen suit provisions of section 520 of SMCRA) [135] could initiate action against a state regulatory authority for failure to analyze each facet of the definition during review of the permit application. While the final rule cannot prevent citizen suit litigation, the final rule, when followed, provides sufficient flexibility to defend against this type of challenge.

Finally, some commenters found our proposed definition to be overreaching and academic in nature and noted that methodology for measuring ecological function is still a matter of scientific debate. While we agree that science will continue to evolve on this topic, we disagree that this continued evolution precludes us from defining ecological function as we have done in the final rule. The final definition of ''ecological function'' merely clarifies our intended meaning of the term. It is not a metric in and of itself and standards for implementing this definition can be adapted, updated, and adjusted as the methodology evolves.

Ephemeral Stream

As discussed in the preamble to the proposed rule, we proposed to redefine ''ephemeral stream'' in a manner that is substantively identical to the manner in which the U.S. Army Corps of Engineers defines that term in Part F of the 2012 reissuance of the nationwide permits under section 404 of the Clean Water Act. *See* 80 FR 44436, 44470 (Jul. 27, 2015). Our existing definition classifies streamflow in response to the melting of snow and ice as an ephemeral stream, whereas the Corps' definition is silent on this point. The preamble to the Corps' definition states that the definition appropriately focuses on the duration of flow and provides that melting snow should not be considered a precipitation event because the development of snowpack over the winter season is not a particular event. *See* 77 FR 10184, 10262 (Feb. 21, 2012). An industry commenter supported the Corps' treatment of snowmelt as appropriate because in areas where there is an ephemeral channel, snow depth can cause extended runoff which should not be considered in the determination of the channel classification. In a similar vein, a regulatory authority noted that small rills created by rainfall events and snowmelt in the arid and semi-arid landscape should not be considered ephemeral streams; other regulatory authority commenters, however, recognized snowmelt is an important source of streamflow in ephemeral streams and asserted that it should be considered as part of the definition. After reviewing the comments, we are revising the definition of ephemeral streams to include those conveyances receiving runoff from snowmelt events and that have both a bed-and-bank configuration and an ordinary high water mark. Including snowmelt events, in addition to rainfall events, as a primary source of flow is appropriate, as long as groundwater is not a source of surface water flow. The additional requirements that only those conveyances with channels that display

[133] Eric Stokstad, *On the Origin of Ecological Structure,* 326 (5949), Science, 33–35.

[134] Mark O. Gessner & Eric Chauvet, *A Case for Using Litter Breakdown to Assess Functional Stream Integrity.* 12(2) Ecological Applications, 498–510 (2002).

[134] 30 U.S.C. 1270.

[135] 30 U.S.C. 1270.

both a bed-and-bank configuration and an ordinary high water mark will ensure that rills created by rainfall or snowmelt events would not be classified as an ephemeral stream.

One commenter strongly advised us to make no reference to the term ''swale'' as a stream. The commenter stated that in the western United States the term ''swale'' is commonly used to describe topographic features that are often not waters of the United States under the Clean Water Act because these features lack an ordinary high water mark. The term ''swale'' was not used in the proposed rule or the final rule. To minimize any confusion concerning what is or what is not a stream, we have revised the stream definitions for ''ephemeral stream'', intermittent stream'', and ''perennial stream'' to include a requirement that any topographic feature to be considered a stream must have both a bed-and-bank and an ordinary high water mark, in addition to the other requirements outlined in the specific definitions.

Excess Spoil

One commenter stated that the proposed definition of ''excess spoil'' was awkwardly worded. The commenter explained that the concept of ''excess spoil'' is complicated by the goal of minimizing ''excess spoil'' to reduce burial of streams. To address this and related comments expressing confusion regarding the term, we added to the definition of ''excess spoil'' a list of the types of spoil that do not constitute ''excess spoil''. This list excludes from the definition of ''excess spoil'': Spoil required to restore the approximate original contour of the mined-out area; spoil used to blend the final configuration of the mined-out area with the surrounding terrain in non-steep slope areas; spoil placed outside the mined-out area as part of a remining operation; spoil placed within the mined-out area in accordance with the thick overburden provisions of § 816.105(b)(1) of the final rule, except spoil material placed on the mined-out area as part of an excess spoil fill with a toe located outside the mined-out area; and any temporary stockpile of material that will be subsequently transported to another location.

Other commenters stated that the proposed definition might be misinterpreted to apply to topsoil or to temporary spoil piles. We agree and have revised the final rule to specify that ''excess spoil'' means spoil material *permanently* disposed of within the permit area. We further specified that temporary stockpiles of material that will be subsequently transported to another location are not included in the definition. The addition of the word ''permanent'' and the list explaining what is not considered ''excess spoil'' should preclude any misinterpretation that excess soil includes spoil or topsoil piles that are recognized as temporary in nature.

Another commenter noted that the proposed definition of ''excess spoil'' could, perhaps, inadvertently, designate material placed in an existing bench to be classified as ''excess spoil''. This commenter explained that spoil material placed on an existing bench above the approximate original contour would be subject to the more stringent proposed requirements for excess spoil disposal. According to the commenter, this would result in an increased burden to both industry and regulatory authorities while not providing additional stability or stream protection. Interpretation of the commenter's term ''existing bench'' could be viewed in two ways. One interpretation is that the ''existing bench'' is actually a previously mined bench. The other interpretation is that the ''existing bench'' is new construction as part of an active operation. If the first interpretation of the commenter's term is accepted—considering a bench on a previously mined area—we note that spoil placement on previously mined benches is preferable to construction of ''excess spoil'' on unmined land because it is more environmentally sound. In response, we revised the definition to exclude spoil material placed outside the mined-out area as part of a remining operation as explained within § 816.106 or § 817.106 of the final rule. Next, we considered the second potential interpretation—that the commenter's term ''existing bench'' pertains to construction as part of a current operation. The commenter is concerned that the classification of ''excess spoil'' includes spoil material placed in a manner that the lower portion of that spoil extends onto an open bench, most likely a bench developed along a lower coal seam mined, and the spoil material is placed at an elevation that is above the original elevation line. For the purposes of responding to this comment, we consider the commenter's reference to ''original elevation line'' to mean the approved approximate original contour surface. In the scenario that the commenter describes, the spoil material is placed on a newly created bench that is within the mined area and is therefore not considered ''excess spoil''. To further address the commenter's concern, we direct the commenter to § 780.35(b)(3) of the final rule that discusses the minimization and disposal of excess spoil. This section of the rule allows the placement of what would otherwise be ''excess spoil'' on the mined-out area to heights in excess of the approved approximate original contour surface. The purpose of § 780.35(b)(3) is to avoid or minimize construction of excess spoil fills on undisturbed lands. When considering the definition of excess spoil and the provisions of § 780.35(b)(3), spoil placed above the approved approximate original contour as described in the commenter's scenario is not considered ''excess spoil.''

One commenter stated that the proposed changes to the ''excess spoil'' definition are primarily focused on mountaintop removal and thick overburden mines and have little relevance outside Appalachia, and that they should therefore be limited to Appalachia. We acknowledge that ''excess spoil'' is primarily generated in central and southern Appalachia where both thick overburden and steep slopes are prevalent. However, mines in other regions also generate ''excess spoil''. For example, Alaska has a permit that generates excess spoil. Further, by definition, excess spoil is only applicable to those areas where it is generated, so, by default, if an area does not generate excess spoil then the rule provisions that pertain to excess spoil would not apply on that location.

One commenter indicated that the proposed preamble discussion implies that box cut spoil placed outside of the pit is not excess spoil for non-steep slope mining. We agree, noting that, by definition, the creation of box cut spoil on non-steep sloped areas does not automatically qualify this material as excess spoil, as this spoil is available for placement within the mined area and outside of the mined area when used to blend with the surrounding terrain.

Fill

We received no comments on this proposed definition, which we are adopting as proposed.

Form

Within §§ 780.28, 784.28, 800.42, 816.57, and 817.57 of the proposed rule, relating to activities in through, or adjacent to perennial and intermittent streams, we made reference to the restoration of the ''form'' of a stream. Specifically, the proposed rule required applicants desiring to mine through or divert a perennial or intermittent stream to ''demonstrate that [they could] restore the form . . . of the affected stream.

. . .'' [136] Additionally, in §§ 816.57 and 817.57 [137] we proposed that ''form'' of a stream segment must be restored. We explained in the preamble to the proposed rule that:

> a restored stream channel or a stream-channel diversion need not exactly replicate the channel morphology that existed before mining . . . it must have a channel morphology comparable to the premining form of the affected stream segment in terms of baseline stream pattern, profile, and dimensions, including channel slope, sinuosity, water depth, bankfull depth, bankfull width, width of the flood-prone area, and dominant in-stream substrate particle size.[138]

Despite this explanation in the preamble, several commenters questioned the meaning of the term ''form'' and how this term related to the term ''function'' that was also discussed in the proposed rule. Similarly, many commenters questioned the application of and relationship to the term ''form'' to the bond release provisions of § 800.42(b)(1) of the proposed rule and references to bond release within proposed §§ 780.28, 784.28, 800.42, 816.57, and 817.57. After consideration of these comments, we agree that the use of the term ''form'' and the similar term ''hydrological form'' within the proposed rule could be confusing. Therefore, we have eliminated any reference to ''hydrological form'' and included in § 701.5 a definition of the term ''form''. The term ''form'' as used in the proposed rule in § 816.57(b)(2)(i) and in the final rule definition was drafted based on the criteria established in ''Applied River Morphology'' by Rosgen.[139]

The addition of the definition of ''form'' will also provide clarity regarding the requirements for achieving Phase I bond release when mining through or permanently diverting a perennial or intermittent stream as discussed and explained more thoroughly throughout the applicable sections of the final rule preamble discussion.

The term ''form,'' as used in §§ 780.28(e)(1)(viii), 784.28(e)(1)(viii), 800.42(b)(1), 816.57(e), and 817.57(e), means the physical characteristics, pattern, profile, and dimensions of a stream channel. It is necessary to define the ''form'' of a stream because it greatly influences a stream's ''hydrologic function,'' which is also a term we are incorporating into the final rule for clarity. As contained in the final rule, the term ''form'' includes, but is not limited to, the flood-prone area to bankfull width ratio (entrenchment), channel width to depth ratio, channel slope, sinuosity, bankfull depth, dominant in-stream substrate particle size, and capacity for riffles and pools.

Specific to the definition of ''form,'' entrenchment defines the extent of flood prone area relative to channel size and, therefore, the areas in which hydrophilic and hydrophytic plant species are most adaptable. Channel width-to-depth ratio, in conjunction with channel slope, determines the discharge that, over time, transports most sediment downstream. Sinuosity directly influences channel slope. The dominant in-stream substrate particle size is dependent on discharge at bankfull stage and channel slope, and determines the nature of in-stream habitat and the types of biota that will dominate given appropriate water quality and nutrient availability. Additionally, in a natural or properly restored stream these components of ''form'' reach equilibrium such that they all remain relatively constant, even as the dynamic stream exists in a constant state of flux, with meanders migrating downstream, and the stream channel at any given location moving back and forth across the flood prone area. All of these features are integral to restoring ''form'' and ultimately to achieving successful stream restoration. Establishment of ''form'' is a prerequisite to achieving ''hydrologic function.''

Fugitive Dust

We proposed to remove this definition because it defines a term that we no longer use in our regulations. *See* 80 FR 44436, 44471 (Jul. 27, 2015).[140] We received no comments on the deletion of this term, so we are adopting our proposed action of deletion.

Groundwater

We proposed to revise the definition of groundwater to provide clarity and to replace the words ''ground water'' with the single word ''groundwater'' throughout our regulations for internal consistency. Specifically, our proposed definition was adapted from a publication entitled ''The ABCs of Aquifers'' [141] and Freeze and Cherry's ''Groundwater.'' [142] Under the proposed rule, we defined ''groundwater'' to mean subsurface water located in those portions of soils and geologic formations that are fully saturated with water; that is, those zones where all the pore spaces and rock fractures are completely filled with water. In conformity with plain language principles it is important to avoid redundancy. Therefore, in the final rule we have removed the phrase, ''*i.e.,* those zones where all the pore spaces and rack fractures are completely filled with rock'' as this is inherent in the meaning of the phrase ''saturated with water'', rendering the former phrase redundant.

We received comments from a regulatory authority that suggested that we define groundwater as ''any water that is beneath the ground surface.'' We do not concur. It would not be appropriate to define groundwater in those terms because the definition proposed by the commenter is not used by the scientific community. Another commenter said that the term ''fully'' was not necessary in our definition. Although we agree with the commenter that the term ''fully'' may be superfluous in some instances, we retained the definition based upon our review of scientific literature including Freeze and Cherry.[143]

Another commenter concerned about restoring perched aquifers within the permit area opined that perched aquifers are often difficult to differentiate from temporary saturation of the soil horizon as a result of precipitation events. We disagree. A perched aquifer has distinct properties, such as saturated permeable sediments overlying discontinuous impermeable sediments that are not found in soil horizons. The geologic information the permittee is required to collect as part of the permit application process under final rule § 780.19(f) will provide the information needed to differentiate a perched aquifer from a temporarily saturated soil horizon within the permit area.

Another commenter asserted that the proposed definition for ''groundwater'' included water in regional and perched aquifers. The same commenter was also concerned with the inclusion of ''perched aquifers'' in the definition of groundwater. The commenter was concerned that mining through a perched aquifer within the permit area would no longer be allowed because it would be considered impacts to groundwater, constituting material

[136] 80 FR 44436, 44610 and 44632 (Jul. 27, 2015).

[137] 80 FR 44436, 44656 and 44681 (Jul. 27, 2015).

[138] *Id.*

[139] Dave Rosgen, *Applied River Morphology,* Chapter 2, *Fundamental Principles of River Systems* and Chapter 5, *The Morphological Description.* (1996).

[140] 80 FR 44436 (Jul. 27, 2015).

[141] Andrew Stone.''The ABCs of Aquifers,'' (May 30, 2010); available at *http://www.nationaldriller.com/articles/85773-the-abcs-of-aquifers* (last accessed Nov. 8, 2016).

[142] Allen Freeze & John A. Cherry, *Groundwater,* Prentice-Hall, Englewood Cliffs, N.J., at pg. 2 (1979).

[143] *Id.* at 2.

damage of the hydrologic balance outside the permit area. We disagree with both of the commenter's assertions. First, under our previous definition of groundwater,[144] perched aquifers, local aquifers, and regional aquifers are all included in the definition. Therefore, there is no change in this respect to the definition of groundwater in the final rule; we merely listed specific aquifer types for the sake of clarity. In the proposed rule, we inadvertently excluded ''local aquifer'' from the list of types of aquifers. This was an oversight; therefore, we added ''local aquifer'' to the final rule definition of ''groundwater''. Secondly, the commenter's assertion that mining through a perched aquifer within the permit area would no longer be permissible is not accurate. As stated in the preamble,[145] perched aquifers could be mined through within the permit area and need not be restored unless restoration is needed to prevent material to the hydrologic balance outside the permit area.

Another commenter suggested that we mention in the definition of groundwater that the terms ''aquifer'' and ''water table'' are sometimes used to mean the same thing in our regulations. The terms do not mean the same thing and we have used the terms consistently and correctly throughout the preamble and final rule. Aquifer means a zone, stratum, or group of strata that can store and transmit water in specific quantities for a specific use.[146] Water table is the level (elevation) in the saturated zone at which the hydraulic pressure is equal to atmospheric pressure.[147] We use both of these terms, consistently in the final rule and not as implied by the commenter. The same commenter also asserted that we should include in the final definition the fact that groundwater water levels may vary seasonally. Although we agree with the commenter that groundwater levels may vary seasonally, it is not necessary to include this fact in the definition of groundwater. However, a requirement exists in final rule § 780.19(b) that the permit application must include information sufficient to document seasonal variations in the quality, quantity, and usage of groundwater, including all surface discharges within the proposed permit area and adjacent area.

We received another comment stating that the definition of groundwater did not need to be changed from the existing regulations. However, as stated in the preamble to the proposed rule,[148] these revisions are necessary to provide clarity and consistency.

Highwall Remnant

We received no comments on our proposed removal of this definition, which we are removing as proposed.

Hydrologic Balance

We proposed to revise our definition of ''hydrologic balance'' in § 701.5 to include more emphasis on water quality by specifying that the definition encompasses ''interactions that result in changes in the chemical composition or physical characteristics of groundwater and surface water, which may in turn affect the biological condition of streams and other water bodies.'' Several commenters either questioned the rationale for inclusion of the latter phrase or erroneously interpreted it as incorporating biological condition into the definition. The commenters opposed the proposed addition, asserting that the definition of ''hydrologic balance'' should focus on water quality and quantity and not the aquatic community.

We never intended for biological condition to be part of the definition of ''hydrologic balance'' which we agree should be limited to water quality, quantity, movement, and storage. Therefore, the definition that we are adopting as part of this final rule does not include the phrase ''which may in turn affect the biological condition of streams and other water bodies.'' However, that phrase is an accurate statement in that interactions that result in changes in the chemical composition or physical characteristics of groundwater and surface water may indeed affect the biological condition of streams and other water bodies, which is one of the reasons that the impact of mining and reclamation on the hydrologic balance is a primary focus of SMCRA and the permitting process.

One commenter stated that the definition should be limited to the flow, quantity, and physical form of water. According to the commenter, the definition should not include any mention of water quality. We disagree. SMCRA quite clearly includes water quality as a component of the hydrologic balance. For example, section 515(b)(10) [149] requires that surface coal mining operations minimize disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas by various methods, including avoiding acid or other toxic mine drainage and preventing, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow. Both of these methods address water quality issues.

Hydrologic Function

Within §§ 780.28, 784.28, 800.42, 816.57, and 817.57 of the proposed rule, relating to activities in through, or adjacent to perennial or intermittent streams, we made reference to the restoration of the ''form'' of a stream. Specifically, the proposed rule required applicants desiring to mine through or divert a perennial or intermittent stream to ''demonstrate that [they could] restore the form . . . of the affected stream . . . .'' [150] Additionally, in §§ 816.57 and 817.57,[151] we proposed that ''form'' of a stream segment must be restored. We explained in the preamble to the proposed rule that:

> a restored stream channel or a stream-channel diversion need not exactly replicate the channel morphology that existed before mining. . . it must have a channel morphology comparable to the premining form of the affected stream segment in terms of baseline stream pattern, profile, and dimensions, including channel slope, sinuosity, water depth, bankfull depth, bankfull width of the flood-prone area, and dominant in-stream substrate.[152]

Despite this explanation in the preamble, several commenters questioned the meaning of the term ''form'' and how this term related to the term ''function'' that was also discussed in the proposed rule. Similarly, many commenters questioned the application of and relationship to the term ''form'' to the bond release provisions of § 800.42(b)(1) of the proposed rule and references to bond release within §§ 780.28, 784.28, 800.42, 816.57, and 817.57. After consideration of these comments, we agree that the use of the term ''form'' and the similar term ''hydrological form'' within the proposed rule could be confusing. Therefore, we have eliminated any reference to ''hydrological form'' and have included a definition of the term ''hydrologic function'' in § 701.5. The term ''hydrologic function,'' is a term we are incorporating into the final rule for clarity.

The addition of the definition of ''hydrologic function'' will also provide clarity regarding the requirements for achieving Phase II bond release when mining through or permanently

[144] 44 FR 15318 (Mar. 13, 1979).

[145] 80 FR 44436, 44471 (Jul. 27, 2015).

[146] 44 FR 15317 (Mar. 13, 1979).

[147] Freeze and Cherry, *Groundwater* at 39.

[148] 80 FR 44436, 44587 (July 27, 2015).

[149] 30 U.S.C. 1265(b)(10).

[150] 80 FR 44436, 44610 and 44632 (Jul. 27, 2015).

[151] 80 FR 44436, 44656 and 44681 (Jul. 27, 2015).

[152] *Id.*

diverting a segment of a perennial or intermittent stream as discussed and explained more thoroughly throughout the applicable sections of the final rule preamble discussion.

The term ''hydrologic function'', as used in §§ 780.28(e), 784.28(e), 800.42(b)(2), 816.57(f), and 817.57(f), refers to the role that streams play in transport of water and flow of water within the stream channel and floodplain. As contained in the final rule, the term ''hydrologic function'' includes total flow volume, seasonal variations in streamflow and base flow, and provisions of the water needed to maintain floodplains and wetlands associated with the stream. Establishment of ''hydrologic function'' occurs after achieving ''form.'' The ''form'' of the stream has a significant impact on hydrologic function.

Intermittent Stream

As discussed in the preamble to the proposed rule,[153] we proposed to redefine ''intermittent stream'' in a manner that is substantively identical to the manner in which the U.S. Army Corps of Engineers defines that term in Part F of the 2012 reissuance of the nationwide permits [154] under section 404 of the Clean Water Act.[155] Additionally, we proposed to remove paragraph (a) of our former definition of ''intermittent stream.'' *See* 80 FR 44436, 44472 (Jul. 27, 2015). We received differing opinions on this invitation for comment. One regulatory authority and other commenters supported the proposed deletion while others urged the retention of paragraph (a), which provided that an intermittent stream means ''a stream or reach of a stream that drains a watershed of at least one square mile. . . .'' This former definition functioned to automatically designate any stream or reach of stream that drains a watershed of at least one square mile as an intermittent stream. We agree with the commenters supporting the deletion of paragraph (a) because the former definition is inconsistent with generally accepted stream classification systems because it is based on watershed size rather than streambed characteristics, duration, and source of streamflow. Therefore, we are not including paragraph (a) as it existed in the former regulation within the definition of ''intermittent stream'' in the final rule.

We received comments requesting that we add runoff from snowmelt events to the definition. For the same reasons explained in the preamble to the ''ephemeral stream'' definition, we are adding reference to ''snowmelt'' within the definition of ''intermittent stream.''

One commenter suggested the definition should be tied to the number of months in each year that snowmelt normally contributes to the baseflow in the stream. This comment was not accepted because the ''intermittent stream'' definition recognizes that snowmelt provides supplemental flow and that supplemental flow may only occur during certain times of the year.

Another commenter pointed out that the proposed definition of ''intermittent stream'' did not explicitly mention the relationship the stream has to the water table. The commenter thought this was problematic because we included the relationship in the proposed definition of ''perennial stream''. For the purposes of consistency and clarity we added a statement in the final rule definition that describes the relationship between the water table and an intermittent stream.

One commenter opined that the definition of ''intermittent stream'' should address whether a stream's function is impaired by change in flow and potential change in frequency, duration, magnitude, rate of change, and timing of flows. We did not accept this comment because functional impairment from water quantity changes is more appropriately addressed by the definition of ''material damage to the hydrologic balance outside the permit area'' found at § 701.5, and explained in this preamble.

Although we specified within the proposed definition that an ''intermittent stream'' means ''a stream or part of a stream that has flowing water during certain times of the year when groundwater provides water for streamflow'' several commenters questioned the extent to which groundwater should be considered in the definition of ''intermittent stream.'' Some commenters requested that the definition of ''intermittent stream'' specify that the groundwater contribution is from an aquifer and not a result of man-made features such as upstream reservoirs, groundwater pumped to the surface, or irrigation return flows. In addition, several commenters recommended the definition require that there be a contribution from groundwater and not strictly surface water runoff. Another commenter requested clarification that the mere occurrence of snowmelt in spring would not automatically make a stream ''intermittent'' rather than ''ephemeral.'' In consideration of these comments, we clarified the definition of ''intermittent stream.'' Within the final rule the definition of ''intermittent stream'' now includes the clarifying statement: ''[t]he water table is located above the streambed for only part of the year, which means that intermittent streams may not have flowing water during dry periods.'' Additionally, we agree with commenters that snowmelt should be considered a supplemental source of water for streamflow. Therefore, we have incorporated ''snowmelt'' into the final rule definition.

A commenter asserted that based on the proposed definition of ''intermittent stream'' and the prohibition of the placement of sedimentation control structures in a perennial or intermittent stream, coal mining would be severely and negatively impacted in the western region. The commenter implies that because intermittent streams with nominally, low-yield base flow from spring discharges are common in the western region, the proposed definition would change the stream classification. We disagree. Neither the proposed definition nor the definition within the final rule has any effect on the steam designation because both definitions require contribution of groundwater flow to the stream during parts of the year. In addition, the commenter opined that there should be an allowance for sediment control systems for other mining areas in relationship to intermittent streams similar to the exceptions allowed for excess spoil fills and steep-slope areas as provided in proposed paragraph (c) of § 816.57 and discussed within the preamble to the proposed rule.[156] The exceptions outlined in the proposed rule are incorporated into the final rule because in some steep-slope areas the only place to install a sedimentation control structure is in the stream. This is discussed in more detail in the preamble discussion of paragraph (h) of § 816.57.

Similar to the explanations within the definitions of ''ephemeral'' and ''perennial'' streams and to address commenters' confusion concerning what is or what is not a stream, we have revised the definition of ''intermittent stream'' to clarify that an ''intermittent stream'' only includes those conveyances with channels that display both a bed-and-bank configuration and an ordinary high water mark. The addition is consistent with the preamble discussions of the ''ephemeral stream'' and ''perennial stream'' definitions.

One commenter opined that linking the SMCRA definitions of ephemeral

[153] 80 FR 44436, 44472 (Jul. 27, 2015).

[154] 77 FR 10184,10288 (Feb. 21, 2012).

[155] 33 U.S.C. 1344.

[156] 80 FR 44436, 44554–44555 (Jul. 27, 2015).

and intermittent streams to the definitions of those terms in the U.S. Army Corps of Engineers 2012 Nationwide Permit may result in our definitions becoming obsolete when the nationwide permits are re-evaluated. After considering the comments, we are not adopting the U.S. Army Corps of Engineers' definition verbatim.

Invasive Species

Some commenters requested the final rule include definitions of ''invasive species,'' ''non-invasive species,'' and ''native species.'' Other commenters requested that we allow the regulatory authority to have latitude to define these terms. In response, we are adding two definitions to the final rule. We are defining ''invasive species'' and ''native species'' in the final rule. In the preamble to the proposed rule at § 780.12(g) [157] we referenced Executive Order 13112,[158] which focused on ''invasive species.'' This 1999 Executive Order included definitions of both ''invasive species'' and ''native species.'' On December 5, 2016, the 1999 Executive Order was amended by Executive Order 13751.[159] Executive Order 13751, entitled ''Safeguarding the Nation from the Impacts of Invasive Species,'' includes a slightly modified definition of invasive species as compared to the 1999 Executive Order. Because the 1999 Executive Order language more closely tracks the language of SMCRA related to protection of the human health and the environment, with one minor change for grammatical improvements, we are incorporating the definitions from the 1999 Executive Order into the final rule:

In response to the commenters that suggested that we allow the regulatory authority latitude to define these terms, we do not agree. It is important to have uniform definitions of these terms, and these definitions, adapted from the 1999 and 2016 Executive Orders, accomplish that objective. These final definitions of ''invasive species'' and ''native species'' satisfy the purposes of SMCRA, are appropriate, will provide sufficient guidance to regulatory authorities, and are generally consistent with the applicable Executive Orders. For example, although our definition of ''invasive species'' contains the term ''alien species'' and the definition in Executive Order 13751 does not, our use of that term is consistent with that Executive Order's new definition of ''alien species.'' In response to the request to define ''non-invasive species,'' we decline because those species that are not defined as invasive species will be classified as non-invasive species.

Land Use

One commenter stated that we should use or recognize international definitions of ''land use'' such as the definitions from the Organisation for Economic Co-operation and Development because these definitions are more practical when recognizing economic and cultural activities associated with human use of the land. The commenter further stated that we should explain the meaning of ''support facilities'' and ''integral part of the use'' included within the definition of ''land use.'' The existing definition of ''land use'' is sufficient. Moreover, as these terms were included in the previous version of the definition of ''land use'' and not otherwise proposed for change, we see no need to further explain their meaning or to use other definitions as suggested by the commenter. Our reason for changing this definition to include the sentence, ''[e]ach land use category includes land used for facilities that support the land use'' is to ensure the definition is aligned with our corresponding changes to §§ 780.24 and 784.24. The alterations of this section allow for modification of postmining land uses from premining without requiring approval of higher and better use if the land that existed before mining was already capable of supporting that use in its existing condition. We did not receive any comments on this aspect of definition change.

Material Damage

This definition discusses ''material damage'' in the context of the subsidence control provisions of §§ 784.30 and 817.121, which we have clarified in this final rule. Several commenters raised concerns about the effects of subsidence on the land and waters overlying the underground mining activities. Commenters also raised concerns about the applicability of the definition of ''material damage'' (in the context of underground mine subsidence) to hydrologic features and recommended that subsidence damage to surface waters be more specifically regulated. Many of these concerns are discussed in Part IV.K. of the preamble which discusses material damage from subsidence and in the preamble discussion to our definition of material damage to the hydrologic balance outside the permit areas in § 701.5 of this preamble. Other comments are discussed in the sections of the preamble that address the changes we have made to our subsidence control plan provisions at § 784.30 (previously § 784.20), or that explain the measures to prevent, control, or correct damage resulting from subsidence at § 817.121. Notably, as explained more fully in our preamble discussion at Part IV.K., we are revising the definition of ''material damage'' in the context of the subsidence control provisions of §§ 784.30 and 817.121 to specifically include wetlands, streams, and bodies of water. Adding these features to the definition clarifies that not only subsidence damage to surface lands but also subsidence damage resulting in functional impairment of wetlands, streams, and bodies of water, must be repaired pursuant to the subsidence repair provisions of § 817.121(c). As previously explained, we have required operators to address impacts and correct subsidence damages to land and water features since 1995 when we published the final rule addressing the subsidence provisions of the Energy Policy Act of 1992. Thus, by adding ''wetlands, streams, and bodies of water'' to the definition of ''material damage'' in the subsidence context, we are merely reinforcing our longstanding position.

Some commenters requested that the final rule specifically address material damage to the hydrologic balance outside the permit area from longwall mining that adversely impacts the productivity of prime farmland. Longwall mining is a method of underground mining that results in planned subsidence. The commenters suggested revisions to several provisions of our regulations, including the definition of ''material damage'' in the context of subsidence in § 701.5, our subsidence control regulations in § 784.30 (previously § 784.20), and our prime farmland restoration regulations in § 785.17.

We decline to adopt the recommended revisions. We do not interpret SMCRA as authorizing protection of prime farmland from the impacts of subsidence from longwall mining operations beyond the degree of protection afforded by § 817.121(c) of our final rule. Section 516(b)(1) of SMCRA [160] does not require that operations using mining technology that requires planned subsidence in a predictable and controlled manner (primarily longwall mining) adopt measures to prevent subsidence from causing material damage to the extent technologically and economically

[157] 80 FR 44436, 44491 (Jul. 27, 2015).

[158] Exec. Order No. 13112 of February 3, 1999, 64 FR 6184 (Feb. 8, 1999).

[159] Executive Order 13751 was published in the **Federal Register** on December 8, 2016, and can be found at 81 FR 88609.

[160] 30 U.S.C. 1266(b)(1).

feasible. However, our regulations at § 817.121(c) provide that, to the extent technologically and economically feasible, the permittee of any type of underground mine, including longwall mines, must correct any material damage resulting from subsidence caused to surface lands, wetlands, streams, or water bodies by restoring the land and water features to a condition capable of maintaining the value and reasonably foreseeable uses that the land was capable of supporting before subsidence damage occurred. Our definition of ''material damage'' in final § 701.5 in the context of subsidence includes any functional impairment of surface lands, features, including wetlands, streams, and bodies of water, structures or facilities, and any physical change that has a significant adverse impact on the affected land's capability to support any current or reasonably foreseeable uses or that causes a significant loss in production or income. Therefore, under final § 817.121(c), to the extent technologically and economically feasible, the permittee must repair any surface lands, including prime farmland, whenever subsidence resulting from underground mining causes significant loss in production or income or has a significant adverse impact on the capability of the land to support the uses that it supported before subsidence damage occurred. In addition, we added § 817.121(c)(2), which requires that the permittee implement fish and wildlife enhancement measures, as approved by the regulatory authority in a permit revision, to offset subsidence-related material damage to wetlands or a perennial or intermittent stream when correction of that damage is technologically and economically infeasible.

Material Damage to the Hydrologic Balance Outside the Permit Area

We received numerous general and specific comments on various aspects of our proposed definition for ''material damage to the hydrologic balance outside the permit area.'' Several commenters requested that we refrain from finalizing a definition and continue to allow regulatory authorities the flexibility to define the term for their jurisdictions in order to best reflect local conditions. These commenters often focused on the diversity of the country and objected to the perceived ''one-size-fits-all'' approach of the proposed definition. Some commenters noted that some states, such as West Virginia and Montana, already have definitions of the term. Other states define ''material damage to the hydrologic balance outside the permit area'' on a case-by-case basis. Similarly, some commenters suggested that, instead of a uniform federal definition of ''material damage to the hydrologic balance outside the permit area'', we could better address the concerns that we raised in the preamble to the proposed rule by providing technical support to the regulatory authorities so that they could be equipped to define ''material damage to the hydrologic balance outside the permit area'' in their own states.

We agree with these commenters in part—states do need the flexibility to define ''material damage to the hydrologic balance outside the permit area'' to account for local and regional differences in geology, hydrology, mining, and reclamation. However, a federal definition is necessary to provide guidance and clarity to the regulatory authorities as they define the term for their own jurisdictions. As discussed in more detail in the preamble to the proposed rule, our previous rules did not contain a definition of ''material damage to the hydrologic balance outside the permit area,'' and, in the more than 30 years since SMCRA's enactment, very few states have adopted a definition.[161] As a result of the lack of a definition, what constitutes ''material damage to the hydrologic balance outside the permit area'' varies greatly. This has led to differences in enforcement across the country. These differences have also resulted in coal field water quality data that shows significant coal mining impacts in many streams across the country.[162] For these reasons, we are adopting a definition of ''material damage to the hydrologic balance outside the permit area'' that provides minimum nationwide standards while also providing each regulatory authority with the flexibility to tailor the definition to meet the needs of its jurisdiction while ensuring minimal standards are met.

To help clarify the regulation and to comply with the requirements of the Office of the Federal Register, we have revised and re-designated proposed paragraphs (a) and (b) of the definition into three paragraphs (1), (2), and (3).

The basic definition now provides that ''material damage to the hydrologic balance outside the permit area'' is an adverse impact, from surface coal mining and reclamation operations, underground mining activities, or subsidence associated with underground mining activities, on the quality or quantity of surface water or groundwater, or on the biological condition of a perennial or intermittent stream.'' What constitutes an adverse impact for determining material damage to the hydrologic balance outside the permit area is now based on consideration of certain types of reasonably anticipated or actual effects of the operation, such as effects that (1) cause or contribute to a violation of applicable state or tribal water quality standards or a state or federal water quality standard established for a surface water outside the permit area under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, for a surface water for which no water quality standard has been established, effects that cause or contribute to non-attainment of any premining use of surface water outside the permit area; (2) preclude a premining use of groundwater outside the permit area; or (3) result in a violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

The combination of the basic definition and procedures for considering the types of effects that constitute material damage to the hydrologic balance outside the permit area in paragraphs (1) through (3) is substantively similar to the proposed definition, with several exceptions. First, we deleted the references in the proposed definition to reasonably foreseeable uses based on comments from the public, state regulatory authorities, and other federal agencies. Among other things, the term ''reasonably foreseeable uses'' is too speculative for purposes of this definition. Second, we also deleted references to ''existing use,'' because, as some commenters noted, it could create confusion because the regulations implementing the Clean Water Act define that term in the context of that law. To avoid any possible confusion, as some commenters suggested, we replaced ''existing'' with ''premining'' in paragraph (2) and added a definition of that term in § 701.5. That definition provides that ''premining'' refers to the conditions and features that exist on a site at the time of application for a permit to conduct surface coal mining operations.

This revised definition also removes the proposed definition's direct reference to designated uses. We made this change for two reasons. First, the concept of water quality standards under the Clean Water Act, includes, but is ultimately broader than using just designated use. Designated uses are part of the water quality standards, along with water quality criteria, antidegradation provisions, and other

[161] 80 FR 44436, 44473–44476 (Jul. 27, 2015).

[162] *See, e.g.,* 80 FR at 44440–44441 (Jul. 27, 2015).

policies each respective state develops to help implement the Clean Water Act. Consideration of all of these components of water quality standards provides a more complete evaluation of what constitutes material damage to the hydrologic balance outside the permit area.

Second, we wanted to emphasize the relationship between the requirements of SMCRA and Clean Water Act as it relates to surface water affected by coal mining operations. Thus, the final definition of material damage to the hydrologic balance outside the permit area better reconciles the requirement of SMCRA to perform a cumulative hydrologic impact assessment with the jurisdiction given to the Clean Water Act authority for the Nation's waters. It also highlights the need for coordination between the regulatory authority and the appropriate Clean Water Act authorities to develop the CHIA and to make the appropriate findings that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

In order to effectively implement this definition, the regulatory authority and appropriate Clean Water Act authorities should coordinate during the permit application process consistent with the requirements of the final rule. After permit issuance, they should also jointly investigate potential water quality violations related to coal mining operations, as appropriate. At both of these stages, this coordination focuses on exchanging project specific information to provide the regulatory authority with information to better assess the effects of the operation on the cumulative impact area. This process should focus on the pertinent water quality standards in force for the specific site and any applicable state or tribal polices governing low flow, mixing zones, and/or any variances in play to ensure an appropriate evaluation of what constitutes material damage to the hydrologic balance outside the permit area, where it should be measured, and what material damage and evaluation thresholds are applicable for each situation. This process should enhance regulatory certainty for permit applicants and operators because it will minimize or eliminate conflicts between the agencies concerning impacts to receiving water bodies and identify measures that should be adopted to comply with the requirements of both statutes.

A commenter expressed concern that the proposed definition was impossible to interpret and evaluate in regard to compliance with SMCRA. We disagree; interpretation and compliance with this definition is possible for several reasons. For the first time since SMCRA was enacted, a federal definition of material damage to the hydrologic balance outside the permit area describes levels of unacceptable changes to the hydrologic balance that result from a SMCRA operation. These unacceptable impacts include precluding the attainment of Clean Water Act water quality standards, not maintaining premining use for groundwater, and effects that result in a violation of the Endangered Species Act. As previously stated, post-SMCRA mining has impaired receiving streams, which is an unacceptable effect of current mining practices under the Act. If the concept of material damage to the hydrologic balance outside the permit area had been more clearly understood or defined, these impacts should have been prevented.

Commenters have generally cited two situations in which it will be impossible for regulatory authorities to apply the proposed definition. First, they claim that a one-time or temporary occurrence should not constitute material damage to the hydrologic balance outside the permit area. As discussed in more detail below, we generally agree, as long as the temporary occurrence does not affect the stream to the extent that, for example, the stream fails to satisfy applicable water quality standards or violate the SMCRA material damage thresholds set for the site. However, over the years, regulatory authorities, including us, have witnessed single or temporary events of large magnitude that have risen to the level of ''material damage to the hydrologic balance outside the permit area''. These events clearly violated the Clean Water Act water quality standards of the streams affected. Second, these commenters contend that the definition does not allow natural and non-mining conditions to be factored into whether a stream maintains its applicable water quality standards. As discussed below, we disagree. The definition allows natural, non-mining, and mining-caused stream variations as long as the stream maintains its applicable water quality standards. The definition simply provides a common framework from which to assess impacts to receiving bodies of water. Latitude exists within this definition for regulatory authorities to tailor the specific meaning of ''material damage to the hydrologic balance outside the permit area'' to suit their particular state and situations encountered at specific mines. In addition, if the designated use is inaccurate or unattainable for natural or other reasons, the Clean Water Act authority has the flexibility under the Clean Water Act and the implementing regulations at 40 CFR part 131 to revise the designated use to more accurately reflect the highest attainable designated use.

A commenter also asserted that the definition, as proposed would result in denial of all future permit applications. We disagree. As previously stated, material damage to the hydrologic balance outside the permit area only occurs when a mining operation causes a stream not to satisfy its applicable Clean Water Act water quality standards or an aquifer to not meet its premining use. Variations in water quality, quantity, biological condition, and/or aquatic habitat can occur as long as the stream satisfies is applicable Clean Water Act water quality standards or an aquifer meets its premining use. A mining operation can have an adverse effect on a receiving stream as long as the stream still satisfies its applicable water quality standards, an aquifer meets its premining use as determined by the SMCRA regulatory authority, and no violations of the Endangered Species Act are occurring. For example, a reduction in a stream's index of biotic integrity score would not constitute ''material damage to the hydrologic balance outside the permit area'' if the stream is satisfying its applicable Clean Water Act water quality standards and not in violation of the Endangered Species Act. Similarly, a reduction in an aquifer's water quality parameter concentrations is not ''material damage to the hydrologic balance outside the permit area'' as long as the aquifer is meeting its premining use and it is not preventing an adjacent receiving stream from satisfying its applicable Clean Water Act water quality standards or if no designated use is defined, its premining use outside the permit area. The concept of Clean Water Act water quality standards has always existed in both the Clean Water Act and has been relevant in SMCRA analyses since the inception of both statutes, *see, e.g.,* section 508(a)(13) of SMCRA. This approach taken in our definition, consequently, is not a new one; the definition simply codifies a system that has existed for more than thirty years and under which many permits have been issued.

A commenter objected to our statement in the proposed rule that because the Clean Water Act does not apply to groundwater, the regulatory authority would need to use ''best judgment'' to establish ''material damage to the hydrologic balance'' criteria to protect existing and

foreseeable uses of groundwater. The commenter asserted that the use of term ''best judgment'' was not sufficiently clear and would negatively impact the operator and, thus, it should be eliminated. First, ''best judgment'' does not appear in the regulation. Instead, it is in recognition of the many decisions the regulatory authority must make about a specific coal mining operation. The regulatory authority makes these decisions using their ''best judgment'' based on the information and data gleaned during the decision making process. This is wholly appropriate, and we are not making any changes to the final rule in response to this comment.

Several commenters implied that material damage to the hydrologic balance outside the permit area should arise any time a partial degradation to surface water or groundwater occurred. Specifically, they suggested that as part of the definition, we should require that material damage to the hydrologic balance outside the permit area include impacts that ''partially or significantly degrade'' or ''partially, completely eliminate, or significantly degrade'' any designated use under sections 101(a) or 303(c) of the Clean Water Act or any existing or reasonably foreseeable use of surface water or groundwater outside the permit area. We disagree that material damage to the hydrologic balance outside the permit area occurs every time a stream or groundwater is partially degraded, or in some circumstances significantly degraded, because the terms ''partially'' and ''significantly'' are subjective, do not convey a sense of magnitude, and are open to interpretation and abuse. Both the Clean Water Act and SMCRA allow some variation in water quality. For instance, the Clean Water Act recognizes that in some situations water quality may vary while still being protective of the designated use. However, if the ambient quality is on the verge of the ambient water quality criterion level, then any amount of degradation could impair the designated use. In addition, section 515(b)(10) of SMCRA [163] requires operations to minimize material damage to the hydrologic balance inside the permit boundary and section 510(b)(3) of SMCRA requires that the proposed operation be ''designed to prevent material damage to hydrologic balance outside [the] permit area.'' [164] SMCRA, therefore, allows damage to the hydrologic balance as long as that damage does not rise to the level of material damage outside the permit area. Therefore, adoption of a standard that does not allow any variation in water quality or quantity within a designated use category is not consistent with SMCRA.

Some commenters expressed concern that the definition as proposed would prohibit any adverse impacts at all and would, for example, consider temporary or minor impacts to be ''material damage to the hydrologic balance outside the permit area.'' As explained above, we disagree that the definition prohibits ''any impact'' outside the permit area. The concept of water quality standards has inherent flexibility within the standards that allow temporary and minor impacts outside the permit area as long as the magnitude of those impacts does not violate applicable Clean Water Act water quality standards for the surface water under review. This change, when read in context of the entire definition, supports the intent of SMCRA, which allows some change in baseline conditions provided that those changes are not of such magnitude that a stream is incapable of attaining its applicable Clean Water Act water quality standards.[165] For example, if the impact from a mining operation causes a measurable decrease in a stream's index of biotic integrity value, but the stream is still attaining its water quality standards under the Clean Water Act, this would not be considered material damage to the hydrologic balance outside the permit area under the definition we are finalizing today. Similarly, temporary impacts would be allowed unless those impacts violate applicable Clean Water Act water quality standards or results in a violation of the Endangered Species Act. Some temporary impacts—such as dewatering a stream for all but a de minimis amount of time or discharges containing parameters of concern in sufficient quantities—may, however, rise to the level of material damage to the hydrologic balance outside the permit area if those impacts violate applicable Clean Water Act water quality standards. Therefore, incorporating the concept of the Clean Water Act water quality standards into this definition as a benchmark to determine material damage to the hydrologic balance outside the permit area accommodates the seasonal and natural fluctuation inherent in natural systems and allows some level of impact to the hydrologic balance consistent with SMCRA while also providing a point of reference for determining when the level of impact becomes detrimental to the hydrologic balance outside the permit area.

In the underground mining context, one commenter opined that the rule should specifically mention that a regulatory authority cannot approve a permit application unless it determines that the proposed operation is not predicted to cause subsidence that would result in the dewatering of any perennial or intermittent stream. Our final rule defines material damage to the hydrologic balance outside the permit area to encompass an adverse impact from subsidence that would dewater or impair an intermittent or perennial stream to the extent that applicable Clean Water Act water quality standards are or would not be met or, if no designated use is assigned, the actual premining use would be precluded, or the Endangered Species Act violated. However, as discussed above, material damage to the hydrologic balance outside the permit area will not occur if the surface water or groundwater can be repaired so that it still attains applicable Clean Water Act water quality standards, or, if no designated use exists, its actual premining use. As discussed in more depth above, in Part IV.K., as long as these regulations are followed, subsidence damage from an underground mining operation that does not rise to the level of material damage to the hydrologic balance outside the permit area may be allowed.

Similarly, several commenters suggested a single exceedance of a water quality standard should not be considered material damage to the hydrologic balance outside the permit area as it may not impact the stream hydrology to the degree that the designated uses are impaired. We agree with this comment. Similar to what we said in our discussion of temporary impacts, under our definition, a simple exceedance of a water quality standard would not necessarily constitute material damage to the hydrologic balance outside the permit area. If stream metrics indicate the stream is maintaining its applicable Clean Water Act water quality standards after exceedance events, then material damage to the hydrologic balance outside the permit area has not occurred. However, there could be situations where the SMCRA regulatory authority determines a single exceedance does constitute material damage to the hydrologic balance outside the permit area: if the stream metrics indicate that the exceedance would violate applicable Clean Water Act water quality standards or one of the other criteria listed in paragraphs (2) through (3). As we explained above, the

[163] 30 U.S.C. 1265(b)(10).

[164] 30 U.S.C. 1260(b)(3).

[165] 30 U.S.C. 1265(b)(10).

SMCRA regulatory authority should consult with the Clean Water Act authority to make this determination.

It is also possible to cause material damage to the hydrologic balance outside the permit area while satisfying all effluent limitations established in the NPDES permit. SMCRA permits require in-stream monitoring for parameters that are not limited or required to be monitored by the corresponding NPDES permits. Therefore, required monitoring under the SMCRA permit may indicate that a parameter that was not expected to have the potential to exceed a numeric or narrative water quality criteria in the receiving stream but does in fact exceed the established criteria. This situation could also occur if numerous individually compliant discharges cumulatively create a situation that violates a stream's applicable Clean Water Act water quality standards or would cause a violation of the Endangered Species Act.

One commenter asserted that the definition of material damage to the hydrologic balance outside the permit area should apply to all streams and stream segments, and that the assessment of material damage to the hydrologic balance outside the permit area must not be restricted to only those streams for which the U.S. Army Corps of Engineers, during the Clean Water Act section 404 process, makes jurisdictional determinations. We agree that material damage to the hydrologic balance outside the permit area is not restricted to only those streams for which there is a Clean Water Act jurisdictional determination issued by the U.S. Army Corps of Engineers.

In addition, final rule § 780.19(c)(6)(i)(C) simplifies the process of delineating stream transitions by requiring that the SMCRA regulatory authority default to any jurisdictional stream determinations made by the U.S. Army Corps of Engineers to delineate stream transitions. If the U.S. Army Corps of Engineers has not determined the location of a transition point, the regulatory authority must set one. There are a number of available resources that may be helpful including the state Clean Water Act authority. The regulatory authority is encouraged to coordinate with the U.S. Army Corps of Engineers and other partners in identification of stream transition points.

Several commenters suggested that linking the definition of material damage to the hydrologic balance outside the permit area with designated use could be problematic in situations where designated uses have not been identified or are not instructive, not accurate, and/or not attainable. The Clean Water Act provides a variety of policies to allow sufficient time to attain the designated uses, such as water quality standards variances, permit compliance schedules, or designated use changes. Several commenters noted that a use attainability analysis may be required to establish or change a designated use and that the use attainability analysis may be time-consuming and expensive. In such cases, the regional U.S. Environmental Protection Agency offices and relevant state Clean Water Act agencies can provide support and may suggest other approaches appropriate for the situation. As noted above, we are retaining the link to attainment of designated uses in the broader water quality standards approach; however, we are also making a clarifying change to address some of these concerns. As proposed, the definition accounts for situations where no designated use has been identified for a particular stream. In those situations, the proposed rule would have required that the ''existing use'' be maintained in a receiving stream. In the final rule, to prevent confusion with the Clean Water Act definition of existing uses and prevent abuses related to impaired streams, we have made revisions to further clarify this concept. Our intent is to maintain the actual use of surface water prior to the proposed mining operation. We are also concerned that the baseline standard for material damage to the hydrologic balance outside the permit area and/or stream restoration standards for an impaired stream, with or without a designated use, may be mistakenly considered as an existing, impaired condition rather than its actual or potential designated use. To remove any confusion and add clarity, we removed the phrase ''existing use'' from the definition and added ''actual use'' to signify uses that existed prior to submission of a coal mine permit application. Thus, paragraph (1) now specifically states that if no designated use has been established under the Clean Water Act, a mining operation cannot preclude attainment of any actual premining use of surface water outside the permit area.

One commenter suggested we only consider ''existing uses'' and that we define ''existing uses'' as any uses in existence as of August 3, 1977, which is the date SMCRA was enacted. We have not adopted this suggestion because we removed the phrase ''existing uses'' from the definition as it relates to surface waters and replaced it with ''any premining use.'' We did not replace it with ''any actual use as of the enactment of SMCRA'' because that change could raise potential conflicts with the Clean Water Act if the stream's designated uses have changed since the enactment of SMCRA.

Another commenter suggested we revise the regulation to provide a hierarchy of stream use categories that would provide consistency in determining material damage to the hydrologic balance outside the permit area (*i.e.,* first designated uses, then existing uses, and finally reasonably foreseeable uses). We agree that the regulation needs to specify the priority of stream use categories and have made changes as a result. As discussed above, we added clarifying language to paragraph (1) that specifies that adverse impacts that violate applicable Clean Water Act water quality standards and, if no water quality standards have been established, then the adverse impacts may not preclude any actual premining use. The proposed rule would have also required operators to ensure that ''reasonably foreseeable uses'' of surface water were maintained. However, many commenters raised concerns about the difficulty in interpreting or assigning reasonably foreseeable use to streams. We agree and have removed the language concerning reasonably foreseeable uses. The final rule no longer includes the term ''reasonably foreseeable uses'' in contexts other than protection of reasonably foreseeable surface land uses from the adverse impacts of subsidence. As explained in other areas of the preamble, we removed the term from the definition of material damage to the hydrologic balance outside the permit area for two reasons. First, the term appears in SMCRA only in section 516(b)(1), which requires that operators of underground mines adopt subsidence control measures to, among other things, maintain the value and reasonably foreseeable use of surface lands. Sections 717(b) and 720(a)(2) of SMCRA separately protect certain water uses. Second, numerous commenters opposed inclusion of the term ''reasonably foreseeable uses'' on the basis that it is too subjective, difficult to determine, and open to widely varying interpretations, which could result in inconsistent application throughout the coalfields.

Proposed paragraph (a) defined material damage to the hydrologic balance outside the permit area as any adverse impact that would preclude any reasonably foreseeable use of surface water or groundwater outside the permit area. Several commenters objected to the use of the term ''reasonably foreseeable uses''. Several commenters suggested using alternate terms such as

''protected use,'' ''existing uses'', and ''future probable use''. As explained above, we deleted references to ''reasonably foreseeable uses'' in paragraph (1) of the final definition and elsewhere in our rules. The term was confusing and could have led to possibly conflicting interpretations.

Another commenter suggested that linking material damage to the hydrologic balance outside the permit area with the concept of reasonably foreseeable uses will create conflicts between the Clean Water Act and SMCRA agencies about what is a foreseeable use. For the reasons explained above, we did not accept this comment.

A commenter expressed concern about how the Clean Water Act concept of anti-degradation would relate to variability in a stream designated use caused by SMCRA mining impacts. We clarified the definition by directly linking to the concept of Clean Water Act water quality standards, which includes provisions for impaired streams and antidegradation. To establish material damage in situations involving impaired streams, the SMCRA regulatory authority should consult with the Clean Water Act authority to ensure a thorough understanding of the water quality standards applicable to the stream and specific situation under review.

In the proposed rule, groundwater was included with paragraph (a). One commenter specifically suggested we define material damage to the hydrologic balance outside the permit area so that it applies to groundwater. Although groundwater was included in the proposed definition, we have decided to include paragraph (2) in the final rule to specifically state that operators must maintain premining uses associated with groundwater. This change clarifies that material damage to the hydrologic balance outside the permit area protects groundwater resources that may not have uses assigned to them. In particular, this paragraph states that ''material damage to the hydrologic balance outside the permit area'' would include those adverse impacts that preclude attainment of any premining use of groundwater outside the permit area. In addition, paragraphs (1) and (2) of the definition would preclude the discharge of contaminated groundwater into a receiving stream if that discharge caused the stream to not satisfy its applicable Clean Water Act water quality standards. Thus, groundwater protections are included in this final definition.

A commenter suggested we revise the definition to ensure it adequately protects listed species or designated critical habitats. The commenter further elaborated that the definition should not be linked to the Endangered Species Act's jeopardy analysis. We agree that the definition of material damage to the hydrologic balance outside the permit area should adequately protect listed species and designated critical habitat, whether aquatic or terrestrial. Paragraph (b) of the proposed rule was included to prevent impacts to threatened or endangered species or adverse effects on designated critical habitat outside the permit area in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* As proposed, it did not specifically link this definition with a jeopardy analysis under the Endangered Species Act, and we are not doing so in the final rule. In the final rule, this paragraph has been redesignated as (3) and simplified to bring attention to the prohibitions found in the Endangered Species Act of 1973, which also includes the unauthorized ''taking'' of listed species (a criminal prohibition). This provision, in conjunction with the other provisions of this final rule related to fish and wildlife resources discussed in the preamble at §§ 780.16(b) and 783.20, should provide adequate protections for threatened and endangered species, aquatic and/or terrestrial, in accordance with the Endangered Species Act.

One commenter, citing section 702,[166] of SMCRA, requested that the definition of material damage to the hydrologic balance outside the permit area be expanded to encompass any violations of other applicable statutes or regulations in addition to those stated in the proposed rule text. The term ''material damage to the hydrologic balance outside the permit area'' is a term unique to SMCRA and there is no need to refer to other statutes or regulations within this definition. Section 702 of SMCRA [167] will continue to fully apply independent of this definition. We singled out the Endangered Species Act in paragraph (3) because the statutory language is unique in its prohibitions against jeopardizing the continued existence of species and adverse changes to their designated critical habitat (if in the context of Section 7 of the Endangered Species Act), and its prohibition against unauthorized ''taking'' of listed species generally. In summary, we agree that SMCRA operations cannot materially damage streams outside the permit area under any circumstance; other statutes notwithstanding.

Many commenters raised concerns with a statement in the preamble to the proposed rule that stated: A ''SMCRA regulatory authority may need to establish numerical material damage criteria for parameters of concern for which there are no numerical water quality standards or water quality criteria under the Clean Water Act.'' [168] For support, these commenters also cited section 702 of SMCRA [169] because, to their understanding of the regulation, the development of numeric standards to determine material damage to the hydrologic balance outside the permit area would create a conflict with the Clean Water Act. In response, we note that nothing in the definition requires the creation of numeric standards. In the proposed rule, the requirement for numeric standards was included in § 773.15(e)(3), which stated that a regulatory authority needed to include a permit condition specifying criteria for material damage to the hydrologic balance outside the permit area on a site-specific basis, expressed in numerical terms for each parameter of concern. As discussed in the preamble to final § 773.15(e)(3), we are not adopting the proposed requirement for numeric criteria unless numeric water quality criteria exist.

One commenter also suggested that inclusion of the term biological condition and ecological function into this definition is a duplication of the Clean Water Act sections 401 and 404 processes. We disagree. First, the term ''ecological function'' is not found in the definition of material damage to the hydrologic balance outside the permit area nor is it a required element to be assessed when setting criteria to asses if material damage to the hydrologic balance outside the permit has occurred (section 780.21). Second, to the extent that any Clean Water Act section 401 or 404 processes also apply, the final rule allows any information obtained in these processes to be used to inform and support analyses conducted under SMCRA. It is vital to link water quality changes with aquatic impacts that may result from SMCRA sites in order to determine whether material damage to the hydrologic balance outside the permit area has been prevented. This linkage is necessary to evaluate the overall impact of the mining operation on the receiving stream and its aquatic community and to assess unacceptable changes in either designated use, actual, or premining use when a designated use

[166] *Id.*

[167] *Id.*

[168] 80 FR 44436, 44475 (Jul. 27, 2015).

[169] 30 U.S.C. 1292.

is not assigned. For these reasons we are retaining the term biological condition within the definition of material damage to the hydrologic balance.

Many commenters speculated as to how coal mining impacts to receiving streams would be assessed in light of the proposed definition. Several commenters questioned the use of the phrase ''adverse impacts'' and were concerned that the phrase could be interpreted to mean any impact to a receiving stream. We disagree with this interpretation. The definition of ''material damage to the hydrologic balance outside the permit area'' needs to be read, understood, and applied in its entirety. As discussed above, an adverse impact does not necessarily constitute material damage to the hydrologic balance outside the permit area. The definition includes only those adverse impacts that, either individually or cumulatively, would preclude a receiving stream from attaining its applicable Clean Water Act water quality standards, or if no designated use exists, the premining use.

Several commenters proposed their own definitions of material damage to the hydrologic balance outside the permit area. Most of these suggested definitions tied material damage to the hydrologic balance outside the permit area to permanent impacts after mitigation attempts have failed. We decline to adopt the term ''permanent'' because impacts can materially damage the hydrologic balance outside the permit area yet not be considered permanent. There are many examples over the last 30 years of impacts that were not permanent but that clearly rose to the level of material damage to the hydrologic balance outside the permit area. Some examples include the Martin County, Kentucky slurry breach, impacts to Tug Fork River that killed all aquatic life in Coldwater Fork and Wolf Creeks, and a mine release of very high conductivity water released from the Blacksville No. 2 Mine into Dunkard Fork in Greene County, Pennsylvania that created a golden algae bloom that caused a massive fish kill in 40 miles of stream. These events have all been mitigated and would not be considered permanent even though they clearly constituted material damage to the hydrologic balance outside the permit area which should have been prevented. Thus, singular, nonpermanent events can rise to the magnitude of material damage to the hydrologic balance outside the permit area.

A commenter recommended that the rule specify that a SMCRA regulatory authority should not consider noncompliant discharges other than those that rise to the level of precluding designated or existing uses because those noncompliant discharges, according to the commenter, remain solely within the purview of the Clean Water Act authority. We disagree. SMCRA gives jurisdictional authority to its regulatory authorities over aspects of water quality resulting from coal mining [170] and requires the evaluation of water quality from SMCRA sites and modification of the SMCRA permit any time a SMCRA site is causing, or leading to, material damage to the hydrologic balance outside the permit area.

Several commenters expressed concern that extraneous, non-mining related impacts, including natural conditions, would be included in assessment of material damage to the hydrologic balance outside the permit area and urged us to limit the scope of assessment to only those impacts directly attributable to the surface coal mining and reclamation operation. We agree with the commenters that many surface coal mining and reclamation operations are located in areas with multiple land uses and that water quality can be impacted from these other non-coal mining sources and natural conditions. The regulations require permit applicants to acquire water samples to help assess the baseline water quality in all streams overlying and adjacent to the proposed operation and for groundwater. Impacts to the water from other existing upstream land uses, including non-coal mining sources, will be reflected in the baseline data. The baseline data will form the basis of the cumulative hydrologic impact assessment developed by the regulatory authority. That assessment evaluates the capacity of the receiving stream to assimilate the expected water quality emanating from the proposed mining operation, and from all other mining-related activities, known and anticipated, within an area known as the cumulative impact area. The cumulative hydrologic impact assessment, therefore, provides the regulatory authority with sufficient information to assess whether the proposed mining operation, in combination with other existing and reasonably anticipated mining activities, will materially damage the hydrologic balance outside the permit area. For example, if a stream's assimilative capacity for a certain parameter is already consumed by other activities or if the proposed operation would exacerbate natural conditions to the point where the stream might fail to attain its applicable Clean Water Act water quality standards, the regulatory authority would either need to modify the permit so that material damage to the hydrologic balance outside the permit area does not occur or disapprove the permit.

Several commenters suggested mining operations should not be required to improve a stream's biological condition beyond the premining condition. We do not agree with this assertion for previously impaired streams. We agree that if a stream is attaining its applicable Clean Water Act water quality standards, there is no requirement under SMCRA for the operation to implement measures, for example, to attain higher designated use categories. That is not the case for mining operations affecting previously degraded streams. Section 515(b)(24) of SMCRA specifically requires the enhancement of fish, wildlife, and related environmental values where practicable and section 508(a)(9) of SMCRA [171] requires steps be taken to comply with all air and water quality laws. Returning a degraded stream to a degraded state neither enhances fish, wildlife, and related environmental values nor takes steps to comply with the Clean Water Act's goal of maintaining a stream's designated use or instituting measures to help it attain its water quality standards.[172] Thus, the Clean Water Act regulatory authorities must develop water quality standards that help streams achieve their designated uses. Allowing a mining operation to return a stream to a degraded state without some form of enhancement would, thus, conflict with the Clean Water Act section 303(d). As a result, in instances where a stream is not meeting its designated use, it is vital that the regulatory authority work closely with the Clean Water Act authority to determine the level of impairment, evaluate the potential impacts from the proposed operation, and thoroughly assess the anticipated effects of the proposed operation over the anticipated life-of-the-mine. This coordination is critical because the state Clean Water Act authorities must implement measures to ensure that all streams achieve their assigned designated use(s) in conformity with section 303(d) of the Clean Water Act.[173]

One commenter also suggested the rule should grant discretion to the regulatory authority when applying bioassessment standards for material damage to the hydrologic balance

[170] *See, e.g.,* 30 U.S.C. 1260(b)(3) and 1265(b)(10).

[171] 30 U.S.C. 1258(a)(9).

[172] 33 U.S.C. 1251 *et seq.*

[173] 33 U.S.C. 1313(d).

evaluation. We agree, and as discussed in more detail in the preamble discussion of material damage to the hydrologic balance outside the permit area in the proposed rule, we stated that the regulatory authorities would have discretion to set criteria, including bioassessment criteria, to determine, on a case-by-case basis, whether there has been material damage to the hydrologic balance outside the permit area.[174] We are adopting that approach today. Thus, the definition contained in this section provides regulatory authorities with the framework to set their own criteria. This framework consists of factors that the regulatory authority must consider in developing and applying their unique bioassessment criteria for material damage to the hydrologic balance outside the permit area.

One commenter indicated that the definition of material damage to the hydrologic balance outside the permit area has been expanded to include quality and quantity impacts to surface water and ground water but also includes adverse impacts to the biological condition of a stream. They further stated that the definition expanded the hydrologic impact review to the adjacent area and/or shadow area of underground mines. In addition, the commenter suggested that inclusion of subsidence damage within the definition of material damage to the hydrologic balance outside the permit area contradicted the Energy Policy Act.[175] We disagree with the commenter's classification of an expanded area of review. In accordance with sections 508(a)(13)(A) and (C) and 515(b)(10) of SMCRA, we have always considered adjacent areas and shadow areas to be part of the evaluation of material damage to the hydrologic balance outside the permit area. Specifically, these areas are clearly contemplated by section 508(a)(13)(A) and (C) of SMCRA, which requires measures to be taken to ensure protection of quality and quantity of surface and ground waters *both on- and off-site* from adverse effects of mining and reclamation.[176] Similarly, section 515(b)(10) requires the operation to ''minimize the disturbances to the prevailing hydrologic balance at the mine-site and in *associated offsite areas* and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations . . . .'' [177] These statutory provisions that specifically concern impacts to waters outside of the permitted area are applicable to both surface and underground mining operations. Although this has been our longstanding position and is clearly mandated by SMCRA, the definition of material damage to the hydrologic balance outside the permit area that we are finalizing today removes any of the ambiguity that may have resulted in this comment.

Moreover, our definition does not conflict with the Energy Policy Act. Section 2504 of Energy Policy Act requires operators to repair or compensate for subsidence impacts they cause to surface structures and requires replacement of water supplies adversely impacted by coal mine subsidence. The water replacement provisions of the Energy Policy Act are incorporated into our regulations at section 817.40 and are still in effect. These regulations provide additional protections for individual well owners. A change to an individual well that would trigger the replacement provision of section 817.40 would not necessarily constitute material damage to the hydrologic balance outside the permit area unless that damage was the result of wholesale adverse changes to an aquifer that the regulatory authority determines rose to the level of material damage to the hydrologic balance outside the permit area.

The commenter further suggested that inclusion of the term biological condition in the introductory text of the definition would result in a ''massive'' amount of new information for the regulatory agency to review. We agree that new information will be received on biological condition, but this information is not anticipated to be ''massive'' or otherwise overburden the regulatory authority. Experience in the Tennessee federal program indicates collection and submission of permit specific biological condition information does not substantially increase the volume of information submitted for a coal mine permit application. Biological condition is a critical component of determining the impact from the mining operation not only on water quality and quantity of the receiving stream but on impact to the aquatic environment. This information needs to be evaluated to ensure mining and reclamation operations do not cause material damage to the hydrologic balance outside the permit area.

Mountaintop Removal Mining

Some commenters expressed concern that the proposed definition of ''mountaintop removal mining'' conflicts with section 515(c)(2) of SMCRA [178] and is a significant change from the existing regulations that could cause confusion for regulatory authorities and the regulated community. Specifically, one commenter alleged that the change from ''removing substantially all overburden off the bench'' to ''removing substantially all overburden above the coal seam'' and the clarification that the overburden be used to create the postmining contours would be a source of misunderstanding. For the reasons discussed below, we disagree and are adopting the definition as proposed.

As we explained in the preamble to the proposed rule, we added a definition of ''mountaintop removal mining'' to § 701.5 by consolidating the descriptions of mountaintop removal mining operations in previous §§ 785.14(b) and 824.11(a)(2) and (3).[179] Previous § 824.11(a)(2) is nearly identical to section 515(c)(2) [180] of SMCRA, which explains that approximate original contour does not need to be achieved where an operation will mine ''an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill (except as provided in subsection (c)(4)(A) hereof) by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining.'' *Id.* Previous § 785.14(b) uses the same language except that it qualifies the amount of overburden with the word ''substantially'' and clarifies that the overburden is removed ''off the bench.'' In our definition of ''mountaintop removal mining,'' we have retained the word ''substantially'' and clarified that ''substantially all of the overburden above the coal seam'' must be removed and used to create approved postmining contours. Overburden is commonly understood to be the strata overlying the coal seam. If one ''removes all of the overburden'' then they are removing the material ''above the coal seam'' to uncover and then extract the entire coal seam. Therefore, we view this change as merely a clarification. Furthermore, the addition of the phrase ''and using that overburden'' actually makes the definition more consistent with SMCRA as it fully implements section 515(c)(4)(E),[181] which requires that ''spoil [] be placed on the mountaintop bench as is necessary to achieve the planned postmining land use.'' Therefore, contrary to the assertions of

[174] 80 FR 44436, 44475 (Jul. 27, 2015).

[175] 42 U.S.C. 6201 *et seq.*

[176] 30 U.S.C. 1258(a)(13)(A) and (C) (emphasis added).

[177] 30 U.S.C. 1265(b)(10) (emphasis added).

[178] 30 U.S.C. 1265(c)(2).

[179] 80 FR 44436, 44476 (Jul. 27, 2015).

[180] 30 U.S.C. 1265(c)(2).

[181] 30 U.S.C. 1265(c)(4)(E).

the commenters, adding ''above the coal seam'' and ''using that material to create'' to the definition of mountaintop removal mining does not create a conflict with the language of SMCRA and does not create confusion. No change has been made to the proposed definition in our final rule.

Native Species

As discussed within the explanation of the definition of ''invasive species'', some commenters requested that the final rule include definitions of ''invasive species,'' ''non-invasive species,'' and ''native species.'' Other commenters requested that we allow the regulatory authority to have latitude to define these terms. In response, we are adding two definitions to the final rule. We are defining ''invasive species'' and ''native species'' in the final rule. In the preamble to the proposed rule at section 780.12(g) [182] we referenced Executive Order 13112 [183] that focused on ''invasive species.'' As discussed above with respect to ''invasive species,'' the 1999 Executive Order includes definitions of both ''invasive species'' and ''native species.'' We are incorporating a definition of ''native species'' into the final rule that does not conflict with either the 1999 or 2016 Executive Orders.

In response to the commenters that suggested that we allow the regulatory authority latitude to define the terms ''invasive species'' and ''native species'', we do not agree because it is important to have uniform definitions of these terms and the definitions, adapted from the 1999 and 2016 Executive Orders in a manner that focuses on the specific goals of SMCRA, are appropriate.

Occupied Residential Dwelling and Structures Related Thereto

We received no comments on our proposed revisions to this definition, which we are adopting as proposed.

Ordinary High Water Mark

One commenter stated that we should use the ordinary high water mark (OHWM) instead of the bankfull elevation when measuring distances from streambanks because the OHWM is both more common for that purpose and more easily determined. We adopted the commenter's suggestion, which meant that we needed a definition of OHWM. To promote consistency between SMCRA and the Clean Water Act, we settled on the definition in regulation 33 CFR 328.3(e).

We made only one change—replacing ''shore'' with ''bank'' in our definition because ''bank'' is more commonly understood and used in the context of the streams affected by coal mining.

Measuring from the OHWM as opposed to the bankfull elevation, which is the point at which the streambanks can hold no more water before spilling flow onto the floodplain, could result in a slightly narrower buffer zone or streamside vegetated corridor, but, in most cases, the difference would be minimal.

Parameters of Concern

We proposed to add the definition of ''parameters of concern'' because we used the term extensively in the proposed rule. Under the proposed definition, ''parameters of concern'' consists of those chemical or physical characteristics or properties of surface water or groundwater that could be altered by mining activities in a manner that would adversely impact the quality of surface water or groundwater or the biological condition of a stream. We continue to use the definition of ''parameters of concern'' within the final rule and adopt it as proposed, with one exception. Within the definition, we have replaced ''biological condition of a stream'' with ''including adverse impacts on aquatic life.''

One commenter expressed concern that the definition of ''biological condition'' coupled with the definition of ''parameters of concern'' would impose new and burdensome requirements. The definition of ''parameters of concern'' was used to clarify that these parameters may be of concern because of potential impacts on aquatic life. Including ''biological condition'' in the context of this definition does not, in and of itself, require additional biological data beyond the requirements expressly defined elsewhere in the regulation; however, we agree that the use of term did not provide sufficient clarity and have replaced ''biological condition of a stream'' with ''including adverse impacts on aquatic life''.

We also received a variety of comments on the definition of ''parameters of concern.'' A few commenters asked us to delete this proposed definition altogether. These commenters alleged that the definition conflicts with the Clean Water Act and exceeds our authority. We disagree. The Clean Water Act established a national goal to restore or maintain the chemical, physical, and biological integrity of the Nation's water.[184] The final rule definition, like the proposed rule definition, complements these Clean Water Act requirements. None of the elements of this final rule affect a mine operator's responsibility to comply with effluent limitations or other requirements of the Clean Water Act. The requirements of the Clean Water Act have independent force and effect regardless of the terms of the SMCRA permit. The independent effect of the Clean Water Act is recognized in section 702(a) of SMCRA, which provides that—

> Nothing in this Act shall be construed as superseding, amending, modifying, or repealing the * * * [t]he Federal Water Pollution Control Act [Clean Water Act] [*citations omitted*], the State laws enacted pursuant thereto, or other Federal laws relating to the preservation of water quality.[185]

Another commenter requested the definition be revised to state that the ''parameters of concern'' will be determined by the approved regulatory authority. While we agree that the regulatory authority should identify local ''parameters of concern,'' if applicable, and include them in the required baseline monitoring data, we are not modifying the definition. Instead, we have clarified §§ 780.19, 784.19, and 780.23 of the rule to state that groundwater and surface water quality descriptions include all ''parameters of concern'' as identified by the regulatory authority. With these clarifications, any ''parameters of concern'' identified by the regulatory authority will more accurately reflect those constituents that could potentially impact water resources during coal mining and reclamation activities in their specific region of the country.

One commenter requested we adopt the term ''pollutants'' instead of ''parameters of concern.'' We disagree because the term ''pollutant'' is narrower than ''parameters of concern.'' We intend the term ''parameters of concern'' to cover all of the chemical or physical characteristics that are currently present in surface water or groundwater, or that could be released as a result of coal mining and reclamation activities or from the natural environment during such activities, and that could be present in sufficient concentrations to result in material damage to the hydrologic balance outside the permit area. In addition, using ''parameters of concern'' instead of ''pollutant'' in our regulations avoids confusion with the term ''pollutant'' as defined in section 502(6) of the Clean Water Act.

In consideration of these comments, we are not making any additional modifications to the final rule. As

[182] 80 FR 44436, 44491 (Jul. 27, 2015).

[183] Exec. Order No. 13112 of February 3, 1999, 64 FR 6184 (Feb. 8, 1999).

[184] 33 U.S.C. 1251(a).

[185] 30 U.S.C. 1292(a).

discussed above, the final rule will be adopted as proposed with the exception of the removal of the reference to ''biological condition of a stream.''

Perennial Stream

As discussed in the preamble to the proposed rule,[186] we proposed to redefine ''perennial stream'' in a manner that is substantively identical to the manner in which the U.S. Army Corps of Engineers defines that term in Part F of the 2012 nationwide permits [187] under section 404 of the Clean Water Act.[188] We are adopting the proposed definition with a few changes. First, in response to commenters requesting that we include runoff from snowmelt to our definition, ''runoff from rainfall events and snowmelt'' is now included within the definition of ''perennial stream.'' This is consistent with the ephemeral and intermittent stream definitions and discussed in more detail within those sections of this preamble. Second, we are adding the statement that ''perennial streams include only those conveyances with channels that display both a bed-and-bank configuration and an ordinary high water mark.'' This addition is also consistent with the ephemeral and intermittent stream definitions discussed herein.

In our revised definition, ''perennial stream'' means a stream or part of a stream that has flowing water year-round during a typical year. One commenter stated that the term ''typical year'' is too vague. Another commenter requested clarification on the length of time meant by ''most of the year.'' Our final definition of ''perennial stream'' is substantively identical to the corresponding U.S. Army Corps of Engineers' definition. Both definitions recognize that perennial streams or segments of those streams may cease flowing during periods of sustained, below-normal precipitation. Thus, a cessation in flow during those periods would not result in the reclassification of the stream as intermittent. To the extent a SMCRA regulatory authority needs additional clarification of the terms ''typical year'' and ''most of the year,'' we recommend that they coordinate with the Clean Water Act authority.

One commenter asserted that the regulations pertaining to a ''perennial stream'' should allow regulatory authorities to adopt and apply regulations that could better protect perennial streams. Similarly, another commenter requested the addition of language recognizing that state protections for all stream types may exceed the U.S. Army Corps of Engineers' requirements and compel regulatory authorities to adopt more stringent protections within the permit conditions. States have the ability to adopt more stringent rules when they are revising their regulations governing surface coal mines and underground mines to satisfy the requirements set forth in the final rule. States can adopt more stringent rules that afford greater protections to ephemeral, intermittent, and perennial streams. Because states already have the authority under section 505(b) of SMCRA [189] to provide for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operations than the provisions of SMCRA, it is not necessary to add additional language to the final rule.

Premining

In response to requests from several commenters, we are adding a definition of ''premining'' to § 701.5 of the final rule. The definition provides that ''premining'' refers to the conditions and features that exist on a site at the time of application for a permit to conduct surface coal mining operations. Some of our regulations refer to conditions or features in existence before any mining occurred on the site, not the conditions or features in existence at the time of preparation of the permit application. In those instances, we typically use the terms ''prior to any mining'' or ''before any mining'' instead of ''premining.''

Reclamation

As we explained in the preamble, we proposed to revise the definition of ''reclamation'' to fully implement SMCRA by expanding the definition to include the entire disturbed area, to encompass all actions taken to restore land and water to the conditions required by SMCRA, and to clarify that the reclaimed land must be capable of supporting the uses it was capable of supporting prior to any mining or, subject to certain restrictions, higher or better uses.[190]

Several commenters requested explanation of the terms ''capable of'' and ''higher or better'' as referenced in the proposed definition. We did not propose to revise the definition of ''higher or better uses'' in this rulemaking. Section 701.5 defines this term as meaning the ''postmining land uses that have a higher economic value or nonmonetary benefit to the landowner to the community than the premining land uses.'' The phrase ''capable of'' was added to the definition of ''reclamation'' because the previous definition could have been misconstrued to require the implementation of the postmining land use, exceeding section 515(b)(2)'s requirement that the disturbed land be restored ''to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses. . . .'' [191] Requiring reclamation of disturbed areas to a condition in which the site is ''capable of'' supporting the uses it was ''capable of'' supporting before any mining is the functional equivalent of requiring that disturbed areas be ''able to'' support the same land uses the land was ''able to'' support prior to mining. This is consistent with the common meaning of the word and nothing in SMCRA indicates that ''capable of'' should be given anything other than the ordinary meaning of the word. For example, the Merriam-Webster Dictionary defines ''capable'' as meaning ''able to achieve efficiently whatever one has to do; competent'' and ''having the ability, fitness, or quality necessary to do or achieve a specified thing.'' [192] Although previous § 816.133 may have been misconstrued to only require that a site be reclaimed for one postmining land use, the revised definition of ''reclamation'' clarifies that the land itself must be reclaimed to support the same variety of land uses it was able to support prior to any mining. Where the land was capable of supporting a wide variety of uses, the reclaimed land must also be able to support those land uses. For example, even if the proposed postmining land use for a formerly forested area is grassland, and grassland is established after mining, the soil must be restored to a condition that could also support forests. In this regard, the ability to successfully support a type of vegetation indicative of a single land use may not alone prove the land's capability has been restored to the requirements of section 515(b)(2) of SMCRA.[193] Finally, previous § 780.23(a)(2)(i), which we adopted in the final rule as § 779.22(b)(1), specifies that capability must be determined on the basis of soil and foundation characteristics,

[186] 80 FR 44436, 44476–44477 (Jul. 27, 2015).

[187] 77 FR 10184, 10288 (Feb. 21, 2012).

[188] 33 U.S.C. 1344.

[189] 30 U.S.C. 1255.

[190] 80 FR 44436, 44477 (Jul. 27, 2015).

[191] 30 U.S.C. 1265(b)(2).

[192] capable. 2016. *In Merriam-Webster.com.* Retrieved Nov.1, 2016, from *http://www.merriam-webster.com/dictionary/capable.* Oxford University Press.

[193] 30 U.S.C. 1265(b)(2).

topography, vegetative cover, and the hydrology of the proposed permit area.

One commenter urged us to include within the definition of ''reclamation'' a reference to the restoration of streams damaged by subsidence. We are not incorporating this recommendation into the final rule because we have specifically addressed this issue within § 784.30, relating to preparation of a ''subsidence control plan and what information must that plan include'' and § 817.121, relating to what measures must be taken to ''prevent, control, or correct damage resulting from subsidence'' within the final rule and discussed more thoroughly within those sections.

Reclamation Plan

Several commenters combined their comments on this definition within their discussion of the definition of ''reclamation.'' Therefore, we addressed the comments regarding ''reclamation plan'' in the same manner as explained in the definition of ''reclamation.'' We received no additional comments on our proposed revisions to this definition; therefore, we are adopting the definition as proposed.

Renewable Resource Lands

We proposed to define ''renewable resource lands'' as ''aquifers, aquifer recharge areas, recharge areas for other subsurface and surface water, areas of agricultural or silvicultural production of food and fiber, and grazing lands.'' The only substantive difference from the previous definition, which we adopted on March 13, 1979, was the addition of recharge areas for surface water.

One commenter expressed concern that the inclusion of recharge areas for surface water could have the effect of classifying all lands within watersheds that drain to a stream or reservoir used for a public drinking water supply as renewable resource lands and thus open the door to challenges seeking to ban all coal mining in those watersheds. According to the commenter, this outcome would be inconsistent with the statement in the DRIA that the proposed rule would not strand or sterilize any reserves; *i.e.,* that the proposed rule would not make any coal reserves that are technically and economically feasible to mine under baseline conditions unavailable for extraction. The commenter further opined that, if we decide to proceed with adoption of the revised definition, we should conduct a detailed socioeconomic impact analysis to fully assess the repercussions of expanding the scope of the definition.

We do not agree with the commenter that the outcome described above represents a change from the status quo. The outcome described by the commenter is consistent with the baseline conditions upon which the DRIA was based. Section 522(a)(3)(C) of SMCRA [194] provides that a regulatory authority may, pursuant to a petition, designate a surface area as unsuitable for certain types of surface coal mining operations if those operations will ''affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas.'' This language clearly includes watersheds of reservoirs and natural water bodies that function as water supplies. We have always interpreted the definition of ''renewable resource lands'' as including those watersheds.[195] Therefore, there is no need for a socioeconomic analysis of the proposed definition because the revisions are intended to reconcile the definition to both the underlying statutory provision and historical practice.

However, we agree that the scope of the proposed definition is too broad in that it would include the watersheds of all surface waters, not just surface water bodies that serve as water supplies. Therefore, we decided not to adopt the proposed revision to the definition to the extent that it would include ''recharge areas for other subsurface and surface water.'' Instead, we revised the definition to include ''recharge areas for other subsurface water,'' which is consistent with the previous definition's inclusion of areas for the recharge of other underground waters. We also revised the definition to include ''surface water bodies that function as a water supply.'' The latter revision more closely tracks the language of section 522(a)(3)(C) of SMCRA.

One commenter supported the proposed modification of the definition to include recharge areas for surface waters. The commenter recommended that we revise the proposed definition to explicitly identify examples of surface waters by adding ''(such as lakes, ponds, and wetlands)'' after ''surface water.'' We decline to adopt this recommendation because our revision of the definition to include ''watersheds for surface water bodies that function as a water supply'' provides sufficient specificity without being under inclusive or over inclusive.

A commenter noted that the preamble to the proposed definition stated that the definition would include recharge areas for wetlands. *See* 80 FR 44436, 44588 (Jul. 27, 2015). The commenter further noted that the definition itself does not mention wetlands, which means that, in practice, recharge areas for wetlands are unlikely to be protected as renewable resource lands. The commenter recommended that we revise the definition to explicitly include recharge areas for wetlands. We acknowledge the inconsistency cited by the commenter. However, nothing in section 522(a)(3)(C) of SMCRA mentions wetlands as being renewable resource lands. Therefore, we decline to revise the definition as recommended. Wetlands will be considered renewable resource lands only to the extent they are integral features of watersheds of surface water bodies that function as water supplies.

Replacement of Water Supply

We received no comments on our proposed revisions to this definition, which we are adopting as proposed.

Temporary Diversion

One commenter expressed concern that the proposed definition of ''temporary diversion'' includes no specific time for ''temporary.'' The commenter noted that, under the proposed definition, a temporary diversion could remain in place until the end of mining and reclamation activities, which may be measured in decades, and therefore is not consistent with the common usage of the word ''temporary.'' The commenter recommended that, with respect to stream diversions, the word ''temporary'' be subdivided into a ''short-term temporary'' period no more than two years in duration and a ''long-term temporary'' period two years or longer in duration that can extend until the end of mining and reclamation activities.

The commenter correctly points out that proposed §§ 780.28 and 784.28 would establish different standards for a temporary stream channel diversion in place for more than two years as compared to one in place for less than two years. However, we do not agree that the revision suggested by the commenter is necessary or would improve clarity. We define a ''temporary diversion'' as a ''channel constructed to convey streamflow or overland flow'' and specify that the term ''includes only those channels not approved by the

[194] 30 U.S.C. 1272(a)(3)(C).

[195] *See* 48 FR 41327 (Sept. 14, 1983) (''these types of lands [watershed lands] may, on a case-by-case basis, be determined to be renewable resource lands'').

regulatory authority to remain after reclamation as part of the approved postmining land use.'' Thus, a temporary diversion is in place only until its intended purpose has been fulfilled, after which time it is removed. A temporary diversion may be in place through the reclamation phase and bond release, which, as the commenter notes, could be decades. While the term ''permanent diversion'' is not specifically defined, it includes anything that is not a ''temporary diversion.'' We do not define the term ''temporary'' relative to the time a diversion is in place, but rather according to whether it will be removed at some point in the reclamation process.

Relative to the commenter's assertion that the definition should be clarified, we did make changes to § 816.43 in the final rule to establish three categories of diversions (diversion ditches, stream diversions, and conveyances or channels within the disturbed area) and we specify the requirements that apply to each category.

Another commenter stated that the word ''conveyance'' in the definition of a temporary diversion should be removed or, at a minimum, modified so that if the conveyances fail, they will be limited to discharges ''out of the pit.'' The commenter further asserted that ''in pit'' conveyance structures that fail do not pose a risk to the public or the environment. Therefore, according to the commenter, they should not be regulated under SMCRA or the Clean Water Act. We did not alter the final rule in response to this comment because many of these conveyances may be quite lengthy, often thousands of feet in length, and a failure along such a conveyance may result in water flowing away for the pit, not always into the pit as suggested by the commenter, which may potentially result in discharges off site. We did however add language to the final definition to include channels that convey flows to a siltation structure or other treatment facility. Thus, diversions can be constructed within the permit area to convey water to a siltation structure or, as the commenter suggested, to the mine pit.

Waters of the United States

We proposed to define the term ''waters of the United States'' in the same manner it is defined within 40 CFR 230.3(s), which is part of the section 404(b)(1) guidelines under the Clean Water Act.[196] We received comments both supporting and opposing our proposed addition of a definition of this term. After evaluating the comments, we agree that adoption of the definition is unnecessary for implementation of the final rule. In response to comments, we have revised the final rule by replacing the term ''waters of the United States'' with ''waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.*''

Wetlands

We did not propose to add a definition of ''wetlands.'' However, a few commenters requested that we define ''wetlands'' or, preferably, clarify that the term ''wetlands'' as used in our final rule corresponds to the existing definition within the regulations promulgated pursuant to the Clean Water Act. We find that a unique definition in the final rule is unnecessary. Instead, we will defer to the definition of ''wetlands'' as promulgated by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency. Additionally, these commenters stated that we should specify in the final rule that wetlands must be delineated using field techniques according to the most recent requirements from the Clean Water Act regulatory authority. One commenter suggested that the U.S. Army Corps of Engineers should delineate, document, map, and field confirm wetlands. This commenter also suggested that we adopt a definition of ''wetlands'' that includes an explanation that ''wetlands are one subset of the Waters of the United States and are subject to the requirements of the Clean Water Act, just as are streams and other regulated bodies.''

We decline to adopt the commenters' recommendations. We are not aware of any instances in which the lack of a definition of ''wetlands'' under SMCRA has created a problem. For regulatory purposes, the term ''wetlands'' is commonly understood to mean wetlands as determined using the diagnostic techniques in the U.S. Army Corps of Engineers Wetlands Delineation Manual, Technical Report Y–87–1, as published in January 1987 and subsequently modified. Paragraph 26 in Part II of that manual summarizes the fundamental characteristics of wetlands. Section 702(a) of SMCRA [197] provides that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act or ''any rule or regulation promulgated thereunder.'' Therefore, SMCRA regulatory authorities must define and identify wetlands in a manner that is no less inclusive than any definition used under the Clean Water Act. However, section 505(b) of SMCRA [198] specifies that any state law or regulation that provides for ''more stringent land use and environmental controls of surface coal mining and reclamation operations than do the provisions of this Act or any regulation issued pursuant thereto shall not be construed to be inconsistent with this Act.'' Therefore, SMCRA regulatory authorities may use wetlands definitions and delineation techniques that differ from those in the U.S. Army Corps of Engineers' Manual so long as those definitions and techniques do not exclude any areas that qualify as wetlands under the Wetlands Delineation Manual. With respect to the comment that the rule should require that the U.S. Army Corps of Engineers delineate, document, map, and field confirm wetlands, we do not have the authority under SMCRA to impose obligations on the U.S. Army Corps of Engineers. We encourage the SMCRA regulatory authority to coordinate review of permit applications with the U.S. Army Corps of Engineers, but we find no reason to expressly restrict wetland delineation to the U.S. Army Corps of Engineers as part of this final rule.

Section 701.16: How will the stream protection rule apply to existing and future permits and permit applications?

Our proposed rule did not include regulatory text clarifying how the rule would affect existing permits and permit applications. A number of commenters emphasized that the final rule needed to include such a provision, both for clarity and to ensure preservation of the rights of existing permit holders. Some commenters noted that many of the requirements of the stream protection rule, such as expanded baseline data collection and permit application requirements and related performance standards and bond release requirements, would be impossible for existing operations to meet because the site has already been disturbed. According to the commenters, the final rule should apply only to new operations or to additions to existing operations, not to existing permitted lands and reclaimed areas. Others emphasized the general legal principle that regulations should be prospective in nature, not retroactive.

One commenter observed that it is not clear which parts of the proposed rule would apply to existing permits. The commenter noted that the DRIA stated that, for purposes of that analysis, §§ 774.15, 800.18, 800.40, 816.35,

[196] 80 FR 44436, 44478 (Jul. 27, 2015).

[197] 30 U.S.C. 1292(a).

[198] 30 U.S.C. 1255(b).

816.36, 816.41, 817.35, 817.36, and 817.41 would be considered as applying to existing permits. The commenter further stated that the final rule should include interim requirements or a schedule for existing permits and permit applications under review to comply with the final rule.

We agree that, in general, the final rule that we are publishing today should be prospective, not retroactive. Therefore, we have added § 701.16 to clarify the applicability of the rule. Section 701.16 applies only to the revisions to Parts 701 through 827, which paragraph (a) characterizes as the ''stream protection rule.'' Section 701.16 does not affect the revisions to our termination of jurisdiction rules in § 700.11(d) because those revisions merely codify longstanding court decisions and legal representations concerning the applicability of the rules governing the termination and reassertion of jurisdiction. Paragraphs (a)(1) through (5) of § 701.16 establish minimum applicability standards for those stream protection rule provisions that do not contain their own specific applicability provisions.

Section 701.16 supersedes the statement in the DRIA that identifies §§ 774.15, 800.18, 800.40, 816.35, 816.36, 816.41, 817.35, 817.36, and 817.41 as applying to existing permits. Under § 701.16, the stream protection rule would not apply to existing permits unless the permittee applies for certain types of permit revisions. Therefore, there is no need for this rule to establish interim requirements or a compliance schedule for existing permits. Of course, it would not be inconsistent with SMCRA for a regulatory authority to, in its discretion, apply some or all provisions of the stream protection rule to part or all of a permit or application not listed in paragraph (a) of this section.

Paragraph (a)(1) of § 701.16 provides that the stream protection rule applies to any application for a new permit submitted to the regulatory authority after the effective date of the stream protection rule under the applicable regulatory program. One commenter argued that the final rule should apply only to new leases or lands acquired after the effective date of the rule because adoption of the proposed rule would significantly increase the cost of mining large tracts of lands and coal reserves in which companies have already made significant investments. We do not agree. Persons who acquire leases, lands, or interests in land do so subject to future regulatory restrictions on use of those leases, lands, or interests in land. To the extent a property right exists to mine coal in a particular location using a particular method that right does not vest until issuance of a SMCRA permit. Even then, the regulatory authority has the right to require reasonable revision of the permit to ensure compliance with the Act and applicable regulatory program. *See* section 511(c) of SMCRA [199] and the implementing regulations at 30 CFR 774.10(b).

Paragraph (a)(2) of § 701.16 provides that the stream protection rule applies to any application for a new permit pending a decision by the regulatory authority as of the effective date of the stream protection rule under the applicable regulatory program, unless the regulatory authority has determined the application to be administratively complete under § 777.15 or its state program counterpart before the effective date of the stream protection rule under the applicable regulatory program. Exempting administratively complete applications would protect permit applicants who invested time and money in developing a good-faith application under the existing rules.

Paragraph (a)(3) of § 701.16 provides that the stream protection rule applies to any application for the addition of acreage to an existing permit submitted to the regulatory authority after the effective date of the stream protection rule under the applicable regulatory program, with the exception of applications for incidental boundary revisions that do not propose to add acreage for coal removal. Under section 511(a)(3) of SMCRA [200] and 30 CFR 774.13(d), any extensions to the area covered by a permit, except incidental boundary revisions, must be made by application for a new permit. However, some state regulatory programs authorize addition of acreage to an existing permit via the permit revision process, provided that the revision meets the application information requirements for a new permit and the regulatory authority processes the application like an application for a new permit. Paragraph (a)(3) would apply to these situations. We added the provision excluding incidental boundary revisions that add acreage for coal removal as a safeguard against abuse of the exception for incidental boundary revisions.

Paragraph (a)(4) of § 701.16 provides that the stream protection rule applies to any application for the addition of acreage to an existing permit pending a decision by the regulatory authority as of the effective date of the stream protection rule under the applicable regulatory program, with two exceptions. First, the stream protection rule would not apply to applications for incidental boundary revisions that do not propose to add acreage for coal removal. Second, the stream protection rule would not apply to applications that the regulatory authority has determined to be administratively complete before the effective date of the stream protection rule under the applicable regulatory program. The rationale for this paragraph is consistent with the rationale contained in paragraphs (a)(2) and (3).

Paragraph (a)(5) of section 701.16 provides that the stream protection rule applies to any application for a permit revision submitted on or after the effective date of the stream protection rule under the applicable regulatory program, or pending a decision by the regulatory authority as of that date, that proposes a new excess spoil fill, coal mine waste refuse pile, or coal mine waste slurry impoundment or that proposes to move or expand the location of an approved excess spoil fill or coal mine waste facility. Many of the studies cited in Part II of the preamble mention that excess spoil fills are especially detrimental to streams, both because they often cover stream segments and because of the adverse impacts of drainage from and through the fill on aquatic life in streams downstream of the fill. Coal mine waste refuse piles and slurry impoundments have similar characteristics in that they sometimes cover stream segments and because drainage from and through the refuse pile or slurry impoundment could adversely impact aquatic life in receiving streams.

Paragraph (a)(5) protects the rights and investment of existing permittees and persons with administratively complete applications, while limiting that protection to the locations and dimensions approved in the permit or contained in an administratively complete permit revision. Allowing a permittee to revise the permit to add new excess spoil fills or coal mine waste facilities, or to alter the location or size of those fills or coal mine waste facilities, without complying with the provisions of this final rule would be inconsistent with the principal purpose of the stream protection rule; *i.e.,* preventing the loss or degradation of streams.

[199] 30 U.S.C. 1261(c).

[200] 30 U.S.C. 1261(a)(3).

C. Part 773—Requirements for Permits and Permit Processing

Section 773.5: How must the regulatory authority coordinate the permitting process with requirements under other laws?

We are finalizing § 773.5 as proposed. We received no comments on this section.

Section 773.7: How and when will the regulatory authority review and make a decision on a permit application?

We are finalizing § 773.7 as proposed. We received no comments on this section.

Section 773.15: What findings must the regulatory authority make before approving a permit application?

We are adopting § 773.15 as proposed with the exception of paragraphs (e), (j), and (n). One commenter urged us to revise paragraph (e)(2) to provide that a regulatory authority may not approve a permit application unless it determines that the proposed operation is not predicted to cause subsidence that would result in the dewatering of any perennial or intermittent stream. Proposed paragraph (e)(2), like section 510(b)(3) of SMCRA,[201] provides that the regulatory authority may not approve a permit application unless the regulatory authority finds in writing that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Therefore, we decline to make the change that the commenter recommends. Instead, the definition of ''material damage to the hydrologic balance outside the permit area'' in § 701.5 of the final rule will govern when dewatering of a perennial or intermittent stream will constitute material damage to the hydrologic balance outside the permit area and thus prevent approval of the permit application.

Proposed paragraph (e)(3) would have required that the regulatory authority include in the permit site-specific criteria for material damage to the hydrologic balance outside the permit area. Proposed paragraph (e)(3) would have required that the criteria be expressed in numerical terms for each parameter of concern. Several commenters opposed this proposed provision, alleging that requiring the regulatory authority to set numerical criteria would supersede the Clean Water Act, which would violate section 702 of SMCRA.[202] Some commenters also cited *In re Surface Mining Regulation Litigation,* 627 F.2d 1346 (D.C. Cir. 1980) as support for their assertions. As discussed further in Part IV.I. of this preamble, neither the proposed rule nor this final rule exceed our authority but instead fills a regulatory gap. This final rule better accomplishes statutory directives in SMCRA, including those that require the prevention of material damage to the hydrologic balance outside the permit area and those that require a minimization of disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas. *See, e.g.,* 30 U.S.C. 1260(b)(3), 1260(b)(10). However, we did not adopt proposed paragraph (e)(3) as part of the final rule because we determined that we did not need this paragraph to in order to implement the statutory directives. Furthermore, we modified proposed §§ 780.21(b) and 784.21(b) to allow regulatory authorities to select narrative as well as numeric thresholds for material damage to the hydrologic balance outside the permit area for the reasons discussed in the preamble to those sections. In determining the appropriate numeric or narrative thresholds, the regulatory authority will consult with the Clean Water Act authority, as appropriate, and undertake a comprehensive evaluation of the factors set forth in § 780.21(b)(6).

Proposed § 773.15(j) would have required that the regulatory authority find that the operation is not likely to jeopardize the continued existence of species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or result in destruction or adverse modification of designated critical habitat under that law. We revised proposed § 773.15(j) in response to comments from the public and other federal agencies and as a result of our consultation with the U.S. Fish and Wildlife Service under sections 7(a)(1) and (a)(2) of the Endangered Species Act of 1973.[203] Referring to species listed as threatened or endangered, the Endangered Species Act provides that ''it is unlawful for any person subject to the jurisdiction of the United States to . . . (C) take any such species within the United States.'' [204] ''Take'' is defined in the statute to mean ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' [205] The U.S. Fish and Wildlife Services' regulations implementing these provisions further define ''harm'' to ''include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.'' [206] Take that is incidental to lawful activity is allowed, but only if the person obtains an authorization for that ''incidental take'' from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, before engaging in the activity.[207] If a person ''takes'' a threatened or endangered species without obtaining authorization from the appropriate agency, that person could be subject to civil or criminal penalties.[208]

Our final § 773.15(j) provides applicants and regulatory authorities with four pathways to demonstrate that the operation will be conducted in compliance with the Endangered Species Act.[209] Paragraphs (j)(1) through (4) set forth those pathways.

Section 773.15(j)(1) applies when the applicant provides documentation that the proposed surface coal mining and reclamation operations would have no effect on species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or on designated or proposed critical habitat under that law. This finding requires a demonstration that no impact on a proposed or listed species, or on designated or proposed critical habitat, will occur, regardless of the severity of the impact or whether the impact is positive or negative. An applicant might demonstrate this by showing that surveys have not revealed the presence of any listed or proposed species or designated or proposed critical habitat within the proposed permit or adjacent areas or that the operation has been designed to avoid areas where a species is known to occur. However, the permit applicant and the regulatory authority should communicate early in the process with the relevant office of the U.S. Fish and Wildlife Service or National Marine Fisheries Service to ensure that any necessary surveys have been completed and any avoidance measures are sufficient to ensure that there will be no effect on relevant species or habitat.

Paragraph (j)(2) applies when the applicant and the regulatory authority document compliance with a valid

[201] 30 U.S.C. 1260(b)(3).

[202] 30 U.S.C. 1292(a)(3).

[203] 16 U.S.C. 1536(a)(1)–(2).

[204] 16 U.S.C. 1538(a)(1)(C).

[205] 16 U.S.C. 1532(19).

[206] 50 CFR 222.102.

[207] 16 U.S.C. 1539(a)(1).

[208] 16 U.S.C. 1540.

[209] 16 U.S.C. 1531, *et seq.*

biological opinion that covers the issuance of permits for surface coal mining operations and the conduct of those operations under the applicable regulatory program. Paragraph (j)(2) would apply to the biological opinion associated with this rulemaking, or to a biological opinion covering the issuance of permits for surface coal mining operations and the conduct of those operations. Compliance with the pertinent biological opinion is an ongoing obligation that extends for the duration of the surface coal mining and reclamation operations.

Paragraph (j)(3) is an option when we are the regulatory authority or there is another federal nexus to the proposed operation. Under this option, the applicant must provide documentation that interagency consultation under section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536, has been completed for the proposed operation. Paragraph (j)(4) is an option when a state regulatory authority is responsible for permitting actions, and another option under this paragraph is either unavailable or is not utilized. Under this option, the applicant must provide documentation that the proposed operation is covered under a permit issued pursuant to section 10 of the Endangered Species Act of 1973, 16 U.S.C. 1539.

Some commenters requested that we revise proposed § 773.15(j) because, as initially proposed, they believed this section required the regulatory authority to make a finding that the operation was ''not likely to jeopardize the continued existence of species listed or proposed for listing'' under the Endangered Species Act. The commenters alleged that it was the responsibility of the Service(s) to make a ''jeopardy'' determination and that the regulatory authorities do not have the expertise to make this type of finding. We agree and have clarified the final regulation. As explained above, we revised this section to require the that the regulatory authority make a finding that the permit will comply with the Endangered Species Act, either because the proposed operation will have no effect upon any species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, or on designated or proposed critical habitat under that law or because the applicant and the regulatory authority have documented compliance with one of the mechanisms described in paragraphs (j)(2) through (4).

Many commenters also alleged that imposing a requirement that an operation must not jeopardize the continued existence of species proposed for listing as threatened or endangered under the Endangered Species Act is beyond our authority under SMCRA. Some commenters alleged that we do not have authority to enforce the requirements of the Endangered Species Act. We do not agree with either comment. As we noted in the preamble to the proposed rule, both SMCRA and the Endangered Species Act provide authority to protect species that have been proposed for listing.[210] SMCRA sections 515(b)(24) and 516(b)(11)[211] require that, at a minimum, mining operations must ''to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.'' The requirement to minimize impacts to ''fish, wildlife, and related environmental values'' is not in any way limited to species that have already been listed under the Endangered Species Act.

Moreover, three different provisions of the Endangered Species Act apply to the Department of the Interior in connection with the implementation of SMCRA. First, section 7(a)(1) of the Endangered Species Act[212] provides that ''[t]he Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act.'' That would necessarily include utilizing SMCRA to protect ecosystems and conserve endangered and threatened species as provided for in the Endangered Species Act.[213] Second, section 7(a)(2) of the Endangered Species Act[214] requires us to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service to ''insure that any action authorized, funded, or carried out'' by us will not jeopardize the continued existence of any species listed as threatened or endangered under the Endangered Species Act or result in the destruction or adverse modification of designated critical habitat. Third, section 7(a)(4) of the Endangered Species Act[215] requires that we ''confer with the Secretary on any action which is likely to jeopardize the continued existence of any species *proposed to be listed* under section 4 [of the Endangered Species Act] . . .'' (Emphasis added). Thus, section 7(a)(2) requires us to consult with the appropriate Service(s) on any actions that may impact species listed under the Endangered Species Act or designated critical habitat for those species, while section 7(a)(4) requires us to confer with the appropriate Service(s) on any actions that may jeopardize the continued existence of any species proposed to be listed under the Endangered Species Act (and any critical habitat proposed to be designated for such species). Seizing on this difference, commenters criticize our inclusion of species proposed for listing in certain provisions of this rulemaking, claiming that we have incorrectly conflated the two different requirements. The commenters are wrong. The existence of a consultation requirement under section 7(a)(2) for listed species does not diminish our separate obligation under section 7(a)(4) to address the impact of coal mining operations on species proposed for listing. Section 7(a)(4) (in addition to our SMCRA authorities) provides us with the authority to protect both species proposed for listing and proposed critical habitat.

Regarding paragraph (k), a commenter requested that we include language within paragraph (k) and in other provisions of the rule that relate to the National Historic Preservation Act[216] to explicitly state that those provisions only apply to ''undertakings'' and that our requirements only apply to federal regulatory programs. Similarly, another commenter asked that we clarify that the National Historic Preservation Act is not applicable to state programs and suggested that reference to the National Historic Preservation Act be removed. We did not propose any substantive changes to paragraph (k) and we are not making any changes in that paragraph in response to these comments. The suggestions made by the commenters are contrary to our longstanding position related to this topic as reflected in our 1987 rulemaking, ''Protecting Historic Properties from Surface Coal Mining Operations.'' This final rule amended our regulations with respect to how historic properties are considered during surface coal mining operations. Within that rulemaking, we stated:

> Under section 522(e) of SMCRA, the regulatory authority (and OSMRE for permits it issues) must protect publicly and privately owned properties listed on the National Register of Historic Places. There is no obligation under section 522(e)(3) to protect properties that are eligible for, but not listed on, the National Register. However, this finding requires the regulatory authority to consider such resources when making

[210] 80 FR 44436, 44565 (Jul. 27, 2015).

[211] 30 U.S.C. 1265(b)(24), 1266(b)(11).

[212] 16 U.S.C. 1536(a)(1).

[213] 16 U.S.C. 1531(b).

[214] 16. U.S.C. 1536(a)(2).

[215] 16 U.S.C. 1536(a)(4).

[216] 54 U.S.C. 300101–307108.

permitting decisions in order to assure that the regulatory authority can assist the Secretary in implementing his responsibilities under section 106 of the National Historic Preservation Act.[217]

We continue to adhere to this position. Moreover, our proposed rule did not include any substantive changes to paragraph (k). If we determine it is appropriate to change our position on protecting historic places from surface coal mining operations, this determination would be better addressed in a future rulemaking.

Proposed paragraph (n)(1) would have required that the applicant demonstrate that the proposed operation has been designed to prevent the formation of discharges with levels of parameters of concern that would require long-term treatment after mining has been completed. Proposed paragraph (n)(2) would have required that the applicant demonstrate that there is no credible evidence that the design of the proposed operation will not work as intended to prevent the formation of discharges with levels of parameters of concern that would require long-term treatment after mining has been completed.

A commenter supported proposed paragraph (n), noting that it ensures advances in predicting the formation of mine drainage will be employed to prevent water pollution. However, other commenters expressed concern that the ''no credible evidence'' standard would create uncertainty and result in unjustified permit denials by regulators fearful of approving any permit application in areas where acid-forming or toxic-forming materials are present. In response, we modified paragraph (n)(2) to delete the ''no credible evidence'' standard and replace it with a requirement that the demonstration and finding be based on a thorough analysis of all available evidence. Final paragraph (n)(2) also requires that the applicant explain why a study or other evidence that supports a contrary conclusion is not credible or applicable to the proposed operation.

Final paragraph (n) requires not only a demonstration by the applicant, but also concurrence by the regulatory authority. The requirement for concurrence by the regulatory authority provides an additional safeguard against the approval of applications that ultimately create long-term discharges in need of treatment.

Unlike the proposed rule, final paragraphs (n)(1) and (2) do not refer to ''parameters of concern'' because the purpose of this finding is to prevent the formation of any long-term discharges that require treatment, regardless of whether the parameter that creates the need for treatment is a parameter of concern. In final paragraph (n)(1), we replaced ''parameters of concern'' with the term ''toxic mine drainage,'' which is both more appropriate and more encompassing. There is no need for a replacement term in final paragraph (n)(2).

Several commenters suggested that proposed paragraph (n) should be revised to explain what the term ''long-term treatment'' means, how a determination of a need for long-term treatment is made, and the ramifications if the findings incorrectly determine the need for long-term treatment. We do not agree that there is a need for additional specificity in the text of the rule. ''Long-term'' refers to a discharge that continues to require treatment for more than a short time after the completion of land reclamation. The ramifications of making a demonstration and finding that ultimately prove inaccurate will vary with the circumstances resulting in the discharge, the nature of the discharge, and the timing of the discovery. Possible outcomes include issuance of a permit revision order, enforcement action, or initiation of action to rescind the permit under section 773.20 of this rule. In all cases, the permittee will need to treat the discharge and post appropriate final assurance or bond to cover treatment costs.

A commenter expressed concern that proposed paragraph (n) would shift the burden of monitoring and accountability for everything that happens to water quality in the watershed to the coal industry. We disagree with the commenter. Final paragraph (n)(1) requires that the applicant demonstrate, and the regulatory authority concur, that the proposed operation has been designed to prevent toxic mine drainage that would require long-term treatment after mining has been completed. Final paragraph (n)(2) requires that the applicant demonstrate, and the regulatory authority concur, that a thorough analysis of all available evidence supports a conclusion that the design of the proposed operation will work as intended to prevent the formation of discharges that would require long-term treatment after mining has been completed. Final paragraph (n)(2) also provides that, if a study or other evidence supports a contrary conclusion, the applicant must explain why that study or other evidence is not credible or applicable to the proposed operation. Nothing in final paragraph (n) assigns accountability for all water quality issues in the watershed to the permittee and the monitoring requirements of this final rule are directed toward identifying mining-related impacts on water quality and quantity so that those impacts can be distinguished from nonmining-related impacts.

One commenter asserted that by incorporating paragraph (n) we were improperly attempting to adopt and incorporate by reference a flawed policy document entitled, ''Hydrologic Balance Protection: Policy Goals and Objectives on Correcting, Preventing, and Controlling Acid/Toxic Mine Drainage'' that we issued on March 31, 1997. In that policy and accompanying documents, we explain that approval of a permit that would result in the creation of a discharge requiring long-term treatment would be inconsistent with SMCRA. We do not agree that the policy is flawed because it is fully justified by SMCRA.[218] Therefore, we made no changes to paragraph (n) based on this comment.

We received many comments supporting proposed section (o), which required that the regulatory authority find that, to the extent possible using the best technology currently available, the proposed operation has been designed to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, as identified in §§ 779.20 or 783.20, and to enhance those resources where practicable, as required under § 780.16 or § 784.16. This language is similar to sections 515(b)(24) and 516(b)(11) of SMCRA [219] and is intended to reinforce compliance with those statutory provisions. We are adopting § 773.15(o) as proposed, with the exception that the final rule does not include the phrase ''as identified in § 779.20 or 783.20'' because those sections do not require identification of all related environmental values.

Section 773.17: What conditions must the regulatory authority place on each permit issued?

We proposed to revise paragraph (e) of this section by adding paragraph (e)(4) to require that the permittee notify the regulatory authority and other appropriate state and federal regulatory agencies of any noncompliance with a term or condition of the permit. Notification would allow those agencies to take any necessary action to minimize the impacts of the noncompliance on the environment or public health or safety, consistent with the purpose

[217] 52 FR 4244 (Feb. 10, 1987).

[218] *See, e.g.,* 30 U.S.C. 1258(a)(13), 1260(b)(3), 1265(b)(10), 1266(b)(9).

[219] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

stated in section 102(a) of SMCRA.[220] We have also added final paragraph (i) that requires compliance with all effluent limitations and conditions in any National Pollutant Discharge Elimination System permit for consistency with §§ 816.41, 816.42, and 817.42.

One commenter generally supported proposed § 773.17(e) but expressed concern that the provision would unnecessarily limit the notification requirement to situations caused by the operator's noncompliance with terms and conditions of the permit. The commenter recommended broadening the requirement in proposed paragraph (e)(4) to include notification to the appropriate regulatory authorities anytime the operator's monitoring reveals the potential for environmental harm, regardless of whether it is caused by the operator's noncompliance. We decline to revise this section as the commenter suggests. As required in final rule § 780.23, an operator must monitor water resources located both within the proposed permit area, as well as adjacent areas. This monitoring must include locations that are situated upgradient and downgradient for groundwater and upstream and downstream for surface water of the mining operations. Samples obtained from the upgradient and upstream monitoring sites are representative of conditions existing in the waters prior to any potential influence of the mining and reclamation activities. Those samples collected from the downgradient and downstream sites are used to evaluate the effect of the operations on water resources once compared to the upgradient/upstream samples. Therefore, any condition detected in the samples, even in those collected in waters prior to entering the mine site indicating an off-site source, that could result in an imminent danger to the health or safety of the public or that could cause or reasonably be expected to cause significant, imminent, environmental harm will be reported as part of the ongoing monitoring requirements regardless of whether or not a noncompliance exists.

Another commenter alleged that the proposed rule language lacked clarity on when the notification was required, what information needed to be included in the notice, and the timing required for the notification. In response to these comments, the language of the final rule has been modified. We have added language in paragraph (e)(4) specifying that the operator must notify the regulatory authority and other appropriate state and federal regulatory agencies whenever conditions within the permit area result in an imminent danger to the health or safety of the public or cause or could be reasonable expected to cause significant, imminent environmental harm to land, air, or water resources, regardless of whether a noncompliance exists. We note, however, that this requirement for immediate notification is only applicable to situations that could result in an imminent danger to public health or safety or significant, imminent environmental harm. For all other situations, as required by § 840.11(a) and (b), the regulatory authority will be at the site for inspections at least monthly and, as required by §§ 816.35(b)(1) and 816.36(b)(1), will review all monitoring data quarterly. Thus, the regulatory authority will have the tools to detect changes that do not rise to the level of imminent harm.

Another commenter objected to the provision in paragraph (e)(4) that would require notice be provided to ''other appropriate state and federal regulatory agencies.'' According to the commenter, the SMCRA regulatory authority is the only agency with jurisdiction over compliance with SMCRA permits. We agree with commenter that the SMCRA regulatory authority has jurisdiction concerning SMCRA permit issues; however, coal mine operations are subject to other state and federal permitting actions. We have, however, limited the scope of paragraph (e)(4) only to those situations that would require the issuance of a cessation order for imminent danger or environmental harm under § 843.11(a). That approach should minimize the reporting burden on the permittee, while ensuring that the regulatory authority and other appropriate agencies receive notice of situations that require immediate attention to protect the public or prevent significant environmental harm from occurring.

We also proposed to add a new permit condition in paragraph (h) of this section, which would require the permittee obtain all necessary authorizations, certifications, and permits in accordance with Clean Water Act requirements before conducting any activities that require approval or authorization under the Clean Water Act. Several commenters objected to this proposed addition. A couple of commenters stated that requiring Clean Water Act permits before mining contradicted section 702 of SMCRA.[221] Others interpreted proposed paragraph (h) as allowing SMCRA to supersede the authority of Clean Water Act agencies in determining when permits are required. We do not agree with those commenters who stated that it violated section 702(a) of SMCRA or otherwise superseded the authority of Clean Water Act agencies. Nothing in the language of this condition authorizes the SMCRA regulatory authority to determine when a Clean Water Act permit is needed—that is exclusively the jurisdiction of the agencies responsible for implementing and administering the Clean Water Act. Instead, the condition merely underscores that the permittee must obtain any required permits, authorizations, or certifications before initiating mining activities for which those permits, authorizations, and certifications are needed. The condition will allow the SMCRA regulatory authority to take enforcement action if another agency determines that a non-SMCRA permit is needed, but the SMCRA permittee does not obtain the necessary permit before beginning the pertinent mining operations.

These same commenters also questioned why we would single out the Clean Water Act as opposed to other state and federal permits for inclusion as permit conditions. After evaluating these comments, we have decided to expand the scope of paragraph (h) to require that the permittee obtain all necessary authorizations, certifications, and permits in accordance with ''other applicable federal, state, and tribal laws before conducting any activities that require authorization, certification, or a permit under those laws.'' Within the proposed rule, we limited the scope of this provision to the Clean Water Act because that is the primary federal statute applicable to water quality and given the focus of this rule it satisfied our purpose to highlight the need for compliance with the Clean Water Act and to enhance coordination with the Clean Water Act authorities. *See* 80 FR 44436, 44480 (Jul. 27, 2015). Upon further review, we find no reason to limit the scope of this provision to the Clean Water Act as it is equally important that the permittee comply with all applicable laws.

As discussed in Part IV, above, in response to general comments about direct enforcement of water quality standards we have added paragraph (i) to final rule *§* 773.17. This paragraph adds a condition whereby the permittee must comply with all effluent limitations and conditions in any National Pollutant Discharge Elimination System permit issued for their operation by the appropriate authority under the Clean Water Act. As we explained in Part IV of the preamble,

[220] 30 U.S.C. 1202(a).

[221] 30 U.S.C. 1292.

the addition of this required permit condition and the revised rule text at 30 CFR 816.42 supports our longstanding regulatory requirement that coal mining operations must comply with the effluent limitations prescribed by Clean Water Act authorities in NPDES permits under section 402 of the Clean Water Act.[222] In combination, these revisions are intended to ensure that violations of effluent limitations are violations of the SMCRA permit, and therefore are enforceable by the SMCRA regulatory authority.

Section 773.20: What actions must the regulatory authority take when a permit is issued on the basis of inaccurate information?

Under proposed § 780.19(k), a permit issued on the basis of what the regulatory authority later determines to be substantially inaccurate baseline information would be void from the date of issuance and have no legal effect. Proposed paragraph (k) also would have required that the permittee cease mining-related activities and immediately begin to reclaim the disturbed area upon notification by the regulatory authority that the permit is void.

Some commenters opposed proposed § 780.19(k) on the basis that it deprived permittees of their rights without due process and that the phrase ''substantially inaccurate'' was too subjective, vague, poorly defined, essentially unlimited in scope, and difficult to enforce. One commenter alleged that proposed paragraph (k) was unreasonable because it did not consider whether the inaccuracy was intentional or had any material impact. Another commenter characterized the proposed paragraph as an unauthorized punitive provision that lacks any statutory support. According to that commenter, section 521(a)(4) of SMCRA [223] provides the sole circumstances under which a SMCRA permit may be revoked—and then only for a pattern of violations.

The commenter further alleged that the explanation in the preamble that proposed § 780.19(k) is necessary to avoid or minimize the environmental harm that could result from initiation or continuation of an operation approved on the basis of inaccurate baseline information constitutes flawed reasoning because proposed paragraph (k) does not require any connection between the inaccurate baseline information and environmental harm—it merely presumes harm without a sufficient foundation. According to the commenter, the sanction (permit nullification) is disproportionately harsh compared to the lesser sanctions and penalties that section 521 of SMCRA [224] authorizes for violations that are causing actual harm on the ground. The commenter noted that, unlike proposed paragraph (k), section 521 affords the permittee due process with respect to the sanctions and penalties that it authorizes. Finally, the commenter urged that we rely upon the regulatory authority's power to order revision of a permit under section 511 of SMCRA [225] to address legitimate concerns with permits that have been issued.

Several commenters expressed concern that adoption of proposed § 780.19(k) would create uncertainty as to the validity of the bond posted for the permit. One commenter suggested that the rule should be revised to specify that the permit would be revoked rather than voided, a change that the commenter indicated would resolve uncertainty about the status of the bond. Several commenters also expressed concern that because the permit would be considered null and void from the date of issuance, the former permittee theoretically could be subject to enforcement action for mining without a permit during the time between permit issuance and permit nullification.

One commenter thought that we had already addressed this issue in the regulations at §§ 773.21 through 773.23 governing improvidently issued permits. That is not the case, however, because those regulations apply only to the permit eligibility criteria of the applicable regulations implementing section 510(c) of SMCRA; [226] *i.e.,* an improvidently issued permit is a permit that should not have been issued because, at the time of permit issuance, the permittee or operator owned or controlled a surface coal mining and reclamation operation with an unabated or uncorrected violation. *See* 30 CFR 773.21(a). Another commenter suggested that we replace proposed paragraph (k) with regulations analogous to those that apply to improvidently issued permits. However, this commenter, like several other commenters urged us to limit their applicability to situations in which information has been falsified or the applicant intentionally submits inaccurate or incomplete data.

After evaluating the comments received, we have decided not to adopt proposed § 780.19(k). Instead, as suggested by one commenter, we are replacing the permit nullification provisions of that paragraph with procedures and requirements analogous to those that apply to improvidently issued permits under §§ 773.21 through 773.23. This approach will afford the permittee ample due process, as urged by numerous commenters. Consistent with the new approach, we are codifying the replacement provisions in section 773.20 rather than section 780.19 because Part 773 contains the requirements for permit processing. However, we do not agree with those commenters who suggested that these regulations should apply only when information has been falsified or when the applicant intentionally submits inaccurate or incomplete data. The purpose of final § 773.20 is to minimize both the possibility that mining conducted under permits approved on the basis of inaccurate information could result in environmental harm and the extent of that harm. The reason for the inaccuracy of the information is not relevant to attainment of this purpose. Thus, limiting § 773.20 to situations in which permit application information was intentionally falsified would be counterproductive and inconsistent with the purpose of this section.

We also disagree with the comment that section 521(a)(4) of SMCRA provides the sole circumstances under which a SMCRA permit may be revoked. As discussed in the preamble to the rule concerning improvidently issued permits,[227] the U.S. Court of Appeals for the D.C. Circuit has held that SMCRA provides both express and implied authority for the suspension or rescission of improvidently issued permits:

> While it is true that section 510(c) does not expressly provide for suspension or rescission of existing permits, the IFR [interim final rule] rescission and suspension provisions reflect a permissible exercise of OSM's statutory duty, pursuant to section 201(c)(1) of SMCRA, to ''order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this chapter or any rules and regulations adopted pursuant thereto.'' 30 U.S.C.[ ] 1211(c). The IIP [improvidently issued permit] provisions simply implement the Congress's general directive to authorize suspension and rescission of a permit ''for failure to comply with'' a specific provision of SMCRA—namely, section 510(c)'s permit eligibility condition. In addition, apart from the express authorization in section 1211(c), OSM retains ''implied'' authority to suspend or rescind improvidently provided permits

[222] 33 U.S.C. 1342.

[223] 30 U.S.C. 1271(a)(4).

[224] 30 U.S.C. 1271.

[225] 30 U.S.C. 1261.

[226] 30 U.S.C. 1260(c).

[227] 65 FR 79583–79584 and 79628 (Dec. 19, 2000).

because of its express authority to deny permits in the first instance.[228]

The same rationale applies to final § 773.20 because it authorizes suspension or rescission of a permit for failure to comply with a specific provision of SMCRA; *i.e.,* the prohibition in section 510(b)(1) [229] against approval of a permit application unless the regulatory authority finds in writing that ''the permit application is accurate and complete and that all the requirements of this Act and the State or Federal program have been complied with.'' Similarly, under the rationale set forth by the court, the regulatory authority has implied authority under SMCRA to suspend or rescind permits issued on the basis of inaccurate information because the regulatory authority has the authority to deny the permit in the first instance.

We further disagree with the comment that described the proposed paragraph as duplicative and unnecessary because states already have effective administrative processes in place to scrutinize data and address issues. We applaud the administrative processes that states have put in place as safeguards against the approval of permit applications with inaccurate baseline information. However, no process is perfect. Final § 773.20 provides a mechanism to address defective permits that slip through those safeguards.

Paragraph (a) of § 773.20 provides that the regulatory authority must initiate action that could lead to suspension or rescission of the permit whenever the regulatory authority discovers that the permit was issued on the basis of what later turns out to be inaccurate baseline information. In response to commenters' concerns that the ''substantially inaccurate'' threshold in proposed § 780.19(k) was too subjective and too broad in scope, we added a proviso that § 773.20(a) applies only if the information is inaccurate to the extent that it would invalidate one or more of the findings required for permit application approval under § 773.15 or other provisions of the regulatory program.

Paragraphs (b) through (d) of § 773.20 are a streamlined version of the requirements and procedures in 30 CFR 773.21 through 773.23 pertaining to improvidently issued permits. We have adapted those requirements and procedures as appropriate, discarding provisions that are unique to improvidently issued permits. We have replaced the references to the administrative review procedures of 43 CFR 4.1370 through 4.1377, which apply only to improvidently issued permits, with references to 30 CFR part 775, which contains administrative and judicial review provisions pertinent to decisions on permits. In addition, we established a uniform 60-day notice period for proposed suspensions and rescissions, rather than adopting the 60-day notice period for proposed suspensions and 120-day notice period for proposed rescissions set forth in § 773.22(b) and (c). We find that there is no purpose or need for the longer notice period for proposed rescissions, particularly when the purpose of § 773.20 is to minimize any environmental harm that may result from the issuance of permits on the basis of inaccurate information. Finally, in 30 CFR 773.20 (c) and (d), we provide a mechanism through which the permittee can avoid permit suspension or rescission by providing updated information and submitting an application to revise the permit as needed to correct the deficiency. We are adopting this mechanism in part because of comments urging us to allow the permittee to take corrective action instead of requiring nullification of the permit. As the commenters noted, permit nullification would be disproportionately harsh compared to the sanctions and penalties that SMCRA and the regulations impose for performance standard violations. Providing an alternative to permit suspension or rescission also is responsive to a comment that we should allow use of the permit revision procedures of section 511 of SMCRA to remedy the deficiency.

Paragraph (e) of § 773.20 sets forth the actions that the permittee must take if a permit is suspended or rescinded. Paragraph (e) is similar to, and based upon 30 CFR 843.13(c), which specifies the actions that the permittee must take if a permit is suspended or revoked for a pattern of violations. Paragraph (e)(1) provides that, if the permit is suspended, the permittee must cease all surface coal mining operations under the permit and complete all affirmative obligations specified in the suspension order within the time established in that order. It also specifies that the regulatory authority must rescind the permit if the permittee does not complete those obligations within the time specified. Paragraph (e)(2) provides that, if the permit is rescinded, the permittee must cease all surface coal mining operations under the permit and complete reclamation within the time specified in the rescission order.

Paragraph (f) of § 773.20 addresses commenter concerns about the impact on bond coverage. Paragraph (f)(1) provides that, if the regulatory authority suspends or rescinds a permit, the bond posted for the permit will remain in effect until the permittee completes all reclamation obligations under the reclamation plan approved in the permit and obtains bond release under §§ 800.40 through 800.44. Paragraph (f)(2) provides that the regulatory authority must initiate bond forfeiture proceedings under § 800.50 if the permittee does not complete all reclamation obligations within the time specified in the permit rescission order.

D. Part 774—Revision; Renewal; Transfer; Assignment, or Sale of Permit Rights; Post-Permit Issuance Requirements

Section 774.9: Information Collection

Section 774.9 pertains to compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* We are adding contact information for persons who wish to comment on these aspects of part 774.

Section 774.10: When must the regulatory authority review a permit after issuance?

We are adopting § 774.10 as proposed, with the exception that we are reorganizing paragraph (a) and adding a new paragraph (a)(2), which replaces proposed § 780.16(c)(5). In the final rule, we are re-designating the introductory text of proposed § 774.10(a) as paragraph (a)(1). In concert with this change, we are re-designating proposed paragraphs (a)(1) through (4) as paragraphs (a)(3) through (6).

Proposed § 780.16(c)(5) required that the permittee periodically evaluate the impacts of the operation on fish, wildlife, and related environmental values in the permit and adjacent areas and then use that information to modify the operations to avoid or minimize adverse effects. Several commenters requested that we provide guidance or specify the frequency and rigor of the mandated periodic evaluation of an operation's impact on fish and wildlife. Additionally, commenters requested clarification as to whose responsibility it would be to complete this evaluation. Some commenters opposed this paragraph because it could be interpreted as requiring that the permittee modify operations even when the adverse effects on wildlife are beyond the control of the permittee.

[228] *Nat'l Mining Ass'n* v. *Dep't of the Interior,* 177 F.3d 1,9 (D.C. Cir. 1999) (''*NMA* v. *DOI II*'').

[229] 30 U.S.C. 1260(b)(1).

Other commenters found this paragraph to be unnecessarily disruptive in that it would undermine the certainty provided by approval of the permit application. In response to these comments, we are not adopting proposed § 780.16(c)(5). Instead, we are including a modified version of that paragraph within the final rule as § 774.10(a)(2). Under the final rule, evaluation of the impacts of the operation on fish, wildlife, and related environmental values will be part of the midterm permit review conducted by the regulatory authority and thus will be the responsibility of the regulatory authority. This timing and the shift in responsibility from the permittee to the regulatory authority is appropriate because the purpose of the midterm permit review is to determine whether the assumptions and predictions upon which permit application approval was based have proven reasonably accurate. If the assumptions and predictions are not accurate, the regulatory authority will issue an order to the permittee to revise the permit to ensure compliance with the regulatory program. In this case, if the regulatory authority determines, as a result of the midterm permit review, that the fish and wildlife protection and enhancement plan approved in the permit is not effectively minimizing disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available, as required by section 515(b)(24) of SMCRA,[230] the regulatory authority will issue an order to the permittee to revise the permit to update the technology required or make other changes necessary to comply with this provision of the Act. The regulatory authority has the discretion to determine the extent of the evaluation conducted as part of the midterm permit review.

Section 774.15: How may I renew a permit?

We proposed within paragraph (b)(2)(vii), relative to application requirements and procedures, to require an analysis of the monitoring results under §§ 816.35 through 816.37 or §§ 817.35 through 817.37, relating to groundwater, surface water, and biological condition of streams and an evaluation of the accuracy and adequacy of the determination of the probable hydrologic consequences of mining prepared under § 780.20 or § 784.20 of this chapter. We also proposed at paragraph (b)(2)(viii) to require an update of the determination of the probable hydrologic consequences of mining prepared under § 780.20 or § 784.20, if needed, or documentation that the findings in the existing determination are still valid.

In addition, proposed paragraph (c)(1), relating to the approval process, provided that a complete and accurate renewal application will be approved unless certain findings are made. We proposed one such finding at (c)(1)(viii), which would allow a regulatory authority to disapprove an application for renewal if the regulatory authority determined, based on an analysis of the monitoring results or the updated determination of the probable hydrologic consequences of mining, that the finding it originally made under § 773.15(e)—the operation is designed to prevent material damage to the hydrologic balance outside the permit area—is no longer accurate.

Several commenters objected to proposed requirements at (b)(2)(vii), (b)(2)(viii), and (c)(1)(viii). These commenters expressed concern that the proposed requirements would compromise the right of successive renewal and recommended the deletion of these regulations. The commenters also stated that there are existing opportunities to review data as it relates to the probable hydrologic consequences, and it is unnecessary to couple a data review requirement with permit renewal. After reviewing the comments, we agree with the commenters and have deleted the proposed requirements at (b)(2)(vii), (b)(2)(viii), and (c)(1)(viii) from the final rule.

E. Part 777—General Content Requirements for Permit Applications

Section 777.1: What does this part cover?

We are finalizing § 777.1 as proposed. We received no comments on this section.

Section 777.11: What are the format and content requirements for permit applications?

Proposed paragraph (a)(3) of this section would have required that all permit applications be filed in an electronic format prescribed by the regulatory authority unless the regulatory authority grants an exception for good cause. One commenter supported this proposal because it would facilitate the acquisition and transfer of permit files by coalfield residents via the internet and avoid the need for those residents to make a lengthy trip to the office of the regulatory authority and copy sometimes unwieldy documents. However, other commenters alleged that adoption of this provision would require major changes in state regulatory programs at great expense for both the regulatory authority and the applicant. Several commenters characterized the proposed requirement as an unfunded mandate on the states unless we are prepared to award grants to states to fully fund the infrastructure needed for electronic permitting. One commenter acknowledged that a fully implemented electronic permitting system may facilitate transfer of application documents, thus avoiding copying and mailing costs. However, the commenter noted, these savings may be illusory as the regulatory authority likely also would request multiple hard copies. Some commenters argued that decisions on electronic permitting should be left to the state regulatory authorities. Another commenter alleged that SMCRA provides no authority for us to prescribe the format of permit applications.

For the reasons set forth in the preamble to the proposed rule,[231] we continue to support and encourage the use of electronic permitting. However, we recognize that state regulatory authorities differ in their capability to implement electronic permitting and that implementation may not be cost-effective or practicable in all cases. In addition, we cannot guarantee availability of the funding needed to implement electronic permitting. Therefore, we have not adopted § 777.11(a)(3) as proposed and have removed reference to any requirement that permit applications be filed in an electronic format. Therefore, the final rule text is substantially similar to previous regulation § 777.11. As finalized, paragraph (a)(3) is substantively identical to section 507(b) of SMCRA,[232] which provides that ''[t]he permit application shall be submitted in a manner satisfactory to the regulatory authority.''

Several commenters provided suggestions on how large map files, professional certifications, and verification of submittals could be submitted electronically. One commenter recommended that all systems include a common system component, which could allow a company to use a central system that can easily be transferred to a common file type for delivery across multiple states. Another commenter urged that digital permit files be available for download on a document-by-document

[230] 30 U.S.C. 1265(b)(24).

[231] *See* 80 FR 44436, 44481 (Jul. 27, 2015).

[232] 30 U.S.C. 1257(b).

basis because persons with computers that have slow processor speeds may not be able to open permits in large file format without having their computers crash repeatedly. The commenter also recommended that digital permit files be available on both compact disc and flash drive and that digitally submitted maps, plans, and cross-sections be made available in both high-definition and low-definition versions. We recognize the merit of these suggestions and recommendations. However, we are not including them in the final rule because final paragraph (a)(3) does not require use of electronic permitting. Regulatory authorities electing to require the submission of permit applications electronically may wish to consider these recommendations.

Section 777.13: What requirements apply to the collection, analysis, and reporting of technical data and to the use of models?

Final Paragraph (a): Technical Data and Analyses

In paragraph (a)(1), we proposed to add requirements for the submission of certain data, such as metadata and field sampling sheets associated with the technical data submitted in the permit application. Several commenters asserted that requiring materials submitted to the regulatory authority (including technical data, maps, plans and cross sections) to be accompanied by metadata, where appropriate, was a good idea and provided valuable information to the regulatory authority. However, several regulatory authorities opined that the requirements under § 777.13, including providing metadata would create an undue hardship for the regulatory authority by requiring additional funds and personnel to log, track, and review the data. We are aware that we will be requiring the operator to collect additional data and submit that data to the regulatory authority, but the data is necessary to establish quality, comprehensive baseline data, along with mining and post-mining data that will help ensure there are no adverse impacts from coal mining operation that would cause material damage to the hydrologic balance outside the permit area. As explained further in the proposed rule, metadata, which consists of data describing the contents and context of data files, greatly increases the usefulness of the original data by providing information about how, where, when, and by whom the data were collected and analyzed.[233]

Several commenters opined that the requirement within proposed paragraph (a) about submitting the results of the laboratory quality assurance and quality control procedures to the regulatory authority was vague and did not include the relevant information necessary to determine the level of quality assurance and quality control (level I, II, III, or IV). In addition, the commenters claimed the requirement for electronically submitted data including the identification of any data transformations would require significant effort by the laboratories that perform this work. The commenters opined the transformed data are typically identified by the laboratory through the use of flags within the final laboratory report and because these flags are generated by the laboratory the flags are likely to differ from lab to lab. Our intent with this requirement is to ensure the quality assurance and quality control data, regardless of the level, is submitted to the regulatory authority so that they can review the data. Furthermore, transformed data should be noted by the laboratory. However, we are not requiring the codes used to denote the transformed data to be the same for all laboratories. Therefore, based on these comments, we did not make any changes to proposed paragraph (a), pertaining to the submission of laboratory quality assurance and quality control data, in the final rule.

However, for the purpose of clarification, we added additional language to the final rule about water quality field sampling sheets that are required to be submitted to the regulatory authority. In the proposed rule, we required field sheets for water quality samples from wells.[234] It was our intent that a permittee submit to the regulatory authority sample field sheets for all water quality samples collected from surface water and groundwater monitoring. Our intent is supported by proposed paragraph (b) where we reference sampling and analysis of surface water and groundwater. To clarify this we added language to final paragraph (a) expressly requiring submission of the field sampling sheets for each surface-water sample collected and for each groundwater sample collected from wells, seeps, and springs. We added ''seeps and springs'' to the list of sample field sheets we require a permittee to submit to the regulatory authority because seeps and springs are commonly monitored to assess water quality of groundwater,

Final Paragraph (b): Sampling and Analyses of Groundwater and Surface Water

In paragraph (b) we proposed to add a requirement that sampling and analyses of surface water and groundwater be conducted according to the methodology in 40 CFR parts 136 and 434. Several commenters asserted that some of the methodology in 40 CFR parts 136 and 434 is not applicable to the type of sampling and analysis conducted at coal mines and the operator should be allowed to use a scientifically-valid methodology acceptable to the regulatory authority. We agree. To address this comment, we revised paragraph (b) to clarify that all sampling and analyses of groundwater and surface water be performed to satisfy all the requirements of this subchapter and that they are conducted according to the methodology in 40 CFR parts 136 and 434; or scientifically-defensible methodology acceptable to the regulatory authority, in coordination with any agency responsible for administering or implementing a program under the Clean Water Act that requires water sampling and analysis. The addition of (b)(2) takes a reasonable approach to sampling and analyses of surface water and groundwater requirements of this subchapter.

Additionally, we received several comments from industry and regulatory authorities recommending that we remove the requirements to provide surface water and groundwater sampling field sheets to the regulatory authority. Instead, these commenters suggested that the regulatory authorities should be able to use their discretion to request them as needed. We disagree. Surface water and groundwater sampling field sheets contain the metadata regarding field parameter measurements and methods used in the collection of water quality samples of both surface water and groundwater. Meta data contained on sampling field sheets, such as, calibration information for instruments used to measure field parameters and information concerning the sampling methods used to collect water quality samples are necessary to accurately assess the water quality data. Further, several commenters suggested that sending groundwater sampling field sheets to the regulatory authority does not enhance the review process because applicants already provide boring logs and well construction diagrams which include information concerning the depth of the well screens for all monitoring wells included as a part of the permit application. In addition, the commenters asserted that descriptions

[233] 80 FR 44436, 44481 (Jul. 27, 2015).

[234] 80 FR 44436, 44592 (Jul. 27, 2015).

of the sampling methodology for all groundwater samples are included in detail within the hydrogeology sections of the SMCRA permit application and that the static water level collected prior to any purging should be considered sufficient for understanding whether the well screen was or was not fully saturated on the sample date. We disagree with the commenters' assertions about the lack of importance of groundwater field sheets when reviewing hydrologic data from the well. We are requiring groundwater sampling sheets be submitted to the regulatory authority because the groundwater sampling sheets contain information about instrument calibration, well purging, and sample collection that are necessary to thoroughly review water-quality data and are not included in the information referenced in the comment. Therefore, no changes were made to the final rule in response to this comment.

Final Paragraph (c): Geological Sampling and Analysis

We received one comment about proposed paragraph (c). The commenter opined that by requiring all geologic sampling and analysis to be conducted using a scientifically valid mythology, it would result in increases in costs and time for permit preparation and approval. We agree that increases in costs and time for permit preparation and approval may occur; however any cost increase is outweighed by the added benefit of better permitting decisions using comprehensive and high quality geologic data. Therefore, we made no changes to paragraph (c) in response to this comment. However, in response to a federal agency comment, in the final rule we use the term ''scientifically-defensible methodology,'' instead of the term ''scientifically-valid methodology,'' as proposed.

Final Paragraph (d): Use of Models

A few commenters requested an explanation for our alleged aversion to the use of models to characterize baseline hydrologic condition within § 777.13(d) when elsewhere in the rule we allow models to evaluate ecological function of streams through the use of bioassessment protocols. These commenters assert that this alleged disparity creates regulatory inconsistency and should be addressed for clarity. These commenters mischaracterize our position. In final paragraph (d), we allow for the use of models as long as they incorporate site specific data to calibrate each model. Contrary to commenters' assertions, we also require site specific data for our evaluation of ecological function; therefore our regulations are consistent.

We also proposed to modify the existing provisions by adding paragraph (d)(2), which would require that all models be calibrated using actual, site-specific data and that they be validated for the region and ecosystem in which they will be used. By adding these additional requirements we intend to improve the accuracy and validity of models and promote better data collection and analysis procedures to ensure more informed permitting decisions. Several commenters from industry and regulatory authorities recommended that we provide regulatory authorities sufficient discretion to allow for professional judgment concerning the necessity for site-specific data and the data requirements to process models. Also, several commenters opined that using site-specific data for calibration may not be possible because it may be costly and the regulatory authority does not have control of activities outside of coal mining permit, thus making it difficult to include that site specific data. We disagree because it is important to use actual site-specific data to calibrate the models. A model that is calibrated using site-specific data is more likely to provide better modeling results.

Therefore, the final rule adopts § 777.13 as proposed, with minor changes as explained herein to paragraphs (a), (b), and (d).

Section 777.14: What general requirements apply to maps and plans?

We revised § 777.14 from the proposed section by making editorial revisions to clearly distinguish between requirements that apply to maps and plans for all operations and those that apply only to maps and plans for operations in existence before the effective date of a permanent regulatory program for the state in which the operation is located. Specifically, paragraph (a) applies to maps and plans for all operations, while paragraph (b) applies only to maps and plans for operations in existence before the effective date of a permanent regulatory program for the state in which the operation is located. This distinction is consistent with the preamble to this rule as originally promulgated, which states that ''[t]he concept of delineation of phases of mining on application maps relates to key dates in the interim [initial] and permanent regulatory programs establishing different periods and levels of regulation under the Act.'' *See* 44 FR 15017 (Mar. 13, 1979).[235]

In the final rule, we removed the first sentence of previous paragraph (b) because it is poorly worded, unnecessary, duplicative of the remainder of paragraph (b), and could erroneously be interpreted as applying to maps and plans for all operations, not just maps and plans for operations in existence before the effective date of a permanent regulatory program for the state in which the operation is located. We also revised paragraph (b) to clarify that its provisions apply only when applicable; *i.e.,* that there is no need to provide maps and plans showing each period listed in paragraphs (b)(1) through (3) if the operations was not in existence during one or more of those periods.

Previous paragraph (b)(4) required that maps and plans show those portions of the operation where surface coal mining operations occurred after the estimated date of issuance of a permit under the approved regulatory program. This paragraph is unnecessary because the map of the proposed permit area identifies the lands upon which surface coal mining and reclamation operations will take place after issuance of the permit. Furthermore, previous paragraph (b)(4) inappropriately refers to surface coal mining operations that occurred after the estimated date of permit issuance. This language is inconsistent with section 506(a) of SMCRA,[236] which specifies that ''no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit. . . .'' Therefore, final section 777.14 does not include a counterpart to previous paragraph (b)(4).

Section 777.15: What information must my application include to be administratively complete?

We are finalizing § 777.15 as proposed. We received no comments on this section.

F. Part 779—Surface Mining Permit Applications—Minimum Requirements for Information on Environmental Resources and Conditions

Section 779.1: What does this part do?

With the exception of altering the title of this section for clarity, we are

[235] The contents of 30 CFR 777.14 were originally published on March 13, 1979 as 30 CFR 771.23(e) before their redesignation as 30 CFR 777.14 on Sept. 28, 1983. The 1979 preamble incorrectly refers to 30 CFR 771.23(e) as 30 CFR 771.21(e).

[236] 30 U.S.C. 1256(a).

finalizing section 779.1 as proposed. We received no comments on this section.

Section 779.2: What is the objective of this part?

We are finalizing § 779.2 as proposed. We received no comments on this section.

Section 779.4: What responsibilities do I and government agencies have under this part?

We are finalizing § 779.4 as proposed. We received no comments on this section.

Section 779.10: Information Collection

Section 779.10 pertains to compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* We are adding contact information for persons who wish to comment on these aspects of part 779.

Previous § 779.11: General Requirements

We have removed and reserved previous § 779.11 for the reasons discussed in the preamble to the proposed rule.[237]

Previous § 779.12: General Environmental Resources Information

We have removed and reserved previous § 779.11 for the reasons discussed in the preamble to the proposed rule.[238]

Section 779.17: What information on cultural, historic, and archeological resources must I include in my permit application?

We are finalizing § 779.4 as proposed. We received no comments on this section.

Section 779.18: What information on climate must I include in my permit application?

One commenter requested that we add language requiring climate data and analysis to this section. We did not add this requirement because a requirement to include a statement of the climatic factors, including average seasonal precipitation, direction and velocity of winds, and temperature ranges, is already required under final rule §§ 779.18 and 783.18 and additional information under this section would not add meaningful information.

Section 779.19: What information on vegetation must I include in my permit application?

Several commenters, including the U.S. Forest Service and other federal agencies, expressed support for the proposed changes to this section. In particular, these commenters voiced strong support for the use of native species rather than introduced species because the use of native species would minimize adverse effects on fish and wildlife.

Other commenters opposed the proposed revisions to § 779.19 as unnecessary and excessively burdensome. These commenters urged us not to adopt the proposed revisions and instead simply reaffirm the regulatory authority's discretion to require vegetation information as needed. We disagree that the previous regulations were adequate. The previous regulations provided the regulatory authority with complete discretion in deciding whether to require submission of vegetation information as part of the permit application. In view of other changes to our regulations to generally require revegetation with native species and reestablishment of native plant communities (with certain exceptions), discretionary submission of premining vegetation information is no longer appropriate. The vegetation information required by final section 779.19 is essential to fully implement the revegetation requirements of section 515(b)(19) of SMCRA,[239] which provides that surface coal mining operations must establish ''a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.'' To comply with this requirement, both the applicant and the regulatory authority need to know the vegetative cover native to the area of land to be affected and the extent of cover of the natural vegetation of the area. The information must be in sufficient detail to assist in preparation of the revegetation plan under § 780.12(g) and to provide a baseline for comparison with postmining vegetation, as final paragraph (b)(1) requires. In addition, the information required by § 779.19 will assist in implementation of section 508(a)(2) of SMCRA,[240] which requires that the reclamation plan in each permit application identify both the premining land uses and the capability of the land prior to any mining to support a variety of uses.

In response to comments that the proposed rule was unnecessary and excessively burdensome, we reevaluated each element of the proposed rule and narrowed the requirements down to those that we determined to be necessary to ensure revegetation and reclamation of mine sites in accordance with SMCRA. We also reorganized and restructured the rule to improve clarity.

Proposed paragraph (a)(1) would have required that the applicant identify, describe, and map existing vegetation types and plant communities on the proposed permit and adjacent areas and within any proposed reference areas. Several commenters asserted that we lack the authority under SMCRA to require vegetation information for the adjacent area. While we do not agree with that assertion, we determined that vegetation information for the adjacent area typically would not be useful either to the applicant in preparing the reclamation and revegetation plans for the permit or to the regulatory authority in reviewing and processing the permit application. Therefore, final paragraph (a) does not require vegetation information for the adjacent area. The regulatory authority, however, may use its discretion to require vegetation information for the adjacent area.

Several commenters questioned the value of the vegetation information requirements in situations where reestablishment of native plant communities would be inconsistent with the postmining land use. We did not provide a waiver under these circumstances for several reasons. First, this rule is intended to more fully implement section 508(a)(2) of SMCRA,[241] which requires that the permit application include a statement of ''the capability of the land prior to any mining to support a variety of uses giving consideration to soil and foundation characteristics, topography, and vegetative cover.'' Descriptions of the vegetative communities that exist on the site, as required by final paragraph (a), and of the native vegetation and plant communities typical of that area in the absence of human alterations, as required by final paragraph (c), are an important part of the determination of the capability of the land. Second, there is no guarantee that the approved postmining land use will be implemented before expiration of the revegetation responsibility period or even that it will be implemented at all. Therefore, our final revegetation rules at §§ 780.12(g) and 816.111 through 816.116 require planting and reestablishment of native plant communities on mined lands unless the approved postmining land use is implemented before the entire bond amount for the area has been fully

[237] 80 FR 44436, 44482 (Jul. 27, 2015).

[238] *Id.*

[239] 30 U.S.C. 1265(b)(19).

[240] 30 U.S.C. 1258(a)(2).

[241] 30 U.S.C. 1258(a)(2).

released under §§ 800.40 through 800.43. Third, sites with agricultural, industrial, commercial, residential, or recreational postmining land uses that may be incompatible with restoration of native plant communities overall often contain small areas that can (and, under this final rule, must) be planted with native species to provide some wildlife habitat.

A commenter on proposed paragraph (a) asked that we specify how an applicant should select appropriate reference areas. Other commenters interpreted the proposed rule as always requiring use of reference areas and objected to this alleged requirement. We did not intend to require use of a reference area. We worded final paragraph (a) in a manner that clarifies that an applicant may use a reference area for purposes of determining revegetation success under § 816.116, but that use of a reference area is not required. We find it unnecessary to provide further regulatory instruction on selecting reference areas because selecting reference areas is a common scientific practice. Furthermore, selection of a reference area depends upon site-specific factors and the regulatory authority is the best resource for further guidance on that matter.

Paragraph (b)(2) of the final rule, which we proposed as paragraph (a)(1), requires that the description and map of vegetation types and plant communities be adequate to evaluate whether the vegetation provides important habitat for fish and wildlife and whether the proposed permit area contains native plant communities of local or regional significance. Some commenters requested additional clarification about what would constitute a native plant community of ''local or regional significance,'' while another commenter asked us to define ''plant community.'' We did not revise the rule in the manner that the commenters requested because ''plant community'' is a commonly understood scientific term and because the regulatory authority should have the latitude to determine what constitutes a plant community of local or regional significance. We encourage the regulatory authority to confer with state and federal agencies with responsibilities for fish and wildlife in making this determination. One potential resource for identifying native plant communities of local or regional significance is the Natural Heritage Network, a network of state programs that gather and disseminate biological information on species of conservation concern and natural plant communities.

Several commenters expressed concern that the dominance of non-native species of grasses and forbs and the presence of invasive or noxious species would make reestablishment of native plant communities challenging, if not impossible. As an example, one commenter provided results from the latest Natural Resources Conservation Service's National Resource Inventory survey showing that over 50 percent of the non-federal native grassland in North Dakota is impacted by non-native species and that non-native species cover at least 25 percent of the soil surface. The Natural Resources Conservation Service concluded that it is impossible to return a site to its historic plant community if Kentucky bluegrass comprises more than 30 percent of the vegetation at the site.[242] The Natural Resources Conservation Service's finding supports our requirement to avoid non-native, invasive species in reclamation and illustrates the value of reestablishing the native plant communities unless introduced species are necessary for the postmining land use. The Natural Resource Inventory also concluded that ''[n]on-native invasive plants negatively impact rangeland throughout the western United States by displacing desirable species, altering ecological and hydrological processes, reducing wildlife habitat, degrading systems, altering fire regimes, and decreasing productivity.'' [243]

Commenters requested that we clarify the permissible amount of invasive species after the completion of reclamation, especially when invasive species are present prior to mining. In response, we added paragraph (b)(3) to the final rule. That paragraph requires the applicant to identify areas with significant populations of invasive or noxious species. Final paragraph (b)(3) provides the regulatory authority with the information necessary to determine whether there is a potential problem with non-native or noxious species and to decide on the appropriate steps to take, such as authorizing unique handling of the soil materials as described in § 816.22(f)(1)(ii) of the final rule. Section 780.12(g)(1)(xi) of the final rule requires that the proposed revegetation plan describe measures that will be taken to avoid the establishment of invasive species on reclaimed areas and to control invasive species if they are established. The allowable amount of invasive species at the time of bond release will depend on multiple factors, which we discuss in the performance standards related to revegetation success in §§ 816.111 through 816.116 of the final rule.

In response to a comment from the U.S. Army Corps of Engineers to revise the rule to provide better protection for wetlands, we added paragraph (b)(4) to the final rule. That paragraph requires that the applicant delineate all wetlands and areas bordering streams that support, or are capable of supporting, hydrophytic or hydrophilic vegetation or vegetation typical of floodplains. Hydrophytic vegetation consists of plants that grow either partly or totally submerged in water, while hydrophilic vegetation consists of water-loving plants that grow along the margins and banks of rivers and streams. This vegetation is indicative of wetlands, which means that vegetation information of this nature will proved baseline data to assist in the identification and protection of wetlands. This provision also will facilitate implementation of § 816.97(e) of the final rule, which requires use of the best technology currently available to avoid, restore, or replace wetlands and to enhance wetlands where practicable. Protection or restoration of wetlands is difficult in the absence of information about where those wetlands were originally located and what type of vegetation they supported. The requirement for information about vegetation bordering streams also will facilitate implementation of our stream assessment requirements in § 780.19(c)(6) and our streamside vegetative corridor requirements of § 816.57(d)(2)(iii).

Commenters requested that we specify a timeframe for the requirement in proposed § 779.19(a)(2) that the permit applicant identify the plant communities that would exist on the proposed permit area under conditions of natural succession. Some commenters requested that we specify whether the permit applicant must do this for each of the particular stages of succession or whether the requirement applies only to the climax community. One commenter noted that, given the various intensive land uses over the last 200 years and the presence of many non-native species, it could be very difficult to know what qualifies as ''natural succession'' and urged us to remove this requirement. As an example, the commenter questioned whether tallgrass prairie would be the

[242] U.S. Dep't. of Agric. Natural Res. Conservation Service, Nation Resources Inventory Report on Non-native Invasive Plant Species; available at *http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1254898.pdf.* (last accessed on Nov. 1, 2016).

[243] Roger Shely et al. *Invasive Plant Management on Anticipated Conservation Benefits: A Scientific Assessment,*). 291–336 (2011). *Conservation Benefits of Rangeland Practices: Assessment, Recommendations, and Knowledge Gaps (D.D. Briske, ed.).* U.S. Dep't of Agric., Natural Res. Conservation Serv. (2011).

natural succession community in the Midwest. After evaluating these and other comments, we decided not to adopt proposed paragraph (a)(2). We replaced proposed paragraph (a)(2) with final paragraph (c), which provides that, if the vegetation on the proposed permit area has been altered by human activity, the applicant must describe the native vegetation and plant communities typical of the area in the absence of human alterations. This information should be readily available from historical references and may be inferred from surviving remnants of natural vegetation in the surrounding area, if those remnants are similar to the proposed permit area. The applicant and regulatory authority need this information to prepare and review the revegetation plan, which must be designed to restore native plant communities, as appropriate and consistent with the final rule.

Proposed § 779.19(b) would have required that the vegetation descriptions in the permit application adhere to the National Vegetation Classification Standard, while proposed paragraph (c) would have allowed use of other generally-accepted vegetation classification systems in lieu of the National Vegetation Classification Standard. In the preamble to the proposed rule, we invited comment on what other classification systems may exist. *See* 80 FR 44436, 44483 (Jul. 27, 2015). We received a large number of comments in response to this request. Many commenters proposed to keep the systems already in use. Other commenters expressed support for the National Vegetation Classification Standard and stated that any alternatives should be evaluated based in part, on consistency with the National Vegetation Classification Standard approach.

Some commenters opined that the National Vegetation Classification Standard is not the best method for classifying vegetation and that the decision as to what method to use should be left to the discretion of the regulatory authority. Another commenter opined that the regulation or preamble should provide direction as to what level of hierarchy in the National Vegetation Classification Standard is appropriate for applications for coal mining operations. Other commenters questioned why proposed paragraph (b) required use of the National Vegetation Classification Standard when proposed paragraph (c) allowed the regulatory authority to approve other classification systems. One commenter suggested revising proposed paragraph (c) by adding ''provided that the alternative classification is accepted in the scientific community suitable for that state or region in which the proposed operation is located'' to reduce the potential for abuse of the discretion given here to the regulatory authority. Another commenter noted that some long-term mining operations may have existing, longstanding vegetation data systems and that it would be impractical to substitute a new system when the final rule comes into effect.

After evaluating the comments received, we decided not to adopt proposed paragraphs (b) and (c). Instead, final paragraph (b)(1) provides that the description and map of vegetation types and plant communities required under paragraph (a) must be in sufficient detail to assist in preparation of the revegetation plan under § 780.12(g) and to provide a baseline for comparison with postmining vegetation. The regulatory authority will determine which classification system best meets the requirements of paragraph (b)(1), other provisions of final § 779.19, and the revegetation requirements of §§ 780.12(g) and 816.111 through 816.116. Furthermore, it is not clear that the National Vegetation Classification Standard is readily adaptable to preparation of descriptions of vegetation types and plant communities for purposes of SMCRA. In addition, we agree with those commenters who questioned the value of proposed paragraph (b) when proposed paragraph (c) would have allowed use of other classification systems.

Proposed paragraph (d) would have required that the permit application include a discussion of the potential for reestablishing both the premining plant communities and the plant communities that would exist on the proposed permit area under conditions of natural succession. Some commenters alleged that proposed paragraph (d) would serve no purpose, at least in the Midwest where agricultural postmining land uses predominate. Because this final rule contains numerous requirements for use of native species in revegetation and for reestablishment of native plant communities, we do not agree that proposed paragraph (d) would serve no purpose. However, proposed paragraph (d) is not appropriate for § 779.19, which merely requires baseline information on premining vegetation and historical plant communities. Nor is it necessary because determination of the potential for reestablishment of native plant communities currently or formerly found in the area is an implicit element of the revegetation plan required under § 780.12(g) of this rule. Therefore, we are not adopting proposed paragraph (d) as part of this final rule.

Section 779.20: What information on fish and wildlife resources must I include in my permit application?

Section 779.20 is intended to ensure that the permit applicant has the information needed to design the proposed mining operation in a manner that meets the fish and wildlife protection and enhancement requirements of the regulatory program. The regulatory authority also needs this information to evaluate the probable impacts of the proposed mining operation on fish, wildlife, and related environmental values for the proposed permit and adjacent areas and to determine whether the scope of the proposed fish and wildlife protection and enhancement plan is sufficient. Except as discussed below, we have adopted § 779.20 as proposed, with minor editorial revisions for clarity and consistency.

Several commenters expressed concern that changes to the fish and wildlife resource information requirements might increase the amount of time it takes to review and process permits, resulting in a need for regulatory authorities to hire additional staff. The proposed and final rules are similar to the fish and wildlife resource information requirements in previous § 780.16(a). They require very little additional information. Therefore, we do not anticipate that final § 779.20 will have a significant impact on regulatory authority resource needs.

Final Paragraph (a): General Requirements

Proposed paragraph (a), like previous § 780.16(a), provided that the permit application must include information on fish and wildlife resources for the proposed permit and adjacent areas. The Department of Justice requested that we revise this provision to clarify that the term ''fish and wildlife resources'' includes all species of fish, wildlife, plants and other life forms listed or proposed for listing under the Endangered Species Act of 1973, 30 U.S.C. 1531, *et seq.* Final § 779.20(a) includes the requested revision, which is not substantive.

Final Paragraph (b): Scope and Level of Detail

As proposed, § 779.20(b) provided that the regulatory authority would determine the scope and level of detail for this information in coordination with state and federal agencies that have responsibilities for fish and wildlife. It also specified that the scope and level

of detail of the information must be sufficient to design the fish and wildlife protection and enhancement plan required under § 780.16. We received no comments specific to this provision. Final paragraph (b) adopts the proposed rule without change.

Final Paragraph (c): Site-Specific Resource Information Requirements

Proposed paragraph (c) sets forth requirements for site-specific fish and wildlife resource information. At the request of a federal agency, we revised proposed paragraph (c)(1), which pertains to species listed or proposed for listing under the Endangered Species Act of 1973, by replacing the phrase ''fish and wildlife or plants'' with ''species'' and the phrase ''state or private'' with ''non-federal'' to be consistent with terminology used in connection with the Endangered Species Act. The phrase ''state or private'' might inadvertently exclude activities of local and tribal governments and quasi-governmental agencies.

Some commenters suggested that we revise paragraph (c)(1) to require that the applicant identify cumulative impacts on federally-listed species. Final paragraph (c)(1) provides that ''the site-specific resource information must include a description of the effects of future non-federal activities that are reasonably certain to occur within the proposed permit and adjacent areas.'' That provision is the functional equivalent of an analysis of cumulative impacts. Therefore, no rule change is necessary. Other commenters asserted that we lack authority to require that applicants submit this information to a state regulatory authority or to require that a state regulatory authority conduct a cumulative effects analysis. According to the commenters, the Endangered Species Act only requires such an analysis for federal actions. We disagree. As discussed in the preamble for final § 773.15(j), section 7(a)(1) of the Endangered Species Act provides that ''[t]he Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act.'' [244] That would necessarily include using SMCRA to protect species listed or proposed for listing as threatened or endangered under the Endangered Species Act.[245] Furthermore, the description of the effects of future non-federal activities that final paragraph (c)(1) requires is necessary for the regulatory authority to ascertain compliance with final § 773.15(j).

Another commenter recommended that we delete all of proposed paragraph (c)(1), as the proposed language would place a significant burden on permit applicants, requiring them to know the affairs and plans of all private surface landowners in a given area and convey those plans as part of a permit application. We disagree and decline to delete this paragraph. This requirement to analyze the possible effects of action by private surface landowners is similar in terminology to a portion of the definition of ''Cumulative Impacts'' used in the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regulations implementing the Endangered Species Act [246] and therefore is a warranted and necessary element in this review. Also, because our previous regulations at 30 CFR 780.16(a)(2) included the requirement to provide site-specific resource information in each permit application, there is no additional burden on permit applicants.

Another commenter suggested that we define ''reasonably certain to occur.'' We do not agree. That term, which mirrors the terminology used in the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regulations implementing the Endangered Species Act.[247] The U.S. Fish and Wildlife Service and the National Marine Fisheries Service have published an Endangered Species Consultation Handbook that explains the meaning of this phrase.[248] No additional definition is needed in this rule.

One commenter urged us to require that the application include information on habitat for species listed as threatened or endangered. Another commenter requested that the rule specifically require information about biological communities that do not contain species of special concern. According to the commenter, those communities are still of interest because they may provide habitat to species that are valuable in other ways. Final § 779.19(a)(1) requires that the permit application identify, describe, and map existing vegetation types and plant communities within the proposed permit area in a manner that is adequate to evaluate whether the vegetation provides important habitat for fish and wildlife. In addition, final § 779.20(b) provides that the regulatory authority must determine the scope and level of detail for the fish and wildlife resource information required in coordination with state and agencies with responsibilities for fish and wildlife. Also, final section 780.16 requires additional action if the information required by final § 779.20(b) indicates that the proposed permit area or the adjacent area contains species listed or proposed for listing as threatened or endangered species under the Endangered Species Act or that are designated as critical habitat. As one commenter noted, one potential resource for identifying this information is the Natural Heritage Program, a network of state programs that gather and disseminate biological information on species of conservation concern and on natural plant communities. Each state Natural Heritage Program would also be an appropriate entity to assist the regulatory authority to identify native plant communities of local or regional significance. The combination of these requirements should ensure that the site-specific resource information includes information on habitat under the circumstances described by the first commenter and in all other situations in which information on habitat is important.

A commenter requested that we include specific reference to the Natural Heritage Program throughout the final rule, and specifically within final §§ 779.20 and 783.20, when providing information about threatened, endangered, and rare species of plants and animals at the state and federal level. The commenter also suggested that evidence of any coordination with the Natural Heritage Program or other resource agencies be attached to the permit application. While we agree that coordination with each states' National Heritage Program can be an important step in obtaining information about threatened, endangered, and rare species of plants and animals, we decline to require this and any evidence of coordination with any National Heritage Program be included within the permit application. These requirements are more appropriately

[244] 16 U.S.C. 1536(a)(1).

[245] 16 U.S.C. 1531(b).

[246] 50 CFR 402.02 defines ''cumulative effects'' as ''those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.''

[247] 50 CFR 402.02 defines indirect effects are ''those that are caused by the proposed action and are later in time, but still are reasonably certain to occur'', and ''cumulative effects'' as ''those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.''

[248] U.S. Fish and Wildlife Serv. and National Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act,* 4–32 (March 1998).

addressed on a case-by-case basis at the discretion of the regulatory authority, because each regulatory authority has the appropriate local expertise and network of resources to make these decisions. However, we do agree that the Natural Heritage Program is an excellent resource for information about threatened, endangered, and rare species of plants and animals.

A commenter requested that we define the term ''endemic species'' in proposed paragraph (c)(3). Another commenter recommended that we clarify that habitat for endemic species should be based on actual habitat boundaries rather than state or other jurisdictional boundaries that are less relevant from a biological perspective. Final paragraph (c)(3) does not include a definition of ''endemic species'' both because that term has a commonly understood meaning and because the U.S. Fish and Wildlife Service's published glossary of terms related to endangered species already defines ''endemic species'' as ''[a] species native and confined to a certain region; generally used for species with comparatively restricted distribution.'' [249] The commenter is correct that jurisdictional boundaries should not determine whether a species is endemic to the area. For example, a species with a small distribution within one state but that is widespread throughout the rest of the country would not typically be considered endemic, despite its low numbers within the state boundaries.

Proposed § 779.20(d) contained provisions regarding U.S. Fish and Wildlife Service review of the fish and wildlife resource information in the permit application. Proposed § 780.16(e) contained substantively identical provisions for U.S. Fish and Wildlife Service review of the fish and wildlife protection and enhancement plan in the permit application. This final rule consolidates proposed §§ 779.20(d) and 780.16(e) into final § 780.16(e), both to streamline the regulations and in response to a comment noting that the Service reviews baseline fish and wildlife resource information together with the fish and wildlife protection and enhancement plan, not separately. The preamble to final § 780.16(e) discusses the comments that we received on the provisions of proposed §§ 779.20(d) and 780.16(e) and how we revised the rule in response to those comments and discussions with the U.S. Fish and Wildlife Service.

Proposed § 779.20(d)(2)(iv) provided that the regulatory authority may not approve the permit application until all issues pertaining to threatened and endangered species are resolved and the regulatory authority receives written documentation from the Service that all issues have been resolved. Proposed § 780.16(e)(2)(iv) contained a substantively identical provision. The final rule consolidates both of those proposed rules into final § 780.16(b)(2) in revised form. Many commenters characterized this provision of the proposed rules as a U.S. Fish and Wildlife Service veto over the SMCRA permit. We discuss that comment in Part IV.J., above. The preamble to final § 780.16(b)(2) discusses other comments that we received on proposed §§ 779.20(d)(2)(iv) and 780.16(e)(2)(iv) and the revisions that we made in response to those comments and discussions with the U.S. Fish and Wildlife Service.

Proposed § 779.20(e) would have provided that the regulatory authority, in its discretion, may use the resource information collected under § 779.20 and information gathered from other agencies to determine whether, based on scientific principles and analyses, any stream segments, wildlife habitats, or watersheds in the proposed permit area or the adjacent area are of such exceptional environmental value that any adverse mining-related impacts must be prohibited.

We received comments both opposing and supporting proposed paragraph (e). Many commenters who supported this provision urged us to revise it to categorically prohibit mining in those areas rather than to afford discretion to the regulatory authority to do so. However, section 522 of SMCRA [250] establishes the process and criteria for categorically designating areas unsuitable for all or certain types of mining. Commenters seeking a categorical prohibition should avail themselves of the petition process provided under that section of SMCRA.

Commenters opposing proposed paragraph (e) challenged our authority under SMCRA to adopt such a provision. They also alleged that it could result in a compensable taking of mineral interests, that it provides too much power to state and federal fish and wildlife agencies, and that it could be enormously disruptive and economically costly because potential permit applicants would not have reasonable certainty as to which portions of the proposed permit area they would be allowed to mine. Other commenters noted that section 515(b)(24) of SMCRA,[251] which contains the performance standard for protection of fish and wildlife, does not include an express prohibition on mining. Instead, it provides that ''to the extent possible using the best technology currently available,'' surface coal mining and reclamation operations must ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values.''

The counterargument is that section 515(b)(23) of SMCRA provides that surface coal mining and reclamation operations must ''meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site.'' [252] One of the purposes of the Act is to ''assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible.'' [253]

Other commenters wanted us to define or otherwise clarify the terms, ''exceptional environmental value,'' ''coordination between agencies, ''scientific principles and analysis'', and ''consultation'' in proposed paragraph (e). They requested clarification on how this provision would be applied to regulatory decisions made prior to the final rule. They also sought an opportunity for further public comment on the meaning of ''exceptional environmental value'' and on how this provision would be applied. We also received comments criticizing the lack of a definition of ''adverse impacts,'' and inquiring whether this term extended to impacts that were short-term or temporary or that imposed no permanent change on biota or the ecosystem.

After evaluating the comments that we received, we decided not to adopt proposed § 779.20(e) because avoiding disturbances to habitats of unusually high value for fish and wildlife, as described in final § 779.20(c)(3), is one of the options provided in final § 816.97(f). Therefore, there is no need to further discuss or address the comments that we received on proposed § 779.20(e). While we are not adopting proposed paragraph (e), we encourage states to consider doing so under section 505 of SMCRA,[254] which specifies that any state law or regulation that ''provides for more stringent land use and environmental controls and

[249] U.S. Fish and Wildlife Serv. *Endangered Species Glossary. http://www.fws.gov/endangered/about/glossary.html* (last accessed Nov. 1, 2016).

[250] 30 U.S.C. 1272.

[251] 30 U.S.C. 1265(b)(24).

[252] 30 U.S.C. 1265(b)(23).

[253] 30 U.S.C. 1202(c).

[254] 30 U.S.C. 1255(b).

regulations of surface coal mining and reclamation operations than do the provisions of this Act or any regulation issued pursuant thereto shall not be construed to be inconsistent with this Act.''

Section 779.21: What information on soils must I include in my permit application?

In the proposed rule,[255] we explained the August 4, 1980 suspension of the rules in relationship to lands other than prime farmlands, why we proposed to lift the suspension of previous § 779.21, and why we replaced those provisions with language consistent with the holding in *In Re Permanent Surface Mining Regulation Litigation I, Round I.*[256] One commenter questioned our logic in lifting the suspension and the consistency of the proposed rule with the court's holding. As explained in the preamble to our proposed rule, this is consistent with the court's decision that section 507(b)(16) of SMCRA is a clear expression of congressional intent to require soil surveys only for prime farmlands identified by a reconnaissance inspection.[257] Consistent with that decision the final rule clarifies that soil surveys are only required when a reconnaissance inspection suggests that the land may be prime farmland. In those circumstances the permit application must include the results of the reconnaissance inspection and, when prime farmland is found to be present, the soil survey information required by § 785.17(b)(3). If prime farmlands are not identified, the court held that § 508(a)(3) did not constitute authority for our regulations to require an applicant to provide soil survey information for lands not qualifying as prime farmland. Our final rule is consistent with the decision. To begin, we rely on section 508(a)(2) of SMCRA.[258] This section of SMCRA requires that each reclamation plan submitted as part of a permit application pursuant to any approved State program or a Federal program under the provisions of SMCRA shall include necessary details to demonstrate that reclamation required by the State or Federal program can be accomplished, a statement of the capability of the land prior to any mining to support a variety of uses giving consideration to soil and foundation characteristics, topography, and vegetative cover, and, if applicable, a soil survey. This statutory provision requires the applicant to include information about soil and foundation characteristics in each permit application, not just in those applications that contain prime farmland.[259] This information, detailed in final paragraphs (b) through (d), does not need to take the form of a requirement to conduct a soil survey unless prime farmland may be present. While it is true that the regulations do not require that soil surveys be conducted for lands that may not be prime farmland, it is also true that some soil surveys for these lands may already exist and these already-existing soil surveys would be useful to the regulatory authority in fulfilling its responsibilities under section 508(a)(2) of SMCRA. Therefore, for lands that may not be prime farmland, our final rule does not require a soil survey to be conducted, but it does require the submittal of soil survey information if it already exists.

Regarding paragraph (a), other commenters indicated that, given the predominant land use in some areas of prime farmland and the Natural Resources Conservation Service's extensive mapping, a ''reconnaissance inspection'' is not necessary to make a determination regarding whether prime farmland exists in the permit area. Similarly, other commenters expressed concern about the requirement for ''a soils reconnaissance inspection'' to determine the presence of prime farmland without further guidance regarding what the reconnaissance inspection would entail. However, paragraph (a) does not contain any new requirements regarding these issues; it merely includes and cross-references existing prime farmland regulations within § 785.17 and reiterated at § 779.21(e) of the final rule.

In paragraph (b), we require the permit applicant to include soil surveys completed by the Natural Resources Conservation Service. A commenter suggested that this information is frequently unavailable on federal, state, or tribal lands, and, in situations where such soil survey information is available, it is frequently provided as an Order 4 soil survey and is not sufficiently detailed to be useful without substantial interpolation. The commenter recommended that we allow Order 2 soil surveys to address reclamation plan needs. For non-prime farmland an applicant need only submit soil survey information that exists; therefore, if, as the commenter suggests, this soil survey information does not exist it would not be required. In the event Order 4 soil surveys are the only data set available those should be submitted; conducting an Order 2 soil survey would not be required if such a survey for the proposed permit area does not exist. The purpose of this section, and others related to establishing soil condition, is to ascertain as much information as possible about the capability and productivity of the land prior to mining in order to develop a reclamation plan that restores the premining land use capabilities.

Some commenters opined that proposed paragraph (c) is problematic. The commenter stated that relying on descriptions of soil depths taken from soil mapping completed by the Natural Resources Conservation Service is not reliable because these maps may not accurately reflect on-site conditions. Final § 816.22(a)(1)(i) requires mine operators to remove and salvage all topsoil and other soil materials. Therefore, regardless of whether or not the Natural Resources Conservation Service maps are exactly accurate is of secondary consequence because the mine operator must remove and salvage these materials as they exist at the permit site. For example, if the map indicates that a certain soil type contains eight inches of topsoil, but the on-site conditions reveal twelve inches of topsoil exist, the mine operator is required to remove and salvage all twelve inches of topsoil, not merely the eight inches indicated on the map.

Some commenters also questioned proposed paragraph (f), which affords the regulatory authority the opportunity to require whatever information it may need to determine land use capability. These commenters opined that this paragraph requires applicants to prepare the reclamation plan with no guidance regarding what is necessary to satisfy this requirement. The commenters misinterpret this regulation; it merely states the inherent authority of the regulatory authority to determine, on a case-by-case basis, what additional information is necessary to assess the land use capability. This provision is discretionary with the regulatory authority and provides a regulatory authority with the ability to use its best professional judgment to require information that may be needed for local conditions or circumstances. However, we have modified final rule § 779.21(f) to clarify that any other information ''on soils'' that the regulatory authority finds necessary to

[255] 80 FR 44436, 44484–44485 (Jul. 27, 2015).

[256] *In re Permanent Surface Mining Regulation Litig.* I, Round I (PSMRL I, Round I), 1980 U.S. Dist. LEXIS 17722 at *62 (D.D.C., February 26, 1980).

[257] 80 FR 44436, 44485 (Jul. 27, 2015) (citing 30 U.S.C. 1258(a)(2) and 1257(b)(16) and *In re Permanent Surface Mining Regulation Litig.* I, Round I (PSMRL I, Round I), 1980 U.S. Dist. LEXIS 17722 at *62 (D.D.C., February 26, 1980)).

[258] 30 U.S.C. 1258(a)(2).

[259] 30 U.S.C. 1257(b)(16).

determine land use capability may be collected. Moreover, we removed the phrase ''and to prepare the reclamation plan'' because the regulatory authority does not prepare the reclamation plan.

A commenter requested that we require more detailed soil descriptions because, in the commenter's opinion, more detailed soil descriptions are needed to differentiate between the soil horizons (O, A, E, B, C, and R) so that they can be properly characterized and segregated. Other commenters suggested that we require the retention of physical soil core samples and photographs because mischaracterization of soil horizons could allow improper mixing of higher quality soils with poor soils. We disagree with these comments because the minimum requirements as established in our final rule are sufficient to develop adequate reclamation plans for the salvage and storage of topsoil and other soil horizons as needed to reconstruct a soil medium that will support the approved postmining land use. As discussed previously, § 779.21(f) allows the regulatory authority to require a greater level of detail, if deemed necessary, which could include the information suggested by the commenters.

Another commenter questioned the rationale of expanding the requirements for soil information, stating that the proposed rule is not supported by science. This commenter did not provide any specific information in support of the assertion that this requirement is not supported by science. Not only do we disagree with the commenter we note that all of the final rule requirements, including soil mapping and available surveys, soil depth and quality, are collectively necessary to effectively determine the premining capability and productivity of the land and to establish the soil salvage, soil substitute, and soil replacement requirements to ensure restoration of these capabilities and successful establishment of native vegetation. Moreover, these requirements are not only consistent with the Act they are essential to fulfilling the requirements of the Act.[260]

Section 779.22: What information on land use and productivity must I include in my permit application?

Commenters expressed concern that proposed paragraph (a)(2), which would require a description of the historic use of the land, contains no time limitation, is unfair and impractical, and creates an impossible standard. Similarly, commenters also noted that it was sometimes difficult to determine with precision all of the land uses within the five-year standard included in the existing regulations at 30 CFR 780.23(a) and that the longer timeframe detailed in paragraph (a)(2) would make it even more difficult. We do not intend this requirement to be unfair, impractical, or create an impossible standard, and for clarity are adding a statement to the end to (a)(2); ''to the extent that this information is readily available or can be inferred from the uses of other lands in the vicinity.'' In most cases, it would be sufficient for the applicant to provide historical land use information similar to that required for a Phase I Environmental Site Assessment under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[261] Standards for these assessments have been established by ASTM International.[262] Assessments may include a review of publicly available records, aerial photos, soil surveys, deed searches, and interviews with owners, occupants, neighbors, and local government officials. Various military and government agencies began collecting aerial imagery as far back as the 1940's and 1950's. Advancements in satellite and sensor technology resulted in agencies gathering imagery from space during the 1970s and 1980s. While results will vary depending on one's geographic area of interest, most areas of the continental United States have aerial imagery coverage dating back several decades. A free, open, and commonly used repository of aerial imagery is available online through the U.S. Geological Survey portal called Earth Explorer: *http://earthexplorer.usgs.gov/*. This user-friendly platform hosts a plethora of aerial imagery as well as satellite imagery. Based on the material available for the site and region, the regulatory authority should easily be able to determine whether the statement of the historical uses of the area is reasonable.

A regulatory authority commenter objected to the placement of the phrase ''capability of the land prior to any mining'' in proposed rule § 779.22(b)(1). Although this phrase is taken directly from section 508 of SMCRA,[263] the commenter expressed concern that ''prior to any'' mining is not sufficiently defined. Further, the commenter opines that it will be problematic to determine the capability of land for areas such as Appalachia where coal mining has existed for more than 150 years. This commenter also questioned whether the purpose of the proposed rule is to require that vegetative communities and land uses are restored to what existed prior to any mining—such as the vegetative communities that existed in 1930. The proposed rule at §§ 779.22(b)(2)(i) and 783.22(b)(2)(i) established requirements for a narrative analysis of the productivity of the proposed permit area . . . as determined by actual yield data or yield estimates . . . ''. One commenter on this section expressed concern that we were making a substantive change by adding the word ''actual'' to the requirement for yield data regarding the average yield of food, fiber, forage or wood products obtained on the land before mining. Another commenter objected to proposed paragraph (b)(2) requiring the presentation of productivity data expressed as average yield of food, fiber, forage, or wood products obtained under ''high levels of management'' because this allegedly requires coal mining operators to speculate about industries and commercial enterprises in which they have no expertise. We disagree. Our previous regulations at § 780.23(a)(2)(ii) required the applicant to determine productivity by yield data or estimates for similar sites based on current data from the U.S. Department of Agriculture, state agricultural universities, or appropriate state natural resource or agricultural agencies. Likewise, our previous regulations at §§ 780.23(a)(2)(ii) and 784.15(a)(2)(ii) included a requirement for productivity information to be expressed ''under higher levels of management'', thus, this is not a new requirement. While our previous regulations do not use the word ''actual'', inclusion of the word ''actual'' in the revised regulations merely emphasizes the distinction between actual data and estimated data and imposes no new requirements. In response to commenters' concerns about potential land uses and determining premining capability, we included a more thorough discussion of these issues in the preamble to final § 780.24.

We received many comments regarding the proposed requirement at § 779.22(b)(3), which would have required the permit applicant to provide a narrative analysis of productivity of the proposed permit area for fish and wildlife before mining. Many commenters supported this requirement, expressing that productivity information was essential to establishing a baseline on which impacts to fish and wildlife can be

[260] *See, e.g.,* 30 U.S.C. 1257(b)(16); 30 U.S.C. 1258(a)(2) and (3); 30 U.S.C. 1265(b)(2), (5), (6) and (7).

[261] 42 U.S.C. 9601 *et seq.; see also* 40 CFR part 312.

[262] *See* ASTM 1527–05 and 1527–13.

[263] 30 U.S.C. 1258(a)(2)(B).

evaluated and for establishing a reference for reclamation of the area to premining conditions. Other commenters alleged that the requirement was unclear on the level and scope the analysis must entail and what metrics and historical documentation would be necessary. After consideration of the comments both supportive and critical of this provision, we have determined that this requirement is overly burdensome due to the survey effort that would be required to document productivity. As expressed in the preamble for the proposed rule, the fish and wildlife information required by proposed paragraph (b)(3) would have assisted the regulatory authority in evaluating the environmental impacts of the proposed operation and in determining the fish and wildlife protection and enhancement measures that may be appropriate. However, these productivity needs can be adequately met by the requirements at §§ 779.20(a)–(c) and 783.20(a) through (c) to include general and site-specific resource information on fish and wildlife resources in the permit application to a level of detail determined by the regulatory authority in coordination with state and federal agencies with responsibilities for fish and wildlife. Therefore, we have eliminated this fish and wildlife productivity narrative from the final rule.

Paragraph (c) allows the regulatory authority the flexibility to require other information deemed necessary to determine the condition, capability, and productivity of the land within the proposed permit area. In the preamble, we noted that this additional information may include data about a site's carbon absorption and storage capability. Commenters claimed that it is not within the purview of SMCRA authority to evaluate the carbon footprint of the proposed operation. We disagree. SMCRA clearly allows regulatory authorities to consider the effects of the proposed operation on the condition of the land, which includes the land's capability prior to any mining.[264] The capability of the land within the proposed permit area could include the land's ability to absorb and store greenhouse gases. As indicated in our Draft and final EIS, greenhouse gases are sequestered and stored in soils and vegetative biomass, which reduces the total amount of carbon present in the atmosphere and mitigates the adverse effects of climate change. Mining may remove significant amounts of forest cover, which would reduce the capability of the land to sequester and store carbon. The regulatory authority may want to factor this information into decisions concerning an applicants proposed changes in land use, or revegetation, including the provisions at final 780.16(d)(3) regarding mandatory enhancement measures to address losses of mature native forests.

Section 779.24: What maps, plans, and cross-sections must I submit with my permit application?

We proposed to consolidate existing §§ 779.24 and 779.25 into § 779.24 and add a new paragraph (c) to clarify that the regulatory authority may require that the applicant submit all materials in a digital format that includes all necessary metadata.[265] Except as discussed below, we are adopting, as proposed, §§ 779.24 and the counterpart at 783.24, related to underground mining.

Section 779, pertains to the minimum requirements for information on environmental resources and conditions for surface coal mining applications. In § 779.24(a)(2), the text mistakenly referred to underground mining activities when we meant surface mining activities; hence, we replaced the word ''underground'' with the word ''surface'' in the final rule text.

Several commenters requested we revise paragraph (a)(9) to include that streams and wetlands within the jurisdiction of the Clean Water Act be field delineated, documented, mapped, and then field confirmed by the U.S. Army Corps of Engineers. We are not adopting this recommendation because we cannot place responsibilities on the U.S. Army Corps of Engineers through SMCRA rulemaking. However, as revised, our final rule at § 773.5(a) requires that each SMCRA regulatory program provide for coordination of review of permit applications and issuance of permits for surface coal mining operations with the federal and state agencies responsible for permitting and related actions under, among other laws, the Clean Water Act. This provision will ensure that the U.S. Army Corps of Engineers has an opportunity to participate in the SMCRA permitting process to the degree that it deems appropriate.

Commenters expressed concern about the confidentiality of information provided to the regulatory authority within proposed paragraph (a)(11). In response to these comments, we revised § 779.24(a)(11), to ensure that this information is kept confidential when necessary for safety and security reasons and to protect the integrity of the public water supply.

Another commenter requested clarity about the extent of ''water supplies'' that must be mapped as required in this section. As stated in proposed paragraph (a)(11), any public water supply and associated wellhead protection zone located within one-half mile, measured horizontally, of the proposed permit area must be included in maps and, when appropriate, in plans and cross sections included in the permit application. This section of the rule does not intend for the origin of the source waters to be included, but rather the location of the public water supply itself. The scale of the map must be sufficient to include all pertinent features as required in final rule § 779.24.

Proposed paragraph (a)(13) requires that the location of any discharge, including, but not limited to, a mine-water treatment or pumping facility, into or from an active, inactive, or abandoned underground mine that is hydrologically connected to the proposed permit area or that is located within one-half mile, measured horizontally, of the proposed permit area be shown on a map or cross-section and included in the permit application. In the final rule, we have revised the phrase ''hydrologically connected to the proposed permit area'' to ''hydrologically connected to the site of the proposed operation'' for consistency with final rule § 783.24(a)(13), which describes what maps, plans, and cross-sections the operator must submit with a permit application for an underground mine. The type of information required in this section aids the applicant in preparing the determination of the probable hydrologic consequences of mining required by section 507(b)(11) of SMCRA [266] and the regulatory authority in preparing the cumulative hydrologic impact assessment required by the same provision of the Act and by section 510(b)(3) of SMCRA.[267] Several commenters, including regulatory authorities and industry commenters, opined that paragraph (a)(13) did not provide any benefit and would result in increased costs. We disagree. The locations of any of these types of discharges are necessary for the applicant to prepare the determination of the probable hydrologic consequences of mining required by section 507(b)(11) of SMCRA,[268] and for the regulatory authority to prepare the cumulative hydrologic impact

[264] *See* 30 U.S.C. 1258.

[265] 80 FR 44436, 44486 (Jul. 27, 2015).

[266] 30 U.S.C. 1257(b)(11).

[267] 30 U.S.C. 1260(b)(3).

[268] 30 U.S.C. 1257(b)(11).

assessment required by the same provision of the Act and by section 510(b)(3) of SMCRA.[269] Another commenter was concerned that the requirement in paragraph (a)(13) may present private property access issues for permit applicants. We acknowledge that lack of landowner consent may restrict data collection; however, we anticipate that the applicant will make every effort to obtain necessary access from private property owners. We also anticipate that the applicant will coordinate with the regulatory authority to rectify this issue, and, at the very least, document the inability to access the private property because of a refusal by the property owner to provide permission.

Proposed paragraphs (a)(18) and (20) included a requirement to submit geographic coordinates of test borings, core samplings, and monitoring stations. One commenter stated that these requirements would require field surveying which would add significant costs to the application process and that coordinates derived through the use of appropriate software could provide greater accuracy than hand-held field devices. Proposed paragraphs (a)(18) and (20) do not specify the means that must be used to obtain the geographic coordinates, only that the coordinates need to be included in the permit application. The use of hand-held global positioning system field devices is acceptable, but the use of appropriate geospatial software and publicly available imagery is also acceptable and provides accurate data. We have not modified the final rule in response to this comment.

Proposed paragraph (a)(19) expands upon the requirement in existing section 779.25(a)(6), which requires maps showing the location and extent of subsurface water, if encountered. The expanded application requirements of the proposed rule would also require all mining applications for both surface and underground mines to identify aquifers; this requirement is currently only applicable to underground mines under existing § 783.25(a)(6). We also proposed to require that the application include the areal and vertical distribution of aquifers and a portrayal of seasonal variations in hydraulic head in different aquifers. In addition, proposed paragraph (a)(19) includes a requirement for the estimated elevation of the water table required by section 507(b)(14) of SMCRA.[270] Two commenters stated that the requirement in paragraph (a)(19) to provide the areal and vertical extent of aquifers on a map provided no benefit and would result in increased costs. Maps showing the areal and vertical extent of aquifers are needed to accurately assess the extent of groundwater within the proposed permit and adjacent areas so that the regulatory authority can conduct an adequate assessment of the hydrology so that it can ensure the proposed coal mining operation will minimize disturbance of the hydrologic balance inside the permit area and adjacent areas and prevent material damage to the hydrologic balance outside the permit area. Another commenter stated that it would prefer the option to use maps instead of cross-sections to show the data required by paragraph (a)(19). In consideration of this comment, we agree that it is prudent to allow the applicant the flexibility, in consultation with the regulatory authority, to select the most appropriate means of supplying this information in the permit application. Therefore, paragraph (19) has been revised to allow for the information to be provided on appropriately-scaled cross-sections or maps, in a narrative, or a combination of these methods.

To provide clarity, we further revised paragraph (a)(19) of the final rule to replace ''portrayal of seasonal variations'' with ''maximum and minimum variations.'' The modification clarifies it is the range in variations in hydraulic head that is needed to provide meaningful information relative to individual water level measurements. We also omitted the word ''estimated'' concerning the elevation of the water table in the aquifers to clarify that the elevations must be based on groundwater data collected from the site rather than on an estimation of the levels based on other sources. Finally, we revised ''location and extent of subsurface water, if encountered'' to ''location and extent of any subsurface water encountered'' to clarify that the intent is to record the presence of any subsurface water encountered within the proposed permit and adjacent areas.

In paragraph (a)(21), we proposed to add a requirement that any coal or rider seams located above the coal seam to be mined also be identified in this section. However, this requirement was removed from the final rule due to a redundancy with requirements in § 780.19(e)(3). Likewise, the requirement in paragraph (a)(23) to identify the location and extent of known workings of underground mines underlying the proposed permit and adjacent areas are removed in the final rule due to redundancy with § 783.24(a)(23).

In paragraph (a)(27), we proposed to add a requirement that the application identify all directional or horizontal drilling for hydrocarbon extraction operations, including those using hydraulic fracturing methods, within or underlying, the proposed permit and adjacent areas. A few commenters objected to the addition of this requirement. These commenters pointed to the difficulty in obtaining the information as it is often proprietary information or would otherwise be time consuming to acquire. The commenters also noted that, at least in western states, this type of drilling generally occurs in zones well below the depth of coal mines and potable water aquifers. Some commenters suggested that the regulatory authority should have the flexibility in determining if this information is necessary. We agree to an extent. We have removed any specific references to directional or horizontal drilling as this requirement applies to all oil and gas wells regardless of whether they are conventional or unconventional. In addition, we included a requirement that the lateral extent of the well bores must be provided unless that information is confidential under state law. However, as required in previous § 779.25(a)(10), some information related to oil and gas wells is necessary for both the applicant and the regulatory authority to fully evaluate the impacts of the potential mining and reclamation activities with regard to the existence of these types of wells within the proposed and adjacent areas. Mining and reclamation activities must be planned appropriately to accommodate the presence of these structures; therefore, the locations of the wells, and in many instances the depths, must be known prior to the development of the mining plan. In recognition that the well completion information may be confidential, the final rule includes the qualifier, ''if available,'' relative to the depth information and we have required the lateral extent of the well bores to be provided unless that information is confidential under state law.

With regard to paragraph (c)—the new paragraph we proposed related to digital submittal of information—we invited comment on whether the digital format option should be mandatory to facilitate review by both the public and the regulatory authority instead of allowing the regulatory authority discretion in determining the format that the operator is required to submit their data. One commenter suggested that we require all regulatory authorities to post online all mine permit applications and associated

[269] 30 U.S.C. 1260(b)(3).

[270] 30 U.S.C. 1257(b)(14).

files. Several commenters were in favor of making this requirement mandatory; however, another commenter suggested that the final rule should not require the digital format option for all materials submitted to regulatory authorities because there are instances where published maps are utilized and metadata may not be available. We agree with the commenter's rationale; thus, there were no changes made to paragraph (c) in the final rule.

Previous § 779.25: Cross Sections, Maps, and Plans

We have removed and reserved previous § 779.25 for the reasons discussed in the final rule.[271]

G. Part 780—Surface Mining Permit Applications—Minimum Requirements for Operation and Reclamation Plans

Section 780.1: What does this part do?

With the exception of altering the title of this section for clarity, we are finalizing section 780.1 as proposed. We received no comments on this section.

Section 780.2: What is the objective of this part?

We are finalizing § 780.2 as proposed. We received no comments on this section.

Section 780.4: What responsibilities do I and government agencies have under this part?

We are finalizing § 780.4 as proposed. We received no comments on this section.

Section 780.10: Information Collection

Section 780.10 pertains to compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* We are adding contact information for persons who wish to comment on these aspects of part 780.

Section 780.11: What must I include in the description of my proposed operations?

We are finalizing § 780.11 as proposed. We received no comments on this section.

Section 780.12: What must the reclamation plan include?

Section 780.12 sets forth requirements for the reclamation plan which must be included within a permit application. Several commenters stated that the new requirements for describing, in detail and in writing, the plans for all activities, including planned animal husbandry practices, reclamation timetables, and plans for minimizing the establishment and spread of invasive species, were too onerous for the applicant to provide, too difficult to establish with any accuracy before a mining operation begins, and too lengthy for the regulatory authority to analyze and approve. We disagree. These new permit description requirements are necessary to fulfill statutory requirements, particularly the requirement to use ''the best technology currently available'' to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of those resources where practicable'' within section 515(b)(24) of SMCRA.[272] The requirements of this section, including the requirement that an applicant provide a timetable for reclamation and other activities, will also ensure that these activities have been given sufficient consideration before a permit is issued. These additional descriptions and timetables are realistic and achievable and will allow the regulatory authority to fully analyze the permit and the operators' efforts to comply with SMCRA.

One commenter stated that the whole section implies that these programs have not been successful in returning lands to approximate original contour and in repairing lands and waters damaged by pre-SMCRA mining. We disagree. Reclamation has been successfully accomplished in many instances. However, reclamation techniques can be improved as the regulatory authorities, mine operators, and the scientific community learns more about successful reclamation. For instance, the Forestry Reclamation Approach of planting shrubs and trees in soil that is not compacted has thoroughly changed how this industry returns forests to mine sites. Additionally, eliminating or limiting the use of non-native, invasive grasses has improved native reclamation in arid areas. The rule that we are adopting today promotes the use of these and other best practices in the field of reclamation and will benefit native species, communities, and ecosystems both within and beyond the permitted site.

Final Paragraph (b): Reclamation Timetable

Section 780.12(b) contains a requirement that applicants submit a timetable for reclamation activities which constitute major steps in the reclamation process, including, but not limited to: The planting of all vegetation in accordance with the revegetation plan approved in the permit (including establishing appropriate vegetation bordering perennial, intermittent, and ephemeral streams); demonstrating revegetation success and the restoration of the ecological function of all reconstructed perennial and intermittent stream segment; and applying for each phase of bond release under section 800.42.

Several commenters expressed concern that these new requirements will place operators in a position to fail or force them into noncompliance, if, despite their best efforts, they do not meet the proposed timetables for demonstration of revegetation success, restoration of the ecological function of all reconstructed perennial and intermittent stream segments, or application for each phase of bond release. In addition, these commenters claim that establishing a timetable for completion of these activities, including the return of ecological function to streams, is unrealistic and that these new requirements would remove the discretion from regulatory authorities to require items they determine are important on a case-by-case basis. We disagree. The current rules already require ''a detailed timetable for the completion of each major step in the reclamation plan'' within § 780.18(b)(1). This section now lists the major steps that, at a minimum, must be included in the timetable. The rule provides the regulatory authority with flexibility to require additional steps at its discretion. Moreover, these minimum standards help implement various provisions of SMCRA including, but not limited to: section 507(d) of SMCRA, which provides that ''[e]ach applicant for a permit shall be required to submit to the regulatory authority as part of the permit application a reclamation plan which shall meet the requirements of this Act'';[273] section 508(a)(4), which requires ''a detailed description of how the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use'';[274] section 508(a)(7), which requires a detailed, estimated timetable for the accomplishment of each major step in the reclamation plan'';[275] and section 515(b)(16), which requires that mining operations ''insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with

[271] 80 FR 44436, 44486 (Jul. 27, 2015).

[272] 30 U.S.C. 1265(b)(24).

[273] 30 U.S.C. 1257(d).

[274] 30 U.S.C. 1258(a)(4).

[275] *Id.* at (a)(7).

the surface coal mining operations.[276] Additionally, permit documents, such as reclamation plans, are allowed to be updated, and frequently are. Reclamation schedules can be revised as needed during the course of mining as long as the regulatory authority finds the adjustment acceptable under section 511(a) of SMCRA.[277] This process should protect operators in situations where, despite their best efforts, they cannot meet the original reclamation schedule. No changes were made as a result of these comments.

We made changes to paragraphs (b)(3), (b)(5), and (b)(7) to clarify that establishment of the surface drainage pattern and stream-channel configuration; the planting of appropriate vegetation along the banks of perennial, intermittent, and ephemeral streams; and the restoration of the ''form'' of all perennial and intermittent stream segments are major steps which must be included in the reclamation plan. As proposed, paragraph (b)(3) added to the list of milestones in the reclamation timetable a requirement for establishing ''[r]estoration of the form of all perennial and intermittent stream segments through which you mine, either in their original location or as permanent stream-channel diversions.'' The requirement described at proposed paragraph (b)(5) was, ''planting,'' and proposed paragraph (b)(7) provided for the ''[r]estoration of ecological function of all reconstructed perennial and intermittent stream segments either in their original location or as permanent stream channel diversions.'' As discussed in more detail below, these changes were made in order to clarify the previous regulation at § 780.18(b)(1) by identifying these requirements as ''major steps in the reclamation process'' and to conform § 780.12(b) of the proposed rule to the proposed rule at §§ 780.28 and 816.57, which related to activities, in, through, or adjacent to streams and the restoration of ecological function, and to proposed rule §§ 816.111 and 816.116, which related to revegetation. It is necessary to document these milestones to ensure that successful reclamation is accomplished and to provide the regulatory authority with assurance that these activities have been given sufficient consideration. Moreover, as previously discussed, the inclusion in the reclamation plan of a ''detailed estimated timetable for the accomplishment of each major step in the reclamation plan'' is consistent with section 508(a)(7) of SMCRA.[278]

Several commenters objected to the inclusion of proposed paragraphs (b)(3) and (b)(7), deeming them unnecessary but not providing justification for this assertion. We disagree. As discussed throughout this preamble and specifically within §§ 780.28, 816.56, and 816.57, stream reconstruction is essential to achieving reclamation. Moreover, section 508(a)(13) of SMCRA specifically requires ''a detailed description of the measures to be taken during the mining and reclamation process to assure the protection of . . . the quality of surface and ground water systems. . . .'' [279] Adding the requirements in paragraphs (b)(3) and (b)(7) will ensure that both the regulatory authority and industry are mindful of the importance of these measures and carefully plan for their appropriate implementation. To ensure consistency with final rule §§ 780.28, 816.56, and 816.57, we have revised paragraph (b)(3).

This modification reflects the different requirements for restoration of ''form'' of perennial and intermittent streams that must occur prior to Phase I bond release, discussed in the preamble of §§ 800.42(b) and 816.57(e) and the postmining surface drainage pattern and stream-channel configuration requirements related to ephemeral streams discussed in §§ 800.42(b) and 816.56(b), that also must occur prior to Phase I bond release.

We have also modified paragraph (b)(5). As proposed, this paragraph merely required ''planting.'' Some commenters alleged that this was nebulous. We agree with these commenters and have revised the paragraph to clarify that the establishment of appropriate vegetation includes the establishment of 100-foot wide, streamside, vegetative corridors when required by § 816.56(c), which relates to ephemeral streams, and § 816.57(d), which relates to perennial and intermittent streams and to clarify that the reclamation plan must include a timetable for the planting of all vegetation including vegetation along the banks of streams. Furthermore, this requirement, as revised, complements the requirements of § 800.42(c), which relates to Phase II bond release.

We also modified proposed (b)(7) for clarity and consistency with final rule §§ 816.57(g) and 800.42, which relate to the requirements and timing of achieving restoration of ecological function of all reconstructed perennial and intermittent stream segments. At paragraph § 780.12(b)(7), we have clarified that applicants must include as part of their timetable a ''demonstration'' that restoration of ecological function will be achieved. This is a change from the proposed rule, which required ''restoration of the ecological function,'' and could have been interpreted as referring to the performance of reclamation work rather than to the time when that work must be completed. Actual restoration, as required in the performance standard of § 816.57(g), must occur prior to Phase III bond release. Our intent here is that the timetable establishes a point at which the permittee must demonstrate that ecological function has been restored.

Several commenters requested that we require a qualified biologist or ecologist to provide written attestation to any stream restoration plans and any bond release that includes a restored stream. We did not modify the final rule in response to these comments. Our final rule incorporates sufficient scientific expertise and success standards. For instance, final rule § 780.12(g)(6) now includes the requirement that a qualified, experienced biologist, soil scientist, forester, or agronomist must prepare or approve the revegetation plan, which includes the vegetation found within the streamside vegetative corridor. Similarly, all reclamation plans described within final § 780.13(b) must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify maps, plans, and cross-sections, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture. These requirements ensure the use of experts in establishing the plans for reclamation. Within §§ 816.111(b) and 817.111(b), we require these plans to be followed, and within §§ 816.116(d) and 817.116(d), we require a scientifically derived success standard for all revegetation. In addition, regulatory authorities have the expertise and protocols necessary to analyze permit documents and bond release evidence, including those in place within §§ 780.12(b) and 800.42(b)(4). Therefore, this final rule incorporates sufficient scientific expertise and success standards and requiring a qualified biologist or ecologist to provide written attestation of any stream restoration plans and any bond release is not

[276] 30 U.S.C. 1265(b)(16).

[277] 30 U.S.C. 1261(a).

[278] 30 U.S.C. 1258(a)(7).

[279] *Id.* at 1258(a)(13).

warranted. We have not incorporated this into the final rule.

As proposed, § 780.12(b)(7) added a requirement to demonstrate restoration of ecological function of all reconstructed perennial and intermittent streams to the list of major steps in the reclamation process. This is consistent with final paragraph (b) that requires each permit application to include a detailed timetable for completion of each major step in the reclamation process. Several commenters opposed the addition of proposed paragraph (b)(7) because they thought it was redundant of the permit or other authorization required under section 404 of the Clean Water Act.[280] We disagree and are retaining paragraph (b)(7). The stream restoration requirements in our final rule share elements in common with requirements under section 404 of the Clean Water Act, but they are not substantively identical.

Final Paragraph (c): Reclamation Cost Estimate

Commenters alleged that by only requiring the reclamation to include the standardized construction cost estimation methods and equipment cost guides, the proposed rule did not adequately address all the factors and costs involved in completing reclamation. Many of these commenters use actual cost methods which take in more local factors, conditions, and circumstances. After consideration of this comment, we have added language to the final rule to allow applicants to use ''up-to-date actual contracting costs incurred by the regulatory authority for similar activities'' in lieu of more broad-based standardized construction costs.

A commenter also questioned the lack of definitions of ''direct'' and ''indirect'' costs. We do not believe that ''direct and indirect'' costs need to be defined within the regulatory text because they are relatively common terms. Another commenter stated that indirect costs should not be included as they are irrelevant to the cost of reclamation and the calculation of bonds. Indirect cost amounts are relevant to bond calculations, as those costs are related to administration and overhead. In the event that the regulatory authority must forfeit bonds for the purpose of carrying out reclamation plans in lieu of the mine operator, costs of a third-party contractor to implement the plan, including overhead cost and profit must be included. Therefore, we determine that the inclusion of indirect costs is essential to an adequate bond calculation. We have made no changes based on these comments.

Final Paragraph (d): Backfilling and Grading Plan

This section of the final rule adds greater specificity to the backfilling and grading plan, requiring a description of how the operator will compact spoil to reduce infiltration, minimize leaching and discharges of parameters of concern, limit the compaction of topsoil and soil materials in the root zone to the minimum necessary to achieve stability, and identify measures that will be used to alleviate soil compaction if necessary. The final rule also requires, if acid-forming and toxic-forming materials are present, a description of how the operator will handle these materials to protect groundwater and surface water in accordance with § 816.38 of this chapter.

Some commenters argued that implementation of the Forestry Reclamation Approach by itself would not reduce elevated conductivity levels resulting from mountaintop removal mining operations to the point at which those levels would no longer damage aquatic life. We acknowledge that the comment is correct. However, as discussed in the preamble to the proposed rule, there is evidence that the use of the Forestry Reclamation Approach will reduce levels of conductivity progressively over time.[281] In addition, our final rule includes other measures to address conductivity. The final rule includes a definition of ''material damage to the hydrologic balance outside the permit area'', in § 701.5; requires baseline information on conductivity in § 780.19, requires that the backfilling and grading plan describe in detail how spoil will be compacted to reduce infiltration and minimize leaching in § 780.12(d)(2)(i); requires the elimination of durable rock fills in § 816.71(g); and requires that excess spoil be placed in a manner that will minimize adverse effects of leachate and runoff on groundwater and surface water, including aquatic life in § 816.71(a)(1)).

Proposed paragraph (d)(1) included a sentence stating, ''You must limit compaction to the minimum necessary to achieve stability requirements unless additional compaction is needed to reduce infiltration to minimize leaching and discharges of parameters of concern.'' However, we have concluded that this sentence does not properly reflect our intent, which was to minimize compaction of soil materials in the root zone, while still requiring compaction of spoil in order to minimize conductivity levels in leachate and runoff from the mine. Therefore, the final rule replaces that sentence with paragraphs (d)(2)(i) and (ii). Paragraph (d)(2)(i) requires that the backfilling and grading plan describe in detail how spoil will be compacted in order to reduce infiltration to minimize leaching and discharges of parameters of concern. Paragraph (d)(2)(ii) requires that the backfilling and grading plan limit compaction of topsoil and soil materials in the root zone to the minimum extent necessary to achieve stability. The plan also must identify measures that the permittee will use to alleviate soil compaction if it nonetheless occurs. These changes better reflect our intent to minimize both compaction and conductivity levels.

Some commenters alleged that there was an apparent contradiction between our emphasis on using compaction to ensure stability and reduce leaching and our attempts to limit compaction that impedes revegetation. Moreover, some commenters opined that our requirements related to compaction are impractical as proposed. These commenters stated that our standards for limiting compaction are not supported by scientific evidence and will require a significant engineering analysis by the regulatory authority to determine what the compaction standard should be on various portions of the permit. Additionally, one commenter in particular stated that the language in this paragraph requiring that compaction of backfills be minimized, except as needed to reduce infiltration and minimize leaching and discharges, is inconsistent with the requirements of § 816.38(a), which requires compaction to prevent acid-forming materials from leaching into the soil. In response to these comments, we have made changes to the final rule at § 780.12(d)(1) and (2) to clarify when compaction must be used to minimize infiltration, leaching, and related discharges and when compaction is problematic because it impedes revegetation. However, we disagree with the commenters who stated that the requirement to minimize compaction within the root zone is not supported by scientific evidence. In reclamation projects across the nation, limiting compaction resulted in increased reclamation success (*e.g.,* Forestry

[280] 33 U.S.C. 1344.

[281] Kenton L. Sena, *Influence of Spoil Type on Afforestation Success and Hydrochemical Function on a Surface Coal Mine in Eastern Kentucky* (2014). Theses and Dissertations—Forestry. Paper 16, pp. 39 and 60. *See http://uknowledge.uky.edu/forestry_etds/16/* (last accessed Nov. 1, 2016).

Reclamation Approach,[282] Extreme Surface Roughening),[283] and supporting evidence for this can be found on SMCRA permitted sites as well as within performance reports, annual reports, and other publications authored by us and other SMCRA regulatory authorities.

One commenter alleged that in § 780.12(d) we did not provide a rationale for our proposal to increase requirements for backfilling and grading plans. The commenter alleged that we did not cite specific problems or deficiencies with state regulatory programs under the existing language. Specifically, the commenter alleged that we inappropriately added a performance standard requiring that applicants limit compaction to the minimum necessary to achieve stability. The purpose of these provisions is to address the widespread and well known water quality issues that have been traced to mineralization of infiltrated water, the well-known stream health deficiencies that have been traced to inadequate forest cover of streams in previously forested areas,[284] [285] and the associated leaching of minerals into water that will be discharged offsite. These provisions will ensure that operators make effective plans to minimize compaction of spoil near the surface of the fill and to facilitate the establishment of vegetation in accordance with the reclamation plan. Revegetation contributes to the enhancement of onsite and offsite streams. The commenter is correct that we do not cite specific problems or deficiencies with the implementation of state regulatory programs in order to justify these changes to our regulations. Our inspections and other oversight activities in primacy states, including the annual evaluation reports, focus on the success of state regulatory authorities in achieving compliance with the approved regulatory program for the state. They do not identify or discuss situations in which the existing regulations provide inadequate protection. The provisions of this rule will address adverse impacts that historically have been allowed to occur under the existing regulations and that have not captured by the annual evaluation reports or other oversight activities. We do not agree with the commenter's assumption that this requirement constitutes a performance standard. Rather, it is a permitting requirement that helps in ensuring that the adequacy and effectiveness of proposed backfilling and grading plans.

Another commenter alleged that the requirement to limit compaction to the minimum extent necessary to achieve stability was ambiguous and, as a result, it would be difficult for the regulatory authority to evaluate and monitor compliance in the field due to contradictory compaction requirements. We recognize that permit requirements about under-compaction and over-compaction were combined in the proposed rule, possibly leading to confusion. For clarity, they have been separated into paragraphs (d)(2)(i) and (d)(2)(ii) in the final rule.

Commenters asserted that the submission of contour maps in paragraph (d)(1) as part of the backfilling and grading plan is of limited use and would need to be continually adjusted to reflect changes in market conditions, in geology, or in other on-site factors. These commenters allege that cross-sections are a better tool for making adjustments to the final surface configuration, including drainage patterns, compared to typical cross-sections, which the commenters claim, have worked best. We are not making any changes to the final rule in response to these comments. Compliance with goals of protecting streams and achieving the approximate original contour can best be judged through the use of contour maps, which offer more detail than a two dimensional cross-section alone. While not every change in a reclamation plan would require a new contour map, at a certain point, using only cross sections to document revised reclamation plans could cause both regulatory authorities and operators to miss potentially significant changes in the configuration of the reclaimed land's surface, changes that, cumulatively or individually, could significantly impact the achievement of approximate original contour and the restoration of streams. As an example, poorly located two dimensional cross-sections could mask problems with the location and shape of the streams that are supposed to be restored, a problem that would not occur with a three dimensional contour map. Regulatory authorities need to use the best tool for determining whether streams are being appropriately restored to form and whether approximate original contour is being addressed as changes are made to the approved reclamation plan. Contour maps are essential to making those determinations. However, we do not allege that cross-sections are unnecessary. Contour maps and cross sections are complementary tools and regulators should use both to evaluate changes to reclamation plans and to monitor compliance.

Final Paragraph (e)(1): Soil Handling Plan—General Requirements

We proposed in paragraph (e)(1)(i) to require that the soil handling plan include a schedule for removal, storage, and redistribution of topsoil, subsoil or other materials including the use of organic matter. Numerous commenters weighed in on aspects of this proposed requirement. Several commenters stated that leaving certain organic materials, such as duff and root wads, in replaced topsoil is not beneficial for agricultural lands and may result in difficulty establishing the vegetation and plant crops that are necessary to prove productivity for bond release. Other commenters expressed concern that the use of organic material could elevate total suspended solids and total dissolved solids, slow reclamation and revegetation, and disrupt surface owner priorities and postmining land use plans. Still other commenters claimed that the proposed rule did not allow regulatory authorities the flexibility to waive these requirements. We agree with the commenters that it would be counterproductive to mandate the use of organic materials on land where those materials would interfere with the success of the approved postmining land use. Instead of making changes to this section, however, we have revised § 816.22(f) to incorporate flexibility into the performance standards related to the salvage, storage, and redistribution of organic material. Specifically, the language we added to § 816.22(f)(3) clarifies that the use of organic materials in certain agricultural areas is not required. Because the use of organic materials in reclamation substantially outweighs the disadvantages, however, we have not made revisions to other regulations that govern the use of these materials.

Another commenter alleges that the preamble to the proposed rule contains conflicting statements. The commenter alleges that in the discussion of organic matter we state that these materials are necessary to establish pre-existing plant species to restore land use, but this is in conflict with our statement that vegetative cover has nothing to do with land use capability. The commenter misinterprets the proposed rule preamble discussion because there is no

[282] Jim Burger et al. *The forestry reclamation approach.* Forest Reclamation Advisory 2 (December 2005).

[283] Mary Ann Wright. *The practical guide to reclamation in Utah.* Utah Oil, Gas & Mining Division, Univ. of Utah, (2000).

[284] Margaret Palmer et al., *Mountaintop Mining Consequences.* 327 (5962) Science 148–149.

[285] Margaret Palmer & Emily Bernhardt, *Mountaintop Mining Valley Fills and Aquatic Ecosystems: A Scientific Primer on Impacts and Mitigation Approaches.* Working paper: 24 (2009).

statement that the use of organic material is necessary to restore land use capability, either by itself or to promote the revegetation of pre-existing plant species. We conclude that the commenter erred by incorrectly referencing our proposed preamble discussion at paragraph (e)(1)(ii), where we discussed the salvage and distribution of soil necessary to restore land use capability, with the proposed preamble discussion of organic matter found at paragraph (e)(1)(i). Within the preamble about proposed paragraph (e)(1)(i) we discussed premining land use capability, but did not specifically refer to the use of organic materials as the commenter alleges.

One commenter opined that requiring storage and redistribution of organic matter exceeds our authority because, according to the commenter, SMCRA limits our authority to the removal and replacement of topsoil. We disagree. As we explained in the preamble to our proposed rule,[286] the use of organic matter assists in satisfying the requirement of section 515(b)(19) of SMCRA [287] to establish a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area; therefore, this requirement is fully within our authority. Organic matter contributes to enhancing postmining land use capability, enhances revegetation diversity, and aids in establishing permanent vegetative ground cover of the same seasonal variety native to the area as required for the postmining land use. However, as discussed in more detail throughout this preamble, the distribution of organic matter is not required when it conflicts with certain postmining land uses.

Regarding the proposed requirement to salvage topsoil and organic materials, we received comments asserting that topsoil is often too thin to salvage. Other commenters stated that because thin topsoil is often closely integrated with organic matter, it would be difficult to separate thin topsoil from organic matter. We also received comments alleging that handling of organic materials as prescribed will significantly increase the cost of reclamation due to increased hauling and storage costs. Other commenters supported the salvage of all topsoil and use of organic matter.

Historically, organic matter has almost universally been either burned, which adds to air pollution and the release of greenhouse gases, or buried. In either case, the organic matter is not available to enhance reclamation of mine sites even though postmining soil environments are often highly deficient in organic matter.[288] Moreover, organic matter serves as a seed bank for the reestablishment of native plants that would otherwise be lost if that material burned or buried. While we recognize that requiring the salvage of all soil, topsoil plus subsoil and organic materials, will increase costs over spoiling these materials, we are finalizing this rule because the salvage of topsoil and organic materials is key to revegetation success, the establishment of most postmining land uses, and the restoration of premining capability. However, in recognition of limited circumstances under which it would not be practical to separate organics from topsoil, final rule §§ 780.12(e) and 816.22(f), when read in conjunction, allow organics and topsoil to be salvaged together, when appropriate. This should make the salvage of even thin topsoil more cost effective compared to separating topsoil from organic materials, and it will be more beneficial than spoiling both materials, as frequently has been done.

Some commenters discussed potential unintended consequences of the proposal to require salvage and storage of organic materials. In general, the commenters state these requirements are too prescriptive and create more problems than they resolve. More specifically, several commenters contended that this requirement would lead to additional transportation and storage of organics. Some commenters contended that the need for extra storage acres appeared to be at cross-purposes with one of the purposes of the proposed rule—to minimize surface disturbance when possible. Other commenters expressed concern that saving organic material in steep slope areas is challenging and may be an unsafe practice which may put workers at risk. Commenters also argued that the regulatory authorities should have discretion to determine what is best for these materials, given the terrain.

If it is feasible to mine in steep sloped areas, operators should also be capable of safely excavating and salvaging these materials. While we recognize that the handling of organic matter has some potential for requiring some additional surface disturbance, as previously cited, the benefit gained by utilizing organic matter as part of reclamation far outweighs negative impacts associated with disturbing additional acres. Because of these benefits, we are retaining the requirement to salvage, store, and redistribute the organic material. We added language to the final rule to ensure that the requirements which govern the placement of organic matter do not conflict with certain agricultural or other postmining land uses. Additionally, in locations where significant populations of invasive plant species are documented, those organic materials may be buried, but not burned, as provided for in §§ 816.22(f)(3)(iii) and 816.22(f)(4).

We proposed to require that three soil horizons, topsoil, B horizon, and C horizon, be removed, segregated, stockpiled, and redistributed to achieve the optimal rooting depth as a final growing medium. We received many comments on this proposal. Several commenters argued that this requirement would place an unnecessary burden on state regulatory authorities because the regulatory authorities would expend more time reviewing the soil handling plan and significantly more time inspecting the operation to ensure the proper removal and replacement of all three horizons. One commenter asserted that successful soil restoration has been achieved in instances where soil horizons were mixed. Another commenter referenced circumstances where some soil horizons, including some topsoil, can demonstrate characteristics adverse to soil reconstruction and reestablishing vegetation. Specifically, the commenter referenced soils with unfavorable sodium content and some topsoil that is salt-affected, and advocated that these should not be salvaged or spread again. Another commenter noted that this portion of the proposed rule appeared to be based upon achieving reforestation on Appalachian mines and may not be appropriate in other parts of the country. Some commenters opposed proposed paragraph (e)(1)(ii), which specified that the reclamation plan must require the removal, segregation, stockpiling, and redistribution of the B and C soil horizons and materials other than topsoil in order to achieve the optimal rooting depths required to restore premining land use capability and to comply with revegetation requirements. They alleged that the proposed rule is inconsistent with paragraphs (b)(5) through (7) of section

[286] 80 FR 44436, 44488–4489 (Jul. 27, 2015).

[287] 30 U.S.C.1265(b)(19).

[288] Peter Stahl, *Accumulation of Organic Carbon in Reclaimed Coal Mine Soils of Wyoming; http://asmr.us/Publications/Conference%20Proceedings/2003/1206-Stahl.pdf* (last accessed Nov. 1, 2016) and J.A. Harris, *The Impact of Storage of Soils during Opencast Mining on the Microbial Community: A Strategist Theory Interpretation; http://onlinelibrary.wiley.com/doi/10.1111/j.1526-100X.1993.tb00014.x/abstract* (last accessed Nov.1, 2016).

515 of SMCRA,[289] which require salvage and redistribution soil materials, other than topsoil, only for prime farmland and in situations in which the subsoil or other materials have been approved as a topsoil substitute. They asserted that requiring the salvage of subsoil or other materials for anything other than prime farmland is not supported by SMCRA. As we explained in the preamble to our proposed rule, scientific studies have determined that an adequate root zone is critical to plant growth and survival, and that topsoil alone generally does not provide an adequate root zone. *See* 80 FR 44488–44489 (Jul. 27, 2015). These studies document that salvage and redistribution of topsoil alone will not necessarily restore the mine site to a condition in which it is capable of supporting the uses that it was capable of supporting before any mining, as required by section 515(b)(2) of SMCRA.[290] Therefore, salvage and redistribution of subsoil and other soil materials will be necessary on sites other than prime farmland in order to meet the requirements of section 515(b)(2) [291] of SMCRA. Consistent with this rationale, the final rule differs slightly from the proposed rule in that final 30 CFR 780.12(e)(1)(ii) requires salvage, stockpiling (if necessary), and redistribution of the B and C soil horizons and other underlying strata only ''to the extent and in the manner needed'' to achieve the optimal rooting depths required to restore premining land use capability and to comply with revegetation requirements. Addition of the qualifier ''if necessary'' with respect to stockpiling reflects the fact that stockpiling may not be needed if salvaged materials can be immediately redistributed on backfilled areas.

In addition, paragraph (e)(1)(ii) includes the addition of certain exceptions in recognition of circumstances when the segregation of the B and C soil horizons and other underlying strata is not required. We made this change in response to comments urging us to allow blending of soil horizons when experience has demonstrated that doing so results in a superior growing medium. As a further response to these comments, we added an exception at paragraph (e)(1)(iv, which allows blending of the B horizon, C horizon, and other underlying strata, or portions thereof, to the extent that research or prior experience under similar conditions has demonstrated that blending will not adversely affect site productivity. Finally, we added an exception at paragraph (e)(1)(iii in response to comments objecting to use of the B and C horizons when one or both of those horizons have physical or chemical characteristics that make them inferior to other overburden materials in creating a medium conducive to plant growth. Paragraph (e)(1)(iii) specifies that the soil handling plan need not require salvage of the B and C soil horizons if the applicant demonstrates that those horizons are inferior to other overburden materials as a plant growth medium, provided that the applicant complies with the soil substitute requirements of paragraph (e)(2). We also note that, while several of the reference materials we cite relate to issues of Appalachia reforestation,[292] soils outside Appalachia will likewise benefit from this enhanced recovery of soil resources.[293] In addition, we expect that these requirements will result in greatly improved quality of the growth medium needed to ensure the restoration of premining capability and revegetation. Finally, because the process of reviewing and approving reclamation plans, as well as inspecting sites for compliance is well established, we conclude that these requirements will not place an added burden upon the regulatory authorities.

Additional commenters also asserted that the regulatory authority should have the discretion to make case-by-case determinations about the redistribution of soil materials and the depths at which those materials must be buried. These commenters noted that each state already has an acceptable method to demonstrate compliance with the soil redistribution requirements. These commenters cite the many years of successful bond releases as evidence that the current process for making determinations related to soil materials is adequate. We agree that determinations on the redistribution of soil materials should be based on site-specific information and the experience of local experts, and this rule does not depart from this perspective. Although this rule requires the regulatory authority to make additional determinations, the regulatory authority remains the ultimate decision-maker on the handling and replacement of soils, and its decisions will be based on local, site-specific conditions. This rule is necessary to align our regulations with the specific requirements of SMCRA sections 508(a)(2)(B) [294] and 515(b)(2),[295] which require that we ensure successful revegetation and the restoration of premining land use capability.

Several commenters objected to the proposed requirement to develop, as part of the reclamation plan, a soil handling plan that will restore the land to premining capability. These commenters indicated that it would be better to design a soil handling plan to accommodate the approved postmining land use provided for in § 816.111 of our regulations because the regulatory authority measures the success of the reclamation by achievement of that use. Commenters further alleged that the proposed rule would lead to confusion because, prior to this rule, reclamation success has always been determined by the ability to achieve the approved postmining land use.

We disagree. Section 515(b)(2) of SMCRA [296] requires that mine operators ''restore land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining. . . .'' Section 508(a)(2) of SMCRA requires that the reclamation plan in the permit application demonstrate that the reclamation can be successfully accomplished.[297] This requires the regulatory authority to assess of the capability of the land to support a variety of uses prior to any mining.[298] This assessment must include an assessment of the premining physical characteristics of the land and a determination regarding the various land uses the site would be able to support. Although revegetation success standards are essential to determining whether the postmining land use has been attained, revegetation alone does not ensure that reclamation has restored the land's capability to support the uses it was determined capable of supporting prior to any mining. If prior to any mining the land had significant physical restrictions or limitations due to, for example, slope or natural soils, the postmining reclamation might be limited. If, however, the land had few physical limitations and was capable of supporting a wide variety of uses prior to any mining, the land must be capable of supporting the same variety of uses after reclamation.

[289] 30 U.S.C. 1265(b)(5) through (7).

[290] 30 U.S.C. 1265(b)(2).

[291] 30 U.S.C. 1265(b)(2).

[292] Carl E. Zipper et al., *Rebuilding Soils on Mined Land for Native Forest in Appalachia,* 77 Soil Sci. Am. J. 337–349 (2012).

[293] Alberta Transp. *Alberta Transportation Guide to Reclaiming Borrow Excavations,* p. 5–6 (December 2013).

[294] 30 U.S.C. 1258(a)(2)(B).

[295] 30 U.S.C. 1265(b)(2).

[296] 30 U.S.C. 1265(b)(2).

[297] 30 U.S.C. 1258(a)(2)(B).

[298] *Id.*

Final Paragraph (e)(2): Soil Handling Plan—Substitutes and Supplements

While existing regulations allow the use of materials as topsoil substitutes and supplements if those materials are ''equal to or better than'' the topsoil, the proposed rule would allow the approval of topsoil and subsoil substitutes and supplements only if those materials would create a better growing medium than the original topsoil or subsoil. Commenters opined that the existing regulations work well, that a change is not needed, and that we have not satisfactorily explained why we proposed to make this change. Other commenters stated that if we intend to require the use of better materials, that requirement should be limited to substitute topsoil and not extended to subsoil as well. We disagree. As explained in the preamble to the proposed rule,[299] these new regulations will better implement section 515(b)(5) of SMCRA,[300] which allows use of other strata'' . . . if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be *more suitable* (emphasis added) for vegetation requirements.'' [301] Under this standard subsoil substitutes, like topsoil, must be ''more suitable'' than the existing topsoil in order to satisfy vegetation requirements. Moreover, this provision of our rule is consistent with the requirements of 515(b)(2) [302] in that it will assist in the restoration of premining capability by encouraging development of the root zone required by many plants for physical support, moisture and nutrient uptake.[303] Thus, we are making no changes to the proposed rule with respect to subsoil substitutes.

Commenters further stated that the proposal to require the ''best materials'' available is unnecessarily restrictive, places an unnecessary burden on regulatory authority resources, and requires more monitoring with little benefit. We disagree. The use of the best materials available will ensure better reclamation. Additionally, while we have raised the threshold on what materials may be considered as an acceptable substitute for subsoil, the process for using substitutes is essentially the same and should place no greater burden on regulatory staff. As such, we are not altering the final rule in response to these comments.

Several commenters questioned the criteria permitting the use of soil supplement and substitution materials. These commenters alleged that the proposed regulations are not consistent with section 515(b)(5) of SMCRA,[304] which allows soil substitution and supplements ''if other strata can be shown to be more suitable for vegetation requirements . . . .'' These commenters alleged that the proposed regulations ignore the term ''more suitable''. These commenters suggested that we revise the regulations to use the ''best overburden material available.'' We have declined to make this change. Our final regulations for the use of soil supplements and substitutes are fully consistent with section 515(b)(5) of SMCRA.[305] As noted above, section 515(b)(5) of SMCRA allows for soil substitution and supplements if a demonstration can be made that other strata are ''more suitable for vegetation requirements . . . .'' Paragraph (e)(2)(i)(B) (purposed as (e)(2)(ii)(B), which we are finalizing today with only minor edits for clarity, allows for the use of substitutes and supplements if ''[t]he use of the overburden materials that you have selected . . . will result in a soil medium that is *more suitable* than existing topsoil and subsoil to support and sustain vegetation . . . .'' (Emphasis added.) This language is fully consistent with the language to section 515(b)(5). Likewise, final paragraph (e)(2)(i)(C) [proposed as (e)(2)(ii)(C)] is also consistent with section 515(b)(5) of SMCRA. That paragraph allows for substitutes and supplements if ''[t]he overburden materials that . . . you select for use as a soil substitute or supplement [materials that] are the *best materials* available in the proposed permit area to support . . . vegetation consistent with the postmining land use and the revegetation plan . . .''. (Emphasis added.) Therefore we are not modifying the final rule based on these comments.

Several commenters stated that the inclusion of a number of characteristics for consideration, such as total depth, texture, and pH of soil horizons and overburden material in paragraph (e)(2)(iii)(B), are unnecessary and costly to test and compare. Commenters specifically objected to the inclusion of ''thermal toxicity,'' which they indicated is a term that is generally used relating to water, not soil. These commenters were uncertain about what that parameter required. In response to these comments, we have eliminated the term ''thermal toxicity'' from the final rule. While this term is applicable to soil, the commenter is correct in stating that it is more commonly used in association with water and aquatic organisms' tolerance to temperature. On reconsideration we have decided the added value of including this characteristic as it relates to soil substitute materials is limited and will not be required. However, the other characteristics listed in proposed § 780.12(e)(2)(iii)(B) are all essential to conducting a comprehensive analysis of whether a material is an acceptable substitute. Moreover, with the exception of ''thermal toxicity,'' which we did not include in the final rule, all of the soil characteristics included in final paragraph (e)(2)(iii)(B) were included in previous § 780.18(b)(4). Additionally, any one of these characteristics individually, if sufficiently adverse, could impact the success of revegetation. For example, a potential substitute material may have an excessively low pH. This factor alone could render it unacceptable as a substitute material. The final rule requires the regulatory authority to examine these factors in a thorough and comprehensive fashion.

We received comments alleging that it is unnecessarily duplicative to require the testing of substitute soil materials twice—once to prove they are suitable and then again after they have been placed. We disagree. Testing of substitute materials before placement is necessary because the testing serves as a baseline for the substitution plan, while testing after placement is needed to ensure that the substitution plan has been properly implemented.

A commenter stated that expansion of the soils-related regulations requires soil science expertise that many regulatory authorities lack. Any soil science expertise and costs related to address that need, if currently unavailable within a regulatory program, would certainly be a legitimate program cost, and, subject to appropriation, states would be eligible to receive matching grant funding to assist with these expenses.

Final Paragraph (f): Surface Stabilization Plan

Several commenters considered this paragraph to be a new permitting requirement. They generally contend that there is no value in this addition and claim that it was proposed without justification. In addition, some commenters asserted that proposed paragraph (f) should be removed because it is duplicative of other non-SMCRA related requirements governing the content of a mine's air quality

[299] 80 FR 44436, 44489–44490, (Jul. 27, 2015)).

[300] 30 U.S.C. 1265(b)(5).

[301] 30 CFR 1265(b)(5).

[302] 30 U.S.C. 1265(b)(2).

[303] Alberta Transp. *Alberta Transportation Guide to Reclaiming Borrow Excavations,* p. 5–6, (December 2013).

[304] *Id.*

[305] Id.

permits. Another commenter suggested that the regulation be relocated or revised to better explain the associated permitting requirements. We disagree. As explained in the preamble to the proposed rule,[306] the surface stabilization plan required by paragraph (f) is the permitting counterpart to the performance standards at § 816.95, which requires that all exposed surface areas must be protected and stabilized to effectively control erosion and air pollution attendant to erosion, and 30 CFR 816.150 and 816.151, which require dust control on mine roads. This permitting requirement, which we are adopting as part of the final rule, allows the regulatory authority to evaluate the anticipated adequacy and effectiveness of proposed surface stabilization measures. Additionally, while many facets of air quality are not governed by SMCRA, it is clearly within our SMCRA authority to regulate air pollution attendant to erosion caused by mining activity. Therefore we are not modifying the final rule based on this comment.

Final Paragraph (g): Revegetation Plan

Final paragraph (g) is substantively identical to proposed paragraph (g), except as discussed below.

Proposed paragraph (g)(1)(v) provided that the revegetation plan must include the species to be planted and the seeding and stocking rates and planting arrangements to be used to achieve or complement the postmining land use and to enhance fish and wildlife habitat. Final paragraph (g)(1)(v) adds a requirement that the revegetation plan include the species to be planted and the seeding and stocking rates and planting arrangements to be used to achieve the streamside vegetative corridor provisions of final §§ 816.56(c) and 816.57(d), when applicable. We added this requirement to emphasize the critical nature of streamside vegetative corridors in achieving restoration of streams that are mined through.

One commenter requested that we implement, to the maximum extent practicable, measures to support pollinators with respect to native plants, consistent with the Presidential Memorandum dated June 20, 2014, ''Creating a Federal Strategy to Promote the Health of Honey Bees and Other Pollinators.'' In response to this comment, we added paragraph (g)(1)(v)(B) to the final rule. That paragraph provides that, to the extent practicable and consistent with other revegetation and regulatory program requirements, the species mix must include native pollinator-friendly plants and the planting arrangements must promote the establishment of pollinator-friendly habitat.

In response to a comment, we revised § 780.12(g)(1)(ix), regarding normal husbandry practices, to correctly cross-reference § 816.115(d).

Commenters recommended that we revise paragraph (g) to require that the selection of revegetation material take into account habitats for the wildlife species with the greatest conservation need, as determined by the state wildlife agency, the U.S. Fish and Wildlife Service, and regional or national wildlife conservation initiatives. According to the commenters, species of concern, which include many grassland birds, may benefit by replacing premining forested lands with grassland habitat.

Revisions of the nature advocated by the commenters may exceed our authority under SMCRA. In particular, adoption of a rule promoting the establishment of grasslands in place of the forests that would naturally exist on those sites would be inconsistent with section 515(b)(19) of SMCRA, which requires that the permittee ''establish on the regraded areas, and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.'' [307] However, the final rule does require that permit applications include appropriate fish and wildlife enhancement measures. Specifically, final § 780.16(d)(2)(iv) promotes the reestablishment of native forests or other native plant communities, both within and outside the permit area.

Many commenters supported proposed paragraph (g)(1)(xi), which required that the applicant describe the process for monitoring and controlling invasive species. Other commenters requested an explanation of how the rule would apply to naturalized invasive or non-native species or when invasive or non-native species drift from adjacent lands and establish themselves on the mine site. The final rule does not distinguish between naturalized non-native species and non-native species that are not naturalized. Nor does it differentiate on the basis of how non-native species arrive on the mine site. Instead, it differentiates on the basis of whether the volunteer non-native species are invasive. In all cases, final paragraph (g)(1)(xi) requires that the revegetation plan identify the measures that the permittee will take to avoid the establishment of invasive species on reclaimed areas or to control those species if they do become established. We recognize that it may not be possible to completely avoid the presence of some invasive species. The bottom line is that invasive species must not be present in quantities that would prevent attainment of the revegetation success standards established in accordance with final § 816.116.

At least one commenter suggested that we move proposed paragraphs (g)(2) and (3) to part 816 and make them performance standards. We declined to make this change. The revegetation plan, which is submitted and approved as part of the permit, is a critical component of the planning stage. After the permit, which includes the revegetation plan, is approved, the permittee then is obligated to comply with the terms and conditions of the approved permit. However, in reviewing the structure of proposed paragraphs (g)(2) and (3) in response to this comment, we determined that the requirement in proposed paragraph (g)(2) that the species and planting rates and arrangements selected as part of the revegetation plan meet the requirements of paragraphs (a) and (b) of § 816.116 is not appropriate. Paragraph (a) of § 816.116 requires that the regulatory authority select standards for revegetation success and statistically valid sampling techniques. Paragraph (b) of § 816.116 requires that the revegetation success standards reflect the revegetation plan requirements of § 780.12(g). Nothing in those two paragraphs would impact development of the revegetation plan. Therefore, final paragraph (g)(2) does not include the provision in proposed paragraph (g)(2) that would have required that the revegetation plan meet the requirements of paragraphs (a) and (b) of § 816.116.

Final paragraph (g)(3)(vii) differs from proposed paragraph (g)(3)(vii) in that the final rule does not include mention of state and federal poisonous plant laws. We made this change because we are not aware of any state or federal poisonous plant laws.

Some commenters requested the rule include more specific information on the meaning of native plant communities and the natural succession process. Final paragraph (g)(3)(iv) differs slightly from its counterpart in the proposed rule in that we added a clarification that the species in the revegetation plan must be consistent with the appropriate stage of natural succession in the native plant communities described in § 779.19 of

[306] 80 FR 44436, 44490 (Jul. 27, 2015).

[307] 30 U.S.C. 1265(b)(19).

the final rule. In other words, we do not intend to require planting of species that would not survive on drastically disturbed sites.

Several commenters stated that the standards for revegetation are not clear and asked whether sites are to be returned to the vegetation that existed prior to human influence. If this is the case, the commenters stated, this requirement would be impossible to meet in situations where non-native vegetation constitutes a significant portion of the premining landscape. The final rule does not necessarily require that the site be revegetated with the species that characterized the site before it was altered by human activities. The species selected must be suitable for the postmining land use. Final paragraph (g)(3)(i) requires use of species native to the area, but it also allows use of introduced species as part of the permanent vegetative cover for the site if the introduced species are both non-invasive and necessary to achieve the postmining land use, planting of native species would be inconsistent with the approved postmining land use, and the approved postmining land use is implemented before the entire bond amount for the area has been fully released under §§ 800.40 through 800.43. Final paragraph (g)(3)(i) is consistent with section 515(b)(19) of SMCRA,[308] which requires establishment of ''a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except, that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan.'' Moreover, the default requirement in the final rule for use of native species is consistent with Section 2(a)(2)(i) of Executive Order 13751 stating, ''[i]t is the policy of the United States to prevent the introduction, establishment, and spread of invasive species, as well as to eradicate and control populations of invasive species that are established.'' Moreover, that Executive Order provides that Federal agencies to ''the extent practicable and permitted by law . . . prevent the introduction, establishment, and spread of invasive species.'' [309]

Many commenters supported the requirement to reclaim lands using predominantly native species. Other commenters considered the proposed requirement too stringent; they recommended fewer restrictions on the use of non-native species and more flexibility for the regulatory authority to approve vegetation plans based on local conditions. As previously explained, our final regulations allow for the appropriate use of introduced species for reclamation, as long as they are not invasive. Requirements to use native species (and, where appropriate, introduced, non-invasive species) for reclamation allow the regulatory authority to approve vegetation plans based on local conditions. They also minimize the risk of allowing non-native species to be introduced when they are not the best choice for long-term reclamation.

We also received comments that alleged that the requirement to use native vegetation conflicted with the requirement to achieve a condition in which the site will support a productive postmining land use and the requirement for use of species capable of self-regeneration and natural succession. The commenters alleged that the proposed requirements were neither sufficient nor the most productive way to achieve the postmining land use. These commenters noted that many non-native species might prove better candidates for achieving productivity, self-regeneration, and natural succession. Similarly, some commenters expressed concern that use of native species is not always suitable or best for a particular postmining land use, and that restoring the premining vegetation may conflict with fish and wildlife postmining land uses that involve elk and other game species.

Nothing in our rules prohibits revegetation of sites with a fish and wildlife postmining land use with species appropriate for the wildlife for which the site will be managed. Furthermore, final § 780.12(g)(3)(i), which incorporates the provisions of proposed paragraph (g)(6), allows the applicant to propose, and the regulatory authority to approve, use of introduced species to achieve a particular postmining land use, provided certain conditions are met. Final paragraphs (g)(3)(i) and (g)(4) allow the use of introduced species if (1) the introduced species are needed to achieve a quick-growing, temporary, stabilizing cover on disturbed and regraded areas, and the species selected to achieve this purpose will not impede the establishment of permanent vegetation; (2) the postmining land use requires the use of introduced, non-invasive species, and (3) the postmining land use will be implemented before the entire bond amount for the area has been fully released. These provisions provide the flexibility needed to allow the use of introduced species for agricultural postmining land uses. Therefore, final paragraph (g)(5) does not include the provision in proposed paragraph (g)(5) that would have allowed the regulatory authority to exempt lands with long-term, intensive agricultural postmining land uses from the requirements of paragraph (g)(3)(i).

Some commenters requested that we include a definition of ''resembles'' within § 780.12(g)(3)(ii), which requires ''a permanent vegetative cover that resembles native plant communities in the area.'' We find it unnecessary to define this term. The final rule allows the regulatory authority the flexibility to approve a native, non-invasive vegetative cover that would allow for natural succession specific to that site. To the extent that more explanation is needed, section 515(b)(19) of SMCRA requires that the permittee ''establish on the regraded areas, and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area. . . .'' [310]

We updated proposed paragraph (g)(4) in the final rule to more clearly reflect our intent to allow the regulatory authority to approve the use of introduced species when controlling erosion, but only if such use does not impede establishment of the permanent vegetation needed to meet revegetation success standards. We made this change is in response to commenters who asked for clarity about natural succession and the establishment of permanent native vegetation.

We also made a change to paragraph (g)(6) of the final rule. The proposed rule required that a professional forester or ecologist develop and certify any revegetation plan that includes trees or shrubs. Many commenters expressed concern over this requirement and noted that many other experienced professionals have the expertise to design and certify these plans. Some commenters observed that states may not professionally recognize or certify ecologists, and in those states that do certify ecologists, it may be rare to find an ecologist with sufficient experience to develop and certify revegetation plans for coal mining operations. We agree and have modified the final rule to address these concerns. Under the

[308] 30 U.S.C. 1265(b)(19).

[309] Sec. 1 Policy and Sec. 2 Federal Agency Duties. 81 FR 88609 (Dec. 8, 2016).

[310] 30 U.S.C. 1265(b)(19).

final rule, any qualified and experienced biologist, soil scientist, forester, or agronomist can now prepare or approve all revegetation plans. This change allows a wide variety of qualified and experienced professionals to approve these plans. We trust that a qualified and experienced professional in one subject area may consult with other appropriate individuals as necessary to prepare or approve the revegetation plan.

Another commenter suggested that we replace all references to ''introduced'' species with ''invasive'' species. We did not make this change. These terms are not synonyms (*i.e.,* there are introduced species that are not invasive), and there are instances where ''introduced'' is more appropriate. The final rule at § 701.5 defines invasive species as ''an alien species (a species that is not native to the region or area), the introduction of which has caused or is likely to cause economic or environmental harm or harm to human health''. The final rule prohibits use of these species for revegetation under SMCRA. However, introduced species that are non-invasive may be used in reclamation, as provided in final § 780.12(g)(3).

Other commenters expressed opposition to the proposed rule because they considered the previous regulations sufficient and not in need of any updates. We disagree. While it is true that under SMCRA, voluntary best practices have advanced to minimize the effect of introduced, invasive species on the natural processes and capability of reclaimed land, (as examples: the elimination in most instances of using crested wheatgrass, *Agropyron cristatum,*[311] Kentucky 31 tall fescue, *Lolium arundinaceum,*[312] and smooth brome, *Bromus inermis;*[313] using the Forestry Reclamation Approach;[314] and extreme surface roughening[315]), the previous regulations were insufficient because they did not require use of these best practices.

Commenters also opined that these new regulations may not accommodate landowner desires. We agree that this statement may sometimes be true, but section 515(b)(19) of SMCRA requires the establishment of ''a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.'' Landowners may replant the site with other species if they wish after final bond release, which terminates jurisdiction under SMCRA.

Other commenters claimed that the proposed rule's emphasis on native species is flawed due to concerns about the availability and survivability of native species, as well as their additional cost. We agree that these native species requirements could increase short-term reclamation costs, but they are not cost-prohibitive. The use of native species is the best technology currently available, and in the long-term, this requirement could also lower maintenance costs. We disagree that the availability and survivability of native species should prohibit our requirement to use them to reclaim SMCRA permitted disturbances. Native species are currently in wide use as best practices in SMCRA and non-SMCRA reclamation across the United States, and substantial progress continues to be made in the availability and diversity of native species. Best practices include contracting with growers to produce seed from the premining vegetation or from adjacent (and appropriate) areas for use in reclamation. This enhances the establishment and the survivability of the native species that are used.

Commenters also expressed concern that the proposed regulations would effectively eliminate postmining land use options other than forest. We disagree. As explained in the preamble discussion at section 701.5 within the ''land use'' definition, there are several acceptable postmining land uses, and forest is only one potential postmining land use. In addition, the revegetation plan set forth in this paragraph only requires the proposed vegetative cover to be consistent with both the approved postmining land use and the establishment of the plant communities described in the permit application, as required by § 779.19. Only those portions of the proposed permit area that are forested at the time of permit application or that would revert to forest under conditions of natural succession must be revegetated using native tree and understory species. This requirement would not apply when a postmining land use other than forestry has been approved, provided reforestation is inconsistent with the land use and provided that the approved postmining land use is implemented before final bond release.

Final Paragraph (h): Stream Protection and Reconstruction Plan

A commenter expressed concern that the steps in this plan would be inflexible and result in inappropriate enforcement actions that do not take into account the time required for restoration and recovery of natural stream functions. The commenter stated that § 780.12(h) implies that it is possible to predict when biological stream functions might be restored, a characterization with which the commenter disagrees. We do not agree that the regulation is inflexible or that it would result in inappropriate enforcement actions. We recognize that once a permittee completes construction of the stream channel and plants of the streamside vegetative corridor, there are few, if any, measures that may be taken to speed ecological restoration. The rule does not anticipate any enforcement action for failure to achieve restoration of ecological function within any specific time. However, it requires that final bond release be delayed until that requirement is accomplished.

A commenter stated that the use of the term ''restoration'' relating to streams should be changed to ''reclamation'' because the term ''restoration'' is not included in the definitions section of SMCRA. We have not made this change. The absence of the term in SMCRA does not prohibit its use, where appropriate, in our regulations. Moreover, section 508(a)(9) of SMCRA requires the permittee to include in the reclamation plan a statement of ''the steps to be taken to comply with the . . . water quality laws and regulations.''[316] As discussed further in §§ 780.27, 780.28, 816.56, and 816.57, the establishment of standards for restoration of ecological function must be in coordination with the appropriate Clean Water Act authority to ensure compliance with all Clean Water Act requirements, where applicable. Further, the term ''restoration'' is appropriate in the context of ecological function restoration requirements for streams, whereas the term ''reclamation'' would be far less clear.

A commenter opined that because the Clean Water Act requires stream restoration plans, there is no need for a SMCRA review and approval of proposals to mine through a perennial or intermittent stream. Therefore, according to the commenter, we should simply reference the Clean Water Act

[311] Gerald E. Schuman, *Mined land reclamation in the Northern Great Plains: Have we been successful* ?, Proceedings 19th Annual Meeting, American Society of Mining and Reclamation. 2002.

[312] U.S. Dep't. of Agric., NRCS, (2002). Tall Fescue, *Lolium arundinaceum* Plant Fact Sheet.

[313] U.S. Dep't. of Agric., NRCS, (2006). Smooth brome, *Bromus inermis* Plant Fact Sheet.

[314] Jim Burger, et al. *The forestry reclamation approach*. Forest Reclamation Advisory 2 (2005).

[315] M.A. Wright, *The practical guide to reclamation in Utah*. Univ. of Utah, Utah Oil, Gas & Mining Division, (2000).

[316] 30 U.S.C. 1258(a)(9).

permit. The commenter further suggests that this requirement be modified or removed as it is duplicative of requirements of other agencies, supersedes the Clean Water Act, and is in violation of section 702 of SMCRA.[317]

We disagree with the commenter's assertion that this requirement supersedes the Clean Water Act. In Part IV.I., above, we further discuss the relationship between SMCRA and Clean Water Act. While Clean Water Act stream restoration plans may serve as the basis for the restoration plan required by our final rule, (which is further justification for coordination with the Clean Water Act authority in the development of such plans), the regulations referenced in our final rule address the need for a plan that restores stream form, hydrologic function and ecological function. The completion of these various phases of a stream restoration plan are all tied to bond release; therefore it is critical that any plan utilized be incorporated into the SMCRA permit. In addition, the Clean Water Act authority may not always require a stream restoration plan, but may instead require mitigation in accordance with Clean Water Act provisions. It is not uncommon for mitigation to consist of in-lieu fee payments to a ''mitigation bank'' which negates the obligation to actually restore the lost stream functions required by the final rule. Our regulations require a demonstration that intermittent and perennial streams can be restored hydrologically and ecologically, otherwise the regulatory authority may not approve of a request to mine through such steams. Therefore we cannot rely on provisions within the Clean Water Act to satisfy this requirement.

Final Paragraph (l): Compliance With the Clean Air Act and the Clean Water Act

This section requires that the reclamation plan describe the steps to comply with the requirements of the Clean Air Act,[318] the Clean Water Act,[319] and other applicable air and water quality laws and regulations and health and safety standards. A commenter asserted that there is no rational basis for this requirement and recommends that we remove it because it is unnecessary for an applicant to describe the steps taken or that are to be taken in association with laws other than SMCRA. In support of this assertion, the commenter states that the permittee must comply with all applicable applications, regulations, and permit approval documents of other applicable laws or face enforcement mechanisms by the pertinent agencies to compel compliance. We disagree with the commenter because section 508(a)(9) of SMCRA [320] specifically requires that the applicant demonstrate in the reclamation plan ''the steps to be taken to comply with applicable air and water quality laws and regulations and any applicable health and safety standards.'' [321] Because this is a statutory requirement, it cannot be removed as the commenter suggests: It is important that the applicant describe how compliance will be attained, especially considering complex mining scenarios and requirements.

Final Paragraph (m): Consistency With Land Use Plans and Surface Owner Plans

One commenter urged us to not to adopt the requirements under paragraph (m) because a mine operator already must comply with any state and local land use plans and programs and these requirements are beyond the authority of the SMCRA agency. The commenter adds that neither the regulatory authority nor the mine operator can know what future plans a landowner may implement that may alter a formerly approved permit following termination of jurisdiction. As we explained in the preamble to the proposed rule,[322] the requirements of this paragraph are now consistent with the requirements of section 508(a)(8) of SMCRA [323] which requires that each reclamation plan submitted as part of permit application include a statement of the ''consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans, and applicable State and local land use plans and programs.'' Mine operators must consider making operations consistent with surface owner plans, in addition to considering post-mining land use. Contrary to the commenters' opinion that this requirement is beyond our authority, final paragraph (m) specifically mirrors the requirements of section 508(a)(8) of SMCRA; therefore, we are adopting paragraph (m) as proposed.

Final Paragraph (n): Handling and Acid-Forming and Toxic-Forming Materials

We have added final paragraph (n) to the final rule because we determined that it was more appropriate to place the permitting requirements about how a permittee must develop an acid-forming and toxic-forming handling plan in the performance standards of proposed § 816.38. Specifically, we have moved proposed § 816.38(a) through (d), which prescribe handling of acid-forming and toxic-forming materials, to final paragraph (n) because these handling requirements must be included in the reclamation plan.

As discussed in the preamble,[324] we proposed to modify section 816.38 to implement more completely section 515(b)(14) of SMCRA,[325] which requires that all acid-forming materials and toxic materials be ''treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters.'' Our revisions to proposed § 816.38, now paragraph (n) of § 780.12, are also consistent with section 515(b)(10)(A) of SMCRA,[326] which requires the permittee to ''minimize the disturbances to the prevailing hydrologic balance . . . by avoiding acid or toxic mine drainage. . . .'' In proposed § 816.38(a), now § 780.12(n)(1), we discuss how handling of acid-forming or toxic-forming materials identified during collection of baseline information under final § 780.19(e)(3) will be prescribed in the reclamation plan. In particular, paragraph (n)(1) pertains to handling acid-forming and toxic-forming materials when they are identified in the overburden above the lowest coal seam mined. One commenter suggested that we should allow the practice of blending acid-forming materials with spoil that exhibits sufficient alkalinity to prevent acid drainage. Because of the neutralization effects of this practice, we agree with the commenter and have added text to paragraph (n)(1)(ii)(A) that expressly allows this practice. Several commenters asserted that we should limit the scope of proposed § 816.38(c), now final § 780.12(n)(1)(ii), to areas where surface water and groundwater problems could occur. We made no revisions in response to this comment. Adverse impacts to surface water or groundwater may occur anywhere acid-forming or toxic-forming materials are present. Thus, final paragraph (n)(1)(ii) properly applies whenever acid-forming

[317] 30 U.S.C. 1292.

[318] 42 U.S.C. 7401 *et seq.*

[319] 33 U.S.C. 1251 *et seq.*

[320] 30 U.S.C. 1258(a)(9).

[321] *Id.*

[322] 80 FR 44436, 44492 (Jul. 27, 2015).

[323] 30 U.S.C. 1258(a)(8).

[324] 80 FR 44436, 44547–44548 (Jul. 27, 2015).

[325] 30 U.S.C. 1265(b)(14).

[326] 30 U.S.C. 1265(b)(10).

or toxic-forming materials are present; therefore, no revisions are necessary or appropriate. The same commenters also asserted that proposed § 816.38(c), now § 780.12(n)(1)(ii), was overly restrictive and should allow techniques other than those set forth in the proposed rule. We disagree with the characterization that final paragraph (n)(1)(ii) is overly restrictive; this provision allows the operator to either demonstrate that acid or toxic drainage will not be generated or choose from proven methods of handling acid-forming and toxic-forming materials to prevent material damage to the hydrologic balance outside the permit area. The commenters suggested, for example, that it may be possible to effectively prevent pollution resulting from acid-forming or toxic-forming materials by placing the materials in a position that is ''high and dry.'' We agree that, in common with other placement methods, placing acid-forming or toxic-forming materials permanently above the groundwater table can be effective. Final paragraph (n)(1)(ii), describes several methods of addressing acid-forming or toxic-forming materials, including treatment with neutralizing materials and placement of the materials so that they will remain permanently above, or below, the groundwater table. However, we must point out that paragraph (n)(1)(ii)(B) only allows placement of acid-forming or toxic-forming materials below the water table, without surrounding them with compacted low permeability material, if you can demonstrate and the regulatory authority finds in writing that complete saturation will prevent the formation of acid or toxic mine drainage. If you, the permittee cannot make this demonstration, you must either treat the acid-forming or toxic-forming material in accordance with paragraph (n)(1)(ii)(A) or completely surround the acid-forming or toxic-forming materials with compacted low permeability material in accordance with paragraph (n)(1)(ii)(C). If you surround the material with compacted low permeability material, you may place the material either permanently below the groundwater table in accordance with paragraph (n)(1)(ii)(C)(*1*), or permanently above the groundwater table in accordance with paragraph (n)(1)(ii)(C)(*2*). Surrounding the material with compacted low permeability material is necessary regardless of placement location because spoil is known to be highly variable in terms of hydraulic conductivity. Therefore, unless these materials are surrounded by compacted low permeability material, acid-forming or toxic-forming elements or compounds may be leached from the materials by infiltrating precipitation (above the groundwater table) or by flowing groundwater (below the groundwater table). As one commenter noted, these requirements are consistent with the holding in *Rith Energy, Inc.* v. *OSM,* 111 IBLA 239 (IBLA 1989) that requires that acid-forming and toxic-forming materials be handled in a manner that will avoid the creation of acid or toxic mine drainage so as to minimize disturbance to the prevailing hydrologic balance.

In § 816.38(d), now § 780.12(n)(2), we have provided for placement of acid-forming or toxic-forming materials in an excess spoil fill or coal mine waste refuse pile using the methods outlined in paragraph (1) to prevent contamination of ground or surface waters. Although we did not receive comments on proposed paragraph (d), we made nonsubstantive changes to the paragraph to conform to plain language principles and to accommodate moving the text to § 780.12.

In § 816.38(a), now § 780.12(n)(3), we address the measures that you must specify in your reclamation plan to prevent adverse hydrologic effects resulting from acid-forming or toxic-forming materials being exposed during mining, if they are present in the stratum immediately below the lowest coal seam being mined. Several commenters, including regulatory authorities and operators, recommended deleting this paragraph, arguing that it erroneously presupposes that all coal seams and the pit floor contain acid-forming and toxic-forming materials. In addition, the commenters opined that requiring an impervious layer below the coal seam could potentially cause more problems than it solves by reducing recharge to aquifers below the coal seam and by sealing unmined coal faces, thus impeding potential groundwater recharge to the backfill. The commenters were particularly concerned with the proposed requirement to cover exposed coal seams and the stratum immediately beneath the lowest coal seam mined with a layer of compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the overlying, less-compacted spoil. The commenters asserted that this requirement is unnecessary and will result in additional cost with little benefit to water quality by imposing increased inspection frequency. Commenters also opined that this would require operators to work adjacent to the highwall for longer periods, presenting numerous safety issues. We disagree with the commenters. This rule requires the development of a plan to prevent any adverse hydrologic impacts that might result from exposure of the stratum beneath the coal seam that was exposed during the mining process. The requirement to develop a plan will apply only when the baseline geologic information collected under section § 780.19(e) indicates that the stratum immediately below the lowest coal seam to be mined contains acid-forming or toxic-forming materials. Final § 773.15(n) prohibits the regulatory authority from approving the permit application unless the applicant demonstrates, and the regulatory authority concurs, that the operation has been designed to prevent the formation of toxic mine drainage or other discharges that would require long-term treatment after mining has been completed. Therefore, the plan must be adequate to satisfy this requirement. One option the permittee may employ is placing a compacted low permeability layer over the in-place stratum immediately beneath the coal seam using the same safety measures that allowed removal of the coal.

Section 780.13: What additional maps and plans must I include in the reclamation plan?

Section 780.13 explains the additional maps, plans, and cross sections that the applicant must include in the reclamation plan. We have adopted the section as proposed with the exception of one additional requirement, a few non-substantive changes, and renumbering of paragraphs.

A few commenters expressed concern about the proposed requirement in § 780.13(a)(9) to map each feature and facility that is constructed to protect or enhance fish, wildlife, and related environmental values. Commenters stated that this is time consuming and that these features are likely to change over the course of mining operations; therefore, the commenters advocated the elimination of these requirements. We disagree. This requirement provides valuable information that will allow the regulatory authority to assess, monitor, and review the evolving operation. While this requirement may result in more time and effort at the initial permitting stage, it should save time and effort in subsequent permit reviews. Furthermore, it is important to accurately document efforts to protect or enhance fish, wildlife, and related environmental values.

As discussed within the preamble to § 816.57(d), we have added to our performance standards a requirement to

establish 100-foot wide vegetative corridors along certain perennial and intermittent streams. In order to ensure consistency between the permit requirements and the performance standards, we have also added a new paragraph (a)(14) to § 780.13, which requires the applicant to provide data about each streamside vegetative corridor that it proposes to establish. Documenting the proposed location of vegetative corridors will aid the applicant in planning and allows the regulatory authority to assess the proposed location of the vegetative corridors to ensure they can be established consistent with the requirements of § 816.57(d).

The U.S. Forest Service supported adoption of proposed paragraph (a)(15) and we received no comments opposing it. For clarity, however, we have divided the requirements of this paragraph into two separate paragraphs, numbered (a)(16) and (a)(17) because of the addition of new paragraph (a)(14) to the final rule. Final paragraph (a)(16) requires the applicant to provide the ''location and geographic coordinates of each monitoring point for groundwater and surface water.'' Final paragraph (a)(17) requires the applicant to provide ''the location and geographic coordinates of each point at which you propose to monitor the biological condition of perennial and intermittent streams.''

Proposed paragraph (c) clarified that the regulatory authority may require an applicant to submit the materials required under this section in digital format. The U.S. Forest Service and others expressed general support for submitting data in digital format. Other commenters recommended that this paragraph be revised to encourage, but not require, the digital format option for all materials submitted for review and analysis by the public and the regulatory authority. These commenters expressed concern that requiring materials to be submitted in a digital format would be financially burdensome and that some operators or state regulatory authorities might not possess the technical ability to provide the information in a digital format. We do not agree. Proposed paragraph (c) did not require the submission of materials in a digital format but merely clarified that the regulatory authority can require digital submissions if it so chooses. Requiring permit materials to be submitted in digital format could actually save regulatory authorities a significant amount of time that might otherwise be spent digitizing materials submitted by applicants so that they will be accessible to the public and to us. Furthermore, submission of digital data is increasingly common and does not require highly specialized technology or equipment. Consequently, we have made no substantive change to the final rule.

Section 780.14: What requirements apply to the use of existing structures?

Most changes to § 780.14 are editorial in nature. They primarily implement plain language principles and improve syntax and structure. In addition, we revised paragraph (b)(2) to eliminate the requirement for specifying the interim steps in the schedule for reconstruction of each existing structure because such a requirement would have no utility to the regulatory authority. What matters from a regulatory perspective is the starting and ending dates of the reconstruction, which revised paragraph (b)(2) continues to require. We also revised paragraph (b)(2) to apply the schedule requirement to both modification and reconstruction of existing structures, not just to reconstruction of those structures. The change makes paragraph (b)(2) consistent with the language of paragraph (b)(1). It also avoids the need for the applicant and regulatory authority to distinguish between modification and reconstruction. That distinction serves no regulatory purpose because any existing structure must be brought into compliance with applicable regulatory requirements. It makes no difference whether the effort to achieve compliance is called modification or reconstruction.

Section 780.15: What plans for the use of explosives must I include in my application?

One commenter recommended that we revise the blasting regulations in relation to the impact of the use of explosives on birds. This recommendation is outside the scope of our current rulemaking because the proposed rule included no substantive revisions to the blasting regulations.

Section 780.16: What must I include in the fish and wildlife protection and enhancement plan?

Section 780.16 is intended to ensure that a proposed surface coal mining and reclamation operation is designed in a manner that meets the fish and wildlife protection and enhancement requirements of the regulatory program. Except as discussed below, we have adopted § 780.16 as proposed, with minor editorial revisions for clarity and consistency.

Final Paragraph (b): Protection of Threatened and Endangered Species and Species Proposed for Listing as Threatened or Endangered

Proposed paragraph (b) required the permittee to describe how the permit would comply with the Endangered Species Act, 16 U.S.C. 1531 *et seq.,* including any species-specific protection and enhancement plans developed in accordance with that law. In response to comments from federal agencies, we have added a new paragraph (b)(1) stating that final paragraphs (b)(2) and (b)(3) apply when the proposed operation may affect species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or designated or proposed critical habitat under that law.

Another commenter requested that we add ''proposed species'' to this section. We made the recommended revisions because, as discussed in greater detail in the preamble text for section 773.15(j) above, both SMCRA and the Endangered Species Act provide authority to protect species that have been proposed for listing.[327] Section 7(a)(4) of the Endangered Species Act[328] requires that Federal agencies confer with the U.S. Fish and Wildlife Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed as threatened or endangered. SMCRA sections 515(b)(24) and 516(b)(11)[329] require that, at a minimum, mining operations must ''to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.'' The requirement to minimize impacts to ''fish, wildlife, and related environmental values'' is not in any way limited to Endangered Species Act-listed species.

Several commenters expressed support for proposed § 780.16(b) to the extent that it requires compliance with the Endangered Species Act[330] and incorporation of any species-specific protection and enhancement measures into the permit, including those provided for under applicable biological opinions for the mining operations at issue. However, commenters also noted that ''species-specific protection and enhancement measures'' are not developed in accordance with the

[327] 80 FR 44436, 44565 (Jul. 27, 2015).

[328] 16 U.S.C. 1536(a)(4).

[329] 30 U.S.C. 1265(b)(24), 1266(b)(11).

[330] 16 U.S.C. 1531 *et seq.*

Endangered Species Act, as our proposed regulation indicated. They noted that a more appropriate Endangered Species Act tool might be a habitat conservation plan under Section 10 of the Endangered Species Act and suggested we replace ''protection and enhancement plan'' with ''habitat conservation plan'' as an example of a relevant plan developed in accordance with the Endangered Species Act. We agree and have changed the text of paragraph (b)(2) accordingly. However, species-specific protection and enhancement measures, where developed, should also be followed wherever possible.

Several commenters also requested that we require an applicant to demonstrate that it has complied with all applicable species-specific protection and enhancement measures. However, compliance with applicable species-specific protection and enhancement measures, while important, does not necessarily ensure compliance with the Endangered Species Act. For example, we, along with the U.S. Fish and Wildlife Service, and a representative group of state regulatory authorities have only developed species-specific protection and enhancement measures for a limited number of species. While this type of guidance can reduce uncertainty and streamline the permitting process, it is not possible to develop range-wide, species-specific protection and enhancement measures for every Endangered Species Act-listed species affected by coal mining operations. Further, the fact that guidance has not been produced for a particular species does not excuse an applicant from developing protection and enhancement measures specific to that species for inclusion in a permit application. Where species-specific protective measures have not been developed, an applicant will have to coordinate with the appropriate office of the U.S. Fish and Wildlife Service or National Marine Fisheries Service to ensure that adequate measures are incorporated into a permit. Where species-specific protective measures have been developed, such as the range-wide Indiana Bat protection and enhancement plan guidelines finalized in 2009,[331] site-specific modifications to these guidelines are often necessary depending on the size, location, or other characteristics of the operation and/or permit area. Therefore, we have determined that it is more accurate to simply require that an application must demonstrate compliance with the Endangered Species Act because this requirement would encompass any necessary species-specific protection and enhancement measures developed in coordination with the appropriate U.S. Fish and Wildlife Service or National Marine Fisheries Service office. However, in evaluating this suggestion we have determined that proposed paragraph (e)(4), containing the requirement that an application must demonstrate compliance with the Endangered Species Act should be moved to paragraph (b). Therefore, we combined proposed paragraph (e)(3) with final paragraph (b)(1) and moved proposed paragraph (e)(4) to a new paragraph at (b)(2) in the final rule.

Other commenters requested that we require applicants to demonstrate that the proposed permit would not adversely impact any species listed or proposed for listing under the Endangered Species Act. Additionally, one commenter suggested that there should be a strict prohibition on any activity within 100 feet of streams because of the potential to adversely impact aquatic species. We do not agree that additional prescriptive protective measures should be required in this section or that an applicant must demonstrate that a proposed mining operation will not adversely impact any listed species. In the final rule, we have revised our previous regulations to ensure that threatened and endangered species and species proposed for listing as threatened or endangered are correctly identified and described, as explained in § 779.20; that the permit is designed to protect and enhance those species, as explained in § 780.16; and that the regulatory authority makes a finding that the permit complies with the Endangered Species Act as explained in § 773.15(j). The analysis of what protection and enhancement measures are required under paragraph (b) should be species and site-specific and should be done in close coordination with the appropriate state or federal agencies. These types of species and site-specific considerations do not lend themselves to prescriptive rules. The exact process of developing protection and enhancement plans will depend on how the applicant intends to demonstrate achievement of the finding required under final § 773.15(j). Final § 780.16(b) fits into this scheme by simply requiring that an applicant describe how it will comply with the Endangered Species Act. This description will vary depending on how the applicant intends to demonstrate compliance with the Endangered Species Act, site-specific considerations, and the number and type of listed or proposed species potentially impacted by the operation.

Other commenters expressed concern over the requirement, now located in final paragraph (b)(2), that compliance with the Endangered Species Act must be demonstrated before the regulatory authority may approve a permit. Many commenters opined that it takes a long time to obtain approval of necessary protection and enhancement measures for proposed or listed species from the U.S. Fish and Wildlife Service or National Marine Fisheries Service and questioned whether it was possible to obtain a permit on the condition that no impact to listed species would occur until the coordination process was complete. We have evaluated this request and determined that, until the coordination process is complete, it would be very difficult to determine whether an operation will not impact species. However, where an operation can be reduced in size or divided into different phases to avoid proposed or listed species, there is no prohibition on pursuing a permit for that smaller area while simultaneously pursuing approval of a second, nearby permit where impacts to species may occur. This could allow an operator to begin mining on the permit that would have no impacts to species, assuming all other requirements were met, such as the requirement that phases of operations that are significantly related must be evaluated in a single impact statement pursuant to NEPA,[332] while continuing the coordination process on the permit where impacts to species are possible.

Final Paragraph (c): Protection of Other Species

One commenter recommended we remove from the final rule all language that the commenter characterized as ''subjective,'' such as ''to the maximum extent practicable'' or to ''minimize disturbances and effects'' and instead provide specific examples of techniques and practices that would be expected to be implemented or followed. We have not revised the final rule in response to this comment. Similar language is found throughout SMCRA, and provides an appropriate level of flexibility for each regulatory authority to determine the applicability of techniques and practices on a case-by-case basis. It would be inappropriate to prescribe techniques and practices within the regulations

[331] OSMRE, *Range-wide Indiana Bat Protection and Enhancement Plan Guidelines for Surface Coal-Mining Operations,* Jul. 2009, available at: *http://www.osmre.gov/lrg/docs/INBatPEPGuidelines.pdf* (last accessed Nov. 1, 2016).

[332] 40 CFR 1502.4(a).

implementing SMCRA, as these may be site specific, and the best technology currently available and best practices are not static and evolve.

In response to paragraph (c)(1) of the proposed rule, many commenters opposed the requirement to time mining operations as to avoid or minimize disruption of critical life cycle events for all fish and wildlife, such as migration, nesting, breeding, calving, and spawning. These commenters criticized the paragraph as either unclear, conflicting with other requirements, or overbroad and noted that, if implemented, it could halt all mining activity because these critical lifecycle events happen throughout the year. While it may, on a species by species basis, be necessary to time certain activities to avoid or minimize impacts on certain species, we generally agree with commenters that requiring it for all species would not be appropriate. Therefore, we have deleted this paragraph and renumbered the remaining paragraphs accordingly.

Proposed paragraph (c)(2), now final paragraph (c)(1), requires a description of how the permittee will retain forest cover and other native vegetation as long as possible and time the removal of that vegetation to minimize adverse impacts on aquatic and terrestrial species. Some commenters alleged that this requirement is too difficult to comply with because timing the removal of forest cover and native vegetation for one species might conflict with the timing for another species. As an example, several commenters pointed out conflicts between cutting restrictions for endangered bats and the needs of other species. We do not agree with this concern. Paragraph (c) addresses the protection of non-listed species and related environmental values and requires applicants to minimize disturbances and adverse impacts on species ''to the extent possible using the best technology currently available.'' If it is not possible to time the removal of vegetation to minimize adverse impacts to a non-Endangered Species Act species because of other species considerations, such as the Endangered Species Act-listed Indiana Bat tree cutting guidelines, a description of why the vegetation must be cut at a specific time is sufficient to satisfy this requirement. We have not made any changes as a result of these comments as this paragraph provides sufficient flexibility to time the removal of forest cover and vegetation to best protect aquatic and terrestrial species, including endangered species.

We received numerous comments, ranging from highly critical to very supportive, of the requirement in proposed paragraph (c)(3) that operations must maintain, to the extent possible, an intact forested stream buffer of at least 100 feet between surface disturbances and perennial and intermittent streams. We have deleted proposed paragraph (c)(3) because we have revised final § 816.57(b) to include a prohibition on mining in or within 100 feet of a perennial or intermittent stream, subject to the exemptions contained in final § 780.28, making proposed paragraph (c)(3) of this section redundant. A discussion of all comments on the 100 foot stream buffer, including comments on proposed paragraph (c)(3), is available in the preamble discussion of §§ 780.28 and 816.57.

One commenter requested that we define or otherwise clarify the term ''environmental values'' as discussed in proposed paragraphs (c)(4), (5), and (d)(1) because the term is not currently defined within the proposed rule or previous regulations. We decline to define this term, because imposing a national definition for ''environmental values'' would be too restrictive and would not account for regional differences. The regulatory authority has the proper expertise to determine its meaning on a case-by-case basis.

Proposed paragraph (c)(5) required the operator to periodically evaluate the impacts of the operation on fish, wildlife, and related environmental values in the permit and adjacent areas and to use of that information to modify the operations to avoid or minimize adverse effects. Several commenters expressed concern that we did not provide guidance on the appropriate frequency for these ''periodic evaluations'', on how rigorous the evaluation should be, and on who would be responsible for completing the evaluations. Some commenters recommended the removal of this paragraph because of concerns that operators might be required to change mining operations to offset impacts to wildlife beyond the control of the operators. We agree that the proposed rule language was ambiguous about how often the periodic review should be. In response, we are deleting this paragraph in the final rule and renumbering the remaining paragraphs. However, we have added a new requirement at final § 774.10(a)(2) that requires the regulatory authority to review the impacts of the operation on fish, wildlife, and related environmental values in the permit and adjacent areas. This review must occur not later than the middle of each permit term except that permits with a term longer than five years must be reviewed no less frequently than the permit midterm or every five years, whichever is more frequent. The regulatory authority must use that evaluation to determine whether it is necessary to order the permittee to modify operations to avoid or minimize adverse impacts on those values. The regulatory authority has the discretion to determine the rigor of these periodic reviews, which is appropriate because they have the local expertise to determine whether the operation is having the anticipated impact on fish, wildlife and related environmental values and whether revisions are necessary. For example, if unexpected drought conditions cause protection and enhancement measures to be less effective than initially anticipated, the regulatory authority review of the fish and wildlife protection and enhancement plan should evaluate whether, and to what extent, revisions should be made to the permit to effectively implement section 515(b)(24) of SMCRA.[333] The review under final § 774.10(a)(2) is separate from any monitoring and evaluation requirements that may be required to ensure compliance with the Endangered Species Act.

Some commenters stated that proposed paragraph (c)(6), which we adopted as final paragraph (c)(3) and which requires the selection of non-invasive native species for revegetation, could conflict with the need to use non-native species for site stabilization, such as on steep slopes, and in situations where erosion is a problem. As support, some commenters noted that the Natural Resources Conservation Service guidelines propose the use of non-natives to control erosion. We do not view these requirements as conflicting. The final rule does not prohibit the use of non-invasive, non-native vegetation when appropriate to control erosion and when approved in the revegetation plan. However, § 780.16 focuses on the protection and enhancement of fish and wildlife resources, which typically benefit from the use of non-invasive, native species, whenever possible. In response to comments requesting the discretion to use non-native plant species in limited circumstances, we have modified this paragraph to allow for the limited use of non-native species. Specifically, we have included a reference to final § 780.12(g)(4), which allows for use of non-native species when they are necessary to achieve a quick-growing, temporary, stabilizing cover on disturbed and regraded areas, as long as the species selected to

[333] 30 U.S.C. 1265(b)(24).

achieve this purpose will not impede the establishment of permanent vegetation.

Commenters questioned the benefits of using native vegetation in final paragraph (c)(3), alleging that non-native vegetation provides increased forage and habitat for turkey, deer, and elk. We do not agree. The best available science indicates that, on a broader ecological scale, planting native species contributes to the overall health of natural communities. Disturbances of intact ecosystems that open and fragment habitat, such as land clearing activities, increase the potential of invasion by alien species. Native plants provide important alternatives to alien species for conservation and restoration projects in these disturbed areas. Native species can satisfy many of the same land management needs that nonnative species do, but often with lower costs and maintenance requirements. Once established in an appropriate area, most native plant species are hardy and do not require watering, fertilizers, or pesticides.[334] They generally require less watering and fertilizing than non-natives because they are adapted to local soils and climate conditions. They are less likely to need pesticides because they are often more resistant to insects and disease. Finally, local wildlife evolved along with local plants; therefore, wildlife readily uses native plant communities for food, cover and rearing young.

Commenters also recommended that the determination of the types of vegetation to be used should be left to the discretion of the regulatory authority and should be done on a case-by-case basis because regional and site-specific conditions vary. They also stated that landowner input should be considered when determining vegetative cover. In response to these concerns, we note that final § 780.12(g)(4) gives the regulatory authority sufficient flexibility to allow the use of non-native species when necessary to achieve a quick-growing, temporary, stabilizing cover on disturbed and regraded areas, as long as the selected species will not impede the establishment of permanent vegetation. However, SMCRA clearly directs mining operations to establish ''permanent vegetative cover of the same seasonal variety native to the area of land to be affected,'' allowing non-native species to be used only ''where desirable and necessary to achieve the approved postmining land use plan.'' [335] Therefore, because of the statutory importance of the use of native species, we have decided that it is not necessary or appropriate to expand the regulatory authority's discretion any further than the exemption in final § 780.12(g)(4) and have not made any changes in response to these comments.

Proposed paragraph (c)(7) is renumbered in the final rule as paragraph (c)(4). In the final rule we require a permittee to describe the plan for avoiding wetlands, perennial and intermittent streams, and habitat adjacent to perennial or intermittent streams. If avoidance of perennial or intermittent streams is not possible, we outline the steps to minimize impacts that must be taken in final paragraphs (c)(4)(i)(A)–(C).

In final paragraph (c)(4)(i), we have added ''wetlands'' to the list of important habitat features that must, if possible, be avoided during mining. This change is in response to comments from other federal agencies who expressed concern that wetlands were not specifically mentioned in this paragraph. Adding the term ''wetlands'' to relevant sections of final paragraph (c)(4) and its subparts will ensure that operations avoid mining through wetlands as well as perennial and intermittent streams, and habitat adjacent to perennial or intermittent streams, if possible.

One commenter expressed concern that the requirement in proposed paragraph (c)(7)(ii), final paragraph (c)(4)(i)(B), to ''minimize the length of the stream mined through,'' is duplicative of the Clean Water Act section 404 [336] permitting program and is impermissible under section 702 of SMCRA.[337] We disagree. Final paragraph (c)(4) is designed to ensure that operations use ''the best technology currently available [to] minimize disturbances and adverse impacts'' [338] on the fish and wildlife that depend on the wetlands, perennial and intermittent streams, and habitat adjacent to perennial or intermittent streams. Thus, compliance with this provision of SMCRA is a separate, independent obligation on operators from requirements of the Clean Water Act.

In response to a comment we received from a federal agency we have added paragraph (c)(4)(ii) which requires the permittee to identify the authorizations, certifications, and permits required by the Clean Water Act, 33 U.S.C. 1251 *et seq.,* and the steps the permittee will take or has taken to procure those authorizations, certifications, and permits. Furthermore, we point out that issuance of a permit does not authorize a permittee to conduct any surface mining activity in or affecting waters subject to the Clean Water Act until the appropriate Clean Water Act authorization, certification, or permit is obtained. Information submitted and analyses conducted under subchapter G of this chapter may inform the agency responsible for authorizations, certifications, and permits under the Clean Water Act, but they are not a substitute for the reviews, authorizations, certifications, and permits required under the Clean Water Act.

Final Paragraph (d): Enhancement Measures

Proposed paragraph (d) required that permit applicants describe how they would use the best technology currently available to enhance fish, wildlife, and related environmental values both within and outside the area to be disturbed by mining activities, where practicable. Section 515(b)(24) of SMCRA [339] requires that surface coal mining and reclamation operations ''to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.'' Therefore, to be consistent with the statutory language, final § 780.16(d)(1)(i) adds the qualifying phrase ''to the extent possible'' to the proposed rule.

Proposed paragraph (d)(1) also included a list of twelve potential enhancement measures. Many commenters were generally supportive of these potential enhancement measures and as discussed below, we are adopting that list in revised form as final paragraph (d)(2). Others were concerned that these potential enhancement measures were requirements, or could be construed by regulatory authorities as mandatory enhancement measures to be performed on each permitted operation. Commenters explained that mandating conservation easements and/or deed restrictions may conflict with State Trust Lands, state agency goals and objectives, and result in unlawful takings or overly burdensome requirements that private landowners or local government agencies would not be willing to accept. These concerns are

[334] Virginia Department of Conservation and Recreation. *Native Plants for Conservation, Restoration, and Landscaping,* (Sept. 2011). *http://www.dcr.virginia.gov/natural-heritage//document/cp-nat-plants.pdf* (last accessed Nov. 1, 2016).

[335] 30 U.S.C. 1265(b)(19).

[336] 33 U.S.C. 1344.

[337] 30 U.S.C. 1292.

[338] 30 U.S.C. 1265(b)(24).

[339] *Id.*

misplaced as these enhancement measures are only provided as a list of potential measures to be used, to the extent possible. In addition, the list provided is not exhaustive, as regulatory authorities have the discretion to approve other types of enhancement measures on a case-by-case basis. Other commenters interpreted proposed paragraph (d)(1) as requiring implementation of all twelve potential enhancement measures or, for each enhancement measure not used, an explanation of why that particular enhancement measure was not practicable. That was not our intent. Therefore, we modified proposed paragraph (d)(1) by separating it into final paragraphs (d)(1)(i) and (d)(1)(ii). New language in final paragraph (d)(1)(i) clarifies that the list of proposed enhancement measures in final paragraph (d)(2) is not exhaustive and that regulatory authorities may approve other enhancement measures. New language in final paragraph (d)(1)(ii) clarifies that if an applicant does not include any enhancement measure, it must explain, to the satisfaction of the regulatory authority, why implementation of enhancement measures is not practicable. An applicant does not have to address the practicability of all twelve potential enhancement measures.

Several commenters alleged that it would be difficult to know whether an enhancement measure is ''practicable'' and expressed concern that a regulatory authority could force an applicant to enact all enhancement measures. However, this standard was present in our previous regulations and commenters did not identify any situations in which a regulatory authority had abused its discretion with respect to whether an enhancement measure was practicable. Therefore, we have not defined ''practicable'' in response to these comments.

Commenters opined that it is inappropriate to allow enhancement measures distinct from the area to be disturbed by mining activities, especially if enhancement measures would take place in a location physically unconnected to the mine site. Allowing the regulatory authority the flexibility to approve enhancement measures in locations away from the disturbance area is necessary to fully realize the mandate in section 515(b)(24) of SMCRA to achieve enhancement of fish, wildlife, and related environmental values where practicable.[340] While it is typically preferable to conduct enhancement measures on or near the disturbed areas, allowing enhancement measures away from the disturbed area provides significant flexibility and may, at times, be the most beneficial and/or practicable option. Further, there is no requirement within SMCRA that permitted sites must only contain lands spatially connected to one another.

Commenters expressed concern with a perceived ambiguity of the phrase ''natural succession'' in proposed paragraph (d)(1)(iv), which is now final paragraph (d)(2)(iv), as it relates to the establishment or description of a native plant community. Commenters alleged that the term ''natural succession'' is too broad in concept and needs a specific definition. The commenters requested clarification of the term ''natural succession'' and an explanation of why use of the term is necessary. We disagree that natural succession is an ambiguous concept. Our final rule uses the term ''natural succession'' in the standard ecological context of that term, which means the predictable maturation of the native vegetative community over time. The references to natural succession are not a prescriptive mandate for one particular type of plant community. Instead, we use the term ''natural succession'' as an outcome-based requirement aimed at ensuring that the types of plant communities that are initially established allow for the predictable maturation of the site. When a site would typically mature to forest, it would be appropriate to establish native vegetation that will not impede that process.

One commenter suggested we promote the establishment of pollinator-friendly species as described within Presidential Memorandum ''Creating a Federal Strategy to Promote the Health of Honey Bees and Other Pollinators.'' [341] This suggestion furthers the goals not only of the Presidential Memorandum but also of SMCRA section 515(b)(24) [342] because it clearly promotes fish, wildlife, and related environmental values. Consequently, we have added the clause ''establishing native plant communities designed to restore or expand native pollinator populations and habitats'' to final paragraph (d)(2)(iv) in response to this comment.

Some commenters also recommended we revise § 780.16(d)(2)(iv) and (v) as we have in the proposed rule at § 780.16(c)(6), which is now final § 780.16(c)(4), to allow non-native species to be used. We disagree. Because these paragraphs describe a choice of discretionary enhancement measures, they are appropriately more limited in scope than the requirements of final § 780.16(c)(4). While the use of non-native species may, at times, be necessary, it should not be considered an enhancement measure.

Another commenter sought clarification about how native forest and other native vegetation will be reestablished ''both within and outside of the permit area'' as stated in proposed paragraph (d)(1)(iv), which is now final paragraph (d)(2)(iv). The commenter asserted that this paragraph needed to be revised and limited to ''areas within the permit area'' that have been or will be disturbed by mining activities. We do not agree. This section provides optional measures to maximize opportunities to enhance restoration of native vegetation and natural wildlife habitat. Enhancement opportunities may arise within the permit boundary. However, where disturbance from mining may remove a significant portion of native forest or other native vegetation, it may be possible to look some distance outside of the disturbance area for opportunities to reestablish native vegetative cover during mining. The resulting benefits to species could be realized while mining was ongoing, thus offsetting some of the adverse impact on species caused by mining.

This particular commenter also asserted that mining companies cannot operate outside approved permit areas; thus, according to the commenter, any regulation that requires lands not disturbed by mining activities to be affected would be contrary to SMCRA's requirement to minimize disturbances. We do not agree. Some of these measures could be implemented off-permit without adding land to the permit area if the enhancement activity would involve de minimis disturbance, as described in proposed § 780.16(d)(3) and in final § 780.16(d)(4). If reestablishment of native vegetation would involve more than a de minimis disturbance, or if excluding lands from a permit area would restrict the regulatory authority's ability to inspect and confirm completion of a permit term, then these lands could be made part of the permit area in order to implement the planned enhancement.

Commenters stated that the enhancement measure at proposed paragraph (d)(1)(v), which is now final paragraph (d)(2)(v), involving the establishment of vegetative corridors at least 100 feet wide along each bank of

[340] 30 U.S.C. 1265(b)(24).

[341] Presidential Memorandum of June 20, 2014, *Creating a Federal Strategy to Promote the Health of Honey Bees and Other Pollinators,* 79 FR 35903 (June 24, 2014).

[342] 30 U.S.C. 1265(b)(24).

streams that lacked such buffers before mining, could be interpreted by a regulatory authority as requiring an artificial water source, especially in semi-arid states. Further, the commenters stated that the cost of providing these artificial water sources was not analyzed in the DEIS and that we did not evaluate legal considerations related to water rights in western regions. The commenters concern is misplaced. Nothing in this paragraph requires establishment of vegetation that would need an artificial water source. Use of vegetation that requires an artificial water source would be inconsistent with the purpose of the fish and wildlife enhancement measures in this rule, which is to encourage restoration or establishment of natural conditions using native species.

Commenters voiced concern that proposed § 780.16(d)(1)(v), which is now final § 780.16(d)(2)(v), was too inflexible in requiring that, if an enhancement measure involved creating a vegetative corridor for a stream that previously lacked such a buffer, the buffer zone had to be at least 100 feet wide. We agree with this concern and have modified this paragraph to provide additional flexibility. The regulation now states a preference, but not a requirement, for a minimum 100-foot corridor for such enhancement measures. For clarity, we have also revised this requirement to describe the enhancement as the creation of a corridor where there is no such corridor before mining but where a vegetative corridor typically would exist under natural conditions.

Another commenter was concerned that in the event extra material is needed to restore the 100-foot riparian zone and is stacked at the edge of the vegetative corridor, it could disrupt the mine operator's ability to restore the permit to approximate original contour or cropland use. The commenter did not provide an explanation as to why it may be necessary to stack extra material to create a vegetative corridor. However, regardless of the size of the hypothetical stack we do not anticipate this as an impediment to achieving approximate original contour. In the commenter's scenario the stacking would be temporary. Ultimately, the reclamation plan would require the material to be placed to achieve approximate original contour, establish the vegetative corridor consistent with this final rule, and the approved postmining land use. Accordingly, we have not modified the proposed rule in response to this comment.

Proposed paragraph (d)(1)(vii), which is now final paragraph (d)(2)(vii), was modified to specify that permanently fencing off perennial and intermittent streams, as well as wetlands, from livestock was also an appropriate enhancement measure. This change was made to address federal agency concerns about inclusion of wetlands (as discussed above) and to retain consistency with other parts of the final rule about promoting the protection of wetlands.

Final paragraph (d)(3), which we proposed as paragraph (d)(2), makes the use of enhancement measures mandatory where a proposed surface mining activity would result in the temporary or permanent loss of mature native forest or other native plant communities that cannot be restored fully before final bond release under §§ 800.40 through 800.43 of this chapter or permanent loss of a segment of a perennial or intermittent stream. Final paragraph (d)(3)(ii), which we proposed as paragraph (d)(2)(ii), requires that the enhancement measures be commensurate with the magnitude of the long-term adverse impacts of the proposed operation and, ideally, be permanent.

In the preamble discussion of proposed § 780.16(d)(2), which is now final paragraph (d)(3), we explained that ''long-term'' means that the permittee would not be able to correct the resource loss before expiration of the period of extended revegetation responsibility as prescribed in proposed § 816.115 and identified two examples of long-term loss: the removal of significant native forest cover and the burial of a perennial or intermittent stream segment by an excess spoil fill or coal mine waste disposal facility. We invited comment on whether there are other interpretations of ''long-term'' that we should consider. We received two comments in support of the proposed rule's preamble description of ''long-term'' and were offered no alternate definitions. We did, however, receive many comments requesting that we further clarify ''long-term'' within this section. In response to these comments we have revised this paragraph to clarify that ''long-term'' adverse impacts are either the permanent loss of wetlands, or segments of perennial or intermittent streams, or the temporary or permanent loss of mature native plant or forest communities that cannot be restored before bond release.

In the preamble discussion of proposed § 780.16(d)(2), which is now final § 780.16(d)(3), we also invited comment on whether the regulatory authority may consider mitigation measures approved under the authority of the Clean Water Act as satisfying the separate SMCRA requirement for mandatory enhancement measures. We received comments in support of allowing Clean Water Act mitigation to satisfy the requirement for fish and wildlife enhancement measures under this paragraph. Mitigation required under the Clean Water Act may satisfy the fish and wildlife enhancement requirement under the final rule to the extent that mitigation under the Clean Water Act requires actual on-site enhancement activities. Payments into a general fund, as opposed to payments or activities directed to improvement or preservation of a specific stream or site, would not be acceptable because the general fund may be used to finance enhancement projects outside the coalfields and because it would not be possible to determine whether the payment into a general mitigation fund would be commensurate with the magnitude of long-term adverse impacts as required under final paragraph (d)(3)(ii).

We received comments from federal agencies that wetlands should be included in proposed paragraph (d)(2)(i), which is now final paragraph (d)(3)(i)(B). We agree with this comment and have added wetlands to this paragraph.

We also invited comment on proposed § 780.16(d)(2)(ii), which is now final paragraph (d)(3)(ii), about whether our regulations should define ''commensurate'' in the context of ''long-term'' and, if so, how we should define that term. We received two comments in support of defining ''commensurate,'' but neither provided an example of a definition of that term. In light of the small number of affirmative responses and the fact that neither commenter provided any suggested definition, we do not believe that a definition is warranted. Instead, we have determined that the regulatory authority should have the flexibility to determine if the enhancement measures are commensurate to the magnitude of long-term adverse impacts of the proposed operation. Therefore, we are not adding a definition of ''commensurate.''

Final paragraph (d)(3)(iii)(A) provides that enhancement measures to address a proposed operation with long term effects must be implemented within the same watershed if possible. Otherwise, enhancement measures must be implemented in the closest watershed available as long as it is approved by the regulatory authority. Some commenters requested that we require the term ''watershed'' to be applied in accordance with the Hydrologic Unit Code to provide boundaries for the

enhancement measures. We disagree. The regulatory authority is in the best position to determine the scope and location of the enhancement measures. The regulatory authority may factor in the size of the watershed, which requires a case-by-case, region-by-region analysis and cooperation between the operators and the regulatory authority. In any case, the regulatory authority should have flexibility on these issues.

A few commenters also requested that we identify the approach to be used in identifying suitable surrogate enhancements in adjacent watersheds and specify the criteria for determining the equivalent size and cost of enhancement. Commenters also requested that we provide a mitigation hierarchy similar to the 2008 Compensatory Mitigation for Losses of Aquatic Resources.[343] We decline to make these changes. Because this information is best assessed on a case-by-case basis, the regulatory authorities should have the discretion to make these determinations.

One commenter requested we add language to proposed § 780.16(d)(2)(iii)(A), which is now final § 780.16(d)(3)(iii)(A), to specify that, on federal lands, proposed enhancement measures would have to comply with the Federal Land Policy and Management Act,[344] and be consistent with that federal land management agency's land use plan. We disagree. The suggested rule change is not necessary because, for federal lands, any areas upon which fish and wildlife enhancement measures are conducted will be part of the permit area and all proposed measures will be reviewed and processed as part of the SMCRA permit application and Mineral Leasing Act mining plan, as described in Parts 740 through 746 of our regulations. Nothing in this or any other rule grants the permittee authority to take any action on federal lands that is inconsistent with any land management agency's land use plan or federal law.

Proposed paragraph (d)(2)(iv) provided that the regulatory authority must include a condition in the approved permit that requires the completion of the enhancement measures for operations with anticipated long-term adverse impacts. We received a comment that this language seemed circular because we were essentially requiring insertion of a permit condition requiring the applicant to comply with conditions of the permit. Upon consideration of this comment, we agree and have deleted the paragraph.

Some commenters advocated removing proposed paragraph (d)(3), which is now final paragraph (d)(4), as inconsistent with SMCRA. Specifically, these commenters alleged that achievement of the enhancement requirements described in paragraph (d)(2) would always involve more than a de minimis disturbance of the surface land outside the area to be mined, and therefore would need to be placed within the permit. We do not agree that all enhancement measures would be considered more than a de minimis disturbance. In the final paragraph (d)(2), which we proposed as paragraph (d)(1), there are examples of enhancement measures that do not rise to the level of de minimis disturbance, such as establishing conservation easements or nest boxes for birds. Therefore, we have adopted final paragraph (d)(4) because it is important to allow small enhancement measures without the added burden of including those areas within the permit boundary.

Another concern voiced by commenters is that if there is more than a de minimis disturbance to the lands associated with these enhancement measures, the revegetation standards within the permit must be met on these lands associated with the enhancement measures. We agree that if there is more than a de minimis disturbance to the land, for any reason, the area would have to be permitted under SMCRA and revegetation standards would have to be met. However, we did not revise the rule in response to this concern because there are numerous enhancement measures that can be completed that would not require adding additional land to the permit area, such as creating rock piles of value to raptors and other wildlife for nesting and shelter.

Commenters also were concerned that the term ''de minimis disturbance'' is subjective and open to interpretation, and some commenters requested a definition of the term. We decline to define the term. Regulatory authorities are in the best position to determine what constitutes ''de minimis disturbance'' in each circumstance; therefore, a definition in these regulations is not necessary.

Some of the same commenters further alleged that the enhancement measures and the terms describing the enhancement measures as prescribed by proposed § 780.16(d)(3), now § 780.16(d)(2), were inconsistent with other requirements in the proposed rule. Specifically, the commenters expressed concern that the terms ''proposed operation'' and ''area to be mined'', are not defined in our previous regulations or the proposed rule. We are not making any changes in response to these comments. The commenters did not identify the alleged inconsistencies and the two terms, ''proposed operation'' and ''area to be mined'' are used throughout SMCRA, our previous and existing regulations, and are generally accepted terms in the mining industry.

Similarly, several commenters stated that the enhancement option allowing the reclamation of ''previously mined areas located outside the area that you propose to disturb'' creates confusion as to whether activities related to the enhancement measures outside the mining area are considered a mining activity. Other commenters also expressed concern about a perceived inconsistency within proposed § 780.16(d)(2)(xi) and asked the following question: ''[i]s [the area] 'outside the area you propose to disturb' to be included within the proposed permit area?'' We agree that this was confusing. Therefore, we have revised final § 780.16(d)(2)(xi) to prescribe, ''[r]eclaiming previously mined areas located outside the area that you propose to disturb for coal extraction.'' This revision more clearly reflects that this area is within the permit area and related to mining activity, but is not an area of the permit that is proposed to be disturbed by coal extraction.

Final Paragraph (e): Fish and Wildlife Service and National Marine Fisheries Service Review

Proposed §§ 779.20(d) and 780.16(e) contained substantively identical provisions regarding U.S. Fish and Wildlife Service review of the fish and wildlife resource information and the fish and wildlife protection and enhancement plan, respectively. The final rule consolidates proposed §§ 779.20(d) and 780.16(e) into final § 780.16(e), both to streamline the regulations and in response to a comment noting that the Service reviews baseline fish and wildlife resource information together with the fish and wildlife protection and enhancement plan, not separately.

We have modified paragraph (e) and other provisions of the final rule to reference the National Marine Fisheries Service because that agency, along with the U.S. Fish and Wildlife Service, shares responsibility for administration of the Endangered Species Act. This modification is necessary for accuracy and to clarify that, where applicable, such as in situations where anadromous fish or most species within a marine environment would be impacted, the regulatory authority must provide the

[343] 73 FR 19594 (Jun. 9, 2008).

[344] 43 U.S.C. 1701 *et seq.*

resource information, as explained within this section, to the National Marine Fisheries Service.

Final paragraph (e)(1)(i) requires the regulatory authority to provide both the protection and enhancement plan developed under this section and the resource information required under final § 779.20 to the appropriate regional or field office of the U.S. Fish and Wildlife Service or to the National Marine Fisheries Service, as applicable, when that information includes species listed as threatened or endangered under the Endangered Species Act, critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. The regulatory authority must provide both the resource information and the protection and enhancement plan to the appropriate Service(s) no later than the time that it provides written notice of the permit application to governmental agencies under existing § 773.6(a)(3)(ii).

Several commenters supported this provision because it would ensure better coordination and sharing of information among the applicant, the regulatory authority, and the applicable Service early in the permitting process. Other commenters, however, were confused by these transmittal requirements, at least as they stood in the proposed rule where we had placed them in two separate sections. Proposed § 779.20(d)(1)(i) contained the requirement to transmit resource information to the Service(s) at the time the application is filed with the regulatory authority, while proposed § 780.16(e)(1)(i) contained the requirement to transmit the protection and enhancement plan. The commenters criticized us for creating redundant requirements, asserting that the U.S. Fish and Wildlife Service review of baseline wildlife information in the permit application was an unnecessary step because § 780.16 already allowed the agency to review this information in connection with the fish and wildlife enhancement plan. In response to these comments, we consolidated the two provisions in final § 780.16(e)(1)(i).

Final paragraph (e)(1)(ii) is similar to our previous regulations, which allowed the U.S. Fish and Wildlife Service to request fish and wildlife resource information and the fish and wildlife protection and enhancement plan submitted as part of a permit application when the information in those applications does not include species listed as threatened or endangered under the Endangered Species Act, critical habitat designated under that law, or species proposed for listing as threatened or endangered under that law. Under both the previous regulations and the final rule, the regulatory authority must provide that information to the U.S. Fish and Wildlife Service within ten days of receipt of the request.

Proposed §§ 779.20(d)(2)(ii) through (iv) and 780.16(e)(2)(ii) through (iv) prescribed how the regulatory authority must handle comments received from the U.S. Fish and Wildlife Service and how any disagreements must be resolved. These provisions mirrored the 1996 Biological Opinion [345] dispute resolution process. We received many comments, both in support of and opposed to these requirements. After considering these comments, we decided not to adopt proposed §§ 779.20(d)(2)(ii) through (iv) and 780.16(e)(2)(ii) through (iv). Instead, final § 773.15(j) provides applicants and regulatory authorities with several pathways for demonstrating compliance with the Endangered Species Act.

Previous § 780.18: Reclamation Plan: General Requirements

We have removed and reserved previous § 780.18. As discussed in the preamble to the proposed rule we have revised many aspects of previous § 780.18 and moved it to final rule § 780.12.[346]

Section 780.19: What baseline information on hydrology, geology, and aquatic biology must I provide?

This section establishes the baseline information on hydrology, geology, and aquatic biology that is required to be contained within the permit application. We received many comments both supporting and objecting to this section; these comments are addressed below.

Several commenters addressed this section in its entirety. Of these commenters, some supported the revisions within the proposed rule that would require more extensive baseline data collection and found the revisions to be both attainable and prudent. In contrast, other commenters opposed the proposed revisions and requested that they be removed from the final rule. The commenters opposing the revisions generally considered the proposed baseline collection requirements to be too costly, not beneficial, duplicative of the Clean Water Act, in violation of section 702 of SMCRA,[347] and inappropriate for inclusion in the regulations at a national or even regional scale. Commenters' concerns regarding duplication of the Clean Water Act are discussed in Part IV.I., above. We have made a number of changes to the baseline data collection requirements of the final rule in response to some of these general comments as well as more specific comments, described below.

One commenter suggested that we should require the applicant to monitor all baseline monitoring sites for all parameters throughout the life of the permit to ensure uniformity of the water-quality data; thus enhancing the ability to detect adverse impacts from the coal mining operation. We agree with the commenter that baseline monitoring sites need to be monitored throughout mining and reclamation. However, unlike the commenter, we recognize the need for flexibility; *i.e.,* that the frequency and parameter lists of the monitoring sites could be modified based on site specific factors, as long as sufficient data are collected to adequately assess these resources. After baseline monitoring has been completed and mining has commenced, the operator can use the permit revision procedures of § 774.13 to request that the regulatory authority modify the monitoring requirements established in the permit.

A commenter commended us for requiring monthly collection of baseline samples as discussed in paragraphs (b)(6)(ii)(A) and (c)(4)(ii)(A), and excluding samples collected during abnormal hydrologic events. In contrast, however, many commenters thought collecting twelve monthly, evenly spaced, samples of groundwater and surface water was not necessary to establish seasonal variation and did nothing but add time to the permitting process and substantially increase costs. We disagree with this assertion. A study by the U.S. Environmental Protection Agency in 2001 [348] indicated that twelve, evenly spaced samples were the absolute minimum to establish statistical rigor. As a result, we have retained this provision; however, we have provided the regulatory authority with some discretion as it relates to establishing the groundwater baseline. We discuss the rationale for this and change in rule language further in the

[345] 1996 Biological Opinion and Conference Report (1996 Biological Opinion), Consultation Conducted by the U.S. Dep't. of the Interior, U.S. Fish and Wildlife Serv. regarding Endangered Species Act—Section 7 Consultation. Effective September 24, 1996.

[346] 80 FR 44436, 44487–44493 (Jul. 27, 2015).

[347] 30 U.S.C. 1292.

[348] U.S. Envtl. Prot. Agency, Office of Water, *Statistical Analysis of Abandoned Mine Drainage in the Establishment of the Baseline Pollution Load for Coal Re-mining Permits,* 266, EPA–821–B–01–014, (Dec. 2001).

preamble discussion of paragraph (b). In response to other comments about these paragraphs, however, we clarified the extent of the baseline sample period by adding the term ''approximately'' with respect to the requirement for ''equally spaced monthly intervals.'' Several commenters objected to the former terminology and requested latitude to account for variations in field conditions. We did not intend the ''equally spaced monthly intervals'' to be interpreted to mean that there could be no variation in the monthly spacing intervals, but we recognize that the proposed rule could be misinterpreted. Therefore, we have revised the final rule at paragraphs (b)(6) about groundwater and (c)(4) about surface water to provide discretion regarding the sampling intervals. This change also responds to comments received from several regulatory authorities, which expressed concern that dangerous weather conditions and frozen streams could make it dangerous or impossible to collect evenly spaced monthly samples. These regulatory authorities noted specifically that significant snow packs and icy conditions can occur, particularly in the western and northern reaches of the coalfields. Because of groundwater contributions to intermittent and perennial streams, completely frozen streams are rare in most circumstances. Despite this rarity, we recognize the importance of providing the regulatory authority discretion as to what constitutes approximately equally spaced sampling intervals, so that dangerous conditions and the need to sample of completely frozen streams can be avoided. In addition, we have added paragraphs (b)(6)(ii)(B) and (c)(4)(ii)(B) to provide the regulatory authorities flexibility to modify the intervals to ensure the safety of personnel while conducting groundwater and surface water sampling trips and in the rare cases of completely frozen streams.

We also modified the language of the paragraphs (b) and (c) concerning the use of the Palmer Drought Severity Index as a trigger to extend baseline sampling. The proposed rule contained a ''+/− 3.0'' standard. Several states provided an analysis of this standard for their respective states, which concluded that long periods of time existed during which daily or weekly Palmer Drought Severity Index exceeded +/− 3.0. The result of these analyses indicate that the time required under the proposed rule to collect baseline data would be extended for multiple years in order to meet that standard. In response, we have removed the reference to the Palmer Drought Severity Index in the context of extending the baseline data collection period.

Another commenter opined that we did not conduct a frequency analysis to determine the cost of collecting and analyzing the disqualified baseline data to the industry, or the uncertainty of the cost to a mining company to obtain permits in a timely manner. The change discussed above removes the need for us to analyze costs to industry for collecting and analyzing disqualified data and for extended permit processing time.

Certain paragraphs of the final rule, however, still require that the Palmer Drought Severity Index be noted during sample collection to give a sense of magnitude to precipitation deficits or surpluses. This notation will provide important context to the baseline data collected with regard to water quality and quantity. The final rule also provides discretion to the regulatory authority to extend the baseline sampling period to ensure that the baseline data collected at the site is representative of the premining hydrology in the area if National Oceanic Atmospheric Administration, or other atmospheric databases, including the Palmer Drought Severity Index, indicate weather conditions were highly unusual during the baseline sampling period.

A commenter asserted that the proposed rule does not specify how all samples will be collected and analyzed or identify appropriate analytic methods. We have not altered the final rule in response to this comment because it is inappropriate to provide more than a framework from which to collect baseline samples due to the wide variety of standardized methods available to collect and analyze water. Commenters also claimed that we should allow the use of statistical methods and qualitative assessments to establish watershed baseline conditions. Qualitative assessments do not satisfy the intent of establishing the baseline conditions in a watershed. Instead of conducting a qualitative assessment to establish the baseline conditions in a watershed, it is important to collect actual baseline data for the permit. However, the final rule allows regulatory discretion in determining the statistical methods used to assess the baseline data collected for the permit application.

Final Paragraph (a)(1): General Requirements

In paragraph (a)(1), we are finalizing the requirements for the baseline information on hydrology, geology, and aquatic biology that must be included within a permit application. We proposed that this information be provided in ''sufficient detail'' to assist the applicant in developing valid probable hydrologic consequences conclusions and to help the regulatory authority make certain hydrologic determinations. Several commenters requested that we clarify the meaning of ''sufficient detail'' or otherwise provide specific guidance to ensure consistency in the permitting process. A definition is unnecessary. Section 780.20, ''How must I prepare the determination of the probable hydrologic consequences of my proposed operation?'', describes the objective of this part, which is to ensure that the permit applicant provides the regulatory authority with comprehensive and reliable information on how it proposes to conduct surface mining activities and reclaim the disturbed area in compliance with the Act, this chapter, and the regulatory program. Therefore, each regulatory authority is in the best position to provide guidance on what constitutes ''sufficient detail'' to meet that program's requirements.

One commenter alleged that we failed to define ''probable'' in § 780.19(a)(1) and should provide a definition or further elaborate on what is sufficient to satisfy the probable hydrologic consequences of the operation. Webster's dictionary defines probable as ''likely to happen or to be true but not certain.'' [349] This common definition adequately describes the intent of the certainty of events that need to be evaluated when determining the probable hydrologic consequences and no further regulatory definition is needed.

Several commenters expressed concern about the ability to acquire landowner permission for sampling in the adjacent area for baseline or monitoring purposes. We are aware of this concern, but it has been an issue since SMCRA was passed and has been successfully navigated for the past 35 years. Furthermore, the regulatory authority has the latitude to modify sampling locations when landowner access is problematic.

Several commenters were opposed to proposed paragraph (a)(4), now paragraph (a)(1)(iv), which would have required baseline information in sufficient detail to assist the regulatory authority in preparing the cumulative hydrologic impact assessment. As

[349] probable. 2016. *In Merriam-Webster.com.* Retrieved Nov. 2, 2016, from *http://www.merriam-webster.com/dictionary/probable.* Oxford Univ. Press.

required by § 780.21, the cumulative hydrologic impact assessment includes an evaluation of whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. These commenters criticized a perceived lack of sufficient technical guidance with respect to the information and metrics needed in the cumulative hydrologic impact assessment. Because these comments are more relevant to § 780.21, relating to requirements that apply to the preparation and review of the cumulative hydrologic impact assessment, these comments are addressed within that section.

Final Paragraph (a)(2): Core Baseline Water-Quality Data Requirements for Surface Water and Groundwater

In response to many of the general comments outlined above, we have made changes to the baseline data collection requirements. Significantly, we have removed six parameters that we proposed to have operators collect and analyze in surface water and groundwater—ammonia, arsenic, cadmium, copper, nitrogen, and zinc.[350] Removing these parameters will reduce the amount of data collected and the potential for duplication without reducing the protections proposed. First, information on the presence or absence of the parameters we removed is available under an existing Clean Water Act process. Pursuant to 40 CFR 122.44(d), the Clean Water Act NPDES permitting authority completes a reasonable potential analysis and develops permit limits for any pollutant in an authorized discharge that has a reasonable potential to cause or contribute to an exceedance of water quality criteria. The parameters we removed, except for ammonia and nitrogen, are contained in the parameter list for the baseline determination for reasonable potential analysis. Second, state regulatory agencies indicated these parameters are rarely found in mine effluent in appreciable concentrations. Third, we have made revisions to the final rule to ensure that regulatory authorities have the flexibility to require collection of additional parameters and/or monitoring. Specifically, we added language to §§ 780.19(b)(4) and 780.19(c)(2) to clarify that a regulatory authority can require baseline collection of any parameter that is not on the list of parameters contained in these regulations. One commenter mistakenly asserted that because we have identified the parameter specific conductance as a core baseline water-quality requirement, we are, by default, enforcing an effluent limit standard for conductivity. We do not prescribe the water quality standards for discharges from mine sites. Instead, the Clean Water Act authority makes those determinations.[351] Inclusion of the parameter specific conductance in the baseline sampling as part of the baseline sampling protocol is meant to provide another parameter to help establish the premining water-quality conditions.

A number of commenters suggested various parameters be added or deleted from the baseline data collection list found in proposed § 780.19.[352] Conversely, a number of commenters objected to the expanded list as too costly, too burdensome to collect, analyze, or review, and without offering any real benefit to establishing the baseline condition in the streams. Several commenters took a more moderate approach and suggested that any extra parameters beyond those required over the last 30 years should be considered for discretionary inclusion by each regulatory authority and not be part of a nationwide list. As discussed above, we have removed several parameters from the mandatory list in response to commenters' suggestions. We have also declined to add other parameters to a nationwide list, but the rule affords necessary discretion to the regulatory authority to add other parameters if deemed useful at a particular site. Within the final rule, for the sake of clarity, we have listed the parameters in a table located in renumbered § 780.19(a)(2) for both surface water and groundwater.

Several commenters suggested the cation-anion balance requirement should be removed from the parameter list unless laboratory data is suspected to be inaccurate. The cation-anion ratio is a measure of the electrical neutrality of the water sample. To achieve electrical neutrality, the sum total of the negatively charged particles (anions) must equal the sum of the positively charged particles (cations). When the two are approximately equal, two things are evident—no ions with substantive concentrations are missing from the sample and the analysis is accurate. Analyzing just the major cations and anions will not usually result in exact proportions of positive and negative ions because not every ion is analyzed. When the ratio is not within approximately 10%, it indicates that either the analysis is flawed by under or over-reporting the ionic content of a particular ion or an ion constituting a significant portion of the water sample is missing. For either reason, the cation-anion balance is a quick, easy, and inexpensive method of performing quality assurance and quality control of the water sample. For these reasons, we have retained the cation-anion balance requirement. We also note that most labs report this ratio when the major cations and anions are analyzed.

A commenter suggested that the preamble discuss the differences in how variations in selenium speciation impacts aquatic life. Selenium speciation refers to the different forms of selenium (elemental, selenate, selenite, and selenide). A fact sheet from the California Resources Agency provides a concise summary, which we paraphrase here.[353] Selenium has a complex environmental chemistry. In natural systems, it occurs in four different chemical (oxidation or valence) forms: Selenide ($Se2-$); elemental selenium (Se0); selenite (Se4+), and selenate (Se6+). The form selenium takes in nature depends on a variety of environmental conditions, and the chemical form is very important in understanding how it affects aquatic life. In alkaline surface waters that are commonly found in arid areas, selenium occurs mainly as soluble selenate salts that are highly mobile because they are soluble in water and do not adhere well to soils. Selenates can be reduced to selenites, which are more readily accumulated by fish and other aquatic organisms. Selenites may be converted to elemental selenium, which is not very soluble in water and is not readily taken up by plants or animals. In sediment, most of the selenium may occur in the elemental form. If sediments become oxidized (exposed to air) most of the selenium can be converted to selenates and selenites. Metal and organic selenides also are common in bottom sediments. Like elemental selenium, selenides can become oxidized to forms that are more available to plants and wildlife. Organic forms of selenium also occur in or are produced by plants and animals. While the organic forms of selenium are typically less abundant than inorganic selenium (selenate and selenite), the

[350] 80 FR 44436, 44600–44601 (Jul. 27, 2015).

[351] *See, e.g.,* U.S. Envtl. Prot. Agency, *A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams* 76 FR 30938 (May 27, 2011).

[352] 80 FR 44436, 44600–44601 (Jul. 27, 2015).

[353] State of California Res. Agency, *Fact Sheet: Selenium and Its Importance to the Salton Sea* (Feb. 2005), *http://www.water.ca.gov/serp.cfm?q=selinium&cx=001779225245372747843%3Amxwnbyjgliw&cof=FORID%3A10&ie=UTF-8&submit.x=13&submit.y=3.* (last accessed Nov. 1, 2016).

organic forms are important from a biological toxicity standpoint.

Despite these differences in selenium speciation, we find no need to revise the proposed rule in response to this comment. Like the proposed rule, the final rule at § 780.19(b) requires baseline data on total and dissolved selenium in surface water and the dissolved fraction in groundwater. Other provisions of § 780.19 require detailed baseline information on geology, including geochemistry. This combination should be adequate for the applicant to prepare a probable hydrologic consequences determination, as discussed in § 780.20, that predicts the impact of the proposed operation on levels of selenium and other parameters in surface water and a hydrologic reclamation plan, as discussed in § 780.22, that explains how the applicant will address adverse impacts and prevent material damage outside the permit area. The regulatory authority must independently prepare a cumulative hydrologic impact assessment of whether the proposed operation would cause material damage to the hydrologic balance outside the permit area in conformity with § 780.21.

Several commenters suggested that we require testing for dissolved analytes instead of total analytes for groundwater. We agreed with the suggestions because under ideal conditions (proper well construction, well development, and groundwater sampling procedures) field-filtered groundwater samples (dissolved) should yield identical metal concentrations when compared to unfiltered groundwater samples; [354] hence, we have made the change at § 780.19(a)(2) of the final rule.

One commenter suggested that, when evaluating stream function, more than flow data should be collected. The commenter further opined that the baseline data collection should include an evaluation of the premining hydrological regime and the material composition of stream beds, flow patterns, water chemistry, and surface water temperature. We agree, however, all of these requirements, except temperature, are addressed in the proposed rule that we are finalizing today at paragraph (c)(6)(iii)(A) and § 784.19(c)(6)(i)(A). The omission of water temperature from paragraph (c)(6)(iii)(A) and § 784.19(c)(6)(i)(A) was an oversight. It is important to require water temperature measurements for all water-quality samples because water temperature influences biological activity and water chemistry. Based on the commenter's suggestion, we have revised the parameters in paragraph (a)(2) of this section to include temperature within the baseline data collection requirements for surface water and groundwater.

Final Paragraph (b): Groundwater Information

Several commenters raised concerns with § 780.19(b)(2) about baseline collection requirements when an underground mine is present within the permit or adjacent area. One commenter asserted that the need for the requirement was too narrow and that this change lacked justification. Another commenter thought sampling all mine works within 500 feet of the proposed operation should be sufficient. We disagree with both of these comments. Both the regulatory authority and the applicant need to understand the spatial and temporal relationships of adjacent and/or overlying mine works. Both entities need to analyze water quality and quantity data regarding underground mine pools in areas adjacent to proposed permitting actions; especially if the mine works are hydrologically connected to the proposed permitted area. This information and data are necessary for the applicant to analyze the probable hydrologic consequences and for the regulatory authority to develop the cumulative hydrologic impact assessment. We note, however, that the applicant is not required to undertake the sampling unless the regulatory authority finds that a hydrologic connection exists between the adjacent or overlying underground mine and the proposed operation. When permitting an operation that may hydrologically impact an adjacent underground mine pool, there is no justification for ignoring that connection. Hydrologically connected underground mine pools may result in the need for treatment facilities because the water quality in those mine pools may affect the proposed operation and may also pose significant environmental and safety concerns if the new operation causes problems due to underground openings that are flooded or gas-filled.

In proposed paragraph (b)(2), we required an assessment of the characteristics of underground mine pools present in the permit area and stated that the determination of the probable hydrologic consequences required under § 780.20 must include a discussion of the effect of the proposed mining operation on ''any'' underground mine pools within the proposed permit and adjacent areas. One commenter objected to the unilateral treatment of underground mine pools. The commenter argued that mine pools below drainage elevation have a low chance or historic incidence of impacting surface hydrology. Thus, the commenter alleged that applying this provision to mine pools below drainage elevation would add effort and expense with limited to no environmental benefits. We decline to make modifications based on this comment for several reasons. First, all underground mine pools are part of a hydrologic system whether there classified as above drainage or below drainage.[355] Information about how mine pools affect baseline hydrologic conditions is necessary to estimate the impacts the proposed operation will have on the hydrologic system, including mine pools. Second, several examples exist of active coal mining operations breaching flooded adjacent mines and inundating the active mines with water.[356] Consequently, knowing the extent and characteristics of adjacent mine pools is a vital piece of information for both safety and environmental reasons. Third, contrary to the commenter's statements, examples exist of flooded underground mine pools discharging to streams.[357] For these reasons, we are retaining the requirement for an assessment of the characteristics of any underground mine pool within the permit area or adjacent areas as proposed.

Another commenter alleged that we provided no details on the methods that the applicant should use to assess seasonal changes in quality, quantity, and flow patterns in a given mine pool. They also asserted that we provided no information about how the applicant should demonstrate that the mine pool is or is not physically connected to the proposed operation. Details on assessing seasonal changes and associated methodology are best left to the discretion of the regulatory authority. Industry and the technical reviewers

[354] Robert A. Saar, *Filtration of ground water Samples: A review of Industry practice,* 17(1) Groundwater Monitoring and Remediation, 56–62, (Feb. 1997); U.S. Envtl. Prot. Agency, Envtl. Engineering Committee of the Science Advisory Board, *To filter, or not to filter; That is the question,* 1997, EPA–SAB–EEC–LTR–97–011, (Sept. 1997).

[355] David M. Light & Joseph J. Donovan,, *Mine-water flow between contiguous flooded underground coal mines with hydraulically comprised barriers,* 21(2) Environmental & Engineering Geoscience, 147–164, (May 2015).

[356] J. Donovan, et al., *6th ICARDS Cairns, QLD,* pp. 869–875 (2003); Pennsylvania Dep't. of Envtl. Prot., Report of Comm'n. on Abandoned Mine Voids and Mine Safety, p. 3 (2002).

[357] J.W. Hawkins and M. Dunn, *Final report Fairmont, West Virginia mine-pool, Hydrologic characteristics of a 35-year-old underground mine pool,* U.S. Dep't. of the Interior, OSMRE, Mine Water and the Environment, Vol. 26, pp. 150–159 (2014).

have a wide array of skills, expertise, and methods that enable this requirement to be addressed. With respect to demonstrating the hydraulic connection between mine pools, methods exist to provide a reasonable demonstration of hydraulic interaction. These methods include installation of piezometers in the strata of interest with an assessment of the hydraulic head, groundwater movement patterns, and structural geology influences between the mine site and adjacent mining.

Several commenters suggested that the ''modeling'' we specified for predicting mine pools has not yet been developed or validated for most mining regions and therefore is not practicable. We disagree with these comments. Modeling is a broad term and incorporates the entire range of models from simple mathematical models to complex numerical models. We are not prescribing the exact modeling methods to be used; the regulatory authority has discretion to make this determination on the level of detail required.

Related to paragraph (b)(3), ''[m]onitoring wells,'' several commenters suggested we remove the phrase ''when necessary'' from §§ 780.19(b)(3) and 784.19(b)(3) with respect to when an applicant must install monitoring wells to document seasonal groundwater variation. We agree with the commenter and have made this change because the information is necessary to determine groundwater movement of parameters to down gradient water bodies and to be able to evaluate impacts to groundwater quantity and quality as a result of the mining operation.

Several commenters suggested that groundwater quantity measurements required in paragraph (b)(5) for each coal seam and aquifer are not necessary to establish baseline characterization and did nothing but add additional cost. Another commenter asserted that installation of up and down gradient monitoring wells, as required by paragraph (b)(6), is not necessary because it adds unnecessary time and cost to the permitting process and should be left to the discretion of the regulatory authority. We disagree with these comments. Groundwater levels can change over relatively large areas as the result of surface and underground coal mining. Changes in groundwater levels can affect groundwater flow direction, travel times, and water quality, potentially resulting in adverse impacts to the hydrology within and outside the permit area. Without adequate monitoring in place, it becomes significantly harder to do the evaluation and to correct the problem before it becomes more widespread.

A commenter opined that the groundwater data that we proposed to require in paragraph (b)(5) is insufficient to establish groundwater quantity and that groundwater discharge rates or usage rates as required in this section do not represent groundwater quantity. The commenter asserted that the direction of groundwater flow (horizontally and vertically) requires elevation data, not just depth to water data. We agree and have modified the final rule text requiring elevation data for water table surfaces and potentiometric head surfaces. The same commenter asserted that to determine the quantity of groundwater, an operator would need information on the geometry of the aquifer (area times saturated thickness). The commenter suggested that we require information on the areal extent of aquifers and saturated thickness. We agree with the commenter and have revised the final rule text to require that the applicant determine the areal extent and thickness of aquifers. Although we agree with the commenter that groundwater discharge rates or usage rates do not represent groundwater quantity, we have retained the requirement for this information in the final rule because it is closely associated with groundwater quantity.

Several commenters objected to the use of the term ''water bearing stratum'' in proposed paragraph (b)(5). In response, we have changed the term ''water bearing stratum'' to ''aquifer'' in recognition of commenters' concern that, as proposed, this provision might have been misinterpreted to include water contained in rock units that do not sufficiently supply water in usable quantities. The term ''aquifer'' is used in hydrogeology to denote water bearing units with properties to yield water in economic quantities sufficient to supply domestic or public water wells. We are aware of the use of perched aquifer systems in many states, and this terminology change helps satisfy the commenter's concern and affords users of these systems the sampling, monitoring, and protections found in the revised regulations.

One commenter opposed our limits on using extrapolated measurements to determine seasonal variations in groundwater and surface water quality. Like the proposed rule, the final rule does not allow extrapolated data to be used because based on our past experience, extrapolating data is not a reliably accurate method to document and describe seasonal variations in chemical parameters. Because seasonal variations can be significant, we require collection of this data.

One commenter stated that the requirements related to the frequency and duration of data collection and requirement for the geographic distribution of wells in proposed, and now final paragraph (b)(6), are welcome additions to the groundwater characterization requirements.

Several commenters suggested that groundwater quality does not change much over the course of a month or a year; therefore, twelve monthly samples should not be required. We agree and have revised the final rule by adding paragraph (b)(6)(ii)(C), which affords the regulatory authority discretion to grant the applicant an option to collect eight samples spread over two years with certain conditions. Specifically, the regulatory authority may initiate review of the permit application after collection and analysis of the first four quarterly groundwater samples, but it may not approve the application until after receipt and analysis of the final four quarterly groundwater samples. We are allowing regulatory authority to start reviewing the application because the likelihood of the groundwater data substantially changing during the final four quarters is low due to typically slow groundwater travel times.

Final Paragraph (c): Surface-Water Information

One commenter expressed concern with proposed paragraph (c)(2)(xix) relating to surface water quality descriptions, which would have required baseline information for any parameter added to a National Pollutant Discharge Elimination System permit. The commenter indicated that this requirement would cause unnecessary delays to the SMCRA permit review process because the National Pollutant Discharge Elimination System permit is often not obtained until later in the SMCRA permitting process, which could require the applicant to redo the baseline collection data. We agree and have revised the rule to clarify that the National Pollutant Discharge Elimination System parameter requirement would apply only when those parameters are known at the time of permit application. This change should ensure that there are no unnecessary permitting delays as a result of this requirement.

One commenter noted that the requirements in proposed paragraph (c)(3)(i) referring to ephemeral streams contradicted with the requirements in proposed paragraph (c)(4)(i). In proposed paragraph (c)(3)(i), we specified that the applicant provide

baseline information on seasonal flow variations and peak-flow magnitude and frequency for all perennial, intermittent, and ephemeral streams and other surface-water discharges within the proposed permit and adjacent areas. However, proposed paragraph (c)(4)(i) specified a requirement that the permit applicant establish monitoring points in a representative number of ephemeral streams within the proposed permit area, to ensure collection of data sufficient to fully describe baseline surface water conditions. For clarity, the monitoring requirements for a representative sample of ephemeral streams has been retained in final paragraph (c)(4)(i)(B) and removed from final paragraph (c)(3), which now only applies to perennial and intermittent streams. As discussed in the preamble to the proposed rule,[358] we proposed to modify the previous regulations to require the use of generally-accepted professional flow measurement techniques to ensure the accuracy of baseline flow data. We proposed this change to eliminate visual and estimated flow methods which have proven to be very inaccurate. Accurate flow measurements must be obtained to appropriately evaluate the impacts of the operation on receiving streams. We received numerous comments about various aspects of our proposed flow measurement changes. One commenter indicated that the proposed rule could be interpreted to ban the use of weirs. This is incorrect; weirs are not banned. A weir is a calibrated device using a pre-defined stage-discharge measurement that can be visually recorded by noting the stage of the water flowing through the weir. The distinction is that the visual observation of a stage or measurement has been calibrated to a stage-discharge curve and produces an accurate flow estimate. This method has a scientific basis and provides the level of accuracy and precision necessary to derive accurate flows.

One commenter suggested that the proposed rule should be modified to continue to allow well-accepted, standardized, flow measurement methods. We agree; the final rule does allow-generally accepted methods, but does not allow visual flow estimates for the reasons discussed above. Another commenter opined that not allowing visual flow measurements would create conflict with the requirements of agencies that do allow visual flow measurements. Because visual observations are not acceptable under the final rule, there should be no conflict. Non-SMCRA agencies that accept visual flow measurements can continue to do so even if our requirements are more rigorous. Another commenter suggested we add language pertaining to peer-reviewed citations to document the flow measurement method chosen. This is not necessary because the regulatory authority can decide the generally-accepted measured flow method it prefers and require whatever documentation necessary to substantiate the flow measurement method.

A few commenters remarked that we did not fully consider the burdensome costs to industry of implementing the proposed requirements in 780.19(c)(3)(i)(A) about measuring and analyzing peak flow. We agree with the commenters that the costs of measuring and analyzing peak flow magnitude and frequency were not fully considered, but we have corrected that omission in the RIA and addressed it in the preamble discussion of the Paperwork Reduction Act of 1995, below. However, we do not agree with the commenters that the additional costs to obtain this data would pose an unrealistic burden and thus should be eliminated. The data collected as part of final paragraph (c)(3)(i)(A) will help establish a surface water flow baseline that industry and the regulatory authority can use to better assess the impacts of mining and the effectiveness of reclamation.

One commenter claimed that the regulations are overbroad in that they require upgradient and down gradient baseline sampling points on all intermittent and perennial streams even if impacts are not probable. The regulations at paragraph (c)(4)(i)(A) require baseline characterization on all intermittent and perennial streams on and adjacent to the permitted area. This information is not overbroad because it is vital to help the applicant and regulatory authority to understand the surface water system, provide context and data for the probable hydrologic consequence determination, hydrologic reclamation plan, and cumulative hydrologic impact assessment analysis, and to protect both the operator and regulatory authority in the event of a non-mining related impact in the surface water system on or adjacent to the permitted area. The commenter also requested that we provide greater clarity to the word ''potentially'' in the context of monitoring on potentially affected streams. Potentially affected streams are all streams capable of receiving mine water from the permitted site and streams undermined by an underground mining operation. In underground mining operations, the regulation also requires sampling all streams within a reasonable angle of de-watering as provided in the definition at § 701.5.

With regard to paragraph (c)(4)(i)(B), a commenter suggested that we specify the number of sampling locations that qualify as a representative number when sampling ephemeral streams and other commenters requested more guidance on who determines the ''representative sample of ephemeral streams.'' We decline to prescribe the number of representative samples that adequately characterize ephemeral streams, hydrology, and biology and instead rely on the applicant and regulatory authority to decide the density of sampling on ephemeral streams. It is within the regulatory authority's discretion to determine what constitutes a representative sample of ephemeral streams in order to ensure the permit application contains ''sufficient detail'' about the hydrology, geology, and aquatic biology as required by paragraph (a). We also decline a request from a commenter to prescribe what ''sufficient detail'' means in this context. The regulatory authority is in the best position to determine whether a permit application contains sufficient detail about hydrology, geology, and aquatic biology for it to process the application.

Another commenter suggested ephemeral stream sampling for twelve consecutive months was not possible because ephemeral streams only flow in response to precipitation events. We agree with the comment and have added language in several places to clearly indicate a zero flow event is a valid flow observation. The commenter also recommended daily measurements of intermittent and perennial streams in the proposed and adjacent areas to separate seasonal and event-generated variations. We are declining to require daily flow measurements but sufficient discretion exists within the rule for regulatory authorities to require daily flow measurements when they deem it necessary to characterize baseline conditions.

Several commenters favored the increased monitoring requirements and went further to suggest that twenty-four months of data should be collected, analyzed, and submitted for permit application review. We decline to require twenty-four months of data because of the statistical validity offered by twelve months of evenly spaced data, as discussed above. However, the regulatory authority does have the latitude to require as much additional baseline data as necessary to adequately characterize baseline.

A commenter opined that the requirements outlined in proposed

[358] 80 FR 44436, 44498 (Jul. 27, 2015).

paragraph (c)(4) amounted to a snapshot in time and were inadequate to determine the baseline flow conditions. As we understand the comment, the commenter suggests that obtaining peak flow measurements up and down gradient of the proposed operation on all intermittent and perennial streams is insufficient to characterize seasonal variation. We disagree with the assertion. The minimum requirements prescribed by the regulation provide an adequate baseline characterization. Further, the combination of the locations identified in final paragraphs (c)(4), quantitative measurements found in (c)(3), minimum parameter list at (a)(2), and monthly frequency at (c)(4) will provide adequate baseline characterization. These regulations are minimum sampling requirements; the regulatory agency may require more locations, samples, and increased frequency as necessary.

We received many comments about the requirement in paragraph (c)(5) for self-recording devices to measure precipitation. Most commenters alleged the devices were prone to maintenance problems, that they were not practical on large mine sites, and/or that adequate measurements could be obtained from other sources. The final rule still requires these devices because variations in precipitation can occur over relatively small areas. For example at large mine sites, the operator might need more than one recording device to ensure that precipitation events are recorded adequately at the mine site. The commenters' concern over maintenance is an issue that can be addressed when the operator is choosing a self-recording device to measure precipitation. There are many types of self-recording devices to measure precipitation on the market and not all have the same issues with maintenance. Any mechanical device left in the environment is prone to some maintenance issues, but operators can minimize these issues by choosing a device that best fits their site. Similarly, a commenter asked for clarification surrounding use and validity of hydrologic models generated by precipitation records. The final rule text at paragraph (c)(5)(ii) is clear and provides the regulatory authority with discretion to determine if a hydrologic model is necessary, and, if so, the regulatory authority can decide the accuracy and validity of the model results. Another commenter suggested that the final rule should not require a precipitation recording device at each permitted area. The commenter suggested that several ''permit areas'' can be in very close proximity to one another resulting in redundant data collection. We agree and have added paragraph (c)(5)(iii) in the final rule to allow close proximity permitted areas to share a precipitation recording device. However, it is important to note, as we mention above, that because precipitation can vary significantly across relatively small areas, the regulatory authority should carefully consider exercising this discretion because a precipitation recording device located nearby will not always provide accurate data for the precipitation event at the mine site.

Final Paragraph (c)(6): Stream Assessments

We received numerous comments, both supporting and objecting to the scope and scale of our proposed stream assessment requirements in §§ 780.19(c)(6) and 780.19(e), especially as they related to the following requirements: Sampling of macroinvertebrate populations within all streams; ephemeral stream baseline sampling; and detailed descriptions of stream channel and streamside vegetation requirements for streams in the adjacent area. Commenters asked how that information would be useful in designing the mining and reclamation plan or in the context of other SMCRA regulatory program requirements. Some commenters recommended requiring data for only a representative sample of all streams, rather than for each stream. Further, we received other comments on a variety of topics. All of these comments are addressed below.

In the final rule, we have consolidated all stream assessment requirements in § 780.19(c)(6) by merging proposed paragraphs (c)(6) and (e). Comments relevant to proposed paragraph (e) are addressed in this section. In addition to consolidating the paragraphs, we have carefully reevaluated each component of the proposed rule concerning stream assessments. The final rule retains only those components that add value to the permitting process and that have utility in the context of SMCRA regulatory programs. However, for the most part, we have not adopted the suggestion to require data only for a representative sample of streams. Each stream is unique in terms of configuration, vegetation, and aquatic life. Therefore, it is important to include data specific to each stream in the permit application. The following table summarizes how we revised the data requirements from the proposed rule to the final rule.

Stream assessment component	Required in Proposed Rule [30 CFR 780.19(c)(6)&(e)]	Required in Final Rule [30 CFR 780.19(c)(6)]
Map with identification of each stream	All perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas.	All perennial, intermittent, and ephemeral streams within the proposed permit area. All perennial and intermittent streams within the adjacent area.
Location of transition points from ephemeral to intermittent and from intermittent to perennial.	All perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas.	All perennial, intermittent, and ephemeral streams within the proposed permit area. All perennial and intermittent streams within the adjacent area.
Stream pattern, profile, and dimensions, with measurements of channel slope, sinuosity, water depth, alluvial groundwater depth, depth to bedrock, bankfull depth, bankfull width, width of the flood-prone area, and dominant in-stream substrate.	All perennial, intermittent, and ephemeral streams within proposed permit and adjacent areas.	All perennial and intermittent streams within the proposed permit.
Streamside vegetation characteristics	All perennial, intermittent, and ephemeral streams within proposed permit and adjacent areas.	All perennial, intermittent, and ephemeral streams within the proposed permit area.
Identification of stream segments on list of impaired surface waters under section 303(d) of the Clean Water Act.	All perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas.	All perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas.

Stream assessment component	Required in Proposed Rule [30 CFR 780.19(c)(6)&(e)]	Required in Final Rule [30 CFR 780.19(c)(6)]
Extent and quality of streamside wetlands	No	All perennial, intermittent, and ephemeral streams within the proposed permit area. All perennial and intermittent streams within the adjacent area.
Biological condition	All perennial and intermittent streams within the proposed permit area.. All perennial and intermittent streams within the adjacent area that would receive discharges from the proposed operation.. A representative sample of ephemeral streams within the proposed permit area. A representative sample of ephemeral streams within the adjacent area that would receive discharges from the proposed operation.	All perennial streams within the proposed permit area. Each perennial stream within the adjacent area that could be affected by the proposed operation All intermittent streams within the proposed permit area, if a scientifically defensible protocol for assessment of intermittent streams has been established. In the absence of a protocol, a description of the biology of the stream is required. Each intermittent stream within the adjacent area that could be affected by the proposed operation, if a scientifically defensible protocol for assessment of intermittent streams has been established. In the absence of a protocol, a description of the biology of the stream is required.
Location of channel head on terminal reaches of stream.	All perennial, intermittent, and ephemeral streams within the proposed permit and adjacent areas..	All perennial, intermittent, and ephemeral streams within the proposed permit area All perennial and intermittent streams within the adjacent area.

The language contained in the introductory text of proposed paragraph (c)(6) has been revised and is included as part of final paragraphs (c)(6)(i) and (ii). Final paragraph (c)(6)(i), now requires the applicant to map and separately identify all perennial, intermittent, and ephemeral stream segments within the proposed permit area and all perennial and intermittent stream segments within the adjacent area. In the proposed rule, these requirements would have extended to ephemeral streams adjacent to the permit area as well, but this requirement has been eliminated in the final rule because we have determined that the data collected from adjacent ephemeral streams would serve no useful purpose within a SMCRA permit as there are no performance standards or reclamation requirements pertinent to ephemeral streams in adjacent areas. That is not the case for ephemeral streams within the proposed permit area because final rule §§ 780.27 and 816.56 establish permitting and reclamation requirements that apply when mining in or through an ephemeral stream. For the purposes of clarity and continuity, proposed paragraph (c)(6)(iv) has been moved to final paragraph (c)(6)(i)(B), and proposed paragraph (c)(6)(v) has been moved to final rule (c)(6)(i)(C). In final paragraph (c)(6)(i)(C), we have also clarified that any map of streams must be consistent with any U.S. Army Corps of Engineers determination of the locations of transition points from ephemeral to intermittent and from intermittent to perennial streams, and vice versa, when applicable, to the extent such a determination exists.

In final paragraph (c)(6)(ii) we begin to explain the substantive stream assessment requirements. This paragraph was located in the proposed rule at 780.19(c)(6)(i). Some commenters opposed the proposed rule because many of the requirements were inapplicable to ephemeral streams. In response, we have divided this portion of the rule into two separate categories—perennial and intermittent streams, and ephemeral streams. For perennial and intermittent streams, final paragraph (c)(6)(ii)(A) requires the same amount of information as in the proposed rule; however, because this type of information is not easily attainable and would not be useful within these final regulations, we have now excluded ephemeral streams from these requirements. Now, in final paragraph (c)(6)(ii)(B), we require only a description of the general stream-channel configuration of ephemeral streams within the proposed permit area.

In response to comments claiming this portion of the rule was confusing when it referred to ''riparian zone'' vegetation, the requirements within proposed rule paragraphs (c)(6)(ii) and (vi), now final paragraphs (c)(6)(iii) and (iv), have been revised for clarity. First, final paragraph (c)(6)(iii) now specifies the types of vegetation that we were referring to when we proposed to require a description of ''riparian zone vegetation''. Specifically, in the final rule, we have changed ''riparian zone vegetation'' to ''vegetation growing along the banks of each stream'' and ''percentage of the riparian zone that is forested'' to ''[t]he extent to which streamside vegetation consists of trees and shrubs''. Second, final paragraph (c)(6)(iv) now states that ''[y]ou must identify the parameters responsible for the impaired condition and the total maximum daily loads associated with those parameters, when applicable.'' This language is clearer than the general reference to stressors in the proposed rule, as this has been replaced with identification of the parameters that cause the impaired condition.

We have also made a substantive change to final paragraph (c)(6)(iii) by adding an additional requirement—a scientific calculation of the species diversity of the vegetation. This addition was made in response to comments from other federal agencies that stated it will assist the regulatory authority in documenting baseline conditions with an appropriate level of detail and better ensure restoration of any streamside vegetative corridors damaged or destroyed by mining in or near streams. We agree and have modified the final rule accordingly.

Many commenters raised concerns about the data we are requiring in final paragraphs (c)(6)(ii) and (iii). Some commenters recommended that we identify specific methodologies that would be used to gather these data required in the final rule within

§ 780.19(c)(6)(ii) and (iii). Other commenters requested that the applicant have the option of collecting vegetative information using aerial mapping and/or other geographic information system data or methodologies. According to these commenters, the methodologies for collecting these data should be left to the discretion of the regulatory authority due to varying regional and site specific conditions and should be determined on a case-by-case basis. We agree with other commenters that suggested the on-the-ground locations of the data points should be determined as a collaborative effort between the regulatory authority and the applicant and that specific methodologies should not be identified in this rule. The regulatory authorities are in the best position to assess the methodologies, protocols, and locations acceptable for the data collection requirements within the final paragraphs (c)(6)(ii) and (iii). In some situations, the regulatory authority may determine that it is scientifically defensible to use aerial mapping and/or other geographic information system data when sampling during the correct time of year, for example during full leaf-out, to determine the extent to which streamside vegetation consists of trees and shrubs and the percentage of channel canopy coverage as required in final paragraphs (c)(6)(iii)(B) and (C). However, we decline to revise the rule to provide the regulatory authority with the discretion to eliminate some of these requirements altogether. These requirements are all necessary to attain the appropriate level of detail for establishing the baseline condition on the site for future monitoring and to assess reclamation success.

Final paragraph (c)(6)(v) has been modified to include a requirement for assessing the extent and quality of streamside wetlands. This requirement applies to all perennial, intermittent, and ephemeral streams within the proposed permit area and for all perennial and intermittent streams within the adjacent area, and it requires the identification of the extent of wetlands adjoining streams and a description of the quality of those wetlands. We added this paragraph in response to comments from other federal agencies that recommended additional protections for wetlands in the final rule because wetlands have vegetation not normally associated with other types of habitat. This change will assist regulatory authorities in documenting baseline conditions with an appropriate level of detail in order to better ensure restoration of any wetlands damaged or destroyed by mining in or near streams. This assessment requirement is consistent with 515(b)(19) of SMCRA [359] which requires establishment of ''a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.''

In the proposed rule, paragraph (e) contained the requirements related to the assessment of the biological condition of streams. In the final rule, we revised these requirements and moved them to paragraphs (c)(6)(vi) and (vii). As finalized, an assessment of the biological condition is required for each perennial stream within the proposed permit area and within the adjacent area that could be affected by the proposed operation. For intermittent streams, the biological condition assessment requirements apply to each intermittent stream within the proposed permit area and within the adjacent area that could be affected by the proposed operation, but only if a scientifically defensible bioassessment protocol has been established to assess intermittent streams in the state or region in which the stream is located. Under the rule finalized today, we have eliminated the requirement to assess the biological condition of all ephemeral streams and those intermittent streams in states or regions in which there are no established scientifically defensible bioassessment protocols available; these changes will be discussed in more detail below.

Many commenters opposed the proposed requirements for assessing biological condition because of the alleged limited applicability of these provisions within semi-arid and arid regions. As support, these commenters noted that the preamble to the proposed rule only discusses evidence supporting these requirements with examples from West Virginia and other areas with 26 or more inches of average precipitation per year. In addition, the proposed rule required the use of a bioassessment protocol for all stream types, which many commenters alleged would have very little value because of a lack of baseline studies to use as a reference. They also noted that natural stream conditions are highly variable in arid and semi-arid areas both aerially and from stream to stream, and this makes it difficult to determine a mine's impacts on the biological condition of streams.

We agree with these commenters in part and, as discussed below, have removed provisions requiring the determination of the biological condition of all ephemeral streams and those intermittent streams without established scientifically defensible bioassessment protocols within the state or region where the proposed mining will occur. However, we disagree with these commenters in other respects. Arid and semi-arid states across the United States have scientifically defensible bioassessment protocols for perennial streams and/or intermittent streams that have been established by Clean Water Act authorities and these protocols consider geographic and annual variation of macroinvertebrate populations. In their comments, several SMCRA regulatory authorities in the western states provided evidence of rigorous protocols for determining the biological condition of perennial streams that are already in place.[360] Also, the U.S. Environmental Protection Agency has established a scientifically defensible bioassessment protocol and accompanying indices that are valid on all perennial streams within the 48 conterminous states,[361] further supporting the requirement of sampling protocols and indices in perennial streams.[362] The ability to obtain information through bioassessment protocols is currently available on national, regional, and state levels and the ability to establish effective baseline information on all perennial streams, no matter the size, habitat type, or vegetative cover is attainable using the best technology currently available.

[359] 30 U.S.C. 1265(b)(19).

[360] *See* Arizona Department of Environmental Quality. *Implementation Procedures For the Narrative Biocriteria Standard.* (2015); Colorado Dep't. of Pub. Health and Env't. Water Quality Control Div.—Monitoring Unit. *Development of Biological Assessment Tools for Colorado;* M. Tepley, *Montana Rivers and Streams Assessment.* Cramer Fish Sciences, Lacey Office, (2013); Utah Dep't. of Envtl. Quality, Div. of Water Quality. 2014. Utah Comprehensive Assessment of Stream Ecosystems; E.G. Hargett, *The Wyoming Stream Integrity Index (WSII)—Multimetric Indices for Assessment of Wadeable Streams and Large Rivers in Wyoming.* Wyoming Dep't. of Envtl. Quality Water Quality Div. document #11–0787, (2011); U.S. Envtl. Prot. Agency, *Information on Bioassessment and Biocriteria Programs from Streams and Wadeable Rivers. https://www.epa.gov/wqc/information-bioassessment-and-biocriteria-programs-streams-and-wadeable-rivers (last accessed Oct. 21, 2016).*

[361] For the 48 conterminous states, U.S. Envtl. Prot. Agency, *National Rivers and Streams Assessment: Field Operations Manual.* EPA–841–B–07–009. Washington, DC (2007).

[362] Alaska is scheduled to have these protocols and indices established in 2020. Further, ''AKMAP statistical surveys can provide baseline information for protection and restoration actions.'' S*ee,* Alaska Dep't. of Envtl. Conservation. *Alaska Clean Water Five-Year Strategic Plan Fiscal Years 2016–2020,* p. 5 (2015).

Some commenters recommended that we use biological assessments that focus on terrestrial productivity to assess the biological condition of streams, such as yield in pounds per acre, percent groundcover, stems per acre, tree diameter at breast height, livestock average daily gains, and species frequency. We disagree because these assessments do not assess the aquatic biota as accurately as the bioassessment protocols we are requiring in the final rule and, thus, are not the best technology currently available to assess the effects of mining on perennial streams.

One commenter requested we remove all bioassessment protocols because streams were already being reclaimed successfully. We disagree. There are documented instances of streams adversely affected by mining across the United States. In addition, these baseline assessments are not solely designed to monitor the reclamation of streams, but also to monitor streams that are not approved for disturbance but may be impacted by the operation. Across all coal bearing regions, since the approval of state run regulatory authorities, examples of surface water impacts have been identified.[363] While many of these effects are minor and moderate, they also involve off-site impacts. Other impacts are not currently detected, and this rule is designed to improve the baseline analysis to further detect the potential for offsite impacts, to detect unplanned impacts, and to minimize these off-site impacts using the best technology currently available. We are retaining these requirements. These baseline assessments of the biological condition of streams where scientifically defensible protocols exist will allow for appropriate stream assessment and monitoring and will result in minimization of effects to fish, wildlife, and environmental resources consistent with the requirements of section 515(b)(24) of SMCRA.[364]

Some commenters also recommended that we eliminate the requirement for bioassessments of every perennial stream potentially affected by the proposed operation. These commenters suggested we use a representative stream sample or solely streams from adjacent areas, which they claim would suffice to assess baseline condition and monitor reclamation within the proposed permit. We disagree. First, because offsite impacts are to be avoided or minimized when they do occur, all streams within the influence of the operation need an appropriate level of knowledge specific to each stream to be able to comprehensively measure these offsite impacts (if they occur). And because these offsite impacts may encompass many different types of effects (*e.g.,* physical, chemical, biological, human-related) to surface waters off of the permitted site at any time or in any location, this level of detail using the best technology currently available is warranted. Second, small perennial streams that occur within the proposed permitted site may differ in physical, chemical, and biotic attributes from those adjacent to the proposed permitted site. If perennial streams from areas adjacent to the permit are used for this baseline survey, the attributes and biological assemblages that contain localized and unique species within the permit may be missed.[365] Assessing only a subset of perennial streams within the proposed site may also lose this type of biological resolution and is not appropriate when SMCRA requires the operation to minimize effects to water quality and quantity as required by section 515(b)(10) of SMCRA,[366] and to fish and wildlife and related environmental values as required by 515(b)(24) of SMCRA.[367] In summary, the perennial streams under these requirements may contain rare, sensitive, and important habitat and small populations of rare and sensitive organisms that are not likely to be comprehensively cataloged without thoroughly sampling the potential permitted site. Third, it is incumbent that the permittee provide assurance that effects of the operation on federal, state, and tribal-listed threatened and endangered species have been properly assessed.

Another reason the commenters offered for deleting these mandatory bioassessments was that these bioassessment protocols have historically been conducted for a different purpose: As part of a suite of metrics (*i.e.,* scientifically defensible data) used and not a stand-alone tool to characterize the nature of an ecosystem or community. We did not alter the rule in response to these comments and are retaining these bioassessments as specified in final paragraph (c)(vii). The U.S. Environmental Protection Agency first established the policy that scientifically defensible biocriteria values may be used independently to provide conclusive evidence that water quality standards are or are not attained.[368] But more importantly, as used in this rule, bioassessments (using at a minimum, macroinvertebrate sampling) are part of a suite of scientifically defensible data that will be used. These bioassessments also include physical, chemical, and other biological attribute measurements to determine baseline condition and to monitor the operation through final bond release. In addition, regulatory authorities routinely use bioassessment protocols for practical and compliance purposes, including total maximum daily load development and monitoring, measuring national pollutant discharge elimination system permit compliance, analyzing and establishing best practices for restoration, and measuring the progress of stream restoration. Similar to our discussion in the preamble to the proposed rule, we anticipate that the SMCRA regulatory authority, with assistance from the appropriate Clean Water Act agencies, will define the range of values required to support each designated use and premining use of the stream.[369] The SMCRA and the Clean Water Act authorities have the knowledge and history to provide permit applicants with a robust protocol that will define the range of values required to support each existing and applicable Clean Water Act water quality standards of the stream in question. The final rule simply codifies a minimum requirement to incorporate within this protocol a measurement of aquatic organisms (benthic macroinvertebrates), a calculated values for habitat (including vegetation), and assessments of water quality and quantity. The baseline biological, physical, and chemical assessments of these streams will also allow the regulatory authority to provide guidance to operators on ways to prevent material damage to the hydrologic balance outside of the permitted area because these baseline measurements can be compared with the measurements needed to support each designated use and premining use of the stream in question. The comparison between the values, including index values, and the baseline measurements is based upon substantial studies and scientific support, and it is appropriate to conduct monitoring of

[363] Representative sample of SMCRA regulatory authority Notice of Violations across the United States.

[364] 30 U.S.C. 1265(b)(24).

[365] Judy L. Meyer, et al., *The Contribution of Headwater Streams to Biodiversity in River Networks,* Journal of the American Water Resources Association (JAWRA) 43(1):86–103. DOI: 10.1111/j.1752–1688.2007.00008 (2007).

[366] 30 U.S.C. 1265(b)(10).

[367] *Id.* at 1265(b)(24).

[368] T.T. Davies, Memorandum to Water Management Division Directors, *Transmittal of final policy on biological assessments and criteria.* U.S. Envtl. Prot. Agency. Washington, DC (June 19, 1991).

[369] 80 FR 44436, 44475 (Jul. 27, 2015).

streams potentially impacted by coal mining activities using these protocols.

One commenter requested that we address whether the biological assessments currently employed for Clean Water Act section 404 [370] permitting will suffice. If the assessment includes all of the characteristics required in this final rule and its implementing regulations, the Clean Water Act section 404 assessment will suffice. This commenter was also concerned that these bioassessment requirements could result in needless data duplication that may delay permitting issuance and potentially conflict with the Clean Water Act and the U.S. Army Corps of Engineers requirements. We understand this concern. Final § 780.19(h) requires coordination between the SMCRA regulatory authority and the Clean Water Act authority. Coordination may include baseline data collection points and parameters and the sharing of data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations. This will minimize delays, data duplication, and conflicting requests.

Commenters also voiced concern over the quality control that the regulatory authority would use for these bioassessments. These commenters indicated that strict quality controls to accurately determine the perennial stream condition would be difficult to execute and requested that the regulatory authority be provided discretion to either modify or eliminate bioassessment protocols. One commenter specified that the regulatory authority should be able to use its discretion to grant waivers of this requirement to protect the safety of the individuals performing the studies. We disagree that quality control for these bioassessments would be too difficult to execute. We also decline to make these bioassessments optional. These bioassessment protocols, both at the state and federal level are designed to address quality control throughout the design, data collection, and analysis phases. These protocols were developed specifically to consider the safety of those performing the protocols and we anticipate that the bioassessments will be conducted consistent with the safety of those performing the assessments. If a state protocol is not available that includes these quality and safety procedures, the ''National Rivers and Streams Assessment 2013/2014 Field Operations Manual for Wadeable Streams'' includes quality assurance measures in field and laboratory design and operations and statistical analysis techniques to provide comprehensive data integrity. This protocol also includes a section that describes the recommended training, communications, safety considerations, safety equipment and facilities, and safety guidelines for field operations. This protocol addresses quality assurance and quality control issues and is valid throughout the 48 conterminous states; therefore, it may be used to assess and monitor SMCRA-permitted operations. Final § 780.19(c)(6)(vii)(E) includes a requirement to describe the technical elements of the bioassessment protocol, including, but not limited to sampling methods, sampling gear, index period, sample processing and analysis, and quality assurance/quality control procedures; an appropriate, scientifically defensible bioassessment would have this information readily available.

Commenters also expressed concern with the proposed rule's reliance on the information created by the bioassessments. Specifically, they noted that the proposed rule did not account for changes in biodiversity of a perennial stream or other surface waters caused by outside sources during the life of the permit. We disagree. Final § 780.19(c)(4)(i) requires sampling upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas. This sampling array will account for potential effects from outside sources. In addition, the protocols and indices we are requiring have been established while considering natural spatial and annual variation. Determining the effects of human activity in streams involves the establishment of reference streams and conditions. This process includes the sampling of aquatic biota and the habitat (*e.g.,* geography, altitude, vegetation, attributes of the physical stream channel and surrounding area, and water chemistry) in and adjacent to the stream. These data are collected to determine reference and non-reference streams and produce consistent results. Once these reference streams and conditions are established, index thresholds are then established, and these will be used to make assessments and monitor streams. This is also mainly an iterative process, where reference streams and conditions are sampled, resampled, and reanalyzed, and the index may be refined as time passes and more data are collected. These metrics are also ecologically relevant to the biological assemblage or community under study and are sensitive to stressors beyond the permitted site, and provide a response that can be discriminated from natural variation. Again, each permit can rely on the National Rivers and Streams Assessment for streams to provide the minimum requirements found in this final rule because this assessment is scientifically defensible in the 48 conterminous states.

Several commenters opposed our use of bioassessment indices as one way to describe ecological function. They noted that well-respected aquatic ecologists, including one ecologist we have cited and relied upon within the proposed rule, have not been able to agree on metrics of ecological function in stream networks, let alone on the ability to restore them. As one example, commenters referred to the Maryland Stream Restoration Association, and these commenters asserted that this association has not yet agreed on such metrics for streams in the Appalachian counties of Maryland. We attempted to corroborate the commenters' assertion, but we could not find a source for this disagreement on the metrics for the Appalachian counties of Maryland. We did, however, discover that the official Web site of the Maryland Stream Restoration Association includes at least one reference to a protocol for adequate stream restoration within the Chesapeake Bay watershed, which includes many references and examples of using biological indices to measure ecological function on restoration projects.[371] Additionally, the Maryland Department of Natural Resources uses bioassessment protocols (with identification to the genus level for regulatory actions) for restoration targeting and measuring restoration progress for Maryland's wadeable streams.[372] These Maryland Department of Natural Resources references further support our requirement for use of scientifically defensible bioassessments because they demonstrate that adequate protocols can be, and have been, developed for the measurement of ecological function. Ecological function is more thoroughly addressed in our preamble discussion of our definition of that term in § 701.5 above.

Several commenters stated that there are other scientifically defensible bioassessment protocols that could be

[370] 33 U.S.C. 1344.

[371] Joe Berg, et al., *Recommendations of the Expert Panel to Define Removal Rates for Individual Stream Restoration Projects:* FINAL REPORT, Urban Stormwater Work Group Chesapeake Bay Partnership (2012).

[372] Maryland Biological Assessment Methodology for Non-Tidal Wadeable Streams, Last Revised on June 4, 2014.

used to assess and monitor the biological condition of streams and recommended that we allow other bioassessment protocols and the multimetric bioassessments that were in the proposed rule. We agree with this recommendation. Further, we recognize that many states are not currently using multimetric macroinvertebrate sampling that use an index of biological integrity. Therefore, we have revised the final rule in response to these comments to allow for the use of other scientifically defensible bioassessment protocols as long as specific minimum requirements are satisfied. In paragraphs (c)(vii)(A) through (D) of the final rule we clarify the minimum requirements for scientifically defensible bioassessment protocols. This includes a measurement that is based upon an appropriate array of aquatic organisms, that at a minimum includes benthic macroinvertebrates, identified to the genus level where possible, otherwise to the lowest practical taxonomic level. We retain the minimum requirements to sample benthic macroinvertebrates as they are particularly useful for assessing the biological condition of the stream because they are diverse, abundant, sensitive to environmental stress, relatively immobile (compared to fish), and many macroinvertebrates have relatively long life cycles of at least a year. These characteristics of macroinvertebrates integrate the effects of environmental stressors over time and therefore are good indicators of local conditions as well as upstream land and water resource conditions. We do not require fish sampling and other organism samplings (such as periphyton) in our final rule; however, regulatory authorities have the discretion to require other sampling protocols. Additionally, the protocol must result in the calculation of index values for both stream habitat and aquatic biota based on the reference condition. We included the terms ''stream'' before habitat and ''aquatic biota based on the reference condition'' instead of only macroinvertebrates as proposed, as these more appropriately describe the requirements due to the inclusion of other types of bioassessments other than multimetric indices that use an index of biological integrity. We revised final paragraph (c)(vii)(C) and added paragraphs (c)(vii)(D) and (E) to provide clarity with respect to the appropriate final characteristics of the required bioassessment protocols. Final paragraph (c)(vii)(D) requires the protocol to include a quantitative assessment of in-stream and riparian habitat condition. Final paragraph (c)(vii)(E) requires the operator to describe the technical elements of the protocols, including, but not limited to; sampling methods, sampling gear, index period, sample processing and analysis, and quality assurance/quality control procedures. These two requirements are included to provide sufficient information to the regulatory authority that the bioassessment to be used will be appropriate and scientifically defensible; for scientifically defensible bioassessments, this information should be readily available. These measures are supported by current science and are also in response to comments described above regarding the concern over the bioassessment protocols containing the proper quality control and safety procedures. A publication by the U.S. Environmental Protection Agency in 2013 identified 13 technical elements of biological assessment programs and included recommendations on how to more precisely define aquatic life uses and approaches for deriving biological criteria, monitoring biological condition, supporting causal analysis, and developing-stressor response relationships.[373] This publication serves as resource to determine the scientific rigor of potential bioassessment protocols to be used.[374]

Many commenters supported biological condition assessments for all streams and other commenters supported only including them for intermittent and perennial streams. As a result of comments we received and our reanalysis of the proposed rule's biological condition requirements, we removed the provisions of proposed paragraph (e) that would have assessed the biological condition of all intermittent streams and a representative sample of ephemeral streams in those states or regions in which there are currently no established scientifically defensible bioassessment protocols available. For all intermittent and some representative number of ephemeral streams, the proposed rule would have required adherence to a multimetric bioassessment protocol.[375] Many commenters correctly noted that it is currently impractical to require the assessment of the biological condition of ephemeral streams and of those intermittent streams in states or regions in which there are no established bioassessment protocols available. Generally, the best technology currently available in many areas for these types of streams does not include bioassessment protocols because application of those protocols would not produce reliable, substantive information that the regulatory authority would be able to use to assess stream function or to monitor reclamation success.

Therefore, we did not include these requirements in the final rule. However, these intermittent and ephemeral streams represent a large proportion of the stream lengths within watersheds, especially in semi-arid and arid environments, and need to be assessed with a degree of scientific rigor. Current science provides examples of watershed management and resource protection only having limited success if non-perennial streams are excluded from assessments and reclamation activities.[376] One reason for the importance of these streams is that their natural, seasonal flow provides significant exports to the downstream habitat such as nutrients and processed organic matter.[377] In addition, these small streams and their associated adjacent vegetative communities can differ widely in physical, chemical, and biotic attributes and provide habitats for a range of species that may not be able to persist in perennial stream reaches due to competition, predation, invasive species, or abiotic factors.[378] Permanent residents as well as migrants travel through ephemeral and intermittent stream channels at particular seasons or life stages, and this movement links headwaters with downstream and adjacent terrestrial ecosystems.[379] Therefore, although we are not requiring the use of a scientifically defensible bioassessment protocol for these streams if one does not currently exist, final paragraphs (c)(6)(ii) and (iii) require the assessment of the physical structure of the channel and a habitat assessment of the vegetative communities within and adjacent to ephemeral streams and those

[373] U.S. Envtl. Prot. Agency, *Biological Assessment Program Review: Assessing Level of Technical Rigor to Support Water Quality Management.* Washington, DC, EPA 820–R–13–001 (2012).

[374] J.E., Allende, *Rigor: The essence of scientific work,* Elec. Journal of Biotechnology, 7(1), (2004).

[375] 33 U.S.C. 1251(a) or 1313(d).

[376] Catherine Leigh, *et al., Ecological research and management of intermittent rivers: an historical review and future directions.* Freshwater Biology (2015).

[377] Raphael D. Mazor, et al. *Integrating intermittent streams into watershed assessments: Applicability of an index of biotic integrity.* Freshwater Science, pgs. 459–474 (2011).

[378] Emily S. Bernhardt and Margaret Palmer. *The environmental costs of mountaintop mining valley fill operations for aquatic ecosystems of the Central Appalachians.* Annals of the New York Academy of Sciences, 1223.1: 39–57 (2011).

[379] Judy L. Meyer, et al. *The Contribution of Headwater Streams to Biodiversity in River Networks.* Journal of the American Water Resources Association (JAWRA) 43(1):86–103. DOI: 10.1111/j.1752–1688.2007.00008.x (2007).

intermittent streams in states or regions in which there are no scientifically defensible bioassessment protocols. Without established scientifically defensible bioassessment protocols, these assessments of the physical structure of the channel and an assessment of the vegetative communities are part of the best technology currently available to describe the streams and provide the regulatory authority with significant, useful, and scientifically defensible information to determine how to minimize the operations' effects to fish, wildlife, and related environmental resources consistent with section 515(b)(24) of SMCRA.[380] These requirements are consistent with proposed paragraphs (i) and (ii) and are discussed in further detail above.

In addition to the requirements of final paragraphs (c)(6)(ii) and (ii), final paragraph (c)(6)(viii) requires, at the time of application, a description of the results of a one-time sampling of the aquatic biota of each intermittent stream segment in states or regions in which there are no established bioassessment protocols available. Final paragraph (viii) requires that these one-time sampling events use a sampling method or protocol established or endorsed by an agency responsible for implementing the Clean Water Act, 33 U.S.C. 1251 *et seq*.[381] Although indices for the bioassessment of intermittent streams are not currently widely available, effective and scientifically defensible protocols exist nationwide (the best current technology also includes the proper Quality Assurance and Quality Control) to sample intermittent streams for the identification and cataloging of the biota found within streams. The best technology currently available for this one time sampling event are frequently the protocols for the bioassessments described above for perennial and some intermittent streams, but without the further scientific analysis and determination of index values. These one-time sampling events must also possess the same quality control and safety considerations as the scientifically defensible bioassessment protocols. As an example, the ''National Rivers and Streams Assessment 2013–2014 Field Operations Manual for Wadeable Streams'' published by the U.S. Environmental Protection Agency serves as a reliable national resource for sampling streams, including intermittent streams. Of critical importance to the sampling of intermittent streams is the correct timing of sampling. The protocol in the National Rivers and Streams Assessment 2013–2014 Field Operations Manual for Wadeable Streams requires greater than 50 percent water throughout the channel reach to execute sampling. The manual also advises against sampling when precipitation results in streamflow above baseflow. The appropriate time to sample intermittent streams is normally narrower than appropriate sampling of perennial streams, simply because of the amount of time when proper water flow exists. When conducted during the correct time of year, this one-time sample will provide the regulatory authority with a description of the biota within these intermittent streams and provide significant and useful information to determine how best to minimize the adverse impacts of the operation on fish, wildlife, and related environmental resources consistent with section 515(b)(24) of SMCRA.[382] These assessments will also help the regulatory authority determine if any species of special concern are present within these stream reaches. These assessments are not intended to be used for analyses other than to identify those species that are found within these streams and to aid in identification of the types of communities present (*e.g.,* coldwater stream community).

Other commenters requested we include an addition to the rule that requires a strict adherence to the approved bioassessment protocol (*e.g.,* sampling gear, sample index period, sample anniversary dates, and sample processing methods). This commenter also voiced a concern that sample periods for small perennial streams (those most likely to be directly affected by mining activities) are shorter than those for larger perennial streams. According to the commenter, we should prescribe sampling times that avoid early season and late-summer index periods because these streams are typically hydrologically stressed and they tend to score poorly (*e.g.,* reduced species diversity and richness) in many indices during these times. We decline to adopt this recommendation because the protocols, requirements, and updates incorporated into the final rule discussed above address this concern. For example, the U.S. EPA National Rivers and Streams Assessment 2013–2014: Field Operations Manual (Wadeable Streams) prohibits sampling of sites with water in less than 50% of the reach length. It also specifies that all sites must be sampled during base flow conditions. In addition, the coordination with the appropriate Clean Water Act authorities will help establish the appropriate sampling dates for the streams in question.

We received support for the identification of macroinvertebrates to the genus level within proposed paragraph (e)(2)(i), now included within final paragraphs (c)(6)(vii)(A) and (c)(6)(viii)(B), along with an assessment of every stream segment potentially affected by the permit. However, one commenter wanted us to specifically mention the limitations of these methods for assessing impacts to species sensitive to water-quality degradation, including federally-listed threatened and endangered species. Several supporters of the proposed rule also requested we require more sampling. For example, commenters suggested sampling fish to the species level, bird surveys, and hyporheic zone assessments in addition to macroinvertebrate data collection. Final paragraph (c)(6) sets out the minimum sampling requirements. We decline to add other requirements. The regulatory authority always has the discretion to require additional measures as appropriate to their region or to the particular permit under consideration.

Other commenters opposed the requirement in final paragraph (c)(viii)(A) to identify macroinvertebrates to the genus level. These commenters alleged that such a requirement is unnecessary, too expensive, and family level identification is preferred and already performing adequately. We disagree. While genus-level identifications are more expensive to process than family-level identifications, they are also the best technology currently available and allow for increased specificity, or degree of detail, of the biology that exists in streams. Further, most scientifically defensible protocols now require genus-level identification in their bioassessments when possible. Also, many studies show that genus-level identification provides both a greater degree of confidence on the condition of streams and a certain degree of knowledge about what types of stressors are affecting streams if they are undergoing stress. In the vast majority of situations, these genus-level identification tools, when compared to family level identification tools, detect smaller differences in water quality and are therefore preferred, not only for assessment purposes but for monitoring

[380] 30 U.S.C. 1265(b)(24).

[381] For example, the U.S. Envtl. Prot. Agency has a sampling protocol applicable across the nation. *National Rivers and Streams Assessment: Field Operations Manual.* (2007) EPA–841–B–07–009. U.S. Envtl. Prot. Agency, Washington, DC. This is just one example, more regional specific protocols may exist.

[382] 30 U.S.C. 1265(b)(24).

purposes.[383] We also recognize that there may be instances where it is not possible to identify to genus and an identification is needed due to a small sample size or other limiting factors, such as situations when an identification is needed and only a partial body is available for identification, the specimen is not the correct sex, or not within the appropriate life stage to identify to genus level. Therefore, final paragraph (c)(6)(viii)(B) now states that the applicant must identify benthic macroinvertebrates to the genus level where possible, otherwise to the lowest practical taxonomic level. This provision also allows for higher-level identifications where classifications of taxa such as flatworms, water mites, and oligochaetes are not practicable. In most instances, identification to the genus level is appropriate for samples in all life stages.

One commenter opposed our use of extrapolated measurements within the bioassessment protocols. This commenter opposed these by stating that in other sections of the proposed rule we will no longer allow extrapolated data because our past experience indicates that extrapolation is not a reliably accurate method to document and describe seasonal variation in chemical parameters; therefore this rule should be consistent and not use an extrapolated biological index value based on arbitrarily developed correlation methods to establish a standard for reclamation success. We disagree. We have experienced inaccuracies and other problems with the extrapolation of seasonal variation in chemical parameters while gathering baseline data and it is an established problem, while the extrapolation of biological condition data is a standard that has been produced and replicated within scientifically defensible bioassessment protocols.

A regulatory authority commenter indicated that the requirement in proposed paragraph (e)(2), now final paragraph (c)(6)(vii), to use a bioassessment method that is approved by the state Clean Water Act regulatory authority appears to be in direct conflict with the state's water quality laws and standards. The commenter opined that this requirement places an additional burden on the state regulatory authority to review, approve, and validate bioassessment protocols when a state may not have or use numerical bioassessment methods. We disagree. This requirement harmonizes a state's Clean Water Act bioassessment methods and the SMCRA requirements found in paragraph (c). Moreover, final paragraph (c)(6)(vii) requires applicants to use either a method approved by the state Clean Water Act authority or ''other scientifically-defensible bioassessment protocols accepted by agencies responsible for implementing the Clean Water Act, 33 U.S.C. 1251 *et seq.,* modified as necessary to meet the following requirements''. Thus, a SMCRA regulatory authority in a state without existing bioassessment methods approved by a state or tribal Clean Water Act authority must either develop a method acceptable to the Clean Water Act authority or use another scientifically defensible bioassessment protocol accepted by agencies responsible for implementing the Clean Water Act, such as the U.S. Environmental Protection Agency's National River and Streams Assessment for Wadeable Streams.

The commenter also maintained that the use of bioassessments and correlation index values are not reasonable for isolated locations in streams that have highly variable flow conditions. In response, we note that requirement for biological condition data in paragraph (c)(6) only applies to (1) all perennial streams and (2) any intermittent streams in a state or region with a scientifically defensible bioassessment method. If no bioassessment methods exist for intermittent streams, then the requirements to obtain biological condition data included in paragraph (c)(6) applies only to perennial streams on the permitted and adjacent area. We are also not aware of any type of situation the commenter describes in which hydrologic conditions are limited to such a small area and to such few streams that development of biological and correlation index values is precluded.[384] Hydrologic data may have widely variable temporal and spatial characteristics, but it typically forms patterns that cover areas large enough to enable development of scientifically defensible bioassessment protocols.

We sought comments within the proposed rule at 780.19(e) on the effectiveness of using index scores from bioassessment protocols to ascertain impacts on existing, reasonably foreseeable, or designated uses. Many commenters supported their use while many claimed they were not effective. We also invited commenters to suggest other approaches that may be equally or more effective. We received several suggestions, including: Solely qualitative measures; yield in pounds per acre, percent groundcover, stems per acre, diameter at breast height, livestock average daily gains, and species frequency; a standard that simply says that there is no material damage to the hydrologic balance outside the permit area if there is no change in designated use of the receiving stream as described by the Clean Water Act regulatory authority attributable to surface coal mining; Water Quality Standards and Physical Habitat scoring are both more dependable measures with replicable results that are not subject to as many variables both in the environment and sample methodology; standardized qualitative assessments for intermittent streams; premining and postmining qualitative biological and habitat assessments made at the appropriate time to determine if and where macroinvertebrates, fish, or amphibians are present in intermittent streams. Although we appreciate the suggestions, these alternatives do not adequately assess the biological functions of streams as accurately as bioassessment protocols described in the final rule and are not the best technology currently available.

Final Paragraph (d): Additional Information for Discharges From Previous Coal Mining Operations

A commenter from a regulatory agency suggested that we define the term ''discharge.'' We agree that this term could be clarified and have included the modifier ''point-source'' before discharge in the final rule. In this section, we also removed the requirement to obtain biological condition information because it was redundant with § 780.19(c)(6), which requires essentially the same information.

Several commenters suggested that a single, low-flow sample representing baseline for each mine discharge located over and adjacent to a mine site does not make sense in light of the requirement for twelve evenly-spaced monthly baseline samples in paragraphs (b) and (c) to characterize groundwater and surface water baseline conditions. Some commenters suggested that no sample was necessary for the discharges from previous operations due to the volume of sampling required for surface water and groundwater characterization. We understand the seeming contradiction in sampling frequency

[383] D.R. Lenat and V.H. Resh, *Taxonomy and stream ecology—the benefits of genus-and species-level identifications.* Journal of the North American Benthological Society, 20(2), pp. 287–298 (2011).

[384] Again, we reference the U.S. Entl. Prot. Agency's National Rivers and Stream Assessment as a scientifically defensible bioassessment for all perennial streams within the forty-eight conterminous states.

between surface water and groundwater and mine discharges, but these regulations are an adequate basis to establish the minimum regulatory authority standards. The low flow period is the most critical period to understand mine discharges because it is at that period when the concentrations of water quality parameters are the highest in both the discharge and receiving streams. Thus, a sample collected during this time is most likely to reveal potential issues as compared to samples taken during higher flows when concentrations are diluted. Of course, state regulatory authorities have the discretion to require whatever sampling frequencies for discharges that they consider necessary to make technical assessments and associated findings for permits within their jurisdiction. For the reasons identified above, we are not revising the sampling requirements for mine discharges.

One commenter suggested that the language pertaining to the required sampling for previous mine operations was imprecise and further questioned whether abandoned and permitted discharges were required to be sampled. The final rule language requires sampling of all discharges from abandoned mine sites found on and adjacent to a proposed mining operation that might have a hydrologic connection to the operation. This requirement provides information that both the regulatory authority and applicant will need to assess whether any adverse impacts from the discharges within and adjacent to the permitted area are a result of the current mining operation. Without this information, the operator and regulatory authority are less likely to detect any changes in water quality and/or flow from these previous mine discharges which may be linked to the proposed operation. For all of these reasons, we decline to change the final rule language regarding data requirements for pre-existing mine discharges.

A commenter opined that the extra monitoring and parameters proposed in §§ 780.19(d) and 784.19(d) are a disincentive for remining. We understand the concern with respect to remining. However, adequate baseline characterization is more important in remining situations, especially with pre-existing discharges. Section 780.28(e)(3)(i)(D) requires that, when mining through a degraded stream, the mining ''[w]ill not further degrade the form, hydrological function, biological condition, or ecological function of the existing stream.'' Thus, adequate baseline characterization is vital for determining if a remining operation is further degrading the form, hydrological function, biological condition, or ecological function of an existing stream segment.

Final Paragraph (e): Geologic Information

Some commenters suggested that the requirement at proposed paragraph (f)(3)(iii), now paragraph (e)(3), to obtain pyritic sulfur and alkalinity information should only apply to regions where it is necessary to acquire such data to prevent acid mine drainage. Under paragraph (e)(5), the regulatory authority has the discretion to waive the pyritic sulfur and alkalinity data if information exists to support the regulatory authority's written finding. We note, however, that we are unclear how *not* collecting the alkalinity and pyritic sulfur is beneficial in any manner. The applicant must conduct an analysis of the geochemical nature of the strata to be removed and assess the net neutralization potential of the entire overburden column. To do so, every stratum needs to be tested, its net neutralization potential calculated, and an analysis made of the overall net neutralization of all the overburden on the site. Only in cases where the strata can be shown through existing information to historically produce net alkaline effluent would it make sense to waive this requirement.

Another commenter requested that we define ''other parameters that may influence the required reclamation.'' In response, we note that such factors may include the weather regime, availability of water, placement of overburden containing sulfur, and vegetation requirements because these factors can significantly affect effluent water quality from the reclaimed site.

Final Paragraph (f): Cumulative Impact Area Information

We received a couple of comments about proposed paragraph (g),[385] now paragraph (f), which addresses cumulative impact area information. One commenter claimed that the paragraph requires the characterization of ''all'' perennial, intermittent, and ephemeral streams, implying there are no limits to what has to be considered when making a determination of the cumulative impacts of the proposed operation on the surface water and groundwater. The commenter asserted that we should use the term ''representative sampling'' and let the regulatory authority use their professional judgment on what is appropriate. This is a mischaracterization of the proposed rule text; there is no language in the paragraph that requires or implies ''all'' streams must be characterized. We require the operator to obtain the information necessary to assess the impacts of both the proposed operation and all anticipated mining on surface-water and groundwater systems in the cumulative impact area. Further, nothing in § 780.21 of the proposed or final rule, which sets the requirements for the preparation and review of the cumulative hydrologic impact assessment, requires or implies that ''all'' streams must be characterized to determine the cumulative hydrologic impacts. Therefore, the commenter's concerns are misplaced, and we have made no changes to the final rule based on this comment.

Another commenter pointed out that proposed paragraph (g), now final paragraph (f), requires the regulatory authority to obtain all hydrologic, geologic, and biologic information necessary to perform the cumulative hydrologic impact assessment. They opined that it places an extraordinary huge burden on the regulatory authority to obtain all this data and this rule appears to require the regulatory authority to research proposed cumulative hydrologic impact assessments, when the traditional role of the regulatory authority has been to evaluate and review permit applications that contain the information. We agree with the commenter. We mistakenly stated in the proposed rule that the regulatory authority was responsible for obtaining this information. The preamble to the previous final rule contains a lengthy discussion on this topic, which makes it clear that the applicant is responsible for collecting this information. *See* 48 FR 43970 (Sept. 26, 1983). In the final rule, we have corrected this error and changed ''[t]he regulatory authority must obtain . . .'' to ''[y]ou must obtain . . .''

We have also made other changes that clarify our intent and the role of the applicant and the regulatory authority. First, in paragraph (f)(1), of the final rule, to better conform to the subject of this paragraph, we changed the rule text from ''probable cumulative hydrologic impacts of the proposed operation . . .'' to ''impacts of both the proposed operation . . .'' Second, in paragraph (f)(2), we replaced the word ''must'' with ''may'' in the first sentence. This change better conforms to the sentence that followed. Third, we modified text within paragraph (f)(3) that clarifies the role of the regulatory authority and

[385] 80 FR 44436, 44602–44603 (Jul. 27, 2015).

complements the changes made in paragraph (f)(1).

Final Paragraph (g): Exception for Operations That Avoid Streams

This section establishes an exception for operations that avoid streams and specifies that the regulatory authority may waive the biological condition information requirements of paragraph (c)(6)(vi) through (viii) of this section if it is demonstrated, and if the regulatory authority finds in writing, that the operation will not: Mine through or bury a perennial or intermittent stream; create a point-source discharge to any perennial, intermittent, or ephemeral stream; or modify the base flow of any perennial or intermittent stream. Several commenters supported this proposed section. Other commenters requested that we remove the reference to ephemeral streams in § 780.19(h)(2), now § 780.19(g)(2). We disagree. Changes to the hydrology in ephemeral streams are linked to intermittent and perennial streams and must be considered when approving a potential exception for collecting baseline condition information.

Another commenter suggested that we include non-point source discharges within this paragraph because there are instances where these types of discharges can impact surface waters, potentially affecting aquatic environments. We decline to modify the final rule in response to this comment because the burden associated with monitoring all non-point source discharges into streams may be outweighed by any benefit that may be received. Moreover, the surface water monitoring requirements, as prescribed by the final rule are adequate to determine the quantity and quality of surface water. Other commenters requested more guidance on whether stormwater controls and outfalls that discharge into ephemeral, intermittent, or perennial streams are considered ''point sources'' under this paragraph. Consistent with section 502 of the Clean Water Act,[386] we consider stormwater (not including agricultural stormwater) that is discharged by means of any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, or other floating craft into a stream to be a point source discharge.

One commenter correctly noted that proposed paragraph (h), now paragraph (g) allows the regulatory authority to grant a waiver from the requirement to establish baseline conditions in intermittent and perennial streams for biological information. However, this commenter indicated that this waiver could conflict with the stream baseline requirements in paragraph (c) pertaining to surface water baseline sample collection. We disagree. The establishment of baseline flow and quality characteristics in paragraph (c) applies to all streams within, and adjacent to, the permitted area and cannot be waived. Proposed paragraph (h), now final paragraph (g), only allows the regulatory authority to waive the biological information required in paragraphs (c)(6)(vi) through (viii)—not the water quality and quantity information in paragraph (c).

One commenter suggested that many other non-mining related impacts occur in streams that could potentially affect the receiving stream's aquatic environment. The commenter suggested removing the exemptions proposed in paragraph (h) and instead require biological condition baseline data in all circumstances. We disagree with the suggestion to remove the three exemption clauses because it saves time and resources in situations where it is not likely to yield data to help with reclamation, and also non-mining related activities are not regulated under SMCRA. The requirements of paragraphs (c)(2) and (3) will provide sufficient data to characterize baseline conditions in most situations where mining operations avoid all activities within or near streams. If the regulatory authority chooses to require biological condition data when one of the three conditions is present, the final rule contains sufficient discretion for them to do so. For these reasons, we are retaining the exemptions within the final rule language.

Final Paragraph (h): Coordination With Clean Water Act Agencies

We received several comments on proposed paragraph (i), now final paragraph (h), and, as a result, we have made a few revisions. First, some commenters asserted that requiring coordination with Clean Water Act agencies would not necessarily be useful if the Clean Water Act authority did not respond to coordination attempts. It is important to obtain the input from the Clean Water Act authority when considering aquatic impacts from SMCRA sites on adjacent receiving streams; the Clean Water Act authority is a valuable source of information and should be used in SMCRA permitting decisions. In response to the commenter's concerns, however, we added the phrase ''make best efforts to'' in the introductory text because the nature of response of the Clean Water Act authority is out of the control of the SMCRA regulatory authority. Adding ''make best efforts to'' also addresses other comments received on what is now final paragraph (h)(2), which provides that the regulatory authority make best efforts to ''minimize differences in baseline data collection points and parameters.'' These commenters also alleged that significant delays in SMCRA permitting will result if the regulatory authority must reconcile the baseline data collection points and parameters required by this rule with the Clean Water Act requirements, which are more complex and include a greater number of parameters. We understand the concern, but data collection reconciliation is important to alleviate wasted effort and to ensure consistency between the Clean Water Act authority and the SMCRA permit holders. For example, multiple but non-coordinated macroinvertebrate sampling can yield inaccurate results if conducted at a similar location and at a frequency that does not allow the site to recover sufficiently between sample events. For all of these reasons, we decline to completely remove the language requiring coordination.

One commenter suggested that we place a reasonable time limit on the agencies to respond to information needed from other agencies in order for the SMCRA regulatory authority to make a permitting decision. The commenter suggested that permit applicants would be at the mercy of other agencies to get all the information necessary for a permitting decision and suggested requiring a reasonable time limit for agency responses to information requests. We are not adopting this suggestion because we have no authority to place regulatory burdens on other agencies exercising other statutory authorities. The intent of this provision is to ensure all information is available to the SMCRA regulatory authority to make an evaluation, permitting decision, and permit findings and associated documents. In addition, the requirement to have sufficient information to make permitting decisions and develop supporting documentation is not a new requirement.

Final Paragraph (i): Corroboration of Baseline Data

We received many comments on the requirement in proposed paragraph (j), now final paragraph (i), to corroborate a sample of the baseline information. Many commenters indicated mandatory sample corroboration was not a feasible mechanism to achieve the desired result

[386] 33 U.S.C. 1362.

because of the timing and expense; others asked what constituted a ''sample.'' The intent of sample corroboration is to ensure the quality of the data collected and that the data accurately characterizes the baseline conditions. We recognize that co-collection of samples or other similar means of corroboration is not the only method to corroborate samples, and we have added the phrase ''visual observation of sample collection'' as an allowable means to corroborate a sample.

Some commenters inquired as to whether corroboration meant one sample or numerous samples. One commenter noted that, under the proposed provision, one sample is sufficient to meet the corroboration requirements but that such corroboration would have no validity because it has a statistical strength of zero. We understand the need for statistical certainty in some situations, but the goal of the corroboration is to evaluate gross water quality features not to achieve statistical certainty. Final paragraph (i), however, leaves the regulatory authority with the discretion to determine the number and means of sample corroboration, even if it is just one sample. The regulatory authority is in the best position to determine the number of corroboration samples due to their familiarity with the area, water quality, and labs used to general data.

Similarly, another commenter raised the possibility of safety concerns if corroboration were to occur during winter months when sites may not be readily or safely accessible. We did not revise paragraph (i) in response to this concern because we are not prescribing when the corroboration occurs; thus, the regulatory authority has the flexibility to approve corroboration at times when sites can be safely accessible.

A commenter, who supported the corroboration requirement, suggested that we revise the language to specify that the corroboration occur on a random sampling of sites with a large enough sample size to statistically represent the data reported to the state regulatory authority. For the same reasons discussed in the previous paragraphs, we decline to be more specific and prescriptive. The regulatory authority is in in the best position to determine corroboration protocol and validity for each proposed operation.

One commenter suggested we consider adopting standard quality assurance and quality control sampling procedures, such as those required by the U.S. Environmental Protection Agency, that require the collection of duplicates at ten percent of stations, analyzing field blanks, and duplicate identification of benthic samples. Similarly, several regulatory authorities commented that they already have sufficient corroboration requirements in their state regulations and the requirement should be stricken from the rule. We applaud these regulatory authorities for their efforts to ensure an adequate and accurate baseline characterization, but we decline to remove this requirement and we also decline to adopt standard quality assurance and quality control sampling procedures. Not all states are as proactive as these states cited by the commenters, and corroboration is an important responsibility that should be applicable to all states. As noted above, however, we have left the provision in general terms so that each state can tailor the corroboration protocol to its unique needs.

Many commenters opined that requiring the regulatory authority to corroborate a sample was a major change from the previous applicant self-monitoring requirement and will considerably increase staff time and cost to implement. Other commenters suggested that the regulatory agency be required to conduct this assessment and should not contract with third party entities at the applicant's expense to complete the task in lieu of the regulatory authority. The final rule, as modified, emphasizes the need for accurate baseline information to be collected by the applicant. Final paragraph (i) simply establishes a quality assurance and control step in the application review process, subject to regulatory authority approval, that should not incur extraneous expense to either the regulatory authority or the applicant because of the minimal number of samples required.

Section 780.20: How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?

As discussed in the preamble to the proposed rule, we proposed to modify § 780.20.[387] After evaluating the comments we received, we are adopting the section as proposed, with the exceptions discussed below.

In general, this section relates to the preparation of the probable hydrologic consequences determination. One commenter requested that we provide a definition of a ''probable hydrologic consequences determination'' and provide a method for predicting the probable hydrologic consequences. Specifically, the commenter requested a defined level of probability; otherwise, the commenter opined that the concept of probable hydrologic consequences is ambiguous and the applicant has discretion to determine what probable hydrologic consequences determination means. We disagree. Section 507(b)(11) of SMCRA [388] and other guidance provided in §§ 780.20(a) and 784.20(a) sufficiently detail what must be considered by the applicant when determining the probable hydrologic consequences and the purpose and goal in making these determinations. In addition, we have published several technical reference documents concerning the development of probable hydrologic consequences determinations and cumulative hydrologic impact assessments. These documents can be accessed via our Web site at *http://www.osmre.gov/.* As a result, we do not need to set a level of probability or to otherwise define ''probable hydrologic consequences determination.''

Throughout this section we are substituting the term ''biology'' for ''biological condition'' for the same reasons we articulate in connection with final paragraphs (c)(6)(vi) through (viii) of § 780.19. In brief, we use the term ''biology'' to encompass the type of information needed to establish both the biological condition of perennial and intermittent streams, for which established protocols exist, and the biology of intermittent streams, for which established protocols are not currently in place. This recognizes that not all states have scientifically defensible protocols for assessing the biological condition of intermittent streams. For the same reasons, we have removed the requirement to evaluate, for the probable hydrologic consequences determination, the biological condition of ephemeral streams within the proposed permit and adjacent areas. For additional information on why we have made these type of changes, please refer to the preamble discussion in final paragraphs (c)(6)(vi) through (viii) of § 780.19, above.

Final Paragraph (a): Content of PHC Determination

Final paragraph (a), similar to proposed paragraph (a), revises the requirements concerning preparation of the determination of the probable hydrologic consequences of mining in previous §§ 780.21(f)(1) through (f)(3) by adding a requirement to consider the impacts of the proposed operation on

[387] 80 FR 44436, 44500–44501 (Jul. 27, 2015).

[388] 30 U.S.C. 1257(b)(11).

the biological condition of perennial and intermittent streams located within the proposed permit and adjacent areas, rather than only on the quantity and quality of surface water and groundwater as in the previous rule.

One commenter made a general statement that numerical standards and biological assessments should be included to improve probable hydrologic consequences determinations and cumulative hydrologic impact assessments. For information concerning the use of numerical standards in the final rule, please refer to the preamble discussion in § 773.15 above. For biological assessments, refer to § 780.19(c)(6)(ii) through (viii).

In response to proposed §§ 780.20(a) and 784.20(a), one commenter suggested that we should not extend the same protections to ephemeral streams as we do to intermittent and perennial streams. We did not propose to extend the same protections to ephemeral streams that we did for intermittent and perennial streams. In response to scientific literature supporting the benefits of these headwaters to essential biological and ecological functions, the final rule provides greater protections to ephemeral streams than do the existing regulations as described in Part VII of the preamble to the proposed rule.[389] These enhanced protective measures are consistent with the purpose of SMCRA at section 102(f) which requires us to ''strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.'' [390] While the protections we are now promulgating for ephemeral streams will be greater than under the previous rules, they will not be the same as those extended to intermittent and perennial streams. In particular, because of the difficulty in sampling the biological condition of ephemeral streams, we have removed ephemeral streams from the requirement under this paragraph to evaluate biological condition.

One commenter recommended we split paragraph (a) into two subparagraphs—one related to biological consequences and one related to hydrologic consequences. The commenter also requested that any discussion of biological consequences not be contained within the cumulative impact assessment. We are not adopting this suggestion because water quality and quantity are linked to biological condition and ecological function, and, in order for the regulatory authority to have a full description of the probable hydrologic consequences, we have determined that biological, hydrological, geologic, and ecological information should be addressed within the same assessment.

Several commenters opined that proposed paragraph (a), requiring the probable hydrologic consequences determination to include surface water quality impacts from point source discharges, effectively replaces the reasonable potential analysis under the Clean Water Act and is in violation of section 702 of SMCRA.[391] Furthermore, the commenter suggested the documentation of water quantity is problematic due to issues with stream flow modeling. We disagree. The probable hydrologic consequences determination has always required that the applicant address the anticipated effects of the planned mining operation and subsequent reclamation on the quality and quantity of surface water and groundwater water resources in the proposed permit and adjacent areas including those waterways that would receive drainage from the site; therefore, with regards to this requirement, paragraph (a) does not require additional analysis from what was previously required. We also disagree that this requirement in any way supersedes the Clean Water Act. Part IV.I. of this preamble further discusses the relationship between SMCRA and Clean Water Act.

One commenter objected to the requirement in paragraph (a) for the probable hydrologic consequences determination to include specific findings on the criteria listed in paragraphs (a)(1) through (a)(5) and further stated that SMCRA holds the regulatory authority responsible for making such findings relative to the cumulative impact. We disagree. Section 507(b)(11) of SMCRA [392] requires that the permit application contain, in a manner satisfactory to the regulatory authority, ''a determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability . . .'' Section 510 (b)(3) of SMCRA [393] states that neither a permit nor a revision to an existing application can be approved unless, among other things, ''the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in section 507(b) has been made by the regulatory authority and the proposed operation thereof has been designed to prevent material damage to hydrologic balance outside permit area . . .''

One commenter was concerned about proposed paragraph (a)(5)(vi) which requires that the probable hydrologic consequences determination contain a finding about the impact that any diversion of surface or subsurface flows to underground mine workings or any changes in watershed size as a result of the postmining surface configuration would have on the availability of surface water and groundwater. Commenters claimed the requirement was open ended, that evaluations of impacts starting at first order streams would be incredibly cumbersome and time consuming, and that such diversions should be addressed on a regional basis in order to properly assess impacts and costs. We disagree. Consideration of this type of data is necessary to produce a comprehensive probable hydrologic consequences determination for the proposed mining operation, as well as a thorough and inclusive cumulative hydrologic impact assessment. For example, diversions of surface or subsurface flows to underground mine workings will increase the existing volume of water which could exceed the holding capacity of the mine voids and result in an unanticipated blowout or discharge of the water to the ground surface. Diversions could also impact users of surface water or groundwater by diminishing or eliminating the availability of the water resources. We agree that it may be prudent in some instances to evaluate diversions of flows to underground mine workings on a regional basis and that should be considered by the regulatory authority while preparing the cumulative hydrologic impact assessment. However, it is the responsibility of the applicant to ensure that all activities of the proposed operation have been considered and evaluated relative to potential impacts. In addition, changes in watershed size as a result of the postmining surface configuration can

[389] 80 FR 44436, 44451 (Jul. 27, 2015).

[390] 30 U.S.C. 1202(f).

[391] 30 U.S.C. 1292.

[392] 30 U.S.C. 1257(b).

[393] 30 U.S.C. 1260(b)(3).

also affect the volume and availability of water resources resulting in either too much, or not enough, available water as compared to premining conditions; therefore, it is necessary that all activities for a proposed mining operation be considered for their potential effect on the quality and quantity of surface and groundwater, including the biology of the waterways, for the proposed permit and adjacent area.

In final paragraphs (a) and (a)(5)(vii), we have exempted operations that avoid streams from the requirement to assess the impact the proposed operation will have on biology of perennial and intermittent stream. We are doing this for the same reasons we articulate above in the preamble discussion of final rule § 780.19(g), which allows the regulatory authority to waive the biological information requirements of final rule § 780.19(c)(6)(vi) through (viii), if the applicant demonstrates and the regulatory authority finds in writing that the operation will not mine through or bury a perennial or intermittent stream, create a point source discharge to any perennial, intermittent, or ephemeral stream, or modify the base flow of any perennial or intermittent stream. For additional information on why we made these types of changes, please refer to the preamble discussion above. One commenter questioned whether, during preparation of the probable hydrologic consequences determination, an operator would always be able to obtain from the regulatory authority the criteria needed to determine whether the operation may cause material damage to the hydrologic balance outside the permit area as required in paragraph (a)(1). We anticipate that the applicant will collaborate and coordinate with the regulatory authority as necessary to ensure that the criteria for assessing the material damage to the hydrologic balance outside the permit area are established in time to be available for the probable hydrologic consequences determination. We also anticipate that the regulatory authority will coordinate with Clean Water Act agencies in preparing these criteria.

We have revised final paragraph (a)(2) to clarify that the applicant must evaluate the potential for toxic mine drainage not only during active mining and reclamation operations but also after these activities have been completed. This provision now specifies that when making a finding on whether acid-forming or toxic-forming materials are present that could result in contamination of surface water or groundwater, the applicant must consider discharges of toxic mine drainage that could occur after the completion of land reclamation in the evaluation.

Proposed paragraph (a)(5) required that the applicant determine what impact the proposed operation will have on specific water quality parameters, including parameters for which baseline information is required under § 780.19(a)(2). We required in proposed paragraph (a)(5)(ii) the addition of any other water quality parameters in the evaluation that were identified to be of local importance.

One commenter disagreed with this addition because it required the regulatory authority to identify the water quality parameters of local importance rather than the Clean Water Act authorities, which the commenter alleged violates section 702 of SMCRA.[394] As discussed in Part IV, section I of this preamble, we disagree that this requirement in any way supersedes the Clean Water Act. Of course, the SMCRA regulatory authority should consult with the Clean Water Act regulatory authority as needed to identify water quality parameters of local importance.

We also revised paragraph (a)(5)(ii) in the final rule to clarify that the proposed reference to ''water quality'' refers to both groundwater and surface water quality. We further revised this paragraph to reference the parameters listed § 780.19(a)(2) as those which must be addressed in the findings on the impacts of the proposed operation on groundwater and surface water. Consequently, we have deleted as redundant proposed paragraphs (5)(ii)(A) through (K) which listed those parameters.

Another commenter requested that we revise proposed paragraph (a)(5)(ii)(L), now paragraph (a)(5)(ii) in the final rule, to state that the regulatory authority would identity parameters of local importance. We agree and have made appropriate revisions to that paragraph. The regulatory authority is in the best position to identify those local parameters of concern, if applicable, and include them in the required baseline monitoring data. Therefore, we have revised §§ 780.19 and 780.23 in the final rule to specify that the regulatory authority will be the one that determines parameters to be of local importance. We anticipate that, during the development of the permit application package, the applicant will take part in this process by consulting with the regulatory authority about which, if any, additional parameters should be added to the baseline monitoring plans.

One commenter indicated that peak-flow data, as required in proposed paragraph (a)(5)(iv), may be insufficient to accurately predict trends in ephemeral streams due to the episodic nature of the flows. We agree with the commenter and have now exempted ephemeral streams from the requirement in §§ 780.19(c)(3) and 780.20(a)(5)(iv) in the final rule. Peak-flow magnitude and frequency data will be required for perennial and intermittent streams within the proposed permit and adjacent areas.

Many commenters on proposed § 780.20(a)(5)(vii) reiterated various points made in connection with proposed § 780.19(e), now § 780.19(c)(6)(ii) through (viii), such as: Support for the assessment of the effects the proposed operation will have on the biological condition of streams; requests that the regulations be revised to clarify that a qualitative evaluation of streams is sufficient in certain cases to establish findings on the biological condition of streams; and that it is not necessary to complete a new and comprehensive assessment of streams for every mine site. Our responses to these comments are set out in the preamble to final § 780.19(c)(6)(ii) through (viii) and are not repeated here.

In § 780.20(a)(5)(vii), we proposed to require an evaluation of the biological condition of the operation in streams both within the permit area and in ''adjacent areas.'' Several commenters expressed concern that the baseline data collection and permitting process may be difficult because the extent of the ''adjacent area'' may not be easy to determine and may change as data are collected and analyzed. We encourage applicants to coordinate with the regulatory authority in determining the size of the adjacent area, *i.e.,* the area from which baseline data must be collected. However, should the regulatory authority determine that supplemental information, including additional information on the adjacent area, is needed to fully evaluate the probable hydrologic consequences of the proposed operation you must then submit supplemental information, as explained in paragraph (b), below.

Final Paragraph (b): Supplemental Information

As proposed, paragraph (b) was substantively identical to previous § 780.21(b)(3), with the exception that we proposed to expand the conditions under which the regulatory authority must request additional supplemental information related to the probable

[394] 30 U.S.C. 1292.

hydrologic consequences determination. We received numerous comments stating that the requirement to submit supplemental information is redundant with similar data requirements in § 780.19, and is onerous and burdensome. Commenters also stated that the supplemental information should not be mandatory under these circumstances, given the more comprehensive nature of baseline permit application information requirements concerning hydrology and geology that will be required under the rule and given that the regulatory authority has the implied authority to request additional information if and when necessary. We agree with these comments and have removed paragraph (b) from the final rule.

Final Paragraph (c): Subsequent Reviews of PHC Determinations

We are adopting paragraph (c)(1), now final paragraph (b)(1), as proposed, which is substantively identical to previous § 780.21(f)(4), which requires that the regulatory authority determine whether a new or updated probable hydrologic consequences determination is needed as part of the process of evaluating permit revision applications. We proposed paragraph (c)(2) to clarify that the applicant must prepare a new or updated probable hydrologic consequences determination whenever a regulatory authority review finds that one is needed. Several commenters objected to the addition of proposed paragraph (c)(2). These commenters noted that a new or updated probable hydrologic consequences determination would result in increased cost and staff time to the applicant. We disagree. The requirement in proposed paragraph (c)(1), now final paragraph (b)(1), for the regulatory authority to make a determination on whether a new or updated probable hydrologic consequences determination is necessary for a permit revision is substantively the same as that in previous § 780.21(f)(4); it has always been anticipated that the applicant would submit a revised or new determination should the regulatory authority deem one necessary. Thus, as this is an existing requirement, there will not be any additional cost or staff time beyond satisfying the requirement of the previous § 780.21(f)(4). This requirement, moreover, is consistent with section 510(b)(3) of SMCRA [395] which requires that ''the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in section 507(b) has been made by the regulatory authority and the proposed operation thereof has been designed to prevent material damage to hydrologic balance outside permit area'' prior to approval.[396] Likewise, for permit revision applications, section 510(b)(3) of SMCRA requires, ''the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in section 507(b) has been made by the regulatory authority and the proposed operation thereof has been designed to prevent material damage to hydrologic balance outside permit area'' prior to approval.[397]

One commenter expressed concern that unless the regulations set forth specific criteria to determine when an updated or new probable hydrologic consequences determination is needed, an applicant could be subjected to denials or endless cycles of probable hydrologic consequences determination studies depending on the bias and preferences of the regulatory authority. Thus, this commenter and others requested that we revise this paragraph to provide objective criteria to clarify this provision and ensure consistency. We disagree with the commenter's assertion that objective criteria for defining when an updated or new probable hydrologic consequences determination must be made should be included in this section of the final rule. Section 510(b)(3) of SMCRA [398] is not explicit regarding that criteria that will result in the need for a new or updated probable hydrologic consequences determination, as these criteria may vary among state regulatory programs. Regulatory authorities should have discretion in establishing the criteria that will trigger the need for an updated probable hydrologic consequences determination based on the changes that are proposed in the permit revision application and based upon local, regional, and operational conditions. Further, we do not agree with the commenter's concern about regulatory abuse. Section 510(b)(3) of SMCRA [399] clearly contemplates the regulatory authority making the assessment of the probable cumulative impact of all anticipated mining in the area. In the event the regulatory authority denies the permit, the permittee may exercise its rights pursuant to section 514 of SMCRA.[400]

Section 780.21: What requirements apply to preparation, use, and review of the cumulative hydrologic impact assessment (CHIA)?

Our previous regulations contained very few standards or criteria for preparation of the cumulative hydrologic impact assessment. As we stated in the preamble to the proposed rule, the lack of standards or content requirements for the cumulative hydrologic impact assessment, coupled with the lack of a definition of ''material damage to the hydrologic balance outside the permit area,'' created an impediment to stream protection under SMCRA because there are no objective criteria to apply. Therefore, as discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 780.21 to include content requirements for the cumulative hydrologic impact assessment, procedural requirements, and criteria for determining material damage to the hydrologic balance outside the permit area.[401] We received numerous comments on our proposed revisions. After evaluating the comments, we are adopting § 780.21 as proposed, with the revisions discussed below.

Final Paragraph (a): General Requirements

Proposed paragraph (a)(2) provided that the regulatory authority would consider relevant information on file for other mining operations located within the cumulative impact area or in similar watersheds during preparation of the cumulative hydrologic impact assessment. One state regulatory authority suggested we change ''will consider'' to ''may consider.'' We reject this comment because the intent of the cumulative hydrologic impact assessment is specifically to assess the cumulative impacts of all coal mining and reclamation operations in the defined cumulative impact area. To properly assess these impacts, the regulatory authority must consider other mining operations in the defined cumulative area. Thus, we have changed ''will consider'' to ''must consider'' in order to indicate the necessity of the requirement to consider other mining operations and to clarify that this aspect of the cumulative hydrologic impact assessment cannot be overlooked during the assessment. Further, this modification reflects the plain language principles discussed in Part II of this preamble because ''will consider'' expresses that the activity may be completed in the future. Because the

[395] 30 U.S.C. 1257(b)(11) and 1260(b)(3).

[396] 30 U.S.C. 1260(b)(3).

[397] 30 U.S.C. 1260(b)(3).

[398] *Id.*

[399] *Id.*

[400] 30 U.S.C. 1264.

[401] 80 FR 44436, 44501–44503 (Jul. 27, 2015).

information about existing mining operations is available, its consideration should occur prior to completion of the cumulative hydrologic impact assessment and not at some point in the future.

Another commenter opined that the analysis conducted in the cumulative hydrologic impact assessment should be performed by mine operators instead of the SMCRA regulatory authority. This commenter asserted that regulatory authorities have historically been negligent in conducting thorough cumulative hydrologic impact assessments because of limited resources and that material damage findings historically often have included little supporting analysis or information. This commenter also asserted that the previous regulations do not require collection of sufficient data to prepare an adequate cumulative hydrologic impact assessment and that mine operators have information more readily available than do the regulatory authorities and this information should be utilized. Section 507(b)(11) of SMCRA [402] specifically requires an assessment to be performed by the regulatory authority of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area. Further, section 510(b)(3) of SMCRA [403] specifies that no permit application or revision may be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing that the assessment of the probable cumulative impact of all anticipated mining in the area has been made and the operation has been designed to prevent material damage to the hydrologic balance outside the permit area. This assessment cannot be delegated to mine operators as the commenter proposes and therefore, we have not changed the final rule in response to this comment.

One commenter recommended that we use consistent terminology between the preamble to the proposed rule, which stated that we intended to ensure that the regulatory authority considers all available information and the proposed rule, which states that the regulatory authority ''must consider'' relevant information on file. We are not modifying the final rule in response to this comment. Although the regulatory authority should consider any information available to it for the assessment, paragraph (a)(2) sets a minimum standard for the regulatory authority to consider relevant coal mining information on file. We recognize that some information associated with other adjacent and underlying industries, such as oil and gas, may be proprietary or difficult to obtain. For this reason, the regulatory authority should consider all available information, but it must consider coal mining information that it has on file.

One regulatory authority commenter indicated that the proposed rule did not include a provision for proposed mine sites that may be hydrologically isolated. When preparing the cumulative hydrologic impact assessment only ''relevant'' information must be considered. In this context, hydrologically isolated, proposed mine sites do not have ''relevant'' information associated with the permit application. Therefore, we are not modifying the final rule in response to this comment.

Paragraph (a)(3) of the final rule clarifies that information required for preparation of the cumulative hydrologic impact assessment must be received and reviewed prior to approval of the permit application. The proposed rule only required receipt of the information prior to permit application approval. We made this change to ensure that the regulatory authority both received and used all the information necessary to properly develop the cumulative hydrologic impact assessment.

Final Paragraph (b): Contents

Proposed paragraph (b) established detailed requirements for the content of the cumulative hydrologic impact assessment to ensure that the assessment is sufficiently comprehensive to support the required finding that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Several commenters supported the content requirements identified in proposed paragraph (b), but other commenters opposed elements of those requirements.

One commenter questioned the requirement of paragraph (b)(1)(iv) that the designated uses of surface water under section 303(c) of the Clean Water Act [404] be displayed on a map. The commenter reasoned that the designated uses that must be specified to meet this requirement should include the designated uses prescribed by the state in which the operation may occur because many states adopt their own designated uses that may differ from federal designations. We agree with the commenter that states may change a designated use. However, the U.S. Environmental Protection Agency is required to review those changes to ensure that revisions in designated uses are consistent with the Clean Water Act and that new or revised criteria protect the designated uses to ensure compliance with the requirements of section 303(c) of the Clean Water Act and federal water quality standards. Therefore, we are still requiring that the current approved designated uses under 303(c) of the Clean Water Act [405] be displayed on a map for the purpose of the cumulative hydrologic impact assessment. However, at the suggestion of a federal agency we removed reference to section 101(a) of the Clean Water Act,[406] which is a statement of the general goals and policies of the Clean Water Act. Limiting reference to section 303(c) of the Clean Water Act is more precise.

As discussed earlier in this preamble, final § 780.19 requires the collection of certain baseline hydrologic information. Final paragraph (b)(3) of § 780.21 requires that the cumulative hydrologic impact assessment contain a description of the baseline hydrologic information for the proposed permit and adjacent areas that are collected under § 780.19. In response to comments about the level of detail required, final paragraph (b)(3) clarifies that the description must be both qualitative and quantitative. Both quantitative and qualitative information on water quality and quantity is needed to describe baseline hydrologic conditions adequately because qualitative descriptions often provide needed context for quantitative information.

Proposed paragraph (b)(3)(ii) would have required information about existing usage of surface water and groundwater, as well as information defining the quality of water required for each existing and reasonably foreseeable use of groundwater and surface water and each designated use of surface water under section 303(c) of the Clean Water Act.[407] Two commenters indicated that the cumulative hydrologic impact assessment findings on reasonably foreseeable designated uses are not clearly defined and may result in variable interpretations when forecasting potential reasonably foreseeable uses. One commenter requested that we make a distinction between protecting designated uses and existing uses. Another commenter strongly recommended that the final rule clarify that the corrective action for

[402] 30 U.S.C. 1257(b)(11).

[403] 30 U.S.C. 1260(b)(3).

[404] 33 U.S.C. 1251(a) or 33 U.S.C. 1313(c).

[405] *Id.*

[406] 33 U.S.C. 1251(a).

[407] *Id.*

designated uses should be tied to the postmining land use and be determined by the state Clean Water Act authority, instead of some other arbitrarily assigned higher use that was not achievable prior to mining. In response to all of these comments, final paragraph (b)(3)(ii) includes a requirement for information on the quantity, as well as the quality, of water needed to support, maintain, or attain water uses. In addition, final paragraph (b)(3)(ii) requires a list of water uses for which the information required in paragraph (b)(3) must be assessed. Specifically, for surface water, final paragraph (b)(3)(ii)(A) requires assessment of the designated uses or, if no designated use exists, each premining use. Final paragraph (b)(3)(ii)(B) requires assessment of premining uses of groundwater. Unlike the proposed rule, the final rule does not require an assessment of reasonably foreseeable uses of either surface water or groundwater. We did not adopt the proposed requirement for assessment of reasonably foreseeable uses because of the subjective nature of that determination.

Proposed paragraph (b)(3)(iii) would have required the inclusion of a description and map of the local and regional groundwater systems as part of the cumulative hydrologic impact assessment. One regulatory authority sought flexibility regarding the presentation and description of the local and regional aquifer system. In response to this comment, we slightly modified the requirement to allow a description or map rather than requiring submission of both a description and a map in all cases. This change provides the regulatory authority with flexibility to accept maps, descriptions, or both in order to best explain aquifer characteristics, such as hydraulic gradient.

Proposed paragraph (b)(3)(iv) required baseline information on the biological condition of all perennial, intermittent, and ephemeral streams. In response to comments, we modified final paragraph (b)(3)(iv) to be consistent with the monitoring requirements at final § 780.19(c)(6)(vi) through (viii) of this part, which no longer require monitoring of the biological condition of ephemeral streams.

One commenter questioned proposed paragraph (b)(5), which required that a quantitative assessment be conducted on how all anticipated surface and underground mining may impact the quality of surface water and groundwater in the cumulative impact area. According to the commenter, this requirement is too vague. The commenter was concerned with how these impacts would be expressed in terms of each baseline parameter identified under § 780.19. The commenter requested guidance on evaluating impacts within the cumulative impact area on a parameter-by-parameter basis. We direct the commenter to the definition of ''cumulative impact area'' in § 701.5, which establishes the scope and intent of the evaluations within the cumulative impact area. We decline to delve into an explanation of methods used to predict water quality on a parameter-by-parameter basis because it is beyond the scope of this document. In general, to arrive at mining-induced changes by parameter, most common methods entail some form of statistical method, with regression analysis of parameter concentration through time being the most common. Additionally, guidance documents are available through our National Library at *www.osmre.gov/resources/Library.shtm*. These documents provide guidance on preparation of the determination of the probable hydrologic consequences of the operation that the applicant must prepare and the cumulative hydrologic impact assessment that the regulatory authority must prepare. We are also available for technical assistance in developing the methods necessary to support cumulative hydrologic impact assessment findings. In summary, both the regulatory authority and the applicant need to understand and forecast the impact of the mining and reclamation plan on the baseline parameters in final § 780.19 and assess the sum total of these impacts on the hydrologic balance within the cumulative impact area, as defined at § 701.5 and as required in paragraphs (b)(3) through (b)(5) of § 780.21.

Proposed paragraph (b)(6) required that the cumulative hydrologic impact assessment include criteria defining material damage to the hydrologic balance outside the permit area on a site-specific basis. Proposed paragraph (b)(6)(i) required that these criteria be established on a numerical basis for each parameter of concern. Numerous commenters argued that there is no authority under SMCRA to establish numerical criteria for material damage to the hydrologic balance outside the permit area. Commenters also claimed that establishment of enforceable water quality criteria under SMCRA that differ from water quality standards promulgated under the Clean Water Act would violate section 702(a) of SMCRA. Section 702(a) provides, in relevant part, that ''[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act ''or any rule or regulation promulgated thereunder.'' Part IV.I. of this preamble discusses the interrelationship between the Clean Water Act and SMCRA. Other commenters provided suggestions to refine the language of this provision. For instance, one commenter suggested replacing the phrase ''numerical terms'' with ''be expressed in applicable state or federal water quality standards (or criteria)'' to allow the use of both numerical and narrative standards. Another commenter supported the use of narrative standards, when applicable, compared to numerical standards. One state regulatory authority requested that the rule require the use of numerical and narrative standards that have defensible numeric threshold criteria.

After evaluating these and other similar comments, we decided not to adopt the proposed requirement that numerical criteria be established for each parameter of concern. Instead, final paragraph (b)(6) requires that the cumulative hydrologic impact assessment and the permit include site-specific numeric or narrative thresholds for material damage to the hydrologic balance outside the permit area. The regulatory authority has the discretion to determine which parameters require material damage thresholds. Material damage thresholds define the point at which the operation has failed to prevent material damage to the hydrologic balance outside the permit area.

Final paragraph (b)(6)(i) provides that, when identifying material damage thresholds in connection with a particular permit, the regulatory authority will, in consultation with the Clean Water Act authority, as appropriate, undertake a comprehensive evaluation that considers the following factors—

(1) The baseline data collected under § 780.19;

(2) The PHC determination prepared under § 780.20;

(3) Applicable water quality standards under section 303(c) of the Clean Water Act;

(4) Applicable state or tribal water quality standards for surface water and groundwater;

(5) Ambient water quality criteria developed under section 304(a) of the Clean Water Act; [408]

(6) Biological requirements of any species listed as threatened or endangered under the Endangered Species Act of 1973, or their designated

[408] 33 U.S.C. 1314(a).

critical habitat, habitat occupied by those species, and areas in which those species are present for only a short time but that are important to their persistence; and

(7) Other pertinent information and considerations to identify the parameters for which thresholds are necessary.

The factors listed above and in final paragraphs (b)(6)(i)(A) through (G) do not constitute material damage thresholds in and of themselves; they are only factors to be considered in determining which parameters require material damage thresholds and what those thresholds should be.

Final paragraph (b)(6)(ii) modifies final paragraph (b)(6)(i) slightly in that it provides that the regulatory authority, in consultation with the Clean Water Act authority, must adopt numeric material damage thresholds as appropriate, taking into consideration relevant contaminants for which there are water quality criteria under the Clean Water Act, 33 U.S.C. 1251 *et seq.* Final paragraph (b)(6)(ii) further provides that the regulatory authority may not adopt a narrative threshold for parameters for which numeric water quality criteria exist under the Clean Water Act. These provisions reflect concerns that were raised during the rule review process. They are intended to promote coordination and consistency with Clean Water Act regulatory programs.

One environmental organization recommended that we codify the following language from the preamble of the proposed rule: ''SMCRA material damage criteria must be no less stringent than Clean Water Act water quality standards and criteria in all cases, but, in some situations, they may need to be more stringent to protect unique uses or to comply with the Endangered Species Act.'' We did not adopt this recommendation because there may be situations in which the quoted preamble language does not apply.

An industry commenter expressed concern that we did not provide sufficient information or clear specifications for the ''numerical terms for each parameter of concern. Final paragraph (b)(6) no longer includes the quoted phrase from the proposed rule. Instead, the final rule grants the regulatory authority discretion to determine which parameters require material damage thresholds and whether those thresholds should be narrative or numeric, except as provided in final paragraph (b)(6)(ii).

Proposed paragraph (b)(6)(ii) provided that, in establishing material damage criteria, which we now refer to as material damage thresholds, the regulatory authority must take into consideration the biological requirements of any species listed as threatened or endangered under the Endangered Species Act when those species or designated critical habitat are present within the cumulative impact area. The U.S. Fish and Wildlife Service requested that we revise this provision to also apply to both the habitat occupied by those species and any areas in which those species are present only for a short time but that are important to their persistence, such as migration and dispersal corridors. Final paragraph (b)(6)(i)(F) includes the recommended language as an evaluation criterion for material damage thresholds.

In the proposed rule,[409] we invited comment on whether the final rule should require that the regulatory authority establish corrective action thresholds, which would be lower than material damage thresholds to identify the point at which the permittee must take action to minimize adverse trends that may continue and ultimately cause material damage to the hydrologic balance outside the permit area. We received comments both supporting and opposing the development of these corrective action thresholds. Several commenters supported the establishment of corrective action thresholds because it would provide a more objective way to assess the existence or nonexistence of material damage to the hydrologic balance outside the permit area. One commenter opposed the concept of corrective action thresholds because, according to the commenter, establishment of those thresholds would conflict with section 702 of the Act. Part IV.I., above, discusses this issue. Another commenter opposed corrective action thresholds as being duplicative of the requirement to monitor surface water and groundwater during mining, which should be sufficient to identify trends that could lead to potential problems. In addition, the commenter noted that the regulatory authority would also be aware of trends through review of the quarterly water monitoring reports required for all operations and the annual reports required by some state programs.

After evaluating these comments and the changes that we made to paragraph (b)(6), we are adding new paragraph (b)(7) to the final rule. This paragraph requires the establishment of evaluation thresholds. We included the requirement for evaluation thresholds within the final rule because we agree with commenters that thresholds would provide a more objective method to assess the potential development of material damage outside the permit area. In addition, evaluation thresholds provide an opportunity to develop and implement corrective measures before adverse impacts rise to the level of material damage to the hydrologic balance outside the permit area. We revised the terminology from ''corrective action thresholds'' to ''evaluation thresholds'' because the action of reaching a threshold would result in reassessment of the probable hydrologic consequences determination and cumulative hydrologic impact assessment. Corrective action may not be necessary if additional evaluation shows that the impact will not rise to the level of material damage to the hydrologic balance outside the permit area. However, if adverse trends exist, it is incumbent upon the SMCRA regulatory authority to evaluate the causes of the adverse trends and take action to ensure that the trends do not result in material damage to the hydrologic balance outside the permit area.

Final paragraph (b)(7) requires that evaluation thresholds be expressed as numeric values because the thresholds must be measurable in order to function as an early warning system that provides ample opportunity for the permittee and the regulatory authority to conduct the necessary evaluation and undertake any necessary measures to prevent material damage to the hydrologic balance outside the permit area. This requirement is intended to identify and address potential water quality and quantity issues before any standards have been violated. This early intervention strategy is necessary because, once a water quality issue exists, it is often very costly or impossible to correct. Evaluation thresholds institutionalize early detection techniques, which can prevent the need for long-term treatment and other costly environmental harms through the prevention of material damage to the hydrologic balance outside the permit area.

Under final § 773.15(e), a SMCRA regulatory authority may not approve a SMCRA permit application if the cumulative hydrologic impact assessment indicates material damage to the hydrologic balance is likely to occur outside the permit area. Material damage to the hydrologic balance outside the permit area that occurs after permit issuance constitutes a violation of final § 816.34(a)(2). In that situation,

[409] 80 FR 44436, 44502 (Jul. 27, 2015).

the state regulatory authority must take enforcement action.

Evaluation thresholds are not enforceable as performance standards. They also do not amend, supersede, modify or otherwise conflict with applicable Clean Water Act requirements, including any National Pollutant Discharge Elimination System effluent limitations or applicable state or federal water quality standards. Instead, evaluation thresholds trigger an obligation for the regulatory authority, in consultation with the Clean Water Act agency, as appropriate, to evaluate the circumstances causing adverse trends and exceedance of the threshold. The purpose of the evaluation and coordination is to better ensure that material damage to the hydrologic balance outside the permit area does not occur as a result of mining activity. If monitoring results at the locations designated under final paragraph (b)(6)(iv) document an exceedance of an evaluation threshold, the regulatory authority must determine the cause of the exceedance in consultation with the Clean Water Act authority, as appropriate. The regulatory authority must also determine the likelihood that the evaluation threshold exceedance will develop into material damage to the hydrologic balance outside the permit area.

The regulatory authority must issue an order to revise the permit if the regulatory authority determines that the adverse trend is the result, in whole or in part, of the mining operation. For a more complete discussion of the relationship between material damage thresholds, evaluation thresholds, and water monitoring requirements please see the discussion of general comments in Part IV. M. of this preamble.

We received numerous comments on proposed paragraph (b)(8), now final paragraph (b)(9). In response to these comments and to maintain consistency with other aspects of the final rule, we revised proposed paragraph (b)(8)(i), now final paragraph (b)(9)(i), to ensure that the proposed operation will not result in violation of applicable Clean Water Act water quality standards or disrupt or preclude attainment of certain uses as identified in final paragraphs (b)(9)(i)(A), (B) and (C). For consistency with the revised definition of ''material damage to the hydrologic balance outside the permit area'' in § 701.5, we deleted ''reasonably foreseeable uses'' from this paragraph. The final rule still protects designated and premining uses. It more closely mirrors the requirements of SMCRA, while explicitly acknowledging that isolated water quality exceedances or short-term local or temporal stream impacts may occur and may not rise to the level of material damage to the hydrologic balance outside the permit area.

Two regulatory authority commenters suggested we replace the term ''exceedance'' with ''long term exceedance'' at proposed paragraph (b)(8)(i)(B), now paragraph (b)(9)(i). In consideration of the implications associated with words that may qualify exceedance such as ''long-term'' or ''minor,'' and concerns on how the term would be interpreted, we removed the reference to exceedance at previous paragraph (b)(8)(i)(B), now final paragraph (b)(9)(i).

An industry commenter suggested that we revise proposed (b)(8)(i)(B) to account for drought conditions, changes in human activity, and other environmental and human use changes that are unrelated to mining that could affect a watershed or streamflow regime. In response, we added language to final paragraphs (b)(9)(i) through (iv) that the proposed operation—

(1) Will not violate applicable Clean Water Act water quality standards;

(2) Preclude attainment of premining use when no water quality standards exist, or preclude attainment of premining uses for groundwater;

(3) Not result in changes in size or frequency peak flows in areas outside the permit boundary;

(4) Perennial and intermittent streams will have sufficient base flow at all times to maintain their premining flow regime; and

(5) Be designed to protect quality and quantity of aquifer units to ensure the prevailing hydrologic balance.

This revision clarifies that it is the mining operation that cannot cause the adverse impacts identified in final paragraphs (b)(9)(i) through (iv). It allows the regulatory authority to distinguish between environmental and human use changes that are related to mining from the proposed operation and those that are not. In addition, the baseline monitoring requirements in § 780.19 of the final rule will better enable the regulatory authority to distinguish between mining-related impacts and non-mining impacts.

Final paragraph (b)(9) requires the regulatory authority to, after consultation with the Clean Water Act authority, as appropriate, provide supporting data and analyses that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. To support this finding, the cumulative hydrologic impact assessment must include several determinations, with appropriate documentation, or an explanation of why the determination is not necessary or appropriate. Final paragraph (b)(9)(i) provides that one of those determinations is that, except as provided in final §§ 780.22(b) and 816.40, the proposed operation will not: (A) Cause or contribute to a violation of applicable water quality standards adopted under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or other applicable state or tribal water quality standards; (B) cause or contribute to a violation of applicable state or tribal groundwater quality standards; (C) preclude attainment of a premining use of a surface water located outside the permit area when no water quality standards have been established for that surface water; or (D) preclude attainment of a premining use of groundwater located outside the permit area.

We have also revised paragraph (b)(8), now final rule paragraph (b)(9), slightly by moving three subsections. Proposed paragraph (b)(8)(i)(A) pertained to conversion of streams from one stream type to another stream type (*e.g.,* intermittent to ephemeral) outside of the permit area. We have allowed some forms of conversion as long as the stream maintains its designated use(s) and have moved this language to final rule paragraph (b)(9)(iii). We retained the language pertaining to streams maintaining their applicable Clean Water Act water quality standards and moved it to final rule paragraph (b)(9)(i)(A). We also slightly modified language at paragraph (b)(6)(i)(F) pertaining to adversely affecting threatened or endangered species. We modified final rule paragraph (b)(6)(i)(F) to say the cumulative hydrologic impact assessment evaluation must consider impacts to threatened and endangered species and also included language to the definition of material damage to the hydrologic balance outside the permit area pertaining to a violation of the Endangered Species Act. We changed the language in those two sections to match the intent of each respective section. Adding language to the definition of ''material damage to the hydrologic balance outside the permit area'' in reference to a violation of the Endangered Species Act also serves as a way to memorialize the performance standard nature of such an event. We also made these changes to be consistent with final rule § 780.16(b), pertaining to the fish and wildlife protection and enhancement plan and § 779.20, pertaining to information about the fish

and wildlife resources to be included in the permit application.

Some commenters expressed concern with the proposed language at paragraph (b)(8)(ii), now paragraph (b)(9)(ii), requiring that the operation be designed to prevent an increase in damage from flooding when compared to premining conditions. One of the commenters indicated that it would be difficult to make the measurements required under this provision and that it would require an investigation of premining flood events to establish baseline for assessing damage from flooding. We agree that the proposed language could be interpreted to require an investigation of premining flood events. We have removed the phrase ''damage from'' within paragraph (b)(9)(ii) of the final rule in order to clarify that such a premining investigation is not required. The final rule, however, continues to require a finding that the operation has been designed to ensure that flows will not cause increased flooding outside the permit area compared to premining conditions. This revision focuses assessment upon peak flows that could result in flooding and not damage from flooding. In addition, we added the phrase ''outside the permit area'' to clarify that the operation must be designed to ensure that neither the mining operation nor the final configuration of the reclaimed area will result in changes in the size or frequency of peak flows from precipitation events or thaws that would cause an increase in flooding outside the permit area, when compared with premining conditions. We made this change to focus the assessment on peak flows that could result in flooding and potential damage. One commenter suggested modifying the word ''changes'' to ''increases'' to be more accurate and limiting. This modification is not necessary because the final rule at paragraph (b)(9)(ii) states that the changes would be of size or frequency to cause an increase in flooding.

Another commenter recommended that the applicant should plan for, and submit, sufficient information on the magnitude of precipitation events, especially given that the operator knows the final reclamation configuration of the site and can anticipate the magnitude of stormwater runoff resulting from the final reclamation configuration. The commenter also opined that this information was not required in the proposed rule. We do not agree with the commenter that the proposed rule did not address this issue; design criteria for postmining site configuration are found at §§ 816.102 to 816.111. These design criteria guide the design, construction, and implementation of the final site reclamation configuration and include requirements to address postmining drainage issues and stormwater management. In addition, hydrologic performance criteria exist at section 816.34 to prevent stormwater-induced flooding from SMCRA sites.

One commenter questioned the application of the term ''recharge capacity'' within proposed paragraph (b)(8)(iii), now paragraph (b)(9)(iii). We have removed this term from this paragraph of the final rule because the term refers to the ability of the overburden to release water to the surface water system and does not reflect the goal of maintaining baseflow in streams overlying and adjacent to a SMCRA mine site. Recharge capacity is an important consideration in the overall hydrologic balance but is not the primary objective of paragraph (b)(9)(iii). Recharge capacity is a term used to describe the movement of water through soil and rock, ultimately to discharge as surface water flow. This concept is different than the primary objective of (b)(9)(iii) which is to maintain baseflow in a stream. For this reason, we removed the term ''recharge capacity'' to focus the requirement on sustaining baseflow to prevent material damage to the hydrologic balance outside the permit area.

Commenters alleged that, as proposed, paragraph (b)(8)(iii), now paragraph (b)(9)(iii), prohibited the conversion of a perennial or intermittent stream to an ephemeral stream or conversion of a perennial stream to an intermittent stream. A regulatory authority commented that, as drafted, the provision would result in the inability of mine operators to permit and mine lands because stream conversion is a common, existing occurrence during mining and reclamation. Two other commenters indicated that, in effect, this paragraph would be impossible to satisfy because streams behave differently depending upon numerous natural and man-made interdependent variables. The commenters further opined that technological and economic limitations may necessitate stream conversion in some situations. The same commenters also suggested that it should be permissible to allow a portion of a watershed to be degraded as long as the watershed as a whole remains functional. For these reasons the commenters recommended removal of the proposed provision that they interpreted as limiting or preventing stream conversions. Several of the commenter's raised concerns about conversions both inside the permit area and outside the permit area. We address commenters' concerns about conversions outside the permit area in this section of the final rule and discuss the changes to the final rule about conversions inside the permit area in the preamble discussion of final rule §§ 780.28(e) and 784.28(e), below. In consideration of the comments specific to preparation, use, and review of the cumulative hydrologic impact assessment, we have revised paragraph (b)(9)(iii) of the final rule about conversions of perennial and intermittent streams outside the permit area. We acknowledge that conversion of streams may often have beneficial effects, such as converting an ephemeral stream to an intermittent or perennial stream. Thus, we have revised the rule language to allow conversion of intermittent streams to perennial streams or conversion of an ephemeral stream to an intermittent or perennial stream outside the permit area as long as the conversion is consistent with the requirements in paragraph (b)(9)(i) and does not violate the Endangered Species Act. Allowing conversion of certain streams addresses the commenters' concern about limiting or preventing conversion while at the same time adhering to the environmental objectives of SMCRA found in sections 510(b) and 515(b).[410]

One regulatory authority suggested that we delete proposed paragraph (b)(8)(iv), now paragraph (b)(9)(iv), related to the protection of the quantity and quality of water in ''any aquifer that significantly ensures the prevailing hydrologic balance.'' The commenter opined that water replacement requirements for in-use water supplies are already protected and adhered to by operators and that replacement supplies are of equal or better quantity, quality, and delivery method. We interpret this comment to mean that existing rule language in other sections provides the same protection as proposed paragraph (b)(9)(iv) and that existing water replacement provisions can be better than existing conditions. While we support the regulatory authorities' continued use and implementation of water replacement requirements, we decline to remove the provision because final paragraph (b)(9)(iv) protects more resources than the water replacement provisions found in the previous regulations. Water replacement provisions are designed to address individual water supplies on a case-by-case basis, which implies an intact

[410] 30 U.S.C. 1260(b) and 1265(b).

aquifer system. In contrast, final paragraph (b)(9)(iv) requires a review of, and prevention of, material damage to the hydrologic balance outside the permit area to important and hydrologically significant aquifers in order to address an entire aquifer, not just a single water supply.

Final Paragraph (c): Subsequent Reviews

We have made a minor change to proposed paragraph (c)(1)(i), now final paragraph(c)(2). Commenters pointed out that, within this section, biological monitoring was not included in the review of monitoring data that the regulatory authority must perform. We agree that it should be included and have added the requirement to this section.

One commenter opined that proposed § 780.21(c) is not adequately conservative because it requires cumulative hydrologic impact assessments only for significant permit revisions. According to the commenter, cumulative hydrologic impact assessments should also be required for certain non-significant revisions. However, the commenter did not provide any specific examples of non-significant revisions that would have the potential to affect the analysis. We are retaining the rule as proposed in relationship to this comment. As explained in the preamble to the proposed rule [411] preparation of a new or updated cumulative hydrologic impact assessment will occur whenever the regulatory authority finds that one is needed based on the evaluation in final paragraphs (c)(1) and (2).

Several industry and regulatory authority commenters expressed concern that the cumulative hydrologic impact assessment review process required in paragraph (c) was linked to permit renewal. These commenters stated that section 506(d) of SMCRA [412] guarantees the right of successive permit renewal and any changes to the cumulative hydrologic impact assessment and underlying conclusions might provide an opportunity to void this right. In response, we have revised final paragraph (c)(2) to require review of the cumulative hydrologic impact assessment, including the evaluation thresholds, every three years instead of linking the review to the renewal of the permit. Because of the same concerns about permit renewal, we have revised paragraphs (b)(vii) through (viii) of final rule § 774.15, related to permit renewal, to remove the requirements to review all monitoring data and to review the probable hydrologic consequences determination.

One regulatory authority commenter explained that it has been standard practice since its program was approved to update the cumulative hydrologic impact assessment whenever a change or proposed change of any aspect of the hydrologic environment warranted the update or when area is added to the permit. The commenter continued by noting that a significant update to the probable hydrologic consequences determination or the hydrologic reclamation plan would trigger a cumulative hydrologic impact assessment update. Another regulatory authority commenter indicated that cumulative hydrologic impact assessment reviews are done as a matter of course and updated as necessary. Industry commenters recognized that any data analysis may be done periodically, as determined by the regulatory authority, in the Annual Report, interim review, or other similar report or process. Commenters generally supported a requirement that allows the state regulatory authority discretion for determining when a cumulative hydrologic impact assessment needs to be updated. Although we recognize that some states do a good job with these updates, a periodic review of the cumulative hydrologic impact assessment data and conclusions must occur on a frequent basis to ensure that material damage to the hydrologic balance outside the permit area is not occurring or is likely to occur through the life of the permit. The absence of consistent cumulative hydrologic impact assessment reviews likely results in adverse trends that may persist to a point where corrective action options become limited, costly, or impossible. Regular review will allow the operation plan to be adjusted before corrective action is needed or options become too limited to adequately protect the hydrologic balance. We selected three year intervals for this review because that time period is not linked with permit renewal or mid-term review but is frequent enough to allow for detection of necessary changes in the mining and reclamation plan and/or needed corrective action to ensure protection of the hydrologic balance outside the permit area. This ensures that permit renewal and mid-term reviews are not contingent on the cumulative hydrologic impact assessment review.

Section 780.22: What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water sources?

Section 780.22 describes the information the operator must include in the hydrologic reclamation plan and the information that must be provided on alternative water sources. As discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 780.22.[413] In response to comments that we received, we have made several modifications.

Final Paragraph (a): Hydrologic Reclamation Plan

This paragraph identifies the requirements the permit applicant must include in the hydrologic reclamation plan, including the maps and descriptions that demonstrate how the proposed operation will comply with the applicable provisions of subchapter K, that relate to protection of the hydrologic balance. We received a comment from a regulatory authority on proposed paragraphs (a)(2)(i) and (ii), requesting that we clarify the relationship between disturbances to the hydrologic balance in adjacent areas, which are allowable, and material damage to the hydrologic balance outside the permit area, which is not allowable. The regulatory authority also suggested that we define disturbances. We have defined material damage to the hydrologic balance outside the permit area in § 701.5 and have provided a general discussion of material damage to the hydrologic balance outside the permit area in Part IV. L. of the preamble. Under our regulations as finalized today, any activity that adversely affects the hydrology of adjacent areas but that does not rise to the level of material damage to the hydrologic balance outside the permit area would be considered a disturbance subject to the minimization requirements of our rule. Consequently, although we appreciate the commenter's concern, it is not necessary to define ''disturbance,'' and we have not made any substantive changes to these paragraphs in the final rule. Importantly, these paragraphs retain the distinctions present in sections 510(b)(3) and 515(b)(10) of SMCRA.[414] We did make minor revisions to clarify the applicability of the bonding sections to paragraphs (a)(2) and (4).

[411] 80 FR 44436, 44503 (Jul. 27, 2015).

[412] 30 U.S.C. 1256(d).

[413] 80 FR 44436, 44526–27 (Jul. 27, 2015).

[414] 30 U.S.C. 1260(b)(3) and 1265(b)(10).

Final Paragraph (b): Alternative Water Source Information

Several regulatory authority commenters expressed concern about proposed paragraph (b). One regulatory authority suggested that we delete the paragraph and retain the previous regulations. In particular, the regulatory authority did not like it that this provision invoked the alternative water source requirements for adverse effects to water sources ''within the proposed permit . . . area[ ].'' The commenter pointed out that there are always adverse impacts within the permit area. We are not accepting the suggestion to remove the entire paragraph (b) because this paragraph is necessary to clarify the water supply replacement requirements of sections 717(b) and 720(a)(2) of SMCRA.[415] However, upon our own review of the rule language, we recognized that we erroneously included the phrase ''within the proposed permit area and adjacent area'' in paragraph (b)(1) of the proposed rule and are removing it from the final rule to ensure the regulations conform to section 717(b) and 720(a)(2), which do not contain this limiting phrase.

Some of the other regulatory authority commenters asserted that in certain situations the regulatory authority already requires water supply infrastructure to be put in place in advance of mining to ensure uninterrupted service. It is good that some regulatory authorities are already ensuring that there will be no gap in the water supply as a result of mining. However, given the importance Congress has placed on protecting water supplies, this requirement should be applicable everywhere. The importance of protection water supplies was underscored in section 717(b) of SMCRA that requires that the operator of a surface coal mine replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from such surface operation.[416] Similarly, section 709(a) of SMCRA affords protections for water replacement as a result of underground mining operations requiring that underground coal mining operations must promptly replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution or interruption resulting from underground coal mining operations.[417] Thus, we are not removing paragraph (b)(1) from the final rule text, but have revised some of the text for the sake of clarity. For the sake of clarity, we also added paragraph (b)(1)(ii) to include the requirement for an implementation schedule as part of the water supply replacement plan. This additional requirement will help ensure that the water supply replacement plan developed by the operator is well planned and feasible. One regulatory authority suggested that we delete the word ''may'' in proposed paragraph (b)(3)(i). This paragraph requires that an alternative water supply be developed and installed on a permanent basis before the operation ''may'' adversely affect an existing water supply protected under the performance standards of final § 816.40, which discusses the responsibility of an operator to replace water supplies. If there is a possibility that a coal-mining operation could adversely impact an existing water supply, an alternative water supply must be developed and installed on a permanent basis before the operation reaches a point where it could adversely affect that existing water supply. Although we do not agree with the commenter's concern about the use of ''may'' we have revised the text for the purpose of clarity and without using the word ''may'' in the revision. Therefore, within the final rule, paragraph (b)(3)(i) in the final rule reads, ''[w]hen a suitable alternative water source is available, your operation plan must require that the alternative water supply be developed and installed on a permanent basis before your operation advances to the point at which it could adversely affect and existing water supply protected under § 816.40 of the chapter.''

Other commenters expressed concern about the lack of regulatory authority discretion in the proposed rule to make a determination that a water supply could be adversely impacted. In addition, a commenter was concerned about the potential burden on industry, especially for underground operations, to replace all potentially impacted water supplies in advance of mining. The final rule mirrors the water replacement provisions located in previous §§ 816.41(h) and 817.41(j), which provide the regulatory authority the discretion to approve the probable hydrologic consequences determination that identifies specific water supplies that may be adversely affected and that would require an alternative source. The final rule does not require replacement of all potentially impacted supplies prior to any mining; however, the water must be replaced prior to the supply being adversely impacted. This provision guarantees that there will be no gap in the availability of water sources and that water sources remain available for use throughout the mining process. As long as this guarantee is met, the timing of when a specific alternative water source needs to be replaced is left to the discretion of the regulatory authority, as approved in the water supply replacement plan.

Section 780.23: What information must I include in plans for monitoring of groundwater, surface water, and the biological condition of streams during and after mining?

As discussed in the preamble to the proposed rule,[418] we proposed to modify our regulations at § 780.23. This section describes what the operator must include in plans for monitoring of groundwater and surface water, and the biological condition of streams during and after mining. This includes annual biological monitoring of intermittent and perennial streams. In response to comments and based upon our further evaluation of the proposed rule, we have made several changes to the final rule.

We have revised paragraph (a)(1)(i) and (b)(1)(i) to clarify that the monitoring plans for groundwater and surface water must include the locations of monitoring sites, the measurements that must be taken at each location, and a listing of the parameters to be monitored. This additional information will assist the review and analysis of the data obtained from monitoring by providing location and measurement context. Additionally, in final paragraphs (a)(1)(ii) and (b)(1)(iii), we have deleted ''for each parameter'' to be consistent with the changes made to final paragraphs (a)(1)(i) and (b)(1)(i).

Final Paragraph (a): Groundwater Monitoring Plan

In the second sentence of § 780.23(a)(1)(iii), we state that, at a minimum, the groundwater monitoring plan must include monitors in three types of locations. One commenter requested that we rephrase this sentence to require only that the groundwater monitoring plan ''consider'' the placement of monitoring wells in these three types of locations because the

[415] 30 U.S.C. 1307(b) and 1309a(a)(2).

[416] 30 U.S.C. 1307(b).

[417] 30 U.S.C. 1309a(a)(2).

[418] 80 FR 44436, 44505–44507 (Jul. 27, 2015).

commenter alleges that some operators cannot establish monitoring sites at the locations specified in this section due to factors beyond their control, such as land ownership conflicts. We decline to make this change because it would, in effect, make the requirements of subparagraphs (A)–(C) about monitoring well placement discretionary. The groundwater sampling data collected as part of paragraph (a) is necessary for comparison with the groundwater data collected as part of § 780.19, a comparison that will help identify any trends and changes in the groundwater conditions. We recognize that land ownership conflicts may present certain challenges. However, without minimum requirements for groundwater monitoring, the regulatory authority would have insufficient data to determine if material damage to the hydrologic balance outside the permit area has occurred. Therefore, we have determined that locating monitoring wells as required under paragraphs (a)(iii)(A) through (C) is necessary, despite potential difficulties associated with locating monitoring wells in different locations.

Several commenters questioned the necessity of installing groundwater monitoring wells in aquifers located above and below the coal seam to be mined as proposed in paragraph (a)(1)(iii)(A), in backfilled portions of the permit area as proposed in paragraph (a)(1)(iii)(B), and in existing underground mine workings that are in direct hydrologic connection to the proposed operation as proposed in paragraph (a)(1)(iii)(C). The commenters considered monitoring above and below the coal seam unnecessary and expensive, and wells installed in the backfill and in underground mine workings to be of little value. Despite these comments, we have not removed these requirements because they are necessary to ensure that the coal mining operation, during and after mining, is not causing material damage to the hydrologic balance outside the permit area. Data collected from upgradient monitoring wells installed in aquifers located above and below the coal seam provide information on the condition of the groundwater entering the mine site. Comparison of this upgradient information to groundwater data obtained from downgradient monitoring wells as it exits the mine site will provide the mine operator and the regulatory authority insight into the effects of the mining activities on the quality and quantity of the groundwater as compared to offsite conditions. Monitoring wells installed in the backfill area and in the underground mine pools is necessary because these areas are the most likely sources of acid mine drainage if it develops. Therefore, we are retaining these requirements in the final rule.

One commenter questioned whether the monitoring wells required under proposed § 784.23(a)(1)(iii)(C) for mine pools that result from underground mining operations would be removed before final bond release and asserted that if they are not removed, it could become a safety issue. Data from hydrologically connected mine pools will provide both the permittee and the regulatory authority with necessary information to evaluate the efficacy of the probable hydrologic consequences determination and to evaluate conditions in the mine pools prior to final bond release; thus, we are retaining the requirement. However, we agree with the commenter that a monitoring well left after final bond release could become a safety issue if it is not transferred to the property owner because no one would be responsible for maintaining the well. When no longer needed, and with approval by the regulatory authority, monitoring wells must be permanently sealed or transferred to another party consistent with §§ 816.13 and 816.39 of this part. Therefore, because appropriate transfer or sealing of monitoring wells must already occur under final §§ 816.13 and 816.39, respectively, we do not need to make any changes to final § 784.23 in response to this comment. Under paragraph (a)(1)(iv)(B), we now requiring that the monitoring data be used to determine the ''biology'' of the perennial and intermittent streams within the proposed permit and adjacent areas instead of the ''biological condition'' of those streams. We made this change for the same reasons we articulated above in connection with final § 780.19(c)(6)(vi) through (viii): ''biology'' encompasses the type of information needed to establish both the biological condition of perennial and intermittent streams, for which established protocols exist and the biology of intermittent streams for which established protocols do not exist. This language change recognizes that not all states have scientifically valid protocols for assessing the biological condition of intermittent streams. We also made an editorial correction, by inserting ''proposed'' before permit and adjacent areas. During the development of the groundwater monitoring plan, the permit has not been issued yet and is part of the permit application. By inserting the word ''proposed'', final paragraph (a)(1)(iv)(B) now correctly reflects the status of the permit application process during compliance with this provision.

Under final paragraphs (a)(2)(i) and (b)(2)(i), we replaced the text ''if those parameters relate to'' with ''to the extent needed to assess,'' in order to clarify that the parameters to be monitored under final paragraphs (a)(2)(i) and (b)(2)(i) must be sufficient to evaluate the requirements of paragraphs (a)(2)(i)(A), and (B) and (b)(2)(A)–(E). Furthermore, under paragraphs (a)(2)(i)(A) and (b)(2)(i)(B), we have added ''accuracy of the'' to stipulate that the purpose of the monitoring is to improve accuracy of the findings and predictions of the probable hydrologic consequences determination prepared under § 780.20.

Under the final rule, we have deleted proposed paragraphs (a)(2)(i)(B) and (b)(2)(i)(D) regarding the requirement to monitor the parameters necessary to assess the biological condition of perennial or intermittent streams or other surface water bodies that receive discharges from groundwater within the proposed permit and adjacent areas. The remaining sections have been renumbered accordingly. The monitoring requirements in the deleted paragraphs were removed because the information they required was already accounted for in the monitoring requirements under final paragraphs (a)(2)(i)(A) and (b)(2)(i)(B), which require monitoring of parameters necessary to assess the accuracy of the findings and predictions in the probable hydrologic consequences determination under § 780.20. In turn, § 780.20(a)(5)(vii) states that the applicant must base the probable hydrologic consequences determination on an analysis of the baseline hydrologic, geologic, *biological,* and other information required under § 780.19 and must include findings on the impact that the proposed operation will have on the biology of perennial and intermittent streams within the proposed permit and adjacent areas, except as provided in § 780.19(g) of that part. Therefore, monitoring of parameters necessary to assess the accuracy of the findings and predictions of the probable hydrologic consequences determination would necessarily include monitoring of the biology, making proposed (a)(2)(i)(B) and (b)(2)(i)(D) redundant.

We made several changes to final paragraphs (a)(2)(ii) and (b)(2)(ii). First, we revised the titles of these paragraphs to clarify that these sections contain the minimum requirements for sampling and analysis of groundwater and surface

water, respectively. Next, we clarified paragraphs (a)(2)(ii) and (b)(2)(ii) by deleting ''that the following parameters be measured at each location'' and replacing it with ''collection and analysis of a sample from each monitoring point.'' Finally, we added language to the end of paragraphs (a)(2)(ii) and (b)(2)(ii) to better introduce the data sampling and analysis requirements in (a)(2)(ii)(A) through (D) and (b)(2)(ii)(A) through (D).

We also reduced redundancies in the rule by removing the breakout of specific parameters that must be collected and analyzed every 3 months in proposed paragraphs (a)(2)(ii)(A) through (Q) and (b)(2)(ii)(B) through (S). These parameters are already listed in final § 780.19(a)(2). Instead, final paragraphs (a)(2)(ii)(A) and (b)(2)(ii)(A) simply require that the data collected include an analysis of each sample for parameters listed in § 780.19(a)(2). The remaining requirements have been re-lettered accordingly. For clarification purposes, under proposed paragraph (a)(2)(ii)(R), now final paragraph (a)(2)(ii)(B), we have added language that specifies that the reporting requirements apply to water levels for all wells and discharge rates for all springs or underground openings used for monitoring purposes. We have revised proposed paragraphs (a)(2)(ii)(S) and (b)(2)(ii)(T), now final paragraphs (a)(2)(ii)(C) and (b)(2)(ii)(C), respectively, for clarity. Final paragraphs (a)(2)(ii)(C) and (b)(2)(ii)(C) now more clearly state that the data required under this paragraph must include an analysis of all parameters detected in the baseline sampling conducted under § 780.19(d) of this part.

Proposed paragraphs (a)(2)(ii)(T) and (b)(2)(ii)(U), now final paragraphs (a)(2)(ii)(D) and (b)(2)(ii)(D), respectively, have been modified to be consistent with the revisions made to the titles of these sections. Additionally, we have replaced the phrase ''parameters of local significance'' with the phrase ''other parameters of concern'' for consistency with the definition of ''parameters of concern'' included in final § 701.5.

Proposed paragraphs (a)(3)(ii) and (b)(3)(ii) included the sentence: ''[a]t a minimum, the plan must require monitoring of all parameters for which the regulatory has established a 'material damage criteria' [419] pursuant to the cumulative hydrologic impact assessment.'' We have revised and moved this requirement. It is now found in final § 780.23(a)(2)(i) and (ii)(D) and states that the plan must require monitoring of all parameters for which the regulatory authority has established ''evaluation thresholds under § 780.21(b)(7) of this part.'' We chose to require monitoring for evaluation thresholds instead of material damage thresholds because, as set forth in final § 780.21(b)(7), evaluation thresholds must be set for all critical water quality and quantity parameters. Evaluation thresholds under § 780.21(b)(7) are values for water quality and quantity parameters that, when attained, will trigger reassessment of the probable hydrologic consequences determination and development of corrective measures, if necessary, to prevent material damage to the hydrologic balance outside the permit area. Monitoring of these critical parameters is thus crucial to detect whether hydrologic conditions are being affected by the mining operation in a manner that could cause an exceedance of the comparable material damage threshold if corrective action is not taken. Thus, any parameter for which there is an evaluation threshold set must be monitored; otherwise, the purpose of setting an evaluation threshold is not being achieved.

Commenters noted that ''water-bearing stratum,'' as used in proposed paragraph (a)(4), is a new term and is not defined. In response, in final paragraph (a)(4), we have replaced the term ''water-bearing stratum'' with ''aquifer,'' a term that is defined in § 701.5. This change avoids using an undefined term but does not change the meaning of the paragraph.

Several commenters requested, that, in order to better protect groundwater resources, we rescind the exception in paragraph (a)(4) from monitoring for aquifers that have no existing or foreseeable use for agricultural or other human purposes or for fish and wildlife purposes and that do not significantly ensure the hydrologic balance within the cumulative impact area. We decline to make this change. SMCRA requires monitoring ''for those surface coal mining and reclamation operations which remove or disturb strata that serve as aquifers which significantly insure the hydrologic balance of water use either on or off the mining site.'' [420] Because SMCRA does not further define the qualities of aquifers that ''significantly insure the hydrologic balance,'' we have used our discretion to interpret this monitoring requirement to refer to aquifers that are or have an existing or foreseeable use for agricultural, human, or fish and wildlife purposes.

This exception also implements section 102(f) of SMCRA [421] by striking a balance between the protection of the environment and supporting the Nation's need for coal by requiring ground water monitoring only where there is an existing or foreseeable use for agricultural, human, or fish and wildlife purposes, or where the aquifer significantly ensures the hydrologic balance within the cumulative impact area. Where a permit qualifies for the exemption in final (a)(4), the applicant can avoid monitoring costs, allowing resources to be available for other protection and enhancement measures that could have a more direct benefit to the environment.

Final Paragraph (b): Surface-Water Monitoring Plan

For changes made to final paragraphs (b)(1)(i), (b)(1)(iii), (b)(2)(i), (b)(2)(ii), and (b)(3)(ii), please refer to the preamble discussion above in the corresponding paragraphs in final paragraph (a).

Several commenters requested that we allow multiple permits to rely on data from a single self-recording device where the multiple permits are close enough to share data. These commenters alleged that allowing multiple operators to share the cost of a self-recording device could result in labor and equipment cost reductions. In response to these comments we have added final paragraph (b)(1)(ii)(C) to allow, at the discretion of the regulatory authority, a single self-recording device to provide precipitation monitoring data for multiple permits that are contiguous or nearly contiguous provided the device can provide adequate and accurate coverage of precipitation events occurring in that area.

We removed the phrase ''for each parameter to be monitored'' in paragraph (b)(1)(iii). For additional information about this change, please refer to the preamble discussion above in final paragraph (a)(1)(ii).

We revised paragraph (b)(1)(v)(B) to more thoroughly address concerns from commenters about the clarity of the proposed rule. This provision now requires the applicant to describe how the monitoring data will be used to determine the impacts of the operation ''upon the biology of perennial and intermittent streams, lakes, and ponds within the proposed permit and adjacent areas.'' For clarity we have substituted a reference to ''lakes'' and

[419] ''Material damage criteria'' are referred to as ''material damage thresholds'' in the final rule. *See* final preamble discussion for section 780.21(b)(6).

[420] 30 U.S.C. 1267(b)(2).

[421] 30 U.S.C. 1202(f).

''ponds'' for the reference in the proposed rule to ''other surface-water bodies.'' We have discussed the substitution of ''biology'' for ''biological condition'' to ''biology'' above in the preamble discussion of § 780.19(c)(6)(vi) through (viii).

A commenter questioned the need for the monitoring data required in proposed paragraph (b)(1)(v)(B) to determine the impacts of the operation on the biology of streams that will be mined through, alleging that this data is unnecessary. The commenter also alleged that this requirement contradicts SMCRA's requirement to minimize impacts within the permit boundary. We disagree that this data is unnecessary. The collection of data related to baseline hydrologic and biologic conditions is necessary for the operator to make a determination whether restoration of the stream is possible as required in §§ 780.12, 780.27, 780.28, 816.56, and 816.57 of this chapter. In addition, it provides information on the quality and quantity of the surface waters prior to mining which will document the baseline conditions needed for determining whether stream restoration is successful.

In final rule paragraph (b)(2)(i), we have deleted ''if those parameters relate to the'' and replaced it with ''to the extent needed to assess the . . . .'' Please see the preamble discussion at (a)(2)(i) for more discussion of this change. In the final rule, we have also deleted proposed paragraph (b)(2)(i)(D) which set out a requirement for monitoring of the biological condition of perennial or intermittent streams or other surface water bodies within the proposed permit and adjacent areas and have renumbered the remaining paragraphs accordingly. Please refer to the preamble discussion above in § 780.28(a)(2)(i)(B) for further information about this change.

In the final rule, we revised proposed paragraph (b)(2)(i)(E), now final paragraph (b)(2)(i)(D), to clarify that the surface-water monitoring plan must include monitoring of those parameters necessary to assess the suitability of the quality and quantity of surface water for all designated uses under 303(c) of the Clean Water Act.[422] We further revised this provision to specify that, if there are no designated uses associated with the surface water, the parameters for monitoring must be sufficient to assess all premining uses of the surface water. We have also clarified that these requirements apply both to surface water located within the proposed permit and to those in the adjacent areas. Similarly, we revised proposed paragraph (b)(2)(i)(F), now final paragraph (b)(2)(i)(E), to clarify the monitoring plan must include the parameters needed to assess the suitability of the quality and quantity of surface water to support the premining land uses both within the proposed permit and adjacent areas.

We have revised final paragraph (b)(2)(ii) for clarity. Please refer to the preamble discussion above on paragraph (a)(2)(ii) for more information. Proposed paragraph (b)(2)(ii)(A), now final paragraph (b)(2)(ii)(B), remains essentially unchanged except that we have clarified that flow rates must be obtained from each sampling location.

We have revised proposed paragraphs (b)(2)(ii)(T) and (U), now final paragraphs (b)(2)(ii)(C) and (D) for clarity. For additional information, please refer to the preamble discussions above on final paragraphs (a)(2)(ii)(C) and (D).

One commenter requested that we include a list of parameters in § 780.23(b)(2)(iii), related to minimum requirements for point source discharges, including those parameters listed in proposed § 780.23(b)(2)(ii)(A) through (S). Conversely, another commenter did not want us to require all of the parameters referenced in § 780.23(b)(2)(ii) for point-source discharges, alleging that it would be outside of our authority under SMCRA. Monitoring requirements for point-source discharges are determined by Clean Water Act authorities under the National Pollutant Discharge Elimination System program. We do not have the authority under SMCRA to mandate what parameters must be included in National Pollutant Discharge Elimination System permits; therefore, we have made no changes to the final rule in response to these comments.

A commenter stated that we should delete proposed paragraph (b)(2)(iii)(B) which requires the surface water monitoring plan to include the measurement of flow rates for point-source discharges. The commenter alleged that this paragraph supersedes section 402 Clean Water Act requirements[423] by establishing criteria for flow measurements other than under National Pollutant Discharge Elimination System permits. We disagree with the commenter. Paragraph (b)(2)(iii)(A) of this section clearly states that monitoring of point-source discharges must be in accordance with 40 CFR parts 122, 123, and 434 and as required by the National Pollutant Discharge Elimination System permitting authority and the measurement of flow rates is required as part of the National Pollutant Discharge Elimination System permit. Therefore, the requirement to measure the flow rates does not supersede section 402 Clean Water Act; it is consistent with that Act. We have also prohibited the use of visual observations to measure flow rates. As we have stated elsewhere in this preamble, visual observations, by their very nature, lack precision and vary among observers. As such, they are not an objective measurement and cannot be reproduced.

We have provided additional language at the end of final paragraph (b)(2)(iv) to specify that the applicant must revise the surface-water monitoring plan to incorporate any site-specific monitoring requirements imposed by the National Pollutant Discharge Elimination System permitting or Clean Water Act authority subsequent to submission of the SMCRA permit application. We have added this provision to ensure that the applicant updates the SMCRA permit application as necessary with information that it has submitted in accordance with National Pollutant Discharge Elimination System permit requirements.

We are adopting final paragraph (b)(3)(ii) as proposed except that we are requiring that the plan include monitoring of all parameters for which the regulatory authority has established evaluation thresholds under § 780.21(b)(7) of this part. We explain this revision further at our preamble discussion for (a)(3)(ii).

Final Paragraph (c): Biological Condition Monitoring Plan

Various commenters opposed the new biological condition monitoring plan requirements at proposed paragraph (c), alleging that the new requirements will be costly to comply with and do not offer clear guidance. Commenters specifically expressed uncertainty about the frequency and timing of monitoring under this paragraph. We acknowledge that the requirements at proposed paragraph (c), final paragraph (c), may contribute to increased monitoring costs. However, we have carefully evaluated the potential benefits of the information required by this provision and have determined that it is necessary to adequately determine the condition of the stream premining, during mining, and after mining. We find that the beneficial impacts of this information outweigh the costs and burdens to the operator and regulatory authority. With respect to the frequency of monitoring

[422] 33 U.S.C. 1251(a) and 30 U.S.C. 1313(c).

[423] 33 U.S.C. 1342.

during and after mining, the final rule within paragraph (c)(2)(iii) clarifies that the sampling frequency must be no less than annual and must not be so frequent as to deplete the populations being monitored.

Some commenters opposed the requirement for the biological condition monitoring plan as proposed in paragraph (c), because of an alleged lack of available studies demonstrating that this type of monitoring is necessary for or appropriate to streams outside of Appalachia. We have determined that these requirements are necessary for and appropriate for mining operations throughout the country. Although we cite studies about Appalachia in support of our conclusions,[424] the ability to obtain information through bioassessment protocols is currently available on international, national, regional, and state levels and the ability to establish effective baseline information for monitoring on all perennial streams, no matter the size, habitat type, or vegetative cover is attainable using the best technology currently available. Additionally, the U.S. Environmental Protection Agency authored the ''National Rivers and Streams Assessment.'' This assessment explains the minimum requirements for monitoring streams and is consistent with our final rule. Further, this assessment is scientifically defensible in the 48 conterminous states.[425] As to the necessity of this monitoring, there are long-standing examples of surface water impacts identified by SMCRA regulatory authorities across all coal bearing regions. While many of these effects are minor, they also often involve off-site impacts, and to minimize these off-site impacts using the best technology currently available, we are retaining these requirements. These baseline assessments of the biological condition of perennial streams where scientifically defensible protocols exist will allow for appropriate stream assessment and monitoring and will result in minimization of effects to fish, wildlife, and environmental resources consistent with the requirements of section 515(b)(24) of SMCRA.[426] For further discussion of using scientifically defensible bioassessment protocols when monitoring streams please see the final preamble discussion in § 780.19(c)(6).

As stated in final § 780.19(c)(6)(vii), the permittee must adhere to a bioassessment protocol approved by the state or tribal agency responsible for preparing the water quality inventory required under section 305(b) of the Clean Water Act,[427] 33 U.S.C. 1315(b), or other scientifically-defensible bioassessment protocol accepted by agencies responsible for implementing the Clean Water Act. Through coordination with the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, and state Clean Water Act authorities, publications and additional information on applicability and region-specific bioassessment protocols can be provided for SMCRA regulatory authorities to establish appropriate biological condition monitoring plans consistent with the required use of scientifically-defensible bioassessment protocols. For further information on bioassessment protocols, please refer to the preamble discussion of paragraphs (vi) through (viii) of final § 780.19(c)(6).

Many commenters supported the requirement to monitor the effects of the mining operation upon the biological condition of intermittent and perennial streams, noting that biological monitoring is necessary to assess the effects of mining operations on fish, wildlife, and related environmental resources as well as to determine whether material damage to the hydrological balance outside the permit area is occurring. Other commenters opposed monitoring the effects of the mining operation upon the biological condition of streams and recommended that we eliminate this requirement from the rule. Commenters opposing the biological condition monitoring requirement alleged that, because only one sample is taken per year, the information gathered will not be helpful in determining, in a timely manner, whether corrective actions are necessary. While these commenters are correct that this sampling is only required annually, additional samples can be taken as long as the additional sampling will not deplete the populations of species being monitored. Additionally, the information obtained from the biological condition monitoring plan should be evaluated alongside the other parts of the water monitoring requirements, such as the surface-water and groundwater monitoring requirements of paragraphs (a) and (b). Taken together, the once-a-year biological condition monitoring and the other more frequent monitoring requirements of paragraphs (a) and (b), will allow the regulatory authority to have the data necessary to identify trends that indicate that an operation is at risk of causing material damage to the hydrologic balance outside the permit area. Therefore, we are retaining the requirement for biological condition monitoring because it is necessary to determine whether material damage to the hydrological balance outside the permit area is occurring, as well as to assess the effects of mining operations on fish, wildlife, and related environmental resources.

These commenters also asserted that biological condition monitoring does not identify the cause of the impacts and could reflect impacts not associated with the mining operations, such as logging, farming, livestock, irrigation, natural variation, or unusual flow events. We agree that in certain instances, such as those listed above, it is possible that the biological condition monitoring may show impacts that are not directly associated with the mining operations. However, as stated above, we intend for data obtained from the biological condition monitoring to be evaluated with the data obtained from surface-water and groundwater monitoring, not on a stand-alone basis. Evaluation of the data resulting from the three types of monitoring will allow the regulatory authority to determine if impacts to stream biology are related to the mining operation and if corrective action is needed to prevent the operation from causing material damage to the hydrological balance outside the permit area. This requirement provides applicants better protection against potential liability for environmental harm because the additional data will make it easier to determine whether the impact is a result of mining activities or activities unrelated to mining.

[424] *See, e.g.,* S.T. Larned, et al., *Emerging concepts in temporary-river ecology.* Freshwater Biology. pgs. 55, 717–738 (2010).

L.A. Beche, et al., *Long-term seasonal variation in the biological traits of benthic-macroinvertebrates in two Mediterranean-climate streams in California, U.S.A.* Freshwater Biology. pgs. 51: 56–75 (2006).

A. Boulton and P. Lake. *The ecology of two intermittent streams in Victoria, Australia III. Temporal changes in faunal composition.* Freshwater Biology pgs. 27, 123–138 (1992).

E. Bernhardt and M. Palmer. *The environmental costs of mountaintop mining valley fill operations for aquatic ecosystems of the Central Appalachians.* The Year in Ecology and Conservation Biology. Ann. N.Y. Acad. Sci. pgs. 39–57 (2011).

C. Leigh and K. Fritz, *Ecological research and management of intermittent rivers: An historical review and future directions.* Freshwater Biology (2015).

T. Nadeau and M. Cable Rains, *Hydrological Connectivity Between Headwater Streams and Downstream Waters: How Science Can Inform Policy.* Journal of the American Water Resources Ass'n, pgs. 43(1): 118–133 (2007).

[425] U.S. Envtl. Prot. Agency. *National Rivers and Streams Assessment 2013–2014: Field Operations Manual—Wadeable.* EPA–841–B–12–009b. Office of Water Washington, DC (2013), *see also,* U.S. Envtl. Prot. Agency, *https://www.epa.gov/wqc/information-bioassessment-and-biocriteria-programs-streams-and-wadeable-rivers* (last accessed Nov. 1, 2016).

[426] 30 U.S.C. 1265(b)(24).

[427] 33 U.S.C. 1315(b).

Several commenters suggested that the biological condition monitoring plans in §§ 780.23(c) and 784.23(c) should be prepared by a qualified ecologist or biologist. Because the requirements contained in final paragraph (c) and paragraphs (vi) through (viii) of final § 780.19(c)(6) contain detailed requirements about what must be monitored and which scientific protocols are acceptable, it is not necessary to also have the plans be prepared by a qualified ecologist or biologist.

We made minor clarifying revisions throughout final paragraph (c). Specifically, the phrase ''for which baseline biological condition data was collected under § 780.19(c)(6)(iv) of this part'' has been added to paragraphs (c)(1) and (c)(2)(ii). This addition provides greater specificity as to the monitoring locations within the proposed permit and adjacent areas that the biological condition monitoring plan must include. Additionally, we updated the citation in final paragraph (c)(2)(i) to reflect changes we made to final § 780.19.

Final Paragraph (d): Exceptions

This paragraph lists exceptions to the requirements for monitoring groundwater, surface water and the biological condition of streams during and after mining. It provides the regulatory authority with the flexibility to modify the groundwater and surface water requirements of paragraphs (a) and (b) of this section and modify or waive the biological condition monitoring plan requirements of paragraph (c) of this section. As discussed below, we did not make any changes to this section in response to comments.

One commenter recommended deleting proposed paragraph (d)(1), which provides the regulatory authority the discretion to modify groundwater, surface water, and biological condition monitoring plan requirements if the proposed permit includes only land eligible for remining. This commenter expressed concern that this provision could be abused through overuse and that biological condition monitoring should be waived only when a stream contains no valuable biological community. The commenter asserted that biological communities in these remined areas will be impacted and that merely conducting a baseline assessment of a stream's biological condition would not be sufficient. Many commenters expressed concern that, in some instances, pre-SMCRA unreclaimed mines have been left undisturbed for so long that the area has naturally revegetated and that any mining would re-disturb important plant communities, despite the fact that these areas might also contain unreclaimed abandoned mine features. We agree that, in some instances, unreclaimed areas that have naturally revegetated, may qualify for the exemption under final paragraph (d)(1). However, despite naturally revegetating and supporting a biological community, these sites are often still dangerous because of unreclaimed spoil piles, highwalls, and pits. Further, reclamation funds are severely limited and remining is often the only viable method of reclaiming previously mined areas, especially those that are far away from public roads or are not actively discharging acid-mine drainage.

The exception at final paragraph (d)(1) applies only where the permit area consists solely of lands eligible for remining and the regulatory authority has determined that a less extensive monitoring plan is adequate to monitor the impacts. The applicant would also have to comply with final § 785.25. Therefore, the exception cannot be invoked for every remining operation. With this exception we are attempting to encourage the mining of already disturbed sites, which will then be reclaimed in a manner that returns the land to a premining state or another appropriate postmining land use. While additional disturbances, and the potential for water quality impacts, would occur with any mining operation, reclaiming these sites to a more natural condition is the best alternative in the long term. This exception conforms to section 102(h) of SMCRA,[428] by promoting the reclamation of mined areas left without adequate reclamation prior to the enactment of SMCRA. While a small percentage of previously mined areas may have naturally revegetated over decades, most of these sites, regardless of revegetation, continue to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, and endanger the health or safety of the public. For these reasons, we are retaining the exception as proposed.

Several commenters also recommended that we allow the regulatory authority to waive biological condition monitoring requirements in other circumstances. Other commenters suggested that we defer to the Clean Water Act authority to determine if biological monitoring is necessary. In support of this position, these commenters assert, without any supporting evidence, that Clean Water Act authorities allow large municipal wastewater treatment plants to eliminate biological monitoring. We do not agree that the regulatory authority should have increased discretion to waive biological condition monitoring. As discussed above and in the preamble to the proposed rule,[429] biological monitoring is generally necessary to determine whether material damage to the hydrologic balance outside the permit area is occurring and to assess the effects of mining operations on fish, wildlife, and related environmental resources. The biological condition monitoring plan is just one part of the water monitoring requirements under 780.23. Other parts of the water monitoring requirements, such as the surface water and groundwater monitoring requirements of paragraphs (a) and (b), determine whether corrective actions are necessary. Taken together, the once-a-year biological condition monitoring and the other more frequent monitoring requirements, will allow the regulatory authority to have the data necessary to identify trends that indicate that an operation is at risk of causing material damage to the hydrologic balance outside the permit area. Despite the importance of this data, the final rule, at (d)(1) and (d)(2), recognizes that there are some limited situations when biological condition monitoring would be unnecessary or unlikely to be helpful in detecting material damage to the hydrologic balance outside the permit area and the effects of mining operations on fish, wildlife, and related environmental resources. We do not find any other exceptions necessary or appropriate under SMCRA. We also do not agree that deference to a Clean Water Act authority is appropriate under this provision as paragraph (d) relates to all monitoring, not just the monitoring done pursuant to the Clean Water Act. It is the regulatory authority's responsibility to ensure that SMCRA's requirements are met, including those related to material damage to the hydrologic balance outside the permit area and fish, wildlife, and related environmental resources. Finally, municipal wastewater treatment plants are not subject the same requirements as surface coal mining and reclamation operations and the analogy to these facilities is not indicative or representative of SMCRA's requirements.

[428] 30 U.S.C. 1202(h).

[429] 80 FR 44436, 44469 (Jul. 27, 2015).

Final Paragraph (e): Coordination With Clean Water Act Agencies

This paragraph is being finalized as proposed with the exception that it has been reorganized for clarity. The statement ''make best efforts to'' was initially applied only to minimizing differences in monitoring locations and reporting requirements and sharing data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations. Several commenters noted that coordinating with Clean Water Act agencies in a timely manner can be difficult if the regulatory authority does not receive responses from the Clean Water Act agencies. We agree and, in response to this comment, moved the statement ''make best efforts to'' to the first sentence of the paragraph, revising the section to read that the SMCRA regulatory authority must make its best effort to consult in a timely manner with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act, minimize differences in monitoring locations and reporting requirements, and share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations.

Section 780.24: What requirements apply to the postmining land use?

One commenter opposed adoption of proposed § 780.24 because, according to the commenter, previous § 780.24 is sufficient. The commenter did not elaborate further. We disagree for the reasons discussed in the preamble to the proposed rule.[430]

Another commenter alleged that the proposed rule confuses land use and land capability. We disagree. Whenever sections 508(a)(2) and (3) and 515(b)(2) of SMCRA [431] use the term ''capable'' or ''capability,'' they do so in the context of land uses, as do our regulations.

The commenter also alleged that the preamble to proposed § 780.24 assumes that a change to a higher or better land use would be a change to a higher capability. According to the commenter, a change to a higher or better postmining land use may reduce the capability of the land to support other uses that it could previously support. We agree that implementation of certain postmining land uses would reduce the capability of the land to support other uses. For example, construction of industrial or commercial facilities as part of implementation of a commercial or industrial postmining land use would reduce the capability of the land to support fish and wildlife habitat or cropland. However, this principle applies regardless of whether a higher or better use is involved. Our rules do not seek to prevent this outcome. Instead, they require that the permittee reclaim the land to a condition in which it is capable of supporting the uses that the land was capable of supporting before any mining. If the land was capable of supporting both industrial and cropland uses prior to any mining, then the permittee must reclaim the mined land to a condition capable of supporting both industrial and cropland uses after mining and reclamation. Nothing in our rules prohibits implementation of the industrial land use before bond release, even if doing so reduces or effectively eliminates the site's capability to support cropland. Our rules, like section 515(b)(2) of SMCRA,[432] merely require that the land be reclaimed to its premining capability until implementation of the postmining land use, which is not the responsibility of the permittee. Thus, our rules operate as a protective measure to ensure restoration of site capability in the event that the approved postmining land use is not implemented.

A few commenters alleged that the proposed rule would greatly limit postmining land use options and severely complicate the ability to obtain approval of higher or better uses. According to the commenters, the proposed rule thus would place an undue burden on the landowner and restrict landowner rights. We do not agree. In reality, the final rule would ease the requirements for obtaining approval of a proposed postmining land use that differs from the actual premining use, provided that the proposed use is a use that the land was capable of supporting prior to any mining. Proposed and final paragraphs (b)(1)(iii)(E) through (G) add three new demonstration and finding requirements for approval of alternative postmining land uses; *i.e.,* higher or better uses that preclude restoration of the land to a condition capable of supporting the uses that it was capable of supporting before any mining. Those additional provisions are intended to ensure that restoration of the land to a condition capable of supporting the alternative postmining land use would not result in increased flooding on adjoining properties, preclude attainment of designated uses of surface water outside the permit area, or preclude actual premining uses of surface water outside the permit area. The latter two criteria are elements of the definition of ''material damage to the hydrologic balance outside the permit area in § 701.5, while the first criterion is intended to protect downstream properties from flood damage, consistent with section 102(a) of SMCRA,[433] which provides that one of the purposes of SMCRA is to protect society and the environment from the adverse effects of surface coal mining operations. None of the three new criteria place an undue burden on the landowner or unduly restrict landowner rights.

The same commenters further alleged that adoption of the proposed rule would place a burden on state regulatory authorities by requiring significantly more time for review and inspection. We do not agree. As discussed in the preamble to the proposed rule,[434] adoption of this rule will reduce the burden on both permit applicants and regulatory authorities by eliminating the requirement in our previous rules to process all proposed postmining land uses that differ from the premining use or uses as alternative postmining land uses. Under the proposed and final rules, the alternative postmining land use review process does not apply if the proposed postmining land use is a use that the site was capable of supporting before any mining, even if that land use is not that same as the current premining land use. The final rule includes no additional regulatory authority review and inspection requirements for this type of land use change. It is true that both proposed and final paragraphs (b)(1)(iii)(E) through (G) add three new demonstration and finding requirements for approval of alternative postmining land uses (higher or better uses). However, we anticipate that the additional burden associated with those demonstrations and findings will be more than offset by a reduction in the number of alternative postmining land use determinations required under the final rule compared to the previous rules.

Final Paragraph (a): What postmining land use information must my application contain?

Proposed paragraph (a)(2) would require that each permit application include a discussion of the utility and capability of the reclaimed land to support a variety of other uses, including the uses that the land was capable of supporting before any mining, as identified under § 779.22, regardless of the proposed postmining

[430] 80 FR 44436, 44507–44508 (Jul. 27, 2015).

[431] 30 U.S.C. 1258(a)(2) and (3) and 1265(b)(2).

[432] 30 U.S.C. 1265(b)(2).

[433] 30 U.S.C. 1202(a).

[434] *See* 80 FR 44436, 44508–44509 (Jul. 27, 2015).

land use. One commenter expressed concern that the proposed rule would result in an extensive list of current uses. Proposed paragraph (a)(2) would require more than a list of current uses—it would require a discussion of the utility and capability of the reclaimed land to support both those uses and the other uses that the land was capable of supporting before any mining. A separate regulation at § 779.22(a)(1) requires only a list of existing uses, consistent with section 508(a)(2)(A) of SMCRA,[435] which provides that the application also must identify ''the uses existing at the time of application.'' To the extent that the commenter may have been concerned about a potentially unlimited suite of land uses, we note that our intent is to require identification and discussion only of those land use categories set forth in the definition of ''land use'' in § 701.5.

The commenter further alleged that the proposed rule does not account for historical land use practices and capabilities resulting from agricultural practices. According to the commenter, the conversion of prairies to cropland and the installation of drainage ditches and drain tiles have altered the capability of the affected lands to support certain land uses. Nothing in the proposed or final rules would have the effect alleged by the commenter. Both proposed and final § 780.24(a)(2) require identification and discussion of the uses that the land was capable of supporting before any mining not at some time in the distant past before the advent of agriculture. It does not matter whether that capability is naturally occurring or the result of agriculture drainage projects or other human intervention.

The commenter also alleged that the proposed rule differs from the statutory provision that it is intended to implement because section 508(a)(2)(B) of SMCRA [436] focuses on the capability of the land whereas the proposed rule changes the emphasis to the uses that the land was capable of supporting before any mining. According to the commenter, this change in emphasis is unnecessary and will not result in provision of any useful information.

We do not agree. Section 508(a)(3) of SMCRA [437] provides the primary statutory authority for § 780.24(a)(2), not, as the commenter alleges, section 508(a)(2)(B) of SMCRA. Sections 508(a) and (a)(3) of SMCRA require that the reclamation plan submitted as part of the permit application ''include, in the degree of detail necessary to demonstrate that reclamation required by the State or Federal program can be accomplished,'' a statement of ''the use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses.'' In this context, the term ''alternative uses'' refers to the uses that the land was capable of supporting before any mining. Section 515(b)(2) of SMCRA [438] requires that surface coal mining and reclamation operations ''restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonably likelihood.'' The information required by proposed paragraph (a)(2) is critical ''to demonstrate that reclamation required by the state or federal program can be accomplished,'' as required by section 508(a) of SMCRA, because it is needed to determine whether the proposed operation has been designed to comply with the performance standard in section 515(b)(2) of SMCRA.

However, in response to these and other comments concerned about the potential burden on regulatory authorities and relevance to permitting decisions, we have made two modifications to proposed paragraph (a)(2). First, final rule § 780.24(a)(2) excludes prime farmland historically used as cropland. Under existing § 785.17(e)(1), the approved postmining land use for these prime farmlands must be cropland, so there is no discretion available in determining an appropriate postmining land use. Furthermore, lands reclaimed in accordance with prime farmland standards will be capable of supporting almost all other potential land uses by default. Second, we have limited the scope of final paragraph (a)(2) to include only the proposed postmining land use and the variety of uses that the land was capable of supporting before any mining. The proposed rule implied that the applicant had to discuss other uses in addition to these. We agree that information concerning any other potential postmining land use would not be relevant to the decision making process.

Proposed paragraph (a)(4)(i) would require that each permit application include a copy of the comments concerning the proposed postmining land use that the applicant receives from the legal or equitable owner of record of the land surface. One commenter erroneously described this provision as a requirement for the regulatory authority to consult with the landowner on all proposed postmining land uses. The commenter did not indicate whether it thought that such consultation should be required, as it is for approval of higher or better uses. However, section 508(a)(3) of SMCRA requires only that the application include ''the comments of any owner of the surface.'' Proposed paragraph (a)(4)(i) is consistent with this statutory requirement and we are adopting it as final without change. The fact that SMCRA requires that the landowner have an opportunity to comment on the proposed postmining land use, however, implies that the regulatory authority must consider those comments, to the extent appropriate, when deciding whether to approve the proposed postmining land use.

Proposed paragraph (a)(4)(ii) would require that each permit application include a copy of the comments concerning the proposed postmining land use that the applicant receives from state and local government agencies that would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation. One commenter urged us not to apply this requirement when the premining and postmining land uses are the same. The commenter further alleged that the permit applicant would be unable to meet this requirement in states and localities that do not have planning or zoning entities.

Section 508(a)(3) of SMCRA requires that the application include the comments of ''State and local governments or agencies thereof which would have to initiate, implement, approve or authorize the proposed use of the land following reclamation.'' There is no exception for situations in which the premining and postmining land uses are identical. In addition, there is no guarantee that state and local governments and agencies would not have a role in initiation, implementation, approval, or authorization of the postmining land use in those circumstances. Therefore, we are adopting proposed paragraph (a)(4)(ii) without change. However, nothing in that paragraph compels those governments or agencies to submit comments. Nor does that paragraph prohibit approval of the proposed postmining land use in the absence of comments from those governments or agencies. Consequently, the commenter's statement that the applicant would be unable to meet this requirement in states and localities that do not have planning or zoning entities has no basis.

[435] 30 U.S.C. 1258(a)(2)(A).

[436] 30 U.S.C. 1258(a)(2)(B).

[437] 30 U.S.C. 1258(a)(3).

[438] 30 U.S.C. 1265(b)(2).

Numerous commenters opposed adoption of proposed paragraph (a)(6)(ii), which would have required that the permit applicant disclose any monetary compensation provided to the landowner in exchange for the landowner's agreement to an alternative postmining land use. Many commenters alleged that we have no authority to require disclosure of private contracts, with one commenter asserting that it would require the disclosure of proprietary and confidential business information. Other commenters asserted that the provision would be impossible to enforce. Some commenters opined that the required information is not relevant to whether the postmining land use change is likely to be achieved, nor is it information that the regulatory authority could use in reaching a decision on a request for approval of an alternative postmining land use. One commenter erroneously asserted that this provision would act as a prohibition on compensation and would illegally require the regulatory authority to adjudicate contract disputes. Another commenter urged us to respect the ability of landowners to determine how best to use their property after mining and to avoid unnecessary regulation of private real estate dealings where such regulation would provide no significant environmental or land use planning benefit.

Another commenter alleged that the proposed rule would not be effective in addressing the core issue, which is the failure of regulatory authorities to make an independent and fact-based determination that the proposed change in land use meets statutory requirements. According to the commenter, compensation for landowner agreement to a postmining land use change could easily be disguised as something else and there is no reason to believe that disclosure of compensation would improve the quality of the decision-making process. Therefore, the commenter recommended that the monetary disclosure provision be deleted and replaced with a provision specifying that landowner consent alone is insufficient basis for approval of a proposed alternative postmining land use without further demonstrations of compliance with the criteria for approval of an alternative postmining land use.

The commenter explained that, in her experience, some permittees have made payments or used other means to persuade landowners to concur with alternative postmining land uses that are not higher or better uses or for which there is no intent to implement. According to the commenter, under the previous rules, landowner consent was often given for uses that were neither higher nor better, that were improbable or impractical, and that sometimes were even undesirable for the landowner. The commenter further stated that regulators rely on landowner consent to an excessive degree to document whether the proposed postmining land use meets the statutory standards for approval as a higher or better use. The commenter cites a decision of Administrative Law Judge Harvey Sweitzer in *Farrell Cooper Mining Company* v. *OSMRE,* Docket No. 2013–1–R, September 30, 2015, as providing insight into the legal and economic forces that hinder proper land restoration following mining. According to the commenter, mining can alter landforms for the better, but the economics of mining also can push both permittees and surface owners to overestimate the need for, and utility of, such structures, resulting in the creation of impoundments too large to ever fill with water, losses of pastureland, retention of mining-related structures for industrial uses never realized, and creation of flat land in inaccessible areas where there is no need to such land. The commenter further stated that, as in the *Farrell-Cooper* decision, she had repeatedly observed legal instruments in which coal companies essentially contract upfront with surface owners to mandate their acquiescence in any future changes to landforms or land use that the permittee may seek to permit. The commenter also cited the *Farrell-Cooper* decision as documenting the failure of regulators to enforce their laws and regulations and make independent and factually supported findings because of deferral to landowner judgment.

After considering these comments, we decided to adopt the approach recommended by the last comment discussed above. Specifically, we are not adopting proposed paragraph (a)(6)(ii). Instead, we revised proposed paragraph (b)(2)(ii) to include language clarifying that landowner consent alone is an insufficient basis for a regulatory authority finding that the applicant or permittee has made the demonstration needed for approval of a proposed alternative postmining land use. We agree with the commenter that this approach should be more effective in ensuring that both applicants and regulatory authorities consider all the criteria in paragraphs (b)(1)(i) through (iii) for approval of alternative postmining land uses rather than deferring to the professed wishes of the landowner. We also agree with the commenter that, while the regulatory authority must take the preferences of landowners into consideration when evaluating a proposed postmining land use, landowner consent is not probative of whether a proposed land use meets the criteria for approval.

Final Paragraph (b): What requirements apply to the approval of alternative postmining land uses?

One commenter asserted that we should delete proposed paragraph (b)(1) because the preamble provides only anecdotal evidence to support the proposition that the current regulations are insufficient to reliably achieve proposed higher or better land uses. However, the commenter only provided arguments concerning paragraph (b)(1)(i), so we interpret the comment as being directed at only that subparagraph. Proposed paragraph (b)(1)(i) would require that the applicant demonstrate that there is a reasonable likelihood that a proposed alternative postmining land use will be achieved after mining and reclamation, as documented by, for example, real estate and construction contracts, plans for installation of any necessary infrastructure, procurement of any necessary zoning approvals, landowner commitments, economic forecasts, and studies by land use planning agencies. According to the commenter, it is impractical to expect long-term mining operations to present evidence such as real estate and construction contracts to support the proposition that the mined area will in fact achieve the proposed postmining land use years prior to the completion of reclamation activities.

Moreover, our regulations do not require attainment of proposed alternative postmining land uses (higher or better uses) as the commenter appears to imply, but, consistent with the underlying statutory provision, they do require that the applicant demonstrate, and the regulatory authority find, that there is a reasonable likelihood that the proposed higher or better use will be achieved. Section 515(b)(2) of SMCRA [439] requires that the permittee restore land affected by mining operations to a condition capable of supporting either the uses that it was capable of supporting prior to any mining or ''higher or better uses of which there is reasonable likelihood.'' Our proposed and final rules give fuller effect than our previous rules to this statutory provision by creating a clearer distinction between requirements applicable to proposed higher or better postmining land uses and requirements

[439] 30 U.S.C. 1265(b)(2).

applicable to proposed postmining land uses consisting of one or more of the uses that the site was capable of supporting prior to any mining.

Our rules always have required a demonstration and finding that there is a reasonable likelihood of achieving a proposed alternative postmining land use, as does the statute. Proposed paragraph (b)(1)(i) differs from the previous rule only in that the proposed rule provides examples of how that demonstration and finding may be made. The list is not exhaustive, but it provides guidance on the type of documentation needed to make a good-faith demonstration and finding. If a permit applicant is unable to provide documentation of this nature, then there is no basis upon which the regulatory authority can make a finding that there is a reasonable likelihood of achieving the proposed postmining use, as the commenter implicitly acknowledges. When there is uncertainty about the reasonable likelihood of achieving a higher or better use, the applicant should propose a different postmining land use, one that the land was capable of supporting before any mining. If, at a later date, implementation of a higher or better use becomes more likely, the permittee may submit a permit revision application to change the postmining land use.

The commenter also questioned the ability of regulatory authorities to evaluate the likelihood that real estate and construction contracts will ensure implementation of the postmining land use. However, the commenter provided no explanation of why this would be the case and we have no reason to believe that regulatory authorities lack this capability.

Final paragraph (b)(1) differs slightly from proposed paragraph (b)(1) in that we replaced the phrase ''use or uses'' with ''uses'' for consistency with paragraph (a) and to emphasize that the default requirement is to restore the site to a condition in which it is capable of supporting the uses that it was capable of supporting before mining, not just the single use that existed prior to mining. The revised language is consistent with section 515(b)(2) of SMCRA,[440] which requires that the land be restored ''to a condition capable of supporting the uses which it was capable of supporting prior to any mining.''

We revised proposed paragraph (b)(1)(iii)(D) by adding the word ''tribal'' to the phrase ''Federal, State, or local law'' found in section 515(b)(2) of SMCRA. We consider this revision to be a clarification rather than a substantive change because we have always considered tribal law to be included in the statutory phrase.

We revised proposed paragraph (b)(1)(iii)(E) to refer to changes in the size or frequency of peak flows that would cause an increase in flooding rather than an increase in damage from flooding as in the proposed rule. We made this change because determination of whether there would be an increase in flooding is easier and more feasible than a determination of whether there would be an increase in damage from flooding. The latter standard would require projection of future development downstream of the proposed permit area, which could be difficult and speculative.

Final paragraphs (b)(1)(iii)(F) and (G) differ from their counterparts in the proposed rule in that we removed references to reasonably foreseeable uses of surface water and groundwater. The final rule no longer includes the term ''reasonably foreseeable uses'' in contexts other than protection of reasonably foreseeable surface land uses from the adverse impacts of subsidence. Our reasons for deletion of this term are twofold. First, the term appears in SMCRA only in section 516(b)(1), which requires that operators of underground mines adopt subsidence control measures to, among other things, maintain the value and reasonably foreseeable use of surface lands. Sections 717(b) and 720(a)(2) of SMCRA separately protect certain water uses. Second, numerous commenters opposed inclusion of the term ''reasonably foreseeable uses'' on the basis that it is too subjective, difficult to determine, and open to widely varying interpretations, which could result in inconsistent application throughout the coalfields.

Final paragraphs (b)(1)(iii)(F) and (G) also differ from their counterparts in the proposed rule in that we clarified that these paragraphs apply only outside the permit area, consistent with section 510(b)(3) of SMCRA,[441] which applies the prohibition on material damage to the hydrologic balance only outside the permit area. We also removed all references to groundwater because these paragraphs pertain only to surface flows. In addition, we revised these paragraphs to track more closely the language concerning designated uses of surface water under the Clean Water Act in our definition of ''material damage to the hydrologic balance outside the permit area'' in § 701.5. Finally, in response to comments from the U.S. Environmental Protection Agency, we replaced the term ''existing'' when referring to uses of surface water with ''any actual use of surface water outside the permit area before mining.'' This change is intended to avoid any confusion with the term ''existing uses'' under the regulations implementing the Clean Water Act.

One commenter expressed concern that proposed paragraph (b)(1)(iii)(F) could be an issue in the arid Southwest when the operation includes the construction of permanent impoundments that do not discharge. According to the commenter, the rule could be interpreted to mean that non-discharging impoundments are precluding downstream reaches from attaining their designated use even though the immediate downstream reaches are ephemeral. This situation could exist only if the runoff from a mine comprises a critical element of the flow necessary to support a designated use of surface water outside the permit area under section 303(c) of the Clean Water Act.[442] We do not anticipate that such a situation would arise, given the infrequency and ephemeral nature of surface runoff in arid areas.

Another commenter stated that proposed paragraph (b)(2)(i) requiring the regulatory authority to consult with ''the landowner or the land management agency having jurisdiction over the lands to which the use would apply'' is vague and unnecessary because it does not explain what specifically the regulatory authority is to seek consultation on. The commenter opines that the regulatory authority only needs to know that the landowner has consented to the land use change. Further, the commenter states that our previous regulations require that consent be provided in writing and thus, the proposed paragraph is unnecessary. We disagree. In our experience landowners frequently discuss significant concerns about alternate postmining land uses when engaged by the regulatory authority. For this reason, consulting with the landowner is essential, particularly when assessing the ''reasonable likelihood'' that a change in land use will occur. Therefore, we are adopting this paragraph as proposed.

Final Paragraph (d): What restrictions apply to the retention of mining-related structures?

Paragraph (d) establishes restrictions on the retention of mining-related structures, other than impoundments and roads, for potential future use in support of the postmining land use. One

[440] 30 U.S.C. 1265(b)(2).

[441] 30 U.S.C. 1260(b)(3).

[442] 33 U.S.C. 1313(c).

commenter asserted that we should not adopt proposed paragraph (d) because adoption is likely to lead to economic waste when structures that could have been utilized by successive landowners or tenants are torn down during reclamation. We find that the outcome posited by the commenter is unlikely to occur. Structures that are not used for postmining land use purposes are unlikely to be maintained by current or future landowners. As such, they rapidly become eyesores and attractive nuisances. Unused structures also prevent restoration of the land upon which they are sited to a condition capable of supporting the uses that the land was capable of supporting before any mining, as required by section 515(b)(2) of SMCRA. Therefore, we are adopting paragraph (d) as proposed, with the modifications discussed below.

One commenter opposed the provisions in proposed paragraphs (d)(2) and (3) that effectively require that the land upon which a structure is sited be revegetated with native vegetation if the structure is removed because of a failure to implement the approved postmining land use during the revegetation responsibility period. According to the commenter, the land from which the structure was removed could be used for cropland or in some other manner that would not warrant planting of native vegetation. The commenter also noted that planting with native vegetation may not be consistent with the surface owner's land use intentions.

Surface owner intentions are an important consideration, but they are not the exclusive criterion for selection of the species planted on land disturbed by mining operations. Section 515(b)(19) of SMCRA [443] requires that lands disturbed by surface coal mining operations be revegetated with native species unless introduced species are desirable and necessary to achieve the postmining land use. Section 515(b)(20) of SMCRA [444] provides an exception to that requirement for sites with a long-term, intensive agricultural postmining land use.

However, we determined that the proposed rule's revegetation requirement was not fully in accord with the underlying statutory provisions discussed above because it did not clearly provide for the exceptions authorized by the statute. Therefore, in final 30 CFR 780.24(d)(2) and (3), we are replacing the phrase ''establishing native vegetation in accordance with § 816.111 of this chapter'' in the proposed rule with ''revegetating the site in accordance with the revegetation plan approved under § 780.12(g) of this part for the permit area surrounding the site upon which the structure was previously located.'' Section 780.12(g) includes the exceptions allowed under paragraphs (b)(19) and (20) of SMCRA.

One commenter expressed concern that proposed paragraph (d)(3) may not allow buildings left after reclamation to be sold. Nothing in the proposed or final rules would prohibit sale of a building. If the sale occurs before expiration of the revegetation responsibility period and the building continues to be used in support of the postmining land use, the building may remain on site. If the sale occurs before expiration of the revegetation responsibility period and the building is no longer used in support of the postmining land use, but is being used for some other purpose, the permittee may apply for a change in postmining land use for the land containing the building. If the sale occurs after final bond release for the land upon the building is sited, the sale and use of the building are no longer a concern under SMCRA because the land is no longer considered to be the site of a surface coal mining and reclamation operations subject to jurisdiction under SMCRA. Under all other circumstances, the buyer must remove the building unless it is used in support of the approved postmining land use.

Final Paragraph (e): What special provisions apply to previously mined areas?

Several commenters noted that proposed paragraph (e) contained an erroneous cross-reference to 30 CFR 780.24(b))(1)(iv), which does not exist. One commenter alleged that adoption of proposed paragraph (e) without correction of the cross-reference would have the effect of prohibiting the regulatory authority from approving any alternative postmining land uses on previously mined land. The commenter also asserted that adoption of the proposed requirement for compliance with proposed paragraph (a) would create a significant disincentive to remining previously mined land because paragraph (a) requires restoration of the land to a condition in which it is capable of supporting the uses that it was capable of supporting before any mining. According to the commenter, compliance with this requirement is impossible if topsoil and subsoil was not salvaged prior to the initial mining.

After evaluating these comments, we find that the commenters are correct. In addition, our review disclosed that the language of proposed paragraph (e) did not match the description of that paragraph in the preamble to the proposed rule. The preamble discussion accurately describes our intent, whereas the actual language of the proviso in proposed paragraph (e) does not. Therefore, we are not adopting the language of paragraph (e) set forth in the proposed rule. Instead, the language of paragraph (e) that we are adopting as part of this final rule is consistent with the description and discussion in the preamble to proposed paragraph (e).[445] Specifically, we are replacing the phrase ''provided that you comply with paragraphs (a) and (b) of this section'' in the proposed rule with ''provided that restoration of the land to that capability does not require disturbance of land previously unaffected by mining.'' Final paragraph (e) does not include the limitations that would lead to the outcomes described by the commenter. It will not create a disincentive for remining.

Section 780.25: What information must I provide for siltation structures, impoundments, and refuse piles?

Section 780.25 as proposed, provides for safety enhancements related to siltation structures, impoundments, and refuse piles.[446] We received a general comment supporting the proposed rule, particularly those related to safety enhancements, such as the planning for the stabilization of siltation structures, impoundments, and refuse piles. As discussed below, some commenters also suggested improvements. After evaluating all the comments, we made several modifications resulting in a final rule that addresses the concerns of commenters and improves the clarity of § 780.25.

Final Paragraph (a): How do I determine the hazard potential of a proposed impoundment?

For the purposes of clarity and to be consistent with other bureaus within the Department of the Interior, final paragraph (a) includes a table representing a simplified process of hazard classification. In response to the proposed rule, a commenter considered our reliance upon the U.S. Department of Agriculture Natural Resource Conservation Service's Technical Release No. 60, misplaced. The commenter noted that, within the Department of the Interior, the Technical Release No. 60 has been superseded by the Federal Emergency Management Agency's hazard

[443] 30 U.S.C. 1265(b)(19).

[444] 30 U.S.C. 1265(b)(20).

[445] 80 FR 44436, 44510, 44608 (Jul. 27, 2015).

[446] 80 FR 44436, 44511–44513 (Jul. 27, 2015).

classifications. There is little difference between the two classification systems, but to be consistent, we are incorporating the classification table in the Federal Emergency Management Agency's *Federal Guidelines for Dam Safety, Hazard Potential Classification System for Dams* in the final rule. The table characterizes the hazard potential of a dam as ''low,'' ''significant,'' or ''high.'' In addition, the nature of the hazard is considered—with the primary consideration being the potential for human mortality. Additionally, because SMCRA mandates protection of the environment as well as the public, the potential for environmental or ''lifeline losses'' is also considered. ''Lifeline losses'' refer to disruption of important public utilities, some of which could result in risk to the public. For example, disruption of highways, waterlines, or communications could interfere with police, fire, or ambulance services. Major railroads and highways are included in this category due to the impact of their disruption on large numbers of people. A feature of the system is that it is used only for hazard classification, and each agency or bureau is able to impose design, operation, and maintenance criteria that meet their specific needs. For example, within final paragraph (a), we are requiring applicants to use the Federal Emergency Management Agency hazard classification system, but we impose the additional requirements detailed within the remainder of § 780.25.

Final Paragraph (b): How must I prepare the general plan for proposed siltation structures, impoundments, and refuse piles?

As a result of the adoption of the hazard potential classification system for dams within paragraph (a) of the final rule, we have relocated the explanation of general plan requirements for proposed siltation structures, impoundments, and refuse piles, discussed at paragraph (a) within the proposed rule, to paragraph (b) of the final rule.

Some commenters raised concerns that this section blurs the distinction between typical sediment structures and structures that satisfy the Mine Safety and Health Administration criteria and imposes unreasonable evaluation and design criteria on sediment structures. Specifically, these commenters questioned the requirement for geotechnical evaluation, including consideration of subsidence, on a small sediment structure designed to typically contain little or no water.

We concur that extensive geotechnical evaluations as proposed in paragraph (a)(1)(iv) and now found in final paragraph (b)(4)(i), are not necessary for small structures in areas with 26.0 inches or less of average annual precipitation or for siltation structures. This is because such structures cannot impound sufficient water to pose a significant risk in the event of failure. Therefore, we have altered the final rule to grant exemptions for small structures in areas with less than 26.0 inches of annual precipitation, found at paragraph (b)(4)(ii)(A), and at paragraph (b)(4)(ii)(B), for siltation structures; as long as the structures do not meet the criteria in § 77.216(a) of this title [447] or have a ''significant'' or ''high'' hazard potential as detailed in the hazard potential classification table within paragraph (a) of this section.

Some commenters also claimed that the requirements in the proposed rule at paragraph (a)(1)(iv), now paragraph (b)(5)(i) in the final rule, are focused on regional issues, such as breakthroughs into underground workings and refuse piles, which are more common in the eastern portion of nation. These commenters asserted that this provision requires a large amount of additional and unnecessary design, permitting, and construction work for the small impoundments typical in western mines that generally pose little risk of failure or danger to the public. Similar to our discussion of the exemptions within final paragraph (b)(4), we concur that extensive evaluations of breakthroughs, as required in final paragraph (b)(5)(i) would not be necessary for small structures in areas with 26.0 inches or less of average annual precipitation or for siltation structures. Again, this is because such structures cannot impound sufficient water to pose a significant risk in the event of failure. We have provided exemptions in paragraphs (b)(5)(ii)(A) for structures in areas with less than 26.0 inches of annual precipitation, and (b)(5)(ii)(B) for siltation structures; as long as the structures do not meet the criteria in 30 CFR 77.216(a) or have a ''significant'' or ''high'' hazard potential under paragraph (a) of this section.

The same commenter that generally supported the safety enhancements to § 780.25 also specifically supported the inclusion of the requirement within the proposed rule at paragraph (a)(1)(v), now paragraph(b)(5)(i), that the general plan for each impoundment include an analysis of the potential for the impoundment to drain into subjacent underground mine workings and an analysis of the impacts of such drainage. We agree that prudent planning is appropriate; therefore, we are incorporating this requirement, as proposed, into the final rule.

In paragraph (a)(1)(vi)(A) of the proposed rule, we included a requirement that the plan must include ''a certification statement that includes a schedule setting forth the dates when any detailed plans for structures that are not submitted with the general plan will be submitted to the regulatory authority.'' We have modified this requirement and reclassified it as paragraph (b)(6) in the final rule. We have removed the ''certification statement'' but required the plan include a schedule setting forth the dates when detailed design plans will be submitted to the regulatory authority.

Final Paragraph (c): How must I prepare the detailed design plan for proposed siltation structures, impoundments, and refuse piles?

Proposed paragraph (a)(2) applied to structures that meet the criteria for ''Significant'' or ''High Hazard'' classification in accordance with the U.S. Department of Agriculture Natural Resources Conservation Service Technical Release 60 [448] and the criteria of the Mine Safety and Health Administration's regulation at 30 CFR 77.216(a). Proposed paragraph (a)(3) applied to ''other structures,'' or structures not meeting these criteria.

We have reclassified proposed paragraphs (a)(2), relating to design plans for high hazard dams, significant hazard dams, and certain impounding structures to paragraph (c)(1), and (a)(3), relating to other structures, to paragraph (c)(2) within the final rule. Additionally, we have made clarifications and modifications to these sections. We have renumbered the paragraphs for clarity and to emphasize the distinctions between the two classifications.

In addition to the reclassification of proposed rule (a)(2) to (c)(1) in the final rule, we have removed the references to the U.S. Department of Agriculture's Technical Release 60, hazard classification procedure from final paragraph (c)(1) and revised it to apply to structures that would have a significant or high hazard potential under paragraph (a) of final rule and, similar to the proposed rule, would satisfy the criteria of the Mine Safety and Health Administration's regulation at 30 CFR 77.216(a).

[447] 30 CFR 77.216(a), Water, sediment, slurry impoundments and impoundment structures; general. Mine Safety and Health Admin., Dep't. of Labor.

[448] U.S. Dep't. of Agric., Natural Resources Conservation Serv., *Earth Dams and Reservoirs,* Technical Release No. 60 (July 2005).

Paragraphs (c)(1) and (c)(2) of the final rule both include requirements related to who may prepare plans. We have moved these from ''general requirements'' and provided separate paragraphs for each to emphasize the distinctions between the levels of associated risk and design requirements. The structures within paragraph (c)(1) of the final rule are critical structures, the failure of which could result in significant loss of human life. Therefore, we have made the design plans for these structures subject to more stringent requirements, including that they be prepared by or under the direction of a registered professional engineer; or for structures covered in paragraph (c)(2), a licensed land surveyor. However, we note that all coal mine waste structures to which §§ 816.81 through 816.84 apply, must be designed by a registered, professional engineer even if such structures do not meet the hazard classification criteria of (c)(1). In addition, we are requiring that the engineer or land surveyor certify the plans. The engineer or land surveyor must have a documented history of experience with dams and impoundments. This is a new requirement; however, due to the potential for loss of life in the event of failure it is important that designers of these structures have, in addition to appropriate credentials, a documented history of pertinent experience.

Paragraph (a)(3) of the proposed rule, now paragraph (c)(2), includes detailed design plan requirements for ''other structures.'' Similar to the detailed design plans for high hazard dams, significant hazard dams, and impounding structures, this paragraph details each of the requirements necessary for an adequate design plan for structures other than those enumerated in paragraph (c)(1). Additionally, within paragraph (c)(2)(i)(A), we included the requirement that the qualified registered professional engineer, or qualified registered professional land surveyor in states that allow land surveyors to design these structures, must be experienced in the design and construction of impoundments. Again, this is a new requirement. We recognize that although the hazard is inherently lower there is still a potential for loss of life. Therefore, utilizing experienced professionals is necessary. Paragraph (c)(2)(i)(B) also includes a requirement that all coal mine waste structures to which §§ 816.81 through 816.84 of this chapter apply must be certified by a qualified, registered, professional engineer to ensure proper construction.

One commenter questioned the requirement in proposed paragraph (c)(2), that the applicant submit the Mine Safety and Health Administration plan to the SMCRA regulatory authority and suggested that we delete it. This commenter alleged that this proposed requirement is unnecessarily confusing and meaningless because an incomplete plan would not be useful to the regulatory authority. The commenter suggested that the provision be either eliminated or revised to require the submission of the completed Mine Safety Health Administration impoundment plan through a permit revision. The commenter also noted that the Mine Safety and Health Administration plan is already subject to many layers of review and submitting it to the regulatory authority would be duplicative. In addition, the commenter noted that many of the procedures set out in the plan do not impact the environment and would not be relevant to a SMCRA review. We concur with the commenter and have removed the requirement within the final rule. It is not necessary for the applicant to submit plans required by the Mine Safety and Health Administration to the SMCRA regulatory authority because, even without those plans, the SMCRA regulatory authority can determine whether there are deviations from the SMCRA plans.

We have moved the requirements that detailed plans not submitted with the permit application be submitted in accordance with a provided schedule and that they be submitted and approved before construction begins from paragraph (a)(1)(vi), under ''General requirements'' in the proposed rule, to paragraph (c)(3) ''Timing of submittal of detailed plans'' in the final rule. This was done because requirements for detailed plans were provided in the two previous paragraphs in the final rule: High hazard dams, significant hazard dams, and certain impounding structures in paragraph (c)(1) and other structures in paragraph (c)(2). We decided to address the issue of scheduling immediately after requirements for those plans were presented.

Final Paragraph (d): What additional design requirements apply to siltation structures?

For the purpose of clarity, proposed paragraph (b), relating to siltation structures, has been reclassified and is found at paragraph (d) in the final rule.

Final Paragraph (e): What additional design requirements apply to permanent and temporary impoundments?

For the purposes of clarity, proposed paragraph (c), relating to ''permanent and temporary impoundments,'' has been modified and reclassified as paragraph (e) within the final rule. We removed the reference to the criteria for Significant Hazard Class or High Hazard Class dams in published by the U.S. Department of Agriculture, Natural Resources Conservation Service Technical Release No. 60. As discussed above, in connection with paragraph (a), we are requiring hazard classification to be done in accordance with the Federal Emergency Management Agency's hazard potential classification system.

In proposed paragraph (c)(4), now (e)(3), we proposed a requirement that permittees of impoundments that will meet the Significant Hazard Class or High Hazard Class criteria for dams [449] or satisfy the Mine Safety and Health Administration criteria of 30 CFR 77.216(a), include with each plan a stability analyses of the structure. One commenter stated that the Mine Safety and Health Administration already require these actions as part of their regulatory program and doing so here would be duplicative. The commenter also indicated that by adding this to the SMCRA permit we are implying that compliance with the Mine Safety and Health Administration provisions is not adequate. This commenter asserted that it is likely to cause inconsistency in requirements between the Mine Safety and Health Administration and the SMCRA regulatory authority. In general, the commenters requested that we remove the provision. We disagree. We are well within our statutory authority under section 515(f) of SMCRA [450] to impose the requirements of paragraph (e)(3). Section 515(f) of SMCRA requires operators to follow standards and criteria that conform to standards and criteria used by engineers to ensure that flood control structures are safe and effectively perform their intended function. In addition, these requirements in no way supersede requirements imposed by the Mine Safety and Health Administration but are, in practice, complementary. Analyses required by the Mine Safety Health Administration are pertinent to individual stages of construction and are submitted piecemeal during construction. Those required by the SMCRA regulatory authority are

[449] U.S. Dep't. of Agriculture, Natural Resources Conservation Serv. 2005. ''Earth Dams and Reservoirs'' Technical Release No.60 (July 2005).

[450] 30 U.S.C. 1265(f).

pertinent to the structure upon completion of all construction. The regulatory authority cannot, during the application review process, evaluate the potential impact of the completed structure without requiring and receiving analyses based on the final configuration. Therefore, in the final rule we now reference the hazard classification in paragraph (a) rather than the Natural Resources Conservation Service Technical Release No. 60. To the extent that duplication may exist between the two regulatory regimes, we encourage states to coordinate the processing of permit applications with the Mine Safety and Health Administration. For example, the states could perform side-by-side review of the analyses of initial stages submitted to Mine Safety and Health Administration and the final configuration submitted with the SMCRA permit application.

Final Paragraph (f): What additional design requirements apply to coal mine waste impoundments, refuse piles, and impounding structures constructed of coal mine waste?

In proposed paragraph (d)(2)(iv), now paragraph (f)(2)(iv) in the final rule, we require that impoundments and siltation structures be designed to ensure that at least 90 percent of the stormwater stored in the impoundment during the design precipitation event will be removed within a 10-day period. One commenter asserted that this requirement would need to be addressed in the National Pollutant Discharge Elimination System permit as well because it could impact mixing zone limits, loading limits, and whether the operation meets numerical effluent standards. This assertion appears to be based on a belief that greater than normal (stormwater) discharges equate to greater than normal loadings of parameters. We proposed this requirement for safety reasons as it is important to restore the stormwater storage capacity as quickly as possible to prepare for the possible occurrence of another significant event. Although the rate of discharge of water is greater than normal following a significant precipitation event, parameters with numerical effluent limits commonly defined in a National Pollutant Discharge Elimination System permit tend to be at low concentrations after a significant precipitation event, due to dilution, with the exception of suspended solids. Therefore, in many cases we do not anticipate that it would be necessary to address stormwater discharged over time or that such a discharge would tend to exceed loading limits or numerical effluent standards. These are issues that should be examined during the National Pollutant Discharge Elimination System permitting process and addressed in that permit. Nothing in this section, however, exempts an operator from complying with its National Pollutant Discharge Elimination System permit as approved. Should discharges of stormwater following a precipitation event result in exceedances of effluent limitations defined in the permit, they would be addressed in the same way as any other such exceedance. In addition to potential enforcement by the Clean Water Act regulatory authority, the SMCRA regulatory authority may also have separate enforcement obligations for failure to comply with requirements of § 780.28(a).

One commenter suggested that we revise the permitting requirements to make them similar to the performance standard changes finalized in a 1983 rulemaking,[451] by: (1) Replacing the term ''coal processing waste banks'' with ''refuse piles'' and (2) replacing the term ''coal processing waste dams and embankments'' with references to coal mine waste impounding structures. We concur, and, as indicated in the proposed rule,[452] we have replaced the term ''coal processing waste banks'' with ''refuse piles'' and the terms ''coal processing waste dams and embankments'' with references to coal mine waste impounding structures.

Section 780.26: What special requirements apply to surface mining near underground mining?

We have redesignated proposed § 780.27, and it is now § 780.26 in the final rule. With the exception of the redesignation, we are finalizing this section as proposed. We received no comments on this section.

Section 780.27: What additional permitting requirements apply to proposed activities in or through ephemeral streams?

In the preamble to the proposed rule we discussed the unique characteristics of ephemeral streams and the vital importance of headwater streams, including ephemeral streams, in maintaining the ecological health and function of streams down gradient of headwater streams.[453] In the preamble to § 701.5 of the final rule, we discussed the revisions of the proposed definition of ''ephemeral stream.'' As revised, the final definition of ''ephemeral stream'' now includes those conveyances receiving runoff from snowmelt events and that have both a bed-and-bank configuration and an ordinary high water mark. The final rule also revises our definition of ''intermittent stream'' so that it no longer automatically includes streams draining a watershed of at least one-square mile. This change may result in a number of streams classified as ''intermittent'' under the previous regulations being categorized as ''ephemeral streams'' under the final rule because the final rule amends the definition of ''intermittent stream.'' Additionally, permitting requirements for ephemeral streams differ from those for perennial and intermittent streams. Because of the distinctions between ephemeral streams and other types of streams, we added § 780.27 to the final rule to specifically address the permitting requirements for mining in or through ephemeral streams. Creating this distinct section also addresses commenters' concerns that it was difficult to discern when regulations applied strictly to ephemeral streams or applied to all streams.

Final Paragraph (a): Clean Water Act Requirements

If the proposed permit area includes waters subject to the jurisdiction of the Clean Water Act, including some ephemeral streams, the regulatory authority must condition the permit to prohibit initiation of surface mining activities in or affecting the applicable waters before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act.[454]This paragraph makes clear that although a SMCRA permit may be obtained prior to you obtaining all necessary authorizations, certifications, and permits under the Clean Water Act, the regulatory authority must place a condition upon the permit that no surface mining activities in or affecting waters subject to the jurisdiction of the Clean Water Act may be initiated before you, obtain all necessary authorizations, certifications, and permits under the Clean Water Act.[455]

A similar requirement was found in proposed § 780.28(a), however, as discussed in the introduction of § 780.27, we have separated out the requirements for ephemeral streams and the requirements pertaining to them are found in final rule § 780.27. This final paragraph more closely tracks the permit condition found in final rule § 773.17(h) and the provisions of final rule § 780.16(c)(4)(ii) about protection of other species and the requirement to

[451] 48 FR 44006 (Sept. 26, 1983).

[452] 80 FR 44436, 44511 (Jul. 27, 2015).

[453] 80 FR 44436, 44451–44453 (Jul. 27, 2015).

[454] 33 U.S.C. 1251 *et seq.*

[455] 33 U.S.C. 1251 *et seq.*

explain how you will avoid or minimize mining through or discharging dredged fill material into wetlands or streams that are subject to the jurisdiction of the Clean Water Act. This approach reconciles the needs of other federal agencies to consider the SMCRA permit when making decisions about granting Clean Water Act authorizations, certifications, and permits but balances the needs of the permittee to make informed decisions about the feasibility of mining in or through ephemeral streams. Placing a permit condition upon the permittee will avoid unnecessary and often costly permit revisions by requiring the permittee to consult with the Clean Water Act authority at the early stages of the SMCRA permitting process. These modifications to the final rule were based on both public comment and comments from a federal agency.

Final Paragraph (b): Postmining Surface Drainage Pattern and Stream-Channel Configuration

Unlike the requirements for intermittent and perennial streams discussed in § 780.28, final rule paragraph (b) of this section only requires the restoration of a postmining surface drainage pattern that is similar to the premining drainage pattern, relatively stable, and in dynamic near-equilibrium and postmining stream-channel configurations that are relatively stable and similar to the premining configuration of ephemeral streams. This means that the stream flood plains maintain their alignments and widths, and although the stream channel location within the floodplain may vary, the general configuration of the stream channel remains relatively constant. To be clear, this section does not require the establishment of hydrologic or ecological function as mandated for perennial and intermittent streams. Paragraph (b)(2) also allows the regulatory authority to approve or require a drainage pattern or stream-channel configuration that differs from the premining pattern if appropriate to: Ensure stability; prevent or minimize downcutting or widening of reconstructed stream channels and control meander migration; promote enhancement of fish and wildlife habitat; accommodate any anticipated temporary or permanent increase in surface runoff as a result of mining and reclamation; accommodate the construction of excess spoil fills, coal mine waste piles, or impounding structures; replace previously channelized or severely altered streams with a more natural, relatively stable, and ecologically sound drainage pattern or configuration; or reclaim a previously mined area. Because the drainage pattern and stream-channel configuration requirements need only be similar to the premining patterns and configurations, some differences are allowable—*i.e.,* an operator is not required to reconstruct 100 percent of the ephemeral streams that existed prior to mining to the same premining configuration. However, in order to control meander migration, ephemeral streams that are reconstructed, must be constructed within a floodplain-width lined channel that is filled with substrate material appropriate to the anticipated gradient and flow conditions. The reconstructed channel is initially excavated in this substrate and allowed to move within the floodplain as a natural stream would migrate. These processes contain meander migration within the designed floodplain and thus prevent uncontrolled erosion of the reconstructed stream channel. We added these requirements in consultation with another federal agency to clarify the goal of final rule § 780.27(b), *i.e.,* to ensure that the stream channel will be stabilized and erosion minimized.

These requirements ensure establishment of a postmining drainage pattern that is functionally equivalent to the premining pattern, is relatively stable, and in dynamic near equilibrium, while affording the regulatory authority the discretion to alter the drainage pattern in certain situations that are likely to be better for the hydrologic balance. For example, the regulatory authority may allow a variance from the requirements in paragraph (b)(1) when onsite conditions are such that undesirable situations can be avoided by altering the drainage pattern. Examples might include situations where reconstructing the premining pattern could result in instability, downcutting or widening, or excessive erosion of the reconstructed stream channel, or when reconstruction of the premining drainage pattern would eliminate an opportunity to enhance wildlife habitat. Other examples would include cases where the premining drainage is altered to accommodate anticipated increased runoff; accommodate construction of spoil, mine waste, or impounding structures; or to replace previously channelized or severely altered streams. Another example would be the accommodation of the construction of approved structures, such as excess spoil fills or coal mine waste impounding structures, which may necessitate drainage patterns alterations. Still another example of when the regulatory authority may approve an alternate drainage pattern is when the premining drainage pattern was altered by previous activities, whether mining-related or not. As noted by commenters, in some circumstances, restoring the postmining drainage to the approximate drainage pattern before any human activity occurred may be beneficial and should be allowed. To address this concern, we added final paragraph (b)(2)(vii) because the premining surface drainage pattern and stream-channel configuration on previously mined areas may not be optimal or desirable from a land use, hydrological or ecological perspective.

Final Paragraph (c): Streamside Vegetative Corridors

As discussed previously in this preamble, throughout the final rule we have replaced the term ''riparian corridor'' as used in the proposed rule with ''streamside vegetative corridor''; this change is also incorporated into this section. The final rule is based on the current understanding of the contributions made by streamside vegetative corridors along ephemeral streams. As discussed above, although a permittee is not required to reconstruct 100 percent of the ephemeral streams mined in or through, those ephemeral streams that are reconstructed must include streamside vegetative corridors constructed in accordance with § 816.56(c)(1) through (3) of the final rule. We note that final rule § 816.56(c)(4) provides exceptions to the requirements to establish streamside vegetative corridors. Final paragraphs (c)(4)(i) through (ii) of § 816.56 excludes prime farmland historically used for cropland or situations in which establishment of a streamside vegetative corridor comprised of native species would be incompatible with an approved post-mining land use that is implemented prior to final bond release. In response to commenters' concerns that prime farmland should not be impacted by streamside vegetative corridors, we have made clear in final rule § 780.27(c)(3) that final § 780.27(c)(1) and (2) do not apply to ephemeral streams located on prime farmland.

Several commenters objected to the requirement to establish a streamside vegetative corridor along ephemeral streams claiming that it is burdensome or unnecessary. We disagree. As noted in the preamble to the proposed rule,[456] scientific literature documents that streamside vegetative corridors—

[456] 80 FR 44436, 44494 (Jul. 27, 2015).

formerly referred to as riparian corridors in the proposed rule—are essential in promoting stream health and that ephemeral streams are important to the over-arching health of the hydrologic regime.[457] Given the unique and essential contributions of ephemeral streams to the hydrologic regime, the maintenance, restoration, and establishment of streamside vegetative corridors for these stream segments is a critical element of stream protection. Moreover, the history of our regulations related to buffer zones for streams is directly linked to the mandates of SMCRA found at sections 515(b)(10) and (24),[458] which require the minimization of disturbances to the prevailing hydrologic balance and to fish, wildlife, and related environmental values. Requirements for streamside vegetative corridors for ephemeral streams were not included in the previous regulations because the majority of the research that identified ephemeral streams as vital to the overall health of streams was conducted after the previous regulations were implemented. One of the purposes of this final rule is to incorporate the results of new research and best technology currently available. By including these protections for ephemeral streams we are satisfying this mandate.

One commenter expressed concern that the establishment of the riparian corridor, along ephemeral streams in particular, supersedes the Clean Water Act and is inconsistent with the land use provisions of SMCRA. Specifically, the commenter alleged that the proposed rule did not consider the actual orientation of headwater ephemeral streams where watershed breaks may fall within 100 feet of each side of the stream channel. It is not clear how the commenter concluded that this requirement supersedes the Clean Water Act. Although the Clean Water Act does not require establishment of postmining streamside vegetative corridors, it certainly does not prohibit the practice. It is also not clear how the commenter concluded that the requirement is inconsistent with SMCRA land use provisions because if the postmining land use requires reconstruction of ephemeral streams, construction of associated streamside vegetative corridors would be entirely consistent and required. In response to this comment, we also note that the natural streamside vegetative corridors contributing to the ecological condition of a stream will typically not extend beyond a watershed boundary. However, if they do and are affected by mining operations, or mining operations necessitate the reconstruction of these particular ephemeral streams, these 100-foot, streamside, vegetative buffers would also need to be part of the permitted site, including the area within an adjacent watershed. If the area within the other watershed is not affected by mining operations, this area would include the already existing vegetation and would already be in compliance of this requirement.

Other commenters suggest that the use of native species in the vegetative streamside corridor is in conflict with requirements imposed by the U.S. Army Corps of Engineers aimed at improving reclamation success by using non-native species. To eliminate this potential conflict, we added paragraph 816.57(d)(2)(i) to the final rule. That paragraph requires planting to be in accordance with the revegetation plan approved in the permit, unless the applicable Clean Water Act authority directs otherwise. Similarly, one commenter raised concerns that the requirement for streamside vegetative corridors along ephemeral streams may conflict with local government agency requirements, such as when a local government agency regulates a drain within that area. It is difficult to conceive of a situation where the scenario proffered by this commenter would occur on a mining permit or, if it did, why one of the other exceptions would not apply, such as the exception for prime farmland.

Some commenters stated that streams that have no streamside vegetation or aquatic life, such as slot canyons and desert swales, should be exempt from these requirements. Under the final rule, if baseline surveys confirm that vegetation does not exist within 100 feet of a stream, establishment of a streamside vegetative corridor is not required. However, we anticipate that these situations will be extremely rare because some vegetation almost exists.

Section 780.28: What additional permitting requirements apply to proposed activities in, through, or adjacent to a perennial or intermittent stream?

Final § 780.28 establishes standards for the review and approval of permit applications that propose to conduct surface mining activities in, through, or adjacent to streams. We discussed the purpose of these standards in the preamble to the proposed rule.[459] After evaluating the comments we received in response to the proposed rule, we have reorganized and made several modifications to this section in the final rule. Our reorganizational changes and relevant general comments are discussed below and are followed by a discussion of comments on specific paragraphs of § 780.28. Because of the reorganization, we provide an introduction to each final paragraph explaining how the final rule related to the proposed rule.

Many commenters opined that the organization of § 780.28 made it difficult to determine which permitting requirements applied to each stream classification. Proposed § 780.28 contained the permitting requirements for perennial, intermittent, and ephemeral streams. Commenters stated that this approach was confusing because the requirements for mining through or diverting ephemeral streams differed from those for perennial or intermittent streams. In response, and as explained in the preamble to § 780.27, we have removed the requirements applicable to ephemeral streams from § 780.28 and placed them in the new § 780.27. As a result, all requirements in § 780.28 apply to perennial and intermittent streams, and we have changed the title of the section to reflect this reorganization. The final rule clearly distinguishes between the requirements that apply to perennial, intermittent, and ephemeral streams. As discussed in more detail below, we have also made a number of organizational changes to § 780.28 to improve clarity.

In Part III of the preamble to the proposed rule,[460] we identified six specific goals for revising our regulations to better protect streams and associated environmental values. One of these goals was to protect and restore streams and related resources, including the headwater streams that are vital to maintaining the ecological health and productivity of downstream waters. We reiterate the need to protect these streams in the final rule. This need is strongly rooted in SMCRA and in scientific literature documenting the importance of streams.[461]

Some commenters, however, requested that we institute stronger protections than proposed and prohibit all mining in or through intermittent and perennial streams. Other commenters took the opposite position and argued that the proposed rule tipped the statutory balance between

[457] Catherine Leigh, et al. Ecological research and management of intermittent rivers: A historical review and future directions. Freshwater Biology. (2015).

[458] 80 FR 44436, 44513–44518 (Jul 27, 2015).

[459] 80 FR 44436, 44513–44518 (Jul. 27, 2015).

[460] *See* 80 FR 44436, 44443 (Jul. 27, 2015).

[461] 80 FR 44436, 44439 (Jul. 27, 2015).

environmental protection and the Nation's need for coal too far toward environmental protection without providing an adequate explanation of the need for such protection. As we discussed in the preamble to the proposed rule, while it is true that SMCRA contains numerous requirements aimed at minimizing or preventing adverse impacts to fish, wildlife, related environmental values, the quantity and quality of surface water and groundwater, and the hydrologic balance,[462] it is also true that SMCRA seeks to ''strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.'' [463] The final rule strikes the appropriate balance. It does not prohibit all mining in or through intermittent and perennial streams. Similar to our previous regulations, the final rule contains a general prohibition against mining in or through intermittent and perennial streams. However, the final rule contains carefully crafted exceptions to this general prohibition which will allow mining in or through intermittent and perennial streams if applicants satisfy certain requirements. These exceptions are designed to minimize disturbances and ensure the protection and restoration of perennial and intermittent streams and related resources which are critical to maintaining the ecological health and productivity of downstream waters, while balancing, as SMCRA requires, the nation's need for coal as an essential energy source. As we acknowledge in the preamble to the proposed rule, our previous regulations did not fully protect many vital environmental values.[464] The final rule, which includes these carefully crafted exceptions, is informed by our regulatory experience over the more than three decades since the adoption of our previous regulations, both as a regulatory authority and overseeing regulatory authorities, and reflects advances in scientific knowledge and mining and reclamation techniques developed during that time. Further, the final rule more completely implements sections 515(b)(24) and 516(b)(11) of SMCRA,[465] which provide that, to the extent possible using the best technology currently available, surface coal mining and reclamation operations must be conducted to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and to achieve enhancement of those resources where practicable. We acknowledge that some commenters assert that this translates to a blanket prohibition on mining in, through or adjacent to streams and others want fewer restrictions, but SMCRA requires, and we promulgate through the final rule, a median position, effectively balancing the commenters' concerns.

Some commenters alleged that restrictions on mining in or through streams may have negative impacts on proven lignite reserves, leaving the reserves stranded and unable to be economically mined. The commenters suggested that we create an exception for lignite. We disagree that this rule will strand lignite reserves. The commenters did not present any support for their position, and there is nothing inherently unique about lignite reserves that would prevent a permittee from satisfying the requirements of this section to allow mining in or through streams or relocating streams in order to recover lignite. More importantly, many of the requirements that the commenters allege would strand lignite reserves would likely be inapplicable under the final rule because of changes we have made in response to public comments and the interagency process. For instance, many streams located above the lignite reserves, especially in the Gulf Coast Region, that were classified as intermittent under the previous regulations, are now categorized as ephemeral streams in the final rule. This is the case because § 701.5 of the final rule amends the definitions of intermittent and ephemeral streams. Under the previous regulations, we would have categorized a stream with a bed-and-bank configuration that is always above the water table and with flows arising solely from precipitation (and snow melt) as intermittent if it had a drainage area of at least one square mile. As discussed in the preamble to final § 701.5, we will now consider a stream with ephemeral flow characteristics (*i.e.,* one with a bed-and-bank configuration, an ordinary high water mark, that is always above the water table and with flows arising solely from precipitation (and snow melt)) to be ephemeral, regardless of the size of the drainage area. Because the final rule contains fewer restrictions for mining in or through ephemeral streams, it is unlikely that lignite reserves will be stranded as a result of this rule. For these reasons, we did not add an exception for lignite.

As discussed more fully below in our discussion on final paragraph (e), we have restructured the final rule by adding a chart to explain the demonstrations a permittee must make prior to performing certain activities in or within a perennial or intermittent stream. Included in the chart are the requirements with which a permittee must comply when proposing to construct a coal mine waste facility that encroaches upon any part of a perennial or intermittent stream. Proposed paragraph (d) contained similar requirements. In response to the proposed rule, one commenter objected to the proposed permitting of coal mine waste facilities in 100-year floodplains and suggested that these facilities should require a higher level of scrutiny with greater long-term protective measures than proposed. In response, we note that, in most states, state and local authorities determine whether any facility may be constructed in a floodplain. Like any other permit applicant seeking to construct a structure in the 100-year floodplain, a permit applicant seeking to construct a coal mine waste facility in a 100-year floodplain must comply with state and local laws and regulations. We have not made any changes to the final rule in response to this comment. We defer to state or local authorities with knowledge of the applicable laws and regulations to make a determination on whether a coal mine waste facility may be appropriately placed in a 100-year floodplain.

Several commenters suggested that the final rule should allow temporary impacts to streams, such as a temporary conversion of a perennial stream to an intermittent stream. Temporary impacts to stream flow during mining and reclamation are allowed under the rule. This is consistent with SMCRA and our previous regulations.[466] As an example of one temporary impact permissible under the final rule, consider final rule paragraph (e)(2), which addresses converting a minimal portion of a mined-through segment of an intermittent stream. It may take several years for a backfilled area to reach hydrologic equilibrium. During that time, a stream may be temporarily converted. However, to convert a minimal portion of a stream, the permittee must still demonstrate that it will restore the hydrologic function and ecological function of the stream as a whole within the mined area to its premining stream type prior to bond release. This is only one example of an allowable temporary impact to streams

[462] 80 FR 44436, 44514.

[463] 30 U.S.C. 1202(f).

[464] 80 FR 44436, 44438–44447 (Jul. 27, 2015).

[465] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

[466] *See* 30 CFR 1265(b)(10) which requires minimization to ''disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas,'' not avoidance or a prohibition of disturbances.

and we agree with the commenter that temporary impacts are permissible. We discuss the specific requirements a permittee must demonstrate to achieve approval to convert a minimal portion of a mined-through segment of an intermittent stream to an ephemeral stream in more detail in final paragraph (e)(2).

One regulatory authority commenter requested additional explanation about the performance standards for alluvial valley floors in Western states. We did not propose any changes to the previous regulations concerning alluvial valley floors in Western states. Therefore, the final rule does not affect those performance standards.

Final Paragraph (a): Clean Water Act Requirements

Final paragraph (a) is similar to proposed paragraph (a). For reference, we proposed to add paragraph (a) to emphasize that a person seeking to conduct surface mining activities ''in waters of the United States'' must procure all necessary authorizations, certifications, and permits pursuant to the Clean Water Act [467] before initiating mining in those waters. In the preamble to the proposed rule we explained that issuance of the SMCRA permit alone is not sufficient.[468]

We have modified final paragraph (a) to clarify that if the proposed permit area includes waters subject to the jurisdiction of the Clean Water Act, including perennial and intermittent streams, the regulatory authority must condition the permit to prohibit initiation of any surface mining activities in or affecting those waters before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act.[469] This paragraph makes clear that although a SMCRA permit may be obtained prior to you obtaining all necessary authorizations, certifications, and permits under the Clean Water Act, the regulatory authority must place a condition upon the permit that no surface mining activities in or affecting those waters may be initiated before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act.[470] Also, at the suggestion of a federal agency, we have removed reference to ''in waters of the United States'' and replaced it with the phrase, ''subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.*''

Final paragraph (a) more closely tracks the permit condition found in final rule § 773.17(h) and the provisions of final rule § 780.16(c)(4)(ii) about protection of other species and the requirement to explain how you will avoid or minimize mining through or discharging dredged fill material into wetlands or streams that are subject to the jurisdiction of the Clean Water Act. It differs from the proposed rule because it now conditions the initiation of surface mining activities in or affecting waters subject to the jurisdiction of the Clean Water Act upon first receiving the necessary authorizations, certifications, and permits under the Clean Water Act. This difference in when applicable surface activities can be initiated reconciles the needs of other federal agencies to consider the SMCRA permit when making decisions about granting Clean Water Act authorizations, certifications, and permits but balances the needs of the permittee to make informed decisions about the feasibility of mining in or through intermittent or perennial streams. Placing a permit condition upon the permittee will avoid unnecessary and often costly permit revisions by requiring the permittee to consult with the Clean Water Act authority at the early stages of the SMCRA permitting process, but will not delay the SMCRA permit authorization. These modifications to the final rule were based on both public comment and comments from a federal agency.

Moreover, final paragraph (a) ensures protection of streams as required by section 515(b)(10) and compliance with section 702(a) of SMCRA, which specifies that nothing in the Act should be construed as superseding, amending, modifying, or repealing, ''federal laws relating to the preservation of water quality,'' including the Clean Water Act and state laws enacted pursuant to the Clean Water Act.[471]

Some commenters opposed the idea of us instituting a permit condition relative to the Clean Water Act asserting that it exceeds our authority under SMCRA, duplicates the requirements of the Clean Water Act, or inappropriately requires the SMCRA regulatory authority to determine whether the applicant obtained the appropriate Clean Water Act authorizations, certifications, or permits. We disagree. We are not exceeding our authority or duplicating the efforts of the Clean Water Act authority by requiring the regulatory authority to condition the permit to prohibit initiation of surface mining activities in or affecting waters subject to the jurisdiction of the Clean Water Act before the permittee obtains all necessary authorizations, certifications, and permits pursuant to the Clean Water Act. Permit conditions are directly enforceable under SMCRA.[472] The fact that this permit condition requires compliance with the Clean Water Act before surface mining activities take place in streams does not convert the SMCRA enforcement of a permit condition into a Clean Water Act enforcement action, nor does it supersede the Clean Water Act.

Another commenter alleged that, in the rule, Clean Water Act requirements are always mentioned in the context of perennial or intermittent streams. The commenter suggested that wetlands are equally subject to the requirements of the Clean Water Act. The commenter recommended that specific mention of wetlands be added to § 780.28(a). We agree with the commenter that wetlands are equally subject to the requirements of the Clean Water Act; however, we decline to make changes to § 780.28(a) because § 780.28 specifically addresses activities in, through, or adjacent to perennial or intermittent streams. Please see the discussion of wetlands in the preamble to final rule § 780.16(c)(4).

Final Paragraph (b): To what activities does this section apply?

We have made non-substantive modifications to the title of this paragraph. Like proposed paragraph (b), final paragraph (b) explains that the permit applicant must provide certain information and demonstrations whenever it proposes to conduct surface mining activities in or through a perennial or intermittent stream or on the surface of lands within 100 feet of a perennial, or intermittent stream. We have added a reference to final paragraphs (c) through (g) in order to clarify that the specific demonstrations required are found in those paragraphs. As discussed above, we have also removed references to ephemeral streams from this section.

One commenter suggested that we replace the term ''bankfull'' in proposed paragraph (b)(1)(ii) with the phrase ''ordinary high water mark'' because ordinary high water mark is both more commonly accepted and more easily determined. We agree and have revised final paragraph (b)(2) and other references to ''bankfull'' throughout the final rule for consistency.[473] For further

[467] 33 U.S.C. 1251 *et seq.*

[468] 80 FR 44436, 44515 (Jul. 27, 2015).

[469] 33 U.S.C. 1251 *et seq.*

[470] 33 U.S.C. 1251 *et seq.*

[471] 30 U.S.C. 1292(a).

[472] *See* 30 U.S.C. 1271(a)(4).

[473] *See* Final rule sections: 701.5—ephemeral, intermittent, and perennial stream definitions,

Continued

discussion of this term, you may consult the preamble discussion on § 701.5 of the final rule.

Final Paragraph (c): Postmining Surface Drainage Pattern and Stream-Channel Configuration

As a general rule, a permittee that proposes to mine through a perennial or intermittent stream must include in its permit application a plan to restore a surface drainage pattern that is relatively stable, and in dynamic near-equilibrium and stream-channel configuration that is similar to the premining configuration and is relatively stable. Final paragraph (c)(1) prescribes this general rule, but final paragraph (c)(2) grants the regulatory authority discretion to approve or require a postmining drainage pattern or configuration that deviates from the general rule in specific circumstances. These requirements ensure the establishment of a postmining drainage pattern or stream-channel configuration that is functionally equivalent to the premining pattern, while affording the regulatory authority the discretion to approve other configurations when such configurations are likely to be better for the hydrologic balance or ecological function. We have re-designated and separated select portions of proposed paragraph (c) to create final paragraph (c) and more clearly explain the permittee's obligations. Components of final paragraph (c) were in proposed paragraph (c)(1) and we discussed them in the preamble to the proposed rule.[474] However, we re-designated the paragraph to improve clarity and address commenters' concerns that proposed § 780.28(c) was confusing. Additionally, as discussed below, we have added final paragraphs (c)(2)(iv) through (vii) to explain when the regulatory may approve or require a different postmining surface drainage pattern or stream-channel configuration.

The general requirement in final paragraph (c)(1) to return the drainage pattern and stream-channel configuration to the functional equivalent of the premining state recognizes that the design of a stream channel is essential to stream health and that successfully restoring stream channel configuration is the first step in the process of reestablishing the ''form'' of the stream. As explained in its definition at final rule § 701.5, the term ''form'' refers to the physical characteristics, pattern, profile and dimensions of a stream channel. Reestablishment of ''form'' is a prerequisite for restoration of hydrologic function and ecological function and ultimately, stream restoration.

Several commenters alleged that restoring the premining drainage pattern is a significant and onerous constraint on postmining grading and backfilling plans. The commenters also asserted that replicating premining characteristics of a stream channel would be virtually impossible. In response to these comments, we note that the final rule does not require the permittee to demonstrate that the postmining drainage pattern be returned to exactly the premining state. In both the proposed and final rule paragraph (c), we require only that the postmining drainage pattern be similar to the premining pattern unless the regulatory authority grants an exception under (c)(2). Other commenters claimed, without explaining the assertion, that the requirements in proposed paragraph (c), including the requirement to restore postmining drainage patterns, are unnecessary in most states. We disagree that these requirements are unnecessary in any state. As we have previously stated in this preamble, streams are important nationwide. Further, as we explained in the preamble of the proposed rule, ''in addition to [providing] ecological benefits, th[ese] requirement[s] would better implement the requirement in section 515(b)(3) of SMCRA that the permittee restore the approximate original contour of the land.'' [475] All mines, regardless of location, are subject to the requirement to restore approximate original contour. Moreover, requiring a permittee to restore the premining drainage pattern and stream channel configuration will likely result in the least impact to the hydrologic and ecological function of the stream as a whole. Therefore, we are retaining this essential requirement.

One commenter suggested that we add specific requirements to final paragraph (c) for applicants to submit data on stream pattern and sinuosity, water depth, alluvial groundwater depth, depth to bedrock, elevation, bankfull depth, and width. The commenter asserted that the general requirements in proposed paragraph (c) were not sufficient. According to the commenter, requiring this data would allow the regulatory authority to better compare the restored drainage pattern and stream-channel configuration with what existed prior to mining. The commenter also requested a definition, guidance, or methodology for determining flood-prone areas. This commenter recommended that we require commonly accepted hydrologic modeling like the Federal Emergency Management Agency's mapping system, Rosgen's Stream Classification, and the measuring of flood-prone elevation, and that we establish a specific distance for the width of each side of the flood-prone area. In addition, the commenter suggested that we provide guidance on considering seasonality effects when conducting these measurements. Conversely, we received numerous comments specifically opposing the adoption of such changes. These commenters claimed that this approach would be too prescriptive and stated that the regulatory authority should have discretion to determine which methodologies to adopt and what kind of data to require. We agree with these latter commenters that the regulatory authority is in the best position to adopt the most appropriate approach because it is the regulatory authority that is most familiar with the unique geographic and geologic characteristics of its own jurisdiction. This will also allow the regulatory authorities additional flexibility to adapt to changing circumstances or to adopt newer techniques as they become available without waiting for an additional federal rulemaking.

However, we note that many of the parameters suggested by the commenter, including sinuosity, bankfull depth, and the flood-prone area to bankfull width ratio (entrenchment) are included in the final rule § 701.5 definition of ''form'' and discussed in the preamble of final rule § 816.57(e). For clarification, a stream segment cannot be successfully reconfigured unless the ''form'' of a stream is restored throughout the length of each stream segment. Therefore, the commenters' concerns are addressed in the performance standards of final rule § 816.57(e) and may also be considered when developing the plan to configure a stream channel as required by final rule § 780.28(c)(1)(ii). As explained in the preamble to final rule § 816.57(e), in order to achieve Phase I bond release, a permittee must demonstrate that it has successfully restored or reconstructed the ''form'' of the stream segment in accordance with the approved design developed in accordance with § 780.28(c)(1). A permittee successfully restores ''form'' under our final rule by utilizing many of the methodologies the commenter suggests. Final paragraph (c) requires a plan to construct a postmining stream channel configuration similar to the premining configuration. Although we are not

780.16(c)(2), 780.28(b)(2) and (d)(2), 780.35(e), 780.37(a)(4)(i), 784.16(c)(2), 784.28(b)(2) and (d)(2), 784.35(e), 784.37(a)(4)(i), 816.57(b), 816.57(d)(iv), 816.97(j)(2)(i), 817.57(b), 817.57(d)(iv).

[474] 80 FR 44436, 44514–44516 (Jul. 27, 2015).

[475] 80 FR 44436, 44516 (Jul. 27, 2015).

requiring a specific methodology for restoring ''form'' in the permitting requirements of final paragraph (c), the performance standards require the characteristics that establish ''form'' to be present in the postmining stream channel configuration. Final paragraph (c) works in conjunction with the performance standards of § 816.57(e).

Final paragraph (c)(2) prescribes seven circumstances under which a regulatory authority may waive the general requirement to restore the premining drainage pattern and stream-channel configurations. Proposed paragraphs (c)(1)(i) through (iii) contained three of these exemptions, which we have retained in final paragraphs (c)(2)(i) through (iii). However, we have added clarity to these exemptions to ensure that the goal of final § 780.28(c) perpetuated, *i.e.,* that the stream channel be stabilized and erosion be minimized. The regulatory authority may grant these exemptions if it finds that a different pattern or configuration is necessary or appropriate to: (1) Ensure stability, (2) prevent or minimize deepening or widening of reconstructed stream channels and control meander migration, or (3) promote or enhance wildlife habitat consistent with sections 515(b)(24) and 516(b)(11) of SMCRA.[476] The same commenters that objected to the general requirements in proposed and final section (c)(1) also opined that the regulatory authority-approved deviations in proposed paragraph (c)(1)(i) through (iii) would be subject to a great amount of subjectivity and misinterpretation by regulators and could result in the inconsistent treatment of operators. We disagree that these requirements are too subjective, and we do not agree that they will be subject to misinterpretation. The information and demonstrations required supply basic information that the regulatory authority needs to determine if mining activity will result in material damage to the hydrologic balance outside the permit area as well as cause irreparable long-term damage to the health of the streams on permit. Despite the commenters' allegations, final paragraph (c)(2) provides more consistency in determining whether mining activity will result in material damage to the hydrologic balance or cause irreparable long-term damage to the health of streams, while simultaneously allowing each regulatory authority the flexibility to take site-specific considerations into account.

In paragraph (c)(2)(iv) through (vii) of the final rule, for the purposes explained below, we have added four more exemptions to the general requirement to restore the premining drainage pattern and stream-channel configurations. The regulatory authority may now also grant exemptions when doing so is necessary or appropriate to: (1) Accommodate any anticipated temporary or permanent increase in surface runoff as a result of mining and reclamation; (2) accommodate the construction of excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures; (3) replace a stream that was channelized or otherwise severely altered prior to submittal of the permit application with a more natural, relatively stable, or ecologically sound drainage pattern or stream-channel configuration; or (4) reclaim a previously mined area.

In response to a commenter's concern that mining may result in temporary or permanent increases in surface runoff, we have added final paragraph (c)(2)(iv). This provision accommodates situations in which watershed boundaries have been moved from premining locations. Relocating watershed boundaries may result in larger surface water flows in some watersheds and smaller surface water flows in other watersheds.

We have added final paragraph (c)(2)(v) in response to a comment suggesting that proposed paragraph (c) and proposed paragraph (d), which set out requirements to construct excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures, conflicted with one another. The commenter opined that it would be impossible to restore the surface drainage pattern and stream-channel configuration of a stream if an excess spoil fill or coal mine waste disposal facility is constructed. We have resolved this alleged conflict by clarifying that the regulatory authority may approve a postmining surface drainage pattern or stream-channel configuration that differs from the premining pattern or configuration when it is necessary to accommodate the construction of excess spoil fills, coal mine waste refuse piles or coal mine waste impounding structures.

We have added final paragraph (c)(2)(vi) to correlate with final paragraph (e)(3), which we added to the final rule to incentivize mining techniques that result in improvements to streams that are degraded. Final paragraph (c)(2)(vi) allows an exemption to the requirement to restore premining drainage pattern and stream-channel configurations if the regulatory authority finds that a different pattern or configuration is necessary or appropriate to replace a stream that was channelized or otherwise severely altered with a more natural, relatively stable, and ecologically sound drainage pattern or stream-channel configuration.

In response to several commenters, including a federal agency commenter, we have added exception (c)(2)(vii). This exception allows for a different pattern or configuration when it is necessary to reclaim a previously mined area because the premining surface drainage pattern and stream-channel configuration on previously mined areas may not be optimal or desirable from a land use, hydrological, or ecological perspective.

Some commenters suggested that there may be additional reasons to change minor channel drainage patterns such as to accommodate coal removal, minimize the re-handling of backfill, and conduct contemporaneous reclamation. We agree that minor deviations from the premining drainage pattern are permissible. However, the additional exceptions outlined by the commenters are not necessary because the final rule only requires the restored drainage patterns be similar to the original drainage patterns. They do not have to be exactly the same. Moreover, the commenters' concerns may be addressed in the expanded list of exemptions that we have discussed above.

Another commenter alleged that the requirements contained in proposed paragraph (c) did not appear to account for special cases, such as dropped off final cuts or initial cut development. We disagree because the examples the commenter provides are not special cases. Final paragraph (c)(2) provides the regulatory authority with discretion to approve a different postmining pattern in certain circumstances, including what the commenter describes as ''special cases.'' For example, if any of the conditions identified in paragraphs (c)(2)(i) through (vi) apply, such as promoting enhancement of the fish and wildlife habitat, in the reclaimed area of initial cut development or in the area of final cut, the regulatory authority could allow the permittee to alter the postmining drainage pattern from that which existed premining. If the exceptions identified in paragraphs (c)(2)(i) through (vi) do not apply, the permittee must reconstruct the drainage pattern to a condition similar to the premining pattern.

We have not adopted proposed paragraph (c)(2)(iv)(A), which would have required the selective placement of low permeability materials in the backfill or fill and associated stream channels to create an aquitard that

[476] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

would channel infiltrated precipitation to restored streams in order to reestablish perennial or intermittent stream flow. Some commenters noted that this requirement could be difficult or impossible to achieve in many circumstances because of the lack of available soil or subsoil, root depth issues, lack of available aquitard material, and changes in permeability due to mining. These commenters stated that the regulatory authority is in the best position to establish objective standards for restoring the ecological function of a stream. While we acknowledge that reestablishing sufficient flow is paramount to successfully returning hydrologic function—and ultimately ecological function—to intermittent and perennial streams, we agree with the commenters that the applicant and the regulatory authority are in the best position to determine the most appropriate method for ensuring stream flow is reestablished post mining. In final paragraph (g) we set out the standards for stream restoration. Use of aquitards to reestablish flow is just one method of accomplishing this restoration Therefore, we have removed the specific requirement in proposed paragraph (c)(2)(iv)(A) to construct aquitards. As discussed in the preamble to final paragraph (g)(3)(iv)(A), although we do not require the use of aquitards we have required that the regulatory authority use the best technology currently available to *either* create standards to restore the form, hydrologic function, and water quality of intermittent streams and reestablishment of streamside vegetation for intermittent streams when there are no scientifically defensible protocols established to assess biological condition *or,* where scientifically defensible protocols exist, assess the biological condition of the stream.

For the reasons discussed in the final preamble to Part 800, we are not adopting proposed § 780.28(c)(2)(B), which would have required a separate bond guaranteeing the return of ecological function.

Final Paragraph (d): Streamside Vegetative Corridors

Final paragraph (d)(1) requires that any permittee proposing to conduct any surface mining activities in or through a perennial or intermittent stream or on the surface of lands within 100 feet of a perennial or intermittent stream must include in the permit application a plan to establish a vegetated streamside corridor at least 100 feet wide along each bank of the stream after the completion of surface mining activities. The streamside vegetative corridor must be consistent with natural vegetation patterns and must adhere to the streamside vegetative corridor requirements of final paragraph (d) of § 816.57. At final paragraph (d)(2) of § 780.28, we also require that the corridor width must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark. We proposed similar requirements at proposed paragraph (b)(3), but we have moved them to final paragraph (d) and consequently, re-titled this paragraph. We have also made some other modifications, as discussed below.

Although we have made substantive changes to the final rule in response to comments, we have retained many of the concepts and specific provisions of the proposed rule relating to streamside corridors. For example, proposed paragraph (b)(3)(i) required the corridor width to be measured on a line perpendicular to the stream, beginning at the ''bankfull elevation or, if there are no discernable banks, the centerline of the active channel.'' One commenter suggested that the 100-foot wide corridor should be measured following the angle of the land rather than horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernable banks, the center line of the active channel. We recognize that it may be easier for a person to actually measure if he or she follows the angle of the land, but this type of measurement is also likely to produce irregular results across the country due to different topographies. Moreover, the method proposed by this commenter does not account for seasonal variability and, in practice, may not uniformly preserve a full 100-foot corridor on each side of the stream. As discussed in the preamble discussion of ''ordinary high water mark'' in § 701.5 of the final rule, one commenter suggested that the term ''ordinary high water mark'' is more commonly accepted and more easily determined than the term ''bankfull.'' We agree and have revised references to ''bankfull'' throughout the final rule. Thus, we modified final paragraph (d)(2) to provide that when determining the 100-foot width of the riparian corridor along both banks of the stream, measurements should be done horizontally on a line perpendicular to the ordinary high water mark.

We have also replaced the term ''riparian corridor'' with the term ''streamside vegetative corridor.'' Proposed paragraph (b)(3)(i) required a permittee seeking to conduct mining activities in or through streams or on the surface of lands within 100 feet of streams to establish a ''riparian corridor'' following mining. Several commenters misinterpreted the language in the proposed rule to mean that all lands within 100 feet of a stream must be revegetated with hydrophilic vegetation. One commenter who interpreted our rule this way cited the Bureau of Land Management's definition of ''riparian corridor'' as ''area exhibiting vegetation and physical characteristics reflective of permanent surface or subsurface water influence'' and suggested that not all areas within 100 feet of a stream have riparian characteristics. We did not intend to imply that the entirety of the corridor must be planted with hydrophilic vegetation. In order to correct this potential misinterpretation, we have replaced the phrase ''riparian corridor'' with ''streamside vegetative corridor.'' Our use of the term ''streamside vegetative corridor'' is intended to clarify that the permittee must use appropriate native vegetation, which is not always riparian or hydrophilic in nature. Postmining streamside vegetative corridors should reflect what is determined to exist in the premining landscape and are not necessarily dependent upon the presence of surface or groundwater. Despite this change in terminology, the comments on proposed (b)(3)(i), including references to ''riparian corridor'', and our responses to those comments are still pertinent to final paragraphs (d)(1) and (d)(2) and we discuss them below.

Many commenters supported the proposed corridor. Others supported the concept of a corridor, but suggested modifications to the size or implementation of the corridor. Still others opposed the proposed corridor. Many of the commenters who supported the proposed requirement for a corridor requested that we strengthen the proposal to impose a strict 100-foot buffer on each side of a stream and not allow the exceptions or variances that we proposed in paragraph (b)(3)(iii). These commenters asserted that anything less than an unequivocal 100-foot buffer on either side of all streams, even in situations where excess spoil is placed or coal mine waste disposal facilities exist, is ''unreasonable'' because the risk of damaging vital waterways and imperiled species poses a greater threat than the stranding of some coal reserves. Further, the commenters alleged that an already declining coal market will not suffer any significant loss if we were to impose a 100-foot ''buffer'' with no exceptions. Several commenters alleged that the

proposed 100-foot minimum width for the corridor as proposed in paragraph (d)(1) was arbitrary. Some of these commenters suggested that the regulatory authority should establish the width of the corridor on a site-by-site basis. Still other commenters objected to the 100-foot riparian corridor, alleging that we had converted a best management practice for operating near streams into an unauthorized, rigorous permitting and design standard that also dictates long-term land uses.

Upon review of these comments, we are retaining the requirement for a general rule establishing a 100-foot wide streamside vegetative corridor on each side of perennial and intermittent streams, subject to certain narrowly-tailored exceptions, because this strikes the necessary balance between environmental protection and the Nation's need for coal as an essential source of energy.[477] In the preamble to the proposed rule at Part IV and proposed § 816.57(a), we explained that this distance is consistent with our history of requiring a minimum, nationwide, 100-foot corridor width on either side of a stream. Contrary to the assertions by some commenters, this requirement has never been considered merely a ''best management practice.'' Furthermore, as discussed in the preamble to the proposed rule, this width is supported by science.[478] In sum, the minimum 100-foot corridor width is within the lower end of the range of recommended minimum widths for wildlife habitat and flood mitigation, in the middle of the range for sediment removal and nitrogen removal from streams, and exceeds the range recommended for water temperature moderation and bank stabilization and aquatic food web maintenance.[479] This approach is well within our authority pursuant to section 515(b)(24) of SMCRA to employ, to the extent possible, the best technology currently available, to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. We conclude, therefore, that the 100-foot minimum width strikes an appropriate balance between the various recommended corridor widths and specific environmental objectives.

The 100 foot minimum corridor requirement, however, does not change the site-specific nature of the determination of the appropriate corridor width. While it does establish a minimum width, the provision also allows a regulatory authority, depending on the permit, to require a wider corridor. For example, a wider corridor may be preferable when species or habitats of concern are present or because of climatological and topographical characteristics of the permit and the relevant adjacent areas.

Some commenters recommended that we extend the requirement to establish a 100-foot corridor to non-forested areas. Like the proposed rule, the final rule 100-foot streamside vegetative corridor requirement applies whenever a permittee proposes to conduct surface mining on the surface of lands within 100 feet of streams, or when the permittee proposes to conduct surface mining activities in or through all streams, with the exception of diversions that will be in place less than three years and subject to the exceptions in final rule § 816.57(d)(4)(i) through (iii). Thus, the streamside vegetative corridor requirement is not limited to streams in forested areas as the commenter contends. Final rule paragraph (d) requires a permittee to populate streamside vegetative corridors consistent with natural vegetation patterns and the performance requirements of final § 816.57. Final § 816.57(d)(2) prescribes the specific requirements for planting streamside vegetative corridors. Although permittees are required to use native trees and shrubs when planting areas within the streamside corridor that were forested or may revert to forest under condition of natural succession, this requirement does not foreclose establishing streamside vegetative corridors on non-forested land. These requirements are part of the best technology currently available to minimize adverse impacts on fish, wildlife, and related environmental values and to achieve enhancement of those resources, as required by section 515(b)(24) of SMCRA.[480]

Other commenters contend that the removal of vegetation and soil disturbance from non-forested areas could lead to sedimentation and other pollution that may cause undue harm to streams and the species that depend on them. We disagree with the commenters asserting that a streamside vegetative corridor may cause undue harm to streams because these commenters fail to consider the other requirements of our regulations that require a permittee to implement erosion and sedimentation controls, such as final rule § 780.12(f), which is designed to stabilize exposed surfaces and effectively control erosion.

Another commenter asked if a riparian corridor must be established along all streams inside a permit area including streams that will not be impacted. In general, the section applies only to streams within the permit area that are affected by mining. Any affected streams within the permit area would be adequately protected by the requirements of this section. It is possible, however, that in a single permit area a permittee may propose to mine through one stream without touching a second stream, but that the 100-foot streamside vegetative corridors could overlap. Consistent with the permitting requirements of this paragraph and final rule § 816.57(d)(1)(ii), in this scenario the permittee must ''establish a vegetative corridor on any land [disturbed] within 100 feet of a perennial or intermittent stream.'' Therefore, to the extent it disturbs the second stream's vegetative corridor, the permittee must establish a streamside vegetative corridor for that second stream.

Some commenters suggested that the 100-foot riparian corridor should not apply in situations where no riparian corridor existed prior to mining or where there was ''human development'' prior to mining. As discussed in Part III of the preamble to the proposed rule,[481] streamside vegetative corridors are essential to stream health. Therefore, we decline to include additional exceptions to account for the use of the land prior to mining.

One commenter suggested that the establishing of a riparian corridor may degrade critical habitat for threatened, endangered, or candidate species by substituting vegetation. We intend § 780.28 to work in concert with the rest of Part 780, including § 780.16, which outlines the requirements for a valid fish and wildlife enhancement plan. As explained in the preamble discussion of § 780.16, the regulatory authority may not issue a permit until an applicant first explains how it will adhere to the Endangered Species Act and what action it will take to protect other species.

One commenter suggested that establishing a riparian corridor might impact property rights because the landowner might not want a streamside vegetative corridor as part of the postmining land use. The last sentence of final § 780.28(d) requires the corridor to be consistent with natural vegetation patterns and to adhere to the streamside

[477] 30 U.S.C. 1202(f).

[478] 80 FR 44436, 44494 and 44552 (Jul. 27, 2015).

[479] *See, e.g.,* David Welsch, *Riparian Forest Buffers: Functions and Design for Protection and Enhancement of Water Resources,* NA–PR–07–91, U.S. Dep't. of Agric., Forest Serv. Northeastern Area and Private Forestry (1991). *http://www.na.fs.fed.us/spfo/pubs/n_resource/buffer/cover.htm* (last accessed Nov. 1, 2016).

[480] 30 CFR 1265(b)(24).

[481] 80 FR 44436, 44443 (Jul. 27, 2015).

vegetative corridor requirements of final § 816.57(d). As discussed more fully in the preamble to final rule § 816.57(d)(4), there are exceptions to establishing a streamside vegetative corridor. To be consistent with final rule §§ 780.28(d) and 816.57(d), if a landowner does not consent to establishing a streamside vegetative corridor and none of the exceptions identified in final rule § 816.57(d)(4) are applicable, mining may not take place in or through a stream or on the surface of lands within 100 feet of a stream.

Several commenters objected to establishing a corridor along ephemeral streams. As discussed above, we are retaining the requirement to establish a streamside vegetative corridor for all streams, including ephemeral streams. However, because we have moved the permitting requirement for ephemeral streams to new § 780.27(c), we address comments specific to permit application requirements for mining in, through, or adjacent to ephemeral streams in the preamble to that paragraph.

We have moved the specific 100-foot streamside vegetative corridor standards and the exceptions to these requirements, initially placed in § 780.28(b)(3)(ii) and (iii),which prescribe permitting requirements to the performance standards of Part 816. We acknowledge that the permittee is obligated only to include a plan to establish a vegetated streamside corridor at the permitting stage. Although the sufficiency of the plan should be assessed in accordance with the requirements of final rule § 816.57(d), the adequacy of the streamside vegetative corridor is assessed after mining is complete and the corridor is constructed. The regulatory authority will assess the adequacy of the streamside vegetative corridor prior to bond release. Therefore, these requirements are more appropriately characterized as performance standards and are now in final rule paragraphs (d)(2) through (4) of § 816.57. Because of this relocation, we discuss comments specifically related to the exceptions proposed in § 780.28(b)(3)(iii) in the preamble to § 816.57(d)(4).

Final Paragraph (e): What demonstrations must I include in my application if I propose to conduct activities in or within 100 feet of a perennial or intermittent stream?

Similar to the proposed rule, final paragraph (e) generally prohibits mining in or near streams, but allows the permittee to conduct certain mining activities when the permittee demonstrates specific criteria. Some commenters supported this approach, emphasizing that this will protect fish and wildlife habitat and encourage ''beneficial remining'' techniques. Final paragraph (e) sets out the specific demonstrations that a permittee must include in a permit application if mining is proposed in or within 100 feet of a perennial or intermittent stream. In proposed paragraph (c) we explained the requirements to be satisfied when mining through or diverting a perennial, intermittent or ephemeral stream. In proposed paragraph (d), we explained the requirements to be satisfied when an applicant proposed to construct an excess spoil fill or coal mine waste disposal facility in a perennial or intermittent stream. Many commenters remarked that proposed paragraphs (c) and (d) were confusing because it was difficult to discern what demonstrations were necessary for mining through or diverting a stream and what additional demonstrations were required for constructing excess spoil fills or coal mine waste disposal facilities in a stream. Additionally, many commenters expressed confusion about mixed references to ephemeral streams, stating they could not differentiate when the demonstrations applied to perennial and intermittent streams only and when the required demonstrations applied to all streams. In consideration of these comments, we have consolidated into final paragraph (e) the demonstration requirements for intermittent and perennial streams that were in proposed paragraphs (c) and (d). To correspond with these changes, we have revised the title of this paragraph to encompass all proposed mining activities in or within 100 feet of a perennial or intermittent stream, not just the diversion of streams and placement of excess spoil fill or coal mine waste disposal facilities. In addition to the consolidation of proposed paragraphs (c) and (d) into final paragraph (e), we modified these provisions in response to comments, including comments from other federal agencies. These modifications include removal of references to ephemeral streams. As discussed above, we have consolidated the permitting requirements related to ephemeral streams and have moved them to final rule § 780.27. We also discuss other modifications to final paragraph (e) below.

One commenter considered any prohibition on mining in intermittent and perennial streams to be contrary to SMCRA. These commenters asserted that section 515(b)(10) [482] requires only that ''damage be minimized,'' which the commenter alleges is different than the prevention of damage from mining in or through streams. We recognize that section 515(b)(10) of SMCRA [483] requires that the permittee conduct surface mining operations to minimize disturbance to the prevailing hydrologic balance at the mine site and associated offsite areas, but section 510(b)(3) of SMCRA [484] forbids the issuance of a surface mining permit if the regulatory authority cannot find that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Scientific literature, studies, and examples of SMCRA-permitted sites demonstrate that, unless carefully designed, mining activities in or through streams can increase the potential for material damage to the hydrologic balance outside the permit area.[485] Contrary to the commenter's assertions, the required demonstrations set forth in proposed paragraphs (b), (c), and (d), and in final paragraph (e) are not a blanket prohibition on mining in these areas. Rather, final paragraph (e)(1) contains the findings required to ensure that, among other things, the proposed operation is designed to minimize the disturbance to the prevailing hydrologic balance at the mine site and prevent material damage to the hydrologic balance outside the permit area. These carefully crafted requirements balance environmental protection and responsible extraction of coal.

For clarity, we have included a table in final paragraph (e)(1) that identifies, by type of activity, the demonstrations that must be made as part of the permit application if the applicant proposed to conduct mining activities in or through a perennial or intermittent stream or on the surface of land within 100 feet of a perennial or intermittent stream. For

[482] 30 U.S.C. 1265(b)(10).

[483] *Id.*

[484] 30 U.S.C. 1260(b)(3).

[485] *See* Margaret A. Palmer, *Reforming watershed restoration: Science in need of application and applications in need of science.* Estuaries and Coasts 32(1): 1–17 (2009). Margaret A. Palmer, & Emily S. Bernhardt, *Mountaintop Mining Valley fills and Aquatic Ecosystems: A Scientific Primer on Impacts and Mitigation Approaches.* Working paper. (2009). Margaret A. Palmer, et al. *Mountaintop Mining Consequences.* Science 327(5962): 148–149 (2010). U.S. Dep't. of the Interior, U.S. Geological Survey, David J. Wangsness, *Reconnaissance of stream biota and physical and chemical water quality in areas of selected land use in the coal mining region, southwestern Indiana, 1979–80,* Open File Report 82–566 (1982). U.S. Dep't. of the Interior, U.S. Geological Survey, David J. Wangsness et al., *Hydrology of area 30, eastern region, Interior Coal Province, Illinois and Indiana* Open File Report 82–1005 (1983); U.S. Dep't of Interior, U.S. Geological Survey, David J. Wangsness, et al., *Hydrology of area 32, Eastern Region, Coal Province, Indiana* Open File Report 81–498 (1981). *https://pubs.usgs.gov/of/1981/0498/report.pdf.*

clarity, this preamble discussion refers to each column of the table by column number as shown below:

1	2	3	4
Demonstration	Activity		
	Any activity other than mining through or permanently diverting a stream or construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream.	Mining through or permanently diverting a stream.	Construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream.

As discussed separately in each paragraph several exceptions exist. Generally, permits subject to approved mining programs that expressly prohibit all surface mining activities in or within 100 feet of perennial or intermittent streams, as discussed in final paragraph (i) of this section, and similarly final § 816.57(i) are exempt from final paragraph (e) because all activity is prohibited.

Within the final rule we also allow certain exceptions applicable to permanent impoundments as specified in final paragraph (e)(4) and for streams that are considered intermittent due to low flowing springs and seeps as prescribed in final rule paragraph (e)(5).

A commenter contended that the proposed rule conflicted with page ES–19 of the DEIS, which stated that the preferred alternative ''would allow mining through any type of stream provided the applicant satisfactorily demonstrates to the regulatory authority'' that ''the hydrological form and ecological function of the affected stream segment could and would be restored using the techniques in the proposed reclamation plan.'' The commenter misquotes the DEIS. The DEIS describes Alternative 8, the Preferred Alternative, at page ES–19, and describes the demonstrations prescribed by proposed paragraph (c)(2)(ii) through (iv), which set out additional requirements applicable to permittees that propose to mine through or divert a perennial or intermittent stream. However, the four demonstrations prescribed by proposed paragraph (b)(2)(i) through (iv), that were prerequisites for satisfying proposed paragraphs (c)(2)(ii) through (iv), were also explained in the DEIS at page ES–19. The chart we have added to the final rule in paragraph (e)(1) should eliminate confusion. It explains each of the demonstrations required for each type of proposed mining activity and there are no longer incorporations by reference, which may have been a source of confusion to the commenter.

The chart differentiates between three categories of mining activities: Mining through or permanently diverting a stream, identified in column 3; construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream, identified in column 4; and any activity other than the activities identified in columns 3 and 4. This third category of activities is identified in column 2. The permittee must make the demonstrations listed in column 1 if there is a ''Yes'' in the column for the type of activity the applicant is proposing to conduct. For example, if an applicant seeks to mine through or permanently divert a stream, it must make the following demonstrations listed in column 1, subject to the exceptions provided in the chart: (i),(ii),(iii),(iv),(v),(vii),(viii),(ix),(x). Column 2 of the chart, which governs any activity other than mining through or permanently diverting a stream and construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream, correlates to the provisions of proposed paragraph (b)(2). Column 3 of the chart about mining through or permanently diverting a stream correlates to the provisions of proposed paragraph (c). Column 4 of the chart, about construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream, correlates to proposed paragraph (d). Each of the demonstrations, identified as paragraphs (i) through (xiii), is discussed below to the extent they were modified or were the subject of comment.

Proposed paragraphs (b)(2)(i) through (iv) set forth the general demonstrations necessary when a permittee proposes to mine in or near perennial or intermittent streams. Although we have moved the paragraphs to final paragraph (e), we have retained these demonstrations with modifications. For example, in response to comments received from another federal agency we modified proposed paragraphs (b)(2)(i) and (iii), now final paragraph (e)(1)(i), to provide that any proposed activity would not cause or contribute to the violation of any applicable water quality standards adopted pursuant to section 303(c) of the Clean Water Act,[486] or other applicable state or tribal water quality standards. This revision clarifies that the permittee must prevent all water quality violations and eliminates any confusion that the term ''designated use'' may have caused in the proposed rule.

In final rule paragraph (e)(1)(ii) we retain the requirement in proposed paragraph (b)(2)(iv) that proposed operations will not ''cause material damage to the hydrologic balance outside the permit area.'' Additionally, in response to a comment from another federal agency, we have added the requirement that the proposed activity also must not ''upset the dynamic near equilibrium of streams outside the permit area.'' As provided in the chart in column 4, the permittee must also demonstrate this requirement if proposing to construct an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches on any part of a stream. This is consistent with our revised definition of material damage to the hydrologic balance outside the permit area and the requirements of section 515(b)(22) of SMCRA about the placement of excess spoil.[487]

Proposed paragraph (b)(2)(ii), required that the permittee demonstrate that the mining activity would not result in conversion of a stream segment from intermittent to ephemeral, from perennial to intermittent, or from perennial to ephemeral. This requirement did not apply to excess spoil fills or coal mine waste facilities. As discussed more comprehensively in the explanation of final paragraph (e)(2), below, we have modified this

[486] 33 U.S.C. 1313(c).

[487] 30 U.S. C. 1265(b)(22).

demonstration by requiring two separate findings. The first finding, as prescribed in final paragraph (e)(1)(iii), requires the permittee to demonstrate that when proposing to conduct any activity in or through an intermittent or perennial stream, with the exception of the construction of excess spoil fill, coal mine waste refuse piles, or impounding structures, the permittee will not convert the affected stream segment from a perennial to ephemeral stream. We received many comments in support of prohibiting conversion of perennial to ephemeral streams. The commenters, including another federal agency, cited the significance of heightened biodiversity in perennial streams as rationale for precluding conversion. We agree and have modified the final rule. Final paragraph (e)(1)(iii) prohibits converting an affected stream segment from perennial to ephemeral.

The second finding derived from proposed (b)(2)(ii), now final paragraph (e)(1)(iv), requires that a permittee demonstrate that the proposed activity would not result in conversion of the affected stream segment from intermittent to ephemeral or from perennial to intermittent, except when the applicant proposes to construct an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream. As set forth in Column 3, final paragraph (e)(2) does allow limited exceptions, which we explain below, in the discussion of final paragraphs (e)(2) and (e)(5).

Final paragraph (e)(1)(v) is similar to proposed paragraph (b)(2)(ii). However, we have modified the final rule to require the permittee to demonstrate that ''there is no practicable alternative'' that would avoid mining through or diverting a perennial or intermittent stream. The final rule deviates from the proposed rule, which required the permittee to demonstrate ''that there is no reasonable alternative'' that would avoid mining through or diverting a perennial or intermittent stream when the permittee proposed to mine through or divert a perennial or intermittent stream. We determined that use of the phrase ''no reasonable alternative'' was not sufficiently precise; therefore we replaced the term. The analysis of practicable alternatives will identify whether an alternative is capable of being accomplished. For example, an applicant's unwillingness to pursue an alternative does not render it infeasible. Similarly, increased costs do not necessarily render an alternative infeasible. In the final rule, the applicant must demonstrate, and the regulatory authority must agree, that there is no ''practicable alternative'' to mining through or diverting the stream. The replacement of the term ''no reasonable alternative'' with the term ''no practicable alternative'' is consistent with other demonstration standards found in the proposed and final rule, such as paragraph (d)(ii), now paragraph (e)(1)(vi). Moreover, the use of the term ''practicable'' more closely tracks the requirements of section 515(b)(24) of SMCRA.[488] One commenter asserted that the proposed requirement was contrary to SMCRA and was duplicative of and in conflict with both section 404 of the Clean Water Act, which requires avoidance, minimization, and mitigation of impacts, and the Clean Water Act section 404(b)(1) alternatives analysis.[489] We disagree for several reasons. SMCRA requires that the permittee minimize disturbances to the prevailing hydrologic balance on the mine site[490] and this demonstration is necessary to determine if the operation would, in fact, be minimizing the disturbance to the prevailing hydrologic balance. Similarly, this requirement is an appropriate means of obtaining the background data and analyses that both the applicant and the regulatory authority need to make informed decisions about compliance with the requirements of sections 515(b)(24) and 516(b)(11) of SMCRA, both of which require the minimization of disturbances to fish, wildlife, and related environmental values and the enhancement of such resources where practicable.[491]

As prescribed by column 3, final paragraph (e)(1)(v) does not apply to specific intermittent streams as identified in final paragraph (e)(3) because the permittee must make different demonstrations for these types of streams. We explain the exceptions for these streams in the discussion of final paragraph (e)(3).

Final paragraph (e)(1)(vi) applies when a permittee proposes to construct an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of perennial or intermittent stream. The permittee must evaluate ''all potential upland locations, including abandoned mine lands and unreclaimed bond forfeiture sites'' and demonstrate that there is no practicable alternative that would avoid placement of excess spoil or coal mine waste in a perennial or intermittent stream. Proposed paragraph (d)(2)(ii) imposed a similar requirement that we have modified in response to comment. In the final rule, we have clarified that ''upland locations in the vicinity of the proposed operation'' includes abandoned mine lands and unreclaimed bond forfeiture sites. The term ''vicinity'' will be determined by the regulatory authority on a case-by-case basis. One commenter suggested that we alter the final rule to include ''abandoned underground mines'' after ''upland locations'' to increase the likelihood of selecting an alternative that reduces excess spoil placement or coal mine waste disposal in a perennial or intermittent stream and instead places it in an already disturbed area. Selective placement may aid in reclamation of another site. We agree with the commenter's rationale and are modifying final paragraph (e)(1)(vi) to add, ''including abandoned mine lands'' of all types, not only ''abandoned underground mines'' and ''unreclaimed bond forfeiture sites.'' The types of sites we listed are only two examples of the kinds of sites that the permittee should consider: This list is not exhaustive. However, we caution that although using abandoned underground mines may serve as a solution for avoiding above ground placement of excess spoil or coal mine waste, this solution may not always be practicable because of additional costs and permitting requirements and the burden of satisfying the other regulatory requirements related to these practices, including section 816.41, which prescribes the requirements for discharging water and other materials into an underground mine.

Another commenter suggested that we add the phrase, ''or reduce the extent of'' to proposed paragraph (d)(2)(ii), now paragraph (e)(1)(vi), so that it would read: ''[a]fter evaluating all potential upland locations in the vicinity of the proposed operation, there is no practicable alternative that would avoid or reduce the extent of placement of excess spoil or coal mine waste in a perennial or intermittent stream.'' The commenter alleged that the additional language is necessary to effectively communicate that the demonstration must decrease the amount of placement of excess spoil or coal mine waste. The commenter opined that the proposed phrase would clarify our proposed rule and prevent the permittee from placing any portion of the material in a perennial or intermittent stream. We agree with the commenter's assertion that construction of excess spoil fills, coal mine waste refuse piles, or encroachment of impounding structures

[488] 30 U.S.C. 1265(b)(24).

[489] 33 U.S.C. 1344(b)(1).

[490] 30 U.S.C. 1265(b)(10).

[491] 30 U.S.C. 1265(b)(24) and 1266(b)(11).

upon streams are permissible only when, among other criteria, no practicable alternative for placement in the vicinity exists, and that the permittee must minimize perennial and intermittent stream disturbance. However, we find the addition of the phrase ''or reduce the extent of'' limiting and not as protective. In the final rule we are retaining the term ''avoid.'' Merriam Webster's dictionary defines ''avoid'' as ''keep away from.'' [492] This term is more consistent with section 515(b)(10) of SMCRA [493] which requires permittees to minimize disturbances to the prevailing hydrologic balance.

Final paragraph (e)(1)(vii) requires the permittee to demonstrate that the proposed operation has been designed to minimize the extent to which the permittee will mine through or divert perennial and intermittent streams or cover streams by an excess spoil fill, coal mine waste refuse pile, or a coal mine waste impounding structure. The permittee must apply this minimization analysis after it makes the alternatives analysis required by final paragraph (e)(1)(v), discussed above. This demonstration is similar to the requirements in proposed paragraphs (c)(2)(iii), relating to mining through or diverting a perennial or intermittent stream, and (d)(2)(iii)(A), relating to construction of an excess spoil fill or a coal mine waste facility. Because of the format of our chart in final paragraph (e)(1) and the similarity between the requirements we have combined the demonstrations in the final rule. However, as prescribed by Column 3, this requirement does not apply to perennial or intermittent streams with a degraded form because the permittee must make different demonstrations for these types of streams. Furthermore, this final paragraph does not apply to streams that are considered intermittent due to low flowing springs and seeps as prescribed in final rule paragraph (e)(5) because again, different demonstrations are required.

Final paragraph (e)(1)(viii) requires the permittee to demonstrate that the stream restoration techniques prescribed in the proposed reclamation plan are adequate to ensure restoration or improvement of the form, hydrologic function, dynamic near-equilibrium, streamside vegetation, and ecological function of the stream after it has been mined through or permanently diverted. However, as prescribed by Column 3, this requirement does not apply to perennial or intermittent streams with a degraded form because the permittee must make different demonstrations for these types of streams. Furthermore, this final paragraph does not apply to streams that are considered intermittent due to low flowing springs and seeps as prescribed in final rule paragraph (e)(5) because again, different demonstrations are required.

Final paragraph (e)(1)(viii) is similar to proposed paragraph (c)(2)(iv), but we modified the final rule after considering comments and to conform to other final rule changes. For example, the final rule requires the permittee to restore or improve the hydrologic function. One commenter recommended that the final rule require a permittee to restore ''stream function in addition to hydrologic form'' to ensure the final rule fully protects the essential elements of stream health. In support, the commenter noted that current scientific literature indicates that a stream's form is generally not a proxy for its function. We agree. Although we mentioned ''form'' in the proposed rule, which we intended to include hydrologic form, many other commenters were confused by the term ''hydrologic form.'' We have eliminated that term and added a definition of ''hydrologic function'' to the final rule to emphasize the importance of the role streams play in transport of water and flow of water within the stream channel and floodplain. The term ''hydrologic function'' includes total flow volume, seasonal variations in streamflow and base flow, and provision of water needed to maintain floodplains and wetlands associated with the stream. ''Form'' includes the physical characteristics of the stream and is a prerequisite of ''hydrologic function.'' The final rule clarifies that a permittee must demonstrate that it will restore or improve both the ''form'' and hydrologic function of a mined through or diverted stream. Another commenter opined that the demonstrations that stream restoration plans must restore ''form and ecological function'' will require a new, expansive section of the permit similar to, and duplicative of, a section 404 Clean Water Act permit. We disagree and refer the commenter to our discussion in the general comments in Part IV. I. We have incorporated both of these requirements, as proposed, into the final rule and we encourage SMCRA regulatory authorities to coordinate the processing of permit applications with the Clean Water Act authority to avoid any potential for duplication.

This paragraph of the final rule also requires the permittee to demonstrate the requirements in proposed paragraph (b)(3), now final paragraph (d), about establishment of streamside vegetation when proposing to mine through or permanently divert a perennial or intermittent stream. One commenter recommended that we require establishment of a 100-foot forested buffer on either side of stream for excess spoil piles and coal waste disposal facilities. We disagree. Final paragraph (e)(1)(viii) specifically exempts excess spoil piles and coal waste disposal areas from this demonstration because the streams beneath them no longer exist, and the stormwater conveyances constructed in conjunction with the structures are not reconstructed streams. As discussed in final paragraph, (e)(5), permittees do not have to make the demonstration required in final paragraph (e)(1)(viii) for streams that are considered intermittent due to low flowing springs and seeps because different demonstrations are required.

Final paragraph (e)(1)(ix) requires the applicant to demonstrate that it has designed the proposed excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream to minimize the amount of excess spoil or coal mine waste the proposed operation will generate. We proposed that the permittee make this demonstration in proposed paragraph (d)(2)(i) and explained the proposed demonstration in the preamble.[494] One commenter contended that our reference to filter presses in the preamble to the proposed rule exhibits a preference for employing filter presses to reduce the generation of coal mine waste. This is an erroneous interpretation. Filter presses were listed as one of several examples of minimization processes that could be used by a permittee and should not be viewed as a preference or the only option.

Many commenters supported proposed paragraph (d)(2)(i), citing the increased level of stream protection compared to our previous regulations. We appreciate these comments and are adopting proposed paragraph (d)(2)(i), now paragraph (e)(1)(ix), with minor adjustments. As reflected in the chart found in paragraph (e)(1) of the final rule, we have added references in columns 2 and 3 to final rule § 780.35(b), which governs minimization of excess spoil. These references operate to remind any permittee proposing to engage in any activity in, through, or adjacent to a perennial or intermittent stream that, in demonstrating that it will minimize

[492] Avoid. 2016. In *Merriam-Webster*. Retrieved Nov. 10, 2016 from *www.merriam-webster.com/dictionary/avoid*.

[493] 30 U.S.C. 1265(b)(10).

[494] 80 FR 44436, 444517 (Jul. 27, 2015).

excess spoil, it must provide supporting calculations and other documentation of the design that it adopts to achieve minimization.

Final paragraph (e)(1)(x) requires that a permittee proposing to engage in any activity in, through, or adjacent to a perennial or intermittent stream must demonstrate that the proposed operation is designed, ''to the extent possible using the best technology currently available'', to minimize adverse impacts on fish, wildlife, and related environmental values. We required this demonstration in proposed paragraph (d)(iii)(A). However, as proposed it was applicable only when a permittee proposed to construct an excess spoil fill or coal mine waste disposal facility. Although we intended this requirement to apply to all activities in, through, or adjacent to perennial or intermittent streams, we did not articulate this requirement clearly in the proposed rule. Therefore, we have clarified the final rule to accurately express our intent. This clarification more accurately tracks the requirements of section 515(b)(24) of SMCRA,[495] which applies to any permit issued under any approved State or Federal program.[496]

Final paragraph (e)(1)(xi) requires a permittee that proposes construction of an excess spoil fill, coal mine waste facility, or impounding structure that encroaches upon any part of a stream to demonstrate that the fish and wildlife enhancement plan required in final rule § 780.16 includes measures that will fully and permanently offset any long-term adverse impacts on fish, wildlife, and related environmental values within the footprint of the fill, refuse pile or impoundment. We imposed this requirement in paragraph (d)(2)(iv) of the proposed rule, but we invited comment seeking suggestions for more specific standards or criteria for determining the meaning of ''fully and permanently offset.'' [497] Some commenters considered the term ''fully and permanently offset'' to be vague, but offered no clarification or alternative. In contrast, another commenter expressed its full endorsement of this phrase. Because we received no practicable alternative for standards or criteria for determining the meaning of ''fully and permanently offset,'' we have adopted the requirement as proposed with the exception of the redesignation. The regulatory authority will have some discretion to determine, on a case-by-case basis, whether the permittee has achieved the ''fully and permanently offset'' requirement.

In addition to the comments in response to our invitation for comment we received many other comments on this proposed paragraph. Another commenter expressed concern that the requirement may create a duplicative mitigation requirement if excess spoil fill or coal mine waste disposal facilities are built in waters within the jurisdiction of the Clean Water Act. We disagree. We expect the SMCRA and the Clean Water Act regulatory authority to coordinate to ensure the selection of the appropriate fish and wildlife enhancement plan, to achieve a solution that satisfies the requirements of both SMCRA and the Clean Water Act. The same commenter expressed concern that the proposed paragraph included the term ''related environmental values,'' which in the commenter's opinion creates a duplicative mitigation requirement. The language of SMCRA expressly requires that the regulatory authority consider ''fish, wildlife, and related environmental values.'' [498]

Another commenter questioned the statement in the preamble to proposed rule section 816.71 that referred to proposed rule § 780.28, where we explained that we do not consider surface runoff diversions constructed under § 816.71(e) to qualify as fish and wildlife enhancement measures pursuant to the requirements of § 780.16(d).[499] By their very nature, however, these diversions are channelized surface water runoff conveyances, and their design and construction do not include measures intended to provide any form of habitat; therefore, they would not qualify as a type of enhancement that would ''fully and permanently'' offset the long-term adverse effects of placement of excess spoil or coal mine waste facilities. We are therefore not changing the rule in response to this comment.

Another commenter alleged that proposed paragraph (d)(2)(iv), now paragraph (e)(1)(xi), inappropriately introduces a backdoor requirement for the establishment of a riparian corridor even though the proposed regulatory text about the establishment of a riparian corridor does not apply to coal mine waste disposal facilities and placement of excess spoil. The commenter misinterprets the proposed rule. If an applicant proposes an excess spoil fill or a coal mine waste disposal facility in an intermittent or perennial steam, the regulatory authority is obliged to ensure the fish and wildlife enhancement plan contains measures to fully and permanently offset any long-term adverse impacts within the footprint of the fill, refuse pile, or coal mine waste impoundment on fish, wildlife, and related values. We are not prescribing the enhancement measures that the permittee must select, although we do list potential enhancement measures in § 780.16(d). One potential enhancement measure in final rule § 780.16(d)(2)(v), proposed paragraph (d)(1)(v), is a vegetative corridor enhancement. In the preamble to the proposed rule, we recommended that, if that option is selected, the regulatory authority should consider the creation of a conservation easement to ensure that the enhancement is fully and permanently offsetting the impacts of the fill, refuse pile, or coal waste impoundment and that the newly planted vegetation is not destroyed at bond release. We did not mandate the selection of vegetative corridor enhancement or the use of conservation easements. We merely suggested these selections as options for enhancement measures. Other enhancement measures are permissible; thus, there is no backdoor requirement, and we have made no revisions to the final rule based on this comment.

Final paragraph (e)(1)(xii) requires a permittee to demonstrate that each excess spoil fill, coal mine waste refuse pile, and coal mine waste impounding structure it proposes to construct is designed in a manner that will not result in formation of toxic mine drainage. This demonstration was required in proposed paragraph (d)(2)(v); however, it was combined with another demonstration which is now required by final paragraph (e)(1)(i). For clarity we have separated these demonstrations in the final rule.

Final paragraph (e)(1)(xiii) requires that a permittee demonstrate compliance with the revegetation plan required under final rule § 780.12(g), which requires reforestation of each completed excess spoil fill if the land is forested at the time of the application or if the land would revert to forest under the conditions of natural succession. This demonstration is intended to minimize the adverse impacts of the fill on watershed hydrology, especially the quantity and quality of surface runoff, and aquatic life in the stream. We proposed this demonstration at paragraph (d)(vi), and are finalizing it, with the exception of the redesignation, as proposed.

Under the provisions in final paragraph (e)(2), a permittee may propose to convert a minimal portion of a segment of an intermittent stream

[495] 30 U.S.C. 1265(b)(24).

[496] 30 U.S.C. 1265(a).

[497] 80 FR 44436, 44518 (Jul. 27, 2015).

[498] *Id.*

[499] 80 FR 44436, 44556 (Jul. 27, 2015).

within the mined area to an ephemeral stream. The regulatory authority may approve the permittee's proposal if the permittee demonstrates and the regulatory authority finds that converting any portion of the intermittent stream will not degrade the hydrologic function, dynamic near-equilibrium, or the ecological function of the stream as a whole within the mined area. The regulatory authority must make this determination by comparing the proposed action to the baseline stream assessment conducted under § 780.19(c)(6).

This is a revision to our proposed rule. In the proposed rule at paragraph (b)(2)(ii), we required a permittee to demonstrate that any mining activity in or through a perennial, intermittent, or ephemeral stream, with the exception of constructing an excess spoil fill or coal mine waste facility, would not ''result in conversion of the stream segment from intermittent to ephemeral, from perennial to intermittent, or from perennial to ephemeral.'' [500] We received many comments opposing the proposed prohibition on stream conversions. For example, one commenter asserted that the prohibition on converting an intermittent stream to an ephemeral stream may preclude mining in many areas. This regulatory authority commenter asserted that converting stream types, should be based on compliance with water quality standards, designated uses, approved land uses, or other permit requirements instead of, what it opines as an arbitrary requirement. We agree. In the final rule, a portion of an intermittent stream may be converted to an ephemeral stream if a permittee can demonstrate and the regulatory finds that the permittee will not degrade the hydrologic or ecological function of the stream as a whole within the mined area. The compliance factors enumerated by the regulatory authority commenter should be included when demonstrating to the regulatory authority that no hydrologic or ecological function will be degraded and to satisfy the requirements of section 800.42 related to bond release. Additionally, in certain circumstances, a seep may create short segments of an intermittent stream in an otherwise ephemeral stream. This is an issue in certain areas, such as North Dakota. Therefore, we have created an exception to final paragraph (e)(2)(i) for this limited circumstance. The exception is enumerated at final rule paragraph (e)(2)(ii), by specifically exempting the circumstances more fully described in final rule § 780.28(e)(5).

A commenter questioned why converting an intermittent to an ephemeral stream may be permissible but converting a stream in the opposite manner, such as from an intermittent to a perennial stream or an ephemeral to an intermittent stream was not restricted in the proposed rule. The commenter is correct in that we do not require a permittee to demonstrate that the conversion of a stream from ephemeral to intermittent or intermittent to perennial would not degrade the hydrologic function or the ecological function. We have not restricted this type of conversion because the same processes that create streams that lose water as it flows downstream resulting in a conversion from intermittent to ephemeral and perennial to intermittent does occur in the opposing direction. Streams may gain flow after reclamation when increases in water volume contribute to, rather than diminish, the flow. This additional contribution of flow comes from infiltrated water exiting the backfill. The gaining stream now maintains flow throughout the year and develops physical features, including for example, an altered bed-and-bank that result in a classification of a stream as intermittent or perennial. Prior to mining, the same stream may have been classified as an intermittent or ephemeral stream because of the lack of certain physical features and the brief duration of flow. The reclassified stream with greater flow has beneficial characteristics, such as a potential increase in both the diversity and abundance of aquatic species and the potential to add more varied uses, especially recreational uses. Additionally, streams that gain flow can result in improved habitat especially if coupled with stream flow throughout the seasons. Moreover, converting an intermittent stream to a perennial stream or an ephemeral stream to an intermittent stream promotes a more productive and varied aquatic life as long as the sediment transport remains similar. Therefore, we do not restrict this type of conversion—from intermittent to perennial or from ephemeral to intermittent—beyond the criteria included in this section and §§ 780.12 and 780.19.

Another commenter objected to the proposed rule and argued that, as described in the Draft Environmental Impact Statement, it would preclude the conversion of any stream segment, and this complete restriction will effectively prohibit any mining that would directly impact the headwaters (or source) of an intermittent or perennial stream. As discussed in the introduction to final § 780.28, temporary impacts, such as temporarily converting certain streams, are permissible. This is consistent with SMCRA, which allows disturbances to be minimized, not precluded.[501] For this reason, we do allow permittees to convert intermittent to ephemeral streams as long as the permittee satisfies the requirements of final paragraph (e)(2). Similarly, another commenter claimed that prohibiting conversions of the upper limits of headwater streams would disproportionately affect Appalachian watersheds where mining in steep slopes is prevalent. The commenter supported this claim by noting that impacts to the location of the stream type transition point is likely to be most prevalent in steep slope environments, like Appalachia, as well as areas with thick overburden and low-gradient streams. We agree that conversion of intermittent streams to ephemeral streams is most common in areas like Appalachia where stream baseflow is more complex because of the permeability of rock strata and the presence or absence of fractures in the strata. Further, following mining the backfill is no longer stratified and, although reconstructed intermittent streams can be engineered to resemble premining characteristics, it is not realistic to expect that they can be precisely reproduced. Therefore, to prevent the disproportionate impact the commenter describes, some conversion must be allowed. Therefore, final paragraph (e)(2) allows for differences in geology and hydrology nationwide.

Another commenter questioned why we would authorize converting a perennial stream to an ephemeral stream, but not allow an intermittent stream to be converted to an ephemeral stream. As explained in the discussion of final paragraph (e)(1)(iii), permittees may not convert a perennial stream to an ephemeral stream, but permittees may, in specific circumstances, convert a minimal portion of a mined-through segment of an intermittent stream to an ephemeral stream. SMCRA allows minimized disturbances to the quality and quantity of surface water and groundwater both during and after surface coal mining.[502] In the final rule we clarify that a permittee may effect these stream conversions only after demonstrating that the hydrologic function and the ecological function of the stream segment as a whole, within the permit, will not be degraded. To ensure the hydrologic function and ecological function will not be

[500] 80 FR 44436, 44610 (Jul. 27, 2015).

[501] 30 CFR 1265(b)(10) and (b)(24).

[502] 30 U.S.C. 1265(b)(10).

degraded, the regulatory authority must examine and compare the baseline stream assessment data collected as required by final rule § 780.19(c)(6). We discuss this data fully in the preamble to final rule § 780.19(c)(6). We discuss the requirements for restoring ecological function in connection with final paragraph (g), below. As explained in final rule § 780.28(e)(2), allowing a permittee to convert a minimal segment of specific stream types satisfies the requirements of sections 515(b)(10) and 515(b)(24) of SMCRA because disturbances to the prevailing hydrologic balance are minimized and the permittee is required to employ the best control technology currently available to minimize disturbances to fish, wildlife, and related environmental values.[503]

Another commenter stated that the proposed rule, prohibiting stream conversions was highly restrictive, may strand coal, and did not recognize longitudinal variations in transition points, such as when transition points move upstream or downstream depending on precipitation patterns. We agree with the commenters that the proposed rule prohibited stream conversions and could restrict some mining. We also recognize that surface mining activities will, in most cases, lower the water table and, thus, impact the location of the stream type transition points which are the point where an ephemeral stream becomes intermittent or an intermittent stream becomes perennial. Furthermore, the inherent nature of mining, particularly disruption of the water table, makes minimal stream conversions unavoidable. We discuss points in support of allowing permittees to convert minimal portions of intermittent streams above in connection with final paragraph (e)(2).

To incentivize operators to engage in re-mining and the associated improvements that occur when mining through streams exhibiting substantial degradation as a result of prior anthropogenic activity and a degraded stream channel that has resulted in substantial adverse impact on ecological function, we have added provisions in final paragraph (e)(3) for mining operations that seek to mine in, through, or near certain intermittent streams. This exemption is restricted to intermittent streams that satisfy the following criteria, as prescribed by final paragraph (e)(3)(ii):

- Prior anthropogenic activity has resulted in substantial degradation of the profile or dimensions of the stream channel; and
- Degradation of the stream channel has resulted in a substantial adverse impact on the ecological function of the stream.

Implementation of these provisions is important because remining through these types of streams often provide environmental benefits including improved water quality and restored streamside vegetative corridors.[504] For example, satisfying the criteria in final paragraphs (e)(3) will accomplish the mandate of section 515(b)(24) of SMCRA [505] by minimizing disturbances to fish, wildlife, and other environmental values while simultaneously encouraging remining and the reclamation benefits that accompany mining. As explained in the chart in the final rule at paragraph (e)(1) and discussed above, final paragraphs (e)(1)(v) and(vii) provide exceptions to the demonstrations required in paragraph (e)(1) as long as the permittee demonstrates and the regulatory authority finds that implementation of the proposed mining and reclamation plan will satisfy five criteria. In particular, final paragraph (e)(3) provides exemptions from: The requirement in final paragraph (e)(1)(v) for a practicable alternative analysis and the requirement in final paragraph (e)(1)(vii) that the permittee minimize the extent of perennial or intermittent stream mined through. However, final paragraphs (e)(3)(i)(A)–(E) require a permittee proposing to mine through intermittent streams prescribed by final paragraph (e)(3)(i), to demonstrate that:

- It will improve the form of the stream segment;
- It will improve the hydrologic function or the dynamic near-equilibrium of the stream;
- Is likely to result in improvement of the biological condition, dynamic near-equilibrium or ecological function of the stream;
- It will not further degrade the hydrologic function, biological condition, or ecological function of the stream; and
- It will result in establishment of a streamside vegetative corridor in accordance with § 816.57(d) of this chapter.

Although not as comprehensive as the final rule, proposed § 816.57(b)(4) included a ''special provision for restoration of degraded stream segments.'' In this section we proposed to include a requirement that ''if the stream segment to be mined through or diverted is in a degraded condition before mining, you must implement measures to enhance the form and ecological function of the segment as part of the restoration or diversion process.'' As we explained in the preamble to the proposed rule,[506] we intended the proposed provision to ensure that stream segments degraded by prior human activities are improved to the fullest extent possible, not just restored to the condition that existed before the current mining operation. In the proposed rule we did not define what qualifies as a degraded stream. Although we have not defined ''degraded'' as some commenters requested, we have added final paragraph (e)(3)(ii) to clarify that the exemption allowed by final paragraph (e)(3) is conditioned upon the stream displaying two characteristics: Prior anthropogenic activity has resulted in substantial degradation of the profile or dimensions of the stream channel and degradation of the stream channel has resulted in substantial adverse impact on the ecological function of the stream.

We address the comments to proposed § 816.57(b)(4), about restoring degraded stream segments here because in final paragraph (e)(3), we have improved and modified proposed § 816.57(b)(4), and placed the new requirements in final rule § 780.28 because they are permitting requirements and not performance standards. One commenter suggested that permittees should restore streams to a higher quality than existed under premining conditions and that the actual premining conditions documented during baseline investigations should be a factor when designing and approving plans for stream restoration, but that this factor should not be dispositive. We agree and we have added language to the final rule at paragraphs (e)(3)(i)(C) and (D) to clarify that the permittee must consider both the biological condition or ecological function and hydrologic function of the stream, as determined by the baseline data, when designing the

[503] 30 U.S.C. 1265(b)(10) and (b)(24).

[504] *See* James McElfish, Jr. & Ann Beier, *Environmental Regulation of Coal Mining: SMCRA's Second Decade* 278 (1990); *see also* Pa. Dep't of Envtl. Prot., Discussion Paper on Water Quality Issues Related to Coal Mining (1998). U.S. Env't. Prot. Agency, Office of Water, Doc. No. EPA–821–B–00–002, *Economic and Environmental Impact Assessment of Proposed Effluent Limitation Guidelines and Standards for the Coal Mining Industry: Remining and Western Alkaline Subcategories* 8–1, (March 2000) (stating that ''EPA estimates that 38 percent to 44 percent of AML [Abandoned Mine Lands] acres affected by remining would experience significant decreases in AMD [abandoned mine drainage] pollutant levels.'').

[505] 30 CFR 1265(b)(24).

[506] 80 FR 44436, 44454 (Jul. 27, 2015).

reconstructed stream, and that it should improve streams harmed by anthropogenic activities, rather than return it to a similar state.

Another commenter opined that anthropogenic activities have severely altered many pre-mining stream channels and the resulting erosion should not be reproduced in the reclamation process. We agree and have modified the final rule to prevent the reproduction of degraded stream channels. Paragraphs (e)(3)(i)(B) through (D) requires a demonstration and finding by the regulatory authority that the design will not further degrade the hydrologic function, biological condition, or ecological function of the stream segment. These requirements, coupled with the other necessary demonstrations, are likely to improve the premining characteristics of the original stream channel to promote the recovery and enhancement of the aquatic habitat and the ecological and hydrologic functions of the stream.

In response to commenters, we have added final paragraph (e)(4), which prescribes that the demonstrations required by final paragraph (e)(1) do not apply to a stream segment that will be part of a permanent impoundment approved and constructed pursuant to the requirements of final rule § 816.49(b) that prescribes mandates for permanent impoundments.

We received comments from a regulatory authority explaining that, in its experience, particularly in North Dakota, streams that are otherwise ephemeral can have segments that are considered intermittent due to low flowing springs and seeps. The commenter asserted that in the geographic area where it performs oversight it is common to find short reaches of streams that are classified as intermittent because of low flowing springs from shallow aquifers. According to the commenter, these low flowing springs often occur at the upper reaches of an ephemeral stream in native grasslands and the flows frequently cease within a few hundred feet or less from the water source. The commenter explained that in its experience the water is frequently saline and usually has little or no value as fish and wildlife habitat. Furthermore, the features do not have sufficient flow to serve as a livestock watering source by ranchers. According to the commenter, proposed rule § 780.28(b)(2)(ii), precluding conversions of stream segments, from which final paragraph (e)(1)(iv) is derived, would essentially prohibit mining in certain areas. The commenter specifically referred to locations where lignite is mined because according to the commenter, the lignite seam is often the aquifer that supplies the groundwater for these low flowing springs. Therefore, the commenter recommended that proposed § 780.28(b)(2)(ii) be modified to allow the conversion of an intermittent stream to an ephemeral stream if the conversion does not affect water uses or significant wildlife habitat. We have incorporated this recommendation into the final rule at paragraph (e)(5). This exception is designed to address the limited scenario described by the commenter in reference to North Dakota. To accommodate the scenario the commenter describes we prescribe in column 3 of final paragraphs (e)(1)(iv), (vii), and (viii) that the permittee is not required to make the requisite demonstrations if the following alternative demonstrations enumerated in final paragraphs (e)(5)(i) through (iii) are satisfied:

- The intermittent stream segment is a minor interval in what is otherwise a predominately ephemeral stream;
- The permittee demonstrates to the satisfaction of the regulatory authority that the intermittent segment has no significant fish, wildlife, or related environmental values, as documented by the stream assessment baseline data collected as required by final rule § 780.19(c)(6); and
- The permittee demonstrates to the satisfaction of the regulatory authority that conversion of the intermittent stream will not adversely affect water uses.

These three alternative demonstrations include the requirement that the permittee demonstrate that the intermittent stream segment is a minor interval in what is otherwise a predominately ephemeral stream.

Final Paragraph (f): What design requirements apply to the diversion, restoration, and reconstruction of perennial and intermittent stream channels?

In addition to satisfying the requirements in paragraphs (a) through (e), permittees proposing to divert, restore, or reconstruct perennial and intermittent stream channels must also satisfy the design requirements prescribed in final paragraph (f). We proposed similar requirements in proposed paragraphs (c)(2)(v) and (vi) of § 780.28, but we have re-designated and modified these paragraphs in response to comments and for clarity.

Final paragraph (f)(1) is similar to proposed paragraph (c)(2)(v)(A). This paragraph applies to permanent stream-channel diversions, temporary stream-channel diversions that will remain in use for greater than three years, and stream channels reconstructed after the completion of mining. These structures must be designed to restore, approximate, or improve the premining characteristics of the original stream channel, to promote the recovery and enhancement of aquatic habitat and the ecological and hydrologic function of the stream, and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement. In final paragraph (f)(1)(ii), we have retained the requirements in proposed paragraph (c)(2)(v)(A) that the pertinent stream-channel characteristics include, but are not limited to, the baseline stream pattern, profile, dimensions, substrate, habitat, and natural vegetation growing in the riparian zone and along the banks of streams. Commenters supported these requirements because they make our regulations more consistent with similar requirements imposed under section 404 of the Clean Water Act and its implementing regulations. In addition to re-designating this section, we have also made some modifications to the final rule which we discuss below.

As proposed, this section applied to temporary stream-channel diversions that were to remain in place for two or more years. Some commenters objected to the imposition of design criteria for temporary stream-channel diversions, proclaiming it a wasteful and nonsensical requirement. One of these commenters suggested that temporary diversions should require only temporary designs, citing the unpredictability of the need for temporary diversions at the time of permitting. The same commenter also stated that the National Pollutant Discharge Elimination System requirements will be in place to protect downstream waters and our rule would be problematic for establishment of long term drainage control in terms of planning and layout cost, extra construction time expense, and maintenance. The same commenter also opined that additional land disturbance will result in added and un-necessary negative environmental impact. These commenters suggested striking the requirement or modifying it in the final rule to reflect a longer term. While we agree that the length of time a temporary stream-channel diversion may be in place may not be known at the time of permitting, we know from over thirty years of experience that many of these diversions are in place for significantly long periods. Further, if the commenters' suggestion of striking the required design criteria were accepted,

''temporary diversions'' may be constructed as little more than straight-lined ditches that could potentially be in place for the life of a permit, which may exceed decades. This outcome does not adequately implement the requirements of SMCRA, ''to minimize disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas. . . .'' [507] Therefore, we are retaining the design criteria. However, we did reanalyze the two year requirement and changed the final rule to apply to temporary stream-channel diversions that will remain in use for three or more years. This is a reasonable time frame as many smaller mines will be completed in less than three years. It would not be reasonable to expect a temporary stream diversion in place for less than three years to reestablish the stream biology because the diversion may not be in place for a sufficient period to reestablish stream biology. However, a diversion of a stream segment in place for more than three years, and as long as several decades, is capable of developing sufficient biology and should be constructed to ''restore, approximate, or improve the premining characteristics of the original stream channel. . . .''

Throughout the final rule we have removed the proposed term ''restored'' and have replaced it with ''reconstructed'' in order to describe more accurately the reclamation that must occur after mining in or through intermittent or perennial streams. Several commenters stated that ''restored'' was vague because no stream that is re-created using the criteria in § 780.28 will have the exact characteristics of a pristine stream. Some of these commenters opined that using the term ''restored'' implied an unachievable standard. We agree with the commenters and note that reconstructed streams may deviate from the premining characteristics as long as the requirements of the final rule are satisfied. Additionally, we have added the phrase ''or improve'' to final paragraph (f)(1)(i), to emphasize the importance of, and to encourage, mining techniques that improve existing stream channels. In the proposed rule we required the design to ''promote the recovery and enhancement of aquatic habitat.'' Promoting recovery and enhancement of aquatic habitat is most successfully done by promoting recovery and enhancement of the ''ecological and hydrologic functions of the stream.'' Therefore, we have included the requirement to ''restore, approximate, or improve'' the premining characteristics of the original stream channel in the final rule to more accurately reflect the mandates of section 515(b)(24) of SMCRA [508] and the scientific literature that discusses the importance of hydrologic and ecological function.[509]

For clarity, we have separated out the last paragraph of proposed paragraph (c)(2)(v)(A) and re-designated it as final paragraph (f)(1)(iii). This provision clarifies that permittees planting vegetation along the banks of temporary diversions in use for three or more years are not required to include species that would not reach maturity until after the diversion is removed. This will prevent unnecessary land disturbance and cost. In the final rule, we have replaced the term ''in the riparian zone'' with ''along the banks of the diversion'' to fully encompass all streamside vegetation. Also, as discussed above, we have changed ''in use for 2 or more years'' with ''in use for 3 or more years.''

We have retained proposed paragraph (c)(2)(v)(B), but re-designated it as final paragraph (f)(2). This paragraph requires the permittee to design all temporary and permanent stream channel diversions to ensure that the hydraulic capacity is at least equal to the hydraulic capacity of the unmodified stream channel immediately upstream from the diversion and no greater than the hydraulic capacity of the unmodified stream channel immediately downstream of the diversion. As we explained in the preamble to the proposed rule,[510] this requirement will protect against the scouring and other adverse impacts that could result from a sudden constriction in channel capacity of the unmodified stream channel downstream of the diversion which may harm important habitat. This paragraph is consistent with the requirement in section 515(b)(24) of SMCRA to minimize adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.[511]

Final paragraph (f)(3) adopts the design criteria for all temporary and permanent stream-channel diversions that were in the proposed rule at proposed paragraph (c)(2)(v)(C). The final paragraph requires that all temporary and permanent stream-channel diversions be designed to ensure that the combination of channel, bank, and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and 100-year, 6-hour precipitation event for a permanent diversion.

We invited comment on whether the design event for a temporary diversion should be raised to the 25-year, 6-hour event to provide added safety and protection against overtopping. In response we received some comments in support of raising the criteria, while other commenters were opposed. The commenters supporting the increase cited the unpredictability of storm events. The comments opposed to a larger precipitation event cited unnecessary increased costs to construct and maintain larger sediment structures. Another commenter suggested that we impose site-specific goals such as zero flows or allowable increases in downstream and upstream flood risks as implemented and determined by the Federal Emergency Management Agency. We disagree with this comment because adopting site-specific design storm standards would, effectively, result in no minimum national standards. Final paragraph (f)(3) prescribes minimum standards and the regulatory authority has discretion to impose more stringent site-specific standards if it deems them appropriate. This approach ensures flood risk is appropriately addressed. To comply with the minimization requirements of SMCRA we have the responsibility to address flood risk because any increase in flood risk caused by mining would constitute the potential for material damage to the hydrologic balance outside the permit area.[512] Ultimately, we decided to retain the 10-year, 6-hour design criteria because it provides sufficient protection. The 25-year, 6-hour criteria provides minimal risk reduction at the price of significantly additional cost and land disturbance. In addition, we point out to the commenters that throughout the final rule, we have adopted provisions, such as final rule § 816.43, that afford greater protection for stream diversions by imposing new design and performance criteria and sediment control measures that should capture any additional runoff within the permit area. Thus, although we are not adopting the commenters' specific suggestions, we

[507] 30 U.S.C. 1265(b)(10).

[508] 30 U.S.C. 1265(b)(24).

[509] *See* Lainie R. Levick et al., *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest.* U.S. Envtl. Prot. Agency and U.S. Dep't of Agriculture ARS Southwest Watershed Research Center, EPA/600/R–08/134, ARS/233046, 116 p. *http://www.epa.gov/esd/land-sci/pdf.* Margaret A. Palmer, *Reforming watershed restoration: Science in need of application and applications in need of science.* Estuaries and Coasts 32(1): 1–17 (2009).

[510] 80 FR 44436, 44517 (Jul. 27, 2015).

[511] 30 U.S.C. 1265(b)(24).

[512] 30 U.S.C. 1265(b)(10).

have afforded sufficient protection to these diversions.

A commenter asserted that considerations for floodplains are not typically included in temporary diversion design; therefore, this commenter questioned whether proposed paragraph (c)(2)(v)(C), now final paragraph (f)(3), will no longer require a permit applicant to ''consider the size of the watershed reporting to the ditch when designing a temporary diversion.'' The commenter did not explain the term ''ditch.'' As we explain in the preamble to final rule § 816.43, there are several types of diversions, including diversion ditches, stream diversions, and conveyances or channels within the disturbed area. Historically, ''ditch'' has been used by industry and others—whether correctly or incorrectly—to describe each of these types of diversions. This is further complicated by the fact that each of these classifications of diversions may be subdivided as temporary or permanent. Because this comment was in direct response to proposed paragraph (c)(2)(v)(C), we interpreted the commenter to be referring to temporary stream diversions as classified by final rule § 816.43(a)(2)(i). The commenter's assertion that floodplain is not considered in temporary diversion design is incorrect. We note that, with the exception of the re-designation, the final rule pertaining to capacity of diversion ditches is identical to that in the existing rules at § 816.43(b)(3). Our final rule specifies that the permittee include precipitation event design criteria for temporary stream diversions. This includes the watershed area tributary that ''reports'' to the diverted stream. Therefore, permittees must continue to consider the size of the watershed ''reporting'' to the ''ditch.'' If the commenter was referring to temporary diversion ditches that are channels constructed to convey surface water runoff or other flows from areas not disturbed by mining activities away from or around disturbed areas, please refer to § 816.43 of the final rule.

Another commenter asserted that it is almost impossible for a stream channel diversion to meet the requirements of both proposed paragraphs (c)(2)(v)(B), now final paragraph (f)(2), which requires that the hydraulic capacity be no greater than the capacity of the unmodified stream channel downstream of the diversion and no less than the capacity of the unmodified stream channel upstream of the diversion, and proposed paragraph (c)(2)(v)(C), now final paragraph (f)(3), which requires that the design be able to pass the 10-year, 6-hour precipitation event for a temporary diversion and the 100-year, 6-hour event for a permanent diversion. As discussed above, we are retaining both paragraphs in the final rule and we have concluded that a permittee can and must satisfy both requirements. Together these requirements ensure that disturbances and adverse impacts to fish, wildlife, and related environmental values are minimized.[513] We acknowledge that reconciling these requirements may create challenges; however, these requirements are necessary to more closely recreate natural conditions as we have explained above. Although the permittee may exercise discretion in designing these diversions, the requirements of final paragraphs (f)(2) and (f)(3) must be satisfied. One method that a permittee may select to satisfy both requirements is to construct a lined channel designed to accommodate discharge from a 10-year or 100-year, 6-hour precipitation event for a temporary or permanent stream diversion then fill the channel with substrate material comparable to that of the premining stream channel. This material should be selected consistent with the baseline stream assessment required in final § 780.19(c)(6)(ii)A. After this is complete, a stream channel similar to the premining stream channel can be constructed in the substrate. The reconstructed stream channel and flood-prone area will convey in-channel and overbank flows that occur during typical precipitation events. If a larger storm event occurs, it is likely that the stream and flood-prone area substrate will be eroded; however, the lining of the larger channel that was constructed first will prevent erosion of the underlying spoil. This is consistent with how natural streams function. During storm events, the substrate in natural streams is typically eroded until bedrock is encountered. In our scenario, the channel that was constructed first operates similar to the bedrock in a natural stream.

Final paragraph (f)(4) requires a permittee to submit a certification from a qualified, registered, professional engineer that the designs for all diverted and reconstructed stream-channels occurring after the completion of mining satisfy the design criteria of this section and any additional design criteria established by the regulatory authority. This certification may be limited to the location, dimensions, and physical characteristics of the stream channel. This requirement was proposed at paragraph (c)(2)(iv). We have redesignated the final paragraph and, with minor exceptions, adopted the paragraph as proposed. Similar to other paragraphs in this section we have replaced the term ''restored'' to ''reconstructed'' because the latter term better describes the streams that are recreated after mining using the criteria prescribed in this section.

One commenter objected to this portion of the proposed rule, alleging that stream restoration requires far more than just engineering and that the rule should be clarified to ensure that the requirement applies only to the engineering aspect of stream channel restoration. The commenter also noted that the U.S. Army Corps of Engineers requires only permanent streams with watersheds over 640 acres to be certified by a professional engineer. Finally, the commenter considered this requirement to be excessive, costly, and useless because both the U.S. Army Corps of Engineers and the regulatory authority constantly inspect the reclamation of these streams.

In response, we note that this requirement does not apply to all streams within a permitted area; it applies only to stream segments reconstructed after being impacted by mining activities. Also, because of the permanency of these reconstructed streams, it is important to ensure that the reconstructed stream matches the design plan. This determination is most appropriately made by a qualified, registered, professional engineer. Moreover, the last sentence of final paragraph (f)(4) expressly limits the certification to the location, dimensions, and physical attributes of the stream. As we explained in the preamble to the proposed rule,[514] the engineering certification does not include assessment of ecological function because that is beyond the professional competency of an engineer.

Final Paragraph (g): What requirements apply to establishment of standards for restoration of the ecological function of a stream?

Final paragraph (g) replaces proposed paragraph (e) which prescribed the standards the permittee must satisfy to restore the ecological function of a stream and provided general guidance for regulatory authorities to establish standards for determining when the permittee had ''restored'' the ecological function of a restored or permanently-diverted perennial or intermittent stream. In the final rule, we have clarified that the permittee must ''reconstruct'' streams that it mines, not ''restore'' or ''permanently divert them;''

[513] 30 U.S.C. 1265(b)(24).

[514] 80 FR 44436, 44516 (Jul. 27, 2015).

have moved to paragraph (g) the criteria that the regulatory authorities must use to establish the standards for restoring ecological function; have clarified that the requirement to restore ecological function applies only to perennial and intermittent streams; and have prescribed the specific criteria the regulatory authority must use when it establishes standards for restoring the ecological function of perennial and intermittent streams. Specifically, the permittee must employ the best technology currently available when it restores the biological component of streams. Because the best technology currently available varies based upon the type of stream that is restored, we differentiated between the standards to be used for perennial and intermittent streams. We made these revisions in response to comments from the public and other federal agencies. We discuss the modifications we made to the final rule in more detail below.

In final paragraph (g)(1), we retained the requirement that the regulatory authority establish criteria for determining when the permittee has restored the ecological function of a perennial or intermittent stream after mining through the stream. However, in response to a federal agency comment, we removed the adjective ''objective'' because the requirements in final paragraphs (g)(2) through (4) provide adequate guidance for establishing these standards.

We made additional revisions to this requirement. First, we clarified that the requirement to restore ecological function applies only to perennial and intermittent streams. Although final § 780.28 specifically refers to these two stream types and not ephemeral streams, several commenters opined that the proposed rule was unclear about what requirements applied to each stream type. Therefore, final paragraph (g)(1) specifically refers to perennial and intermittent streams to clarify that any applicant proposing to mine through a perennial or intermittent stream must incorporate the standards imposed by the regulatory authority and explain how it will satisfy the standards. We reiterate that final § 780.27 provides the requirements applicable to ephemeral streams.

Second, consistent with other paragraphs of the final rule, we removed the proposed terms ''restored'' and ''permanently diverted.'' Several commenters asserted that those terms are vague. We agree and we have replaced those terms with ''reconstructed'' in order to describe more accurately the reclamation that must occur after mining in or through intermittent or perennial streams.

One commenter objected to the requirement that the regulatory authority establish standards for determining when ecological function has been restored because the commenter opined that permittees can never restore identical ecological function. In response, we acknowledge that there has been no consistent documentation that streams can be restored to their identical ecological function. Neither the proposed rule nor the final rule, however, requires that the restored ecological function of a stream be identical to what it was before mining. Instead, § 780.28(g)(3)(ii)(A) of the final rule explicitly provides that the reconstructed streams or stream-channel diversions need not have precisely the same biological condition or biota as the stream segment had before mining.

Several commenters contended that the permit requirements in proposed § 780.28(e)(1) were too subjective and vague. Similarly, some commenters were also concerned that the standards for restoring ecological function are too difficult to determine without further guidance and that developing standards will be a task too complex for regulatory authorities. Many commenters opined that the general reference to proposed § 816.57(b)(2), which provided the requirements for restoration of ''form'' and ''function'' of streams, was too vague and objected stating that the rule did not prescribe specific standards for the restoration of ecological function. To clarify, we are not establishing standards for restoration of ecological function. The regulatory authority must follow the minimum requirements we prescribe in final paragraph (g) to establish standards for determining when the permittee has restored ecological function. We are granting this discretion to the regulatory authority because of the unique characteristics of mining operations and biological systems across the nation and due to the specialized expertise of the regulatory authority in relationship to specific geographic areas. However, the regulatory authority must satisfy the criteria set forth in § 780.28 for establishing appropriate standards. Another commenter requested that we revise the regulations to penalize regulatory authorities that fail to establish standards, in accordance with our requirements, for determining when the permittee has restored the ecological function of a stream. This is not necessary. As we discussed, the final rule appropriately provides regulatory authorities with the flexibility and discretion to establish standards for their jurisdiction. If, at some point, we determine that a regulatory authority is not satisfying the minimum requirements as identified in § 780.28(g), we may exercise our oversight responsibilities as outlined in 30 CFR part 842.

We agree with the comments that we should have been more specific about the criteria for establishing standards for assessing whether the permittee has restored the ecological function of a reconstructed stream. To remedy this, in paragraphs (g)(2), (3), and (4) of the final rule, we clearly prescribed the minimum requirements the regulatory authority must satisfy when it establishes standards. The inclusion of these minimum requirements should also address the commenters' concern that the task of developing standards for determining when the ecological function is restored was too complex of a task for regulatory authorities. We have also moved proposed paragraphs § 816.57(b)(2)(ii)(B), (C), and (D), into final § 780.28(g) because these provisions are more appropriately categorized as permitting requirements, not performance standards.

Final paragraph (g)(2) replaces and enhances the requirement in proposed § 780.28(e)(1)(ii) that the regulatory authority must coordinate with ''the Clean Water Act permitting authority to ensure compliance with all Clean Water Act requirements.'' We have modified this requirement to encompass coordination with all ''appropriate agencies responsible for administering the Clean Water Act, 33 U.S.C. 1251 *et seq.*'' This clarification ensures that the regulatory authority must consult with any federal or state Clean Water Act regulatory authority including agencies responsible for permitting and enforcement actions. We have made this change in response to comments received by other federal agencies and state regulatory authorities.

In final paragraph (g)(3), we provide that the biological component standards for restoration of the ecological function of perennial and intermittent streams must employ the best technology currently available. This is consistent with section 515(b)(24) of SMCRA,[515] which requires utilization of the best technology currently available to minimize disturbances and adverse impacts upon fish, wildlife, and related environmental values. In the final rule we prescribe two separate standards for assessing the restoration of ecological function. The first standard, articulated in paragraphs (g)(3)(ii) and (iii), applies to perennial streams and to those

[515] 30 U.S.C. 1265(b)(24).

intermittent streams for which a scientifically defensible index of biotic integrity and the use of bioassessment protocols have been established. For these streams we specify that the best technology currently available is the biological condition of the stream as determined by an index of biotic integrity and the use of bioassessment protocols consistent with final rule § 780.19(c)(6). The second standard, articulated in paragraph (g)(3)(iv)(A), applies to all other intermittent streams. For these streams, we specify that the best technology currently available consists of the establishment of standards that rely upon restoration of the ''form,'' ''hydrologic function,'' and water quality of the stream and the reestablishment of streamside vegetation as a surrogate for the biological condition of the stream. We developed these two standards after reviewing pertinent scientific literature and considering the comments we received on this topic, including comments from other federal agencies, as we discuss below.

In the preamble to paragraph (b)(2)(ii)(C) of proposed § 816.57,[516] we invited comment on the effectiveness of using index scores from bioassessment protocols to ascertain impacts on existing, reasonably foreseeable, or designated uses. We also invited commenters to suggest other approaches that may be equally or more effective. We are discussing the response to these comments here because, as we discussed above, in the final rule we have moved those provisions to § 780.28(g)(3). Final rule §§ 780.28(g)(3)(ii) and (iii) now contain the provisions that govern the use of protocols for perennial streams and certain intermittent streams and final rule § 780.28(g)(3)(iv) now contains the provision that governs the standards that apply to all other intermittent streams. In response to our invitation, some commenters asserted that the Clean Water Act methodology for water quality standards and physical habitat scoring are more dependable measures than index scores derived from bioassessment protocols. These commenters asserted that the Clean Water Act methodologies are superior to index scores from bioassessment protocols because they are capable of replication and are not subject to as many variables in the environment and sample methodology. Other commenters recommended that if we decided to use index scores from bioassessment protocols we should require them to be used in a qualitative rather than a quantitative manner. We acknowledge that some Clean Water Act authorities use a qualitative or narrative approach in their multimetric bioassessment protocols. While these approaches may be acceptable, physical habitat measurements alone are generally inadequate to determine if the permittee has restored ecological function because water quality and biological measures are also important.[517] One other commenter encouraged us to require functional assessment protocols to test for specific attributes of stream function including: Timing and amount of leaf litter and wood inputs, dissolved organic carbon, dissolved oxygen, nitrogen and phosphorus levels, gross primary production, and nutrient uptake and storage. We have determined, however, that this level of specificity is not necessary because the protocol we set out in final § 780.19(c)(6)(vi) through (viii), and discussed in the preamble to § 780.19(c), should adequately capture the biological condition of streams. For additional discussion of this topic, please see general comment N in Part IV.

Other commenters objected to the requirement in proposed § 816.57(b)(2)(ii)(C), which has been moved to final § 780.28(g)(3). This provision required that the permittee assess the biological condition of a reconstructed stream by using a protocol that meets the requirements of proposed § 780.19(e)(2). Proposed § 780.19(e)(2)(i) required that, for perennial and intermittent streams, the permittee identify benthic macroinvertebrates to the genus level. The commenters specifically objected to this requirement, alleging that this level of identification is significantly more expensive and more stringent, that it is arbitrary, and that it has no apparent benefit. Another commenter added that the bioassessment method is resource intensive and that potentially affected streams are small and highly variable in nature, making the development of credible index values challenging, if not impossible. We disagree. As the commenters noted in response to proposed § 816.57(b)(2)(ii)(C), now 780.28(g)(3), genus-level identification is often more costly than family-level identification. However, scientific literature supports genus level identification because it provides a more accurate indication of the biological condition of a stream than family level. The assertion that genus level identification is too stringent or arbitrary is unfounded because many states require identification to the genus level.[518] For example, the state of West Virginia has developed and is in the process of adopting, a genus level index. Similarly, many projects in Virginia require use of the Eastern Kentucky Stream Assessment Protocol, which uses genus level taxonomy. We have, however, modified the aspects of the proposed rule that required genus level identification. Final § 780.19(c)(6)(vii) requires permittees to measure aquatic organisms identified to the genus level where possible, otherwise to the lowest practical taxonomic level. This modification allows for situations where the permittee cannot measure the genus level taxonomy without harming the population. We have incorporated these protocols by reference in final § 780.28(g)(3)(ii). Therefore, when the state regulatory authority establishes the criteria for best technology currently available for perennial streams and some intermittent streams, the protocols outlined in final rule § 780.19(c)(6), must be used, including identification to the genus level, where possible, otherwise to the lowest practical taxonomic level.

In response to our invitation for comment on the effectiveness of using index scores from bioassessment protocols to ascertain impacts on existing, reasonably foreseeable, or designated uses, another commenter opined that using bioassessment protocols would not effectively measure impact on designated uses for streams in western states. This commenter,

[516] 80 FR 44436, 44553 (Jul. 27, 2015).

[517] U.S. Envtl. Prot. Agency. *Rapid Bioassessment Protocols.* Watershed Academy Web. *https://cfpub.epa.gov/watertrain/moduleFrame.cfm?module_id=25&parent_object_id=1019&object_id=1019* (last accessed Nov. 10, 2016).

[518] The following are examples from coal mining regions across the nation. This list is not exhaustive: Gregory J. Pond, et al., *The Kentucky macroinvertebrate bioassessment index,* Kentucky Dep't for Env't. Protection, Division of Water, Water Quality Branch, Frankfort (2003).

Deborah Arnwine, *Quality system standard operating procedure for macroinvertebrate stream surveys,* Division of Water Pollution Control, Dep't of Env't. and Conservation, State of Tennessee (2011).

Eric G. Hargett, *The Wyoming Stream Integrity Index (WSII)–Multimetric indices for assessment of wadeable streams and large rivers in Wyoming.*'' Wyoming Dep't of Environmental Quality, Water Quality Division, Cheyenne, Wyoming. Document: 11–0787 (Aug. 2011).

Water Quality Assessment Branch Mississippi Dep't of Envtl. Quality, *Development and Application of the Mississippi Benthic Index of Stream Quality (M–BISQ).* (June 2003).

Texas Commission on Environmental Policy, *Surface Water Quality Monitoring Procedures, Volume 2: Methods for Collecting and Analyzing Biological Assemblage and Habitat Data* (June 2007)

Aquatic Life Use Attainment Methodology to Determine Use Attainment for Rivers and Streams, Policy Statement 10–1. 2010. Colorado Dep't of Public Health and Environment Water Quality Control Commission.

however, did not provide specific rationale for this assertion. Despite what the commenter claims, regulatory authorities, including those in western states, routinely use multimetric bioassessment protocols for many purposes, including using them to develop total maximum daily load development, to measure national pollutant discharge elimination system permit compliance, and to do a Use Attainability Analyses, which states employ in order to determine whether a designated use for a waterbody is not feasible. We acknowledge that a major challenge for conducting bioassessments in environmentally diverse regions is ensuring that an index provides consistent meaning in different environmental settings. Further, we recognize that those who develop bioassessment indices should carefully evaluate index performance across different environmental gradients where an index value is applied.[519] For this reason, and as we stated in the proposed rule, ''we anticipate that the SMCRA regulatory authority, with assistance from the appropriate Clean Water Act agencies, will define the range of index values required to support each existing and designated use of the stream segment in question.'' [520]

After considering all of the commenters' suggestions, we are retaining the requirement that SMCRA regulatory authorities use existing scientifically defensible multimetric bioassessment protocols to assess the ecological function when such protocols are available. This requirement is now set out in two places: Final rule § 780.28(g)(3), the analog to proposed rule § 816.57(b)(2)(ii)(C); and final rule §§ 780.19(c)(6)(vi) through (viii), the analog to proposed rule § 780.19(e)(2). These protocols are the best technology currently available to measure the biological condition of perennial and intermittent streams. The approach we take in the final rule is consistent with section 515(b)(24) of SMCRA,[521] which requires the impacts to fish, wildlife, and related environmental values be *minimized* using the best technology currently available. Additionally, studies show that the best technology currently available includes ''incentives for avoidance and minimization'' of disturbance to streams because that is less likely to result in loss of stream functions and services than compensatory mitigation.[522] The regulations at § 780.28(g)(3)(i) through (iv) implement the recommendations made by scientists and other stream experts about the best way to minimize the loss of stream functions.

At the same time, we recognize that some states may not have an established scientifically defensible protocol for intermittent streams. Therefore, in paragraph (g)(3)(iv)(A) we provide that in states without currently established scientifically defensible bioassessment protocols for intermittent streams, the permittee must rely upon the restoration of the form, hydrologic function, water quality, and reestablishment of streamside vegetation as surrogates for the biological condition of the stream. However, we do not mean this approach to be a permanent solution because states are developing additional bioassessment protocols for intermittent streams. Consequently, in final rule § 780.28(g)(3)(iv)(B), we require the regulatory authority at five year intervals to reevaluate the best technology currently available for intermittent streams. We expect the regulatory authorities to consider advancements in bioassessment protocols and to adjust their permitting processes to implement the best technology currently available.

Final § 780.28(g)(3)(ii)(C) ensures that populations of organisms used to assess biological condition are capable of maintaining themselves by independent effort and prevents the usage of stocked or introduced populations. We proposed a similar requirement in § 816.57(b)(2)(ii)(D); however, one commenter asserted that this provision did not provide sufficient detail explaining how an operator will determine whether a population is self-sustaining. In response, we note that the regulatory authority will have discretion to determine the sufficiency of the population reproduction. Natural reproduction is an indicator of a self-sustaining population. As discussed in the preamble to the proposed rule, organisms that happen to drift into the reconstructed channel from other areas will not accurately reflect that the permittee has restored ecological function.[523]

Based upon scientific literature we reviewed at commenters' suggestions,[524] we are also requiring that the bioassessment protocol prohibit substantial replacement of pollution-sensitive species with pollution-tolerant species. This provision in final paragraph (g)(3)(ii)(B) ensures that a full complement of native species is restored in the reconstructed stream and that the stream is not simply dominated by pollution-tolerant species.

One commenter opined that to determine if ecological function has been restored and to assess biological condition regulatory authority staff must possess more knowledge, skills, and abilities related to biological evaluation than required under the previous regulations and that this will create an unnecessary burden. We agree that expertise in biology may be required for regulatory staff to properly review permit applications that propose to conduct activities in, through, or adjacent to streams, but we disagree that the requirement is unnecessary. Restoring ecological function will result in significant long-term benefits to stream health. Additionally, in relationship to bioassessment protocols specifically, the regulatory authority is in the best position to assess protocols because it has the most relevant information and experience related to the specific geographic region and can tailor the protocols to meet local environmental constraints. Therefore, we are retaining this requirement. For further evaluation of the impacts upon regulatory authority staff, please review the RIA. Other commenters recommended that we require a qualified biologist or ecologist to formally attest to the sufficiency of any plan submitted in the permit application to restore the biological function of impacted streams and all determinations regarding restoration of stream ecological function. We have not adopted this recommended change. Instead, we have retained, with slight modification from what was proposed, a process that will ensure that reviewers use the standards as prescribed by final paragraphs (g)(2) through (4) to determine when the operator has restored the ecological function of the reconstructed stream, and that requires the applicant to incorporate those standards and explain how it will satisfy the requirements. As prescribed by final paragraph (g)(2) of § 780.28, this process includes coordination with Clean Water Act regulatory authorities. These authorities, along with the SMCRA regulatory authority, and, as

[519] *See* Raphael D. Mazor et al., *Bioassessment in complex environments: Designing an index for consistent meaning in different settings, Freshwater Science.* 2016. Published online Oct. 22, 2015.

[520] 80 FR 44436, 44475 (Jul. 27, 2015).

[521] 30 U.S.C. 1265(b)(24).

[522] Colleen E. Bronner, et al., 2013. *An Assessment of U.S. Stream Compensatory Mitigation Policy: Necessary Changes to Protect Ecosystem Functions and Services.* 49(2) Journal of the American Water Resources Association (JAWRA) 449–462 (April 2013).

[523] 80 FR 44436, 44553–44554 (Jul. 27, 2015).

[524] J. Todd Petty, et al. *Landscape indicators and thresholds of stream ecological impairment in an intensively mined Appalachian watershed,* 29(4) Journal of the North American Benthological Society, 1292–1309 (2010).

necessary, the U.S. Fish and Wildlife Service when performing its consultation duties under section 7 of the Endangered Species Act, have sufficient expertise to make the required determinations.

Although operators are not required to reconstruct streams that have the precise biological condition as their premining counterparts, we prescribed in proposed rule § 816.57(b)(2)(ii)(B) that the reconstructed stream must be adequate to support both the uses that existed before mining and must not preclude the attainment of the designated uses that existed before mining pursuant to sections 101(a) of 303(c) of the Clean Water Act.[525] We have retained this requirement, with the exception of removing reference to section 101(a) of the Clean Water Act, and moved it to final § 780.28(g)(4). Some commenters expressed support for allowing some variation in the species composition and the array of insects, fish, and other aquatic organisms found in a reconstructed stream or stream-channel diversion as long as the change in species composition does not preclude any use that existed prior to mining, nor attainment of any designated use before mining. However, other commenters indicated that these requirements are duplicative of the Clean Water Act and should be eliminated. We disagree because, as discussed in Part IV. I., above, the requirements of the final rule do not supersede or duplicate the Clean Water Act; instead, these requirements complement the Clean Water Act and will increase coordination between the SMCRA regulatory authority and the Clean Water Act authority.

Other commenters suggested that we revise proposed § 816.57(b)(2)(ii)(B), which has been moved to final rule § 780.28(g)(4), to make clear that all restored streams and receiving streams outside the permit area must have biological assemblages that support threatened and endangered species in the area. We decline to make this change here for several reasons. First, this comment is more applicable to final § 780.28(g)(3), which sets out the requirements for establishing, where applicable, appropriate biological conditions. Second, this revision would be duplicative because we have included specific requirements protecting threatened and endangered species throughout the final rule including, among others, § 773.15(j)(1), which requires documentation that the proposed permit area and adjacent area do not contain species listed or proposed for listing as threatened or endangered under the Endangered Species Act,[526] and § 773.15(j)(2), which requires documentation that the proposed operation would have no effect on species listed or proposed for listing as threatened or endangered under the Endangered Species Act.[527]

Similarly, one commenter asserted that proposed § 816.57(b)(2)(ii), now incorporated in final rule § 780.28(g)(4), did not protect newly listed, threatened or endangered species that are not designated or otherwise protected under the Endangered Species Act at the time the Clean Water Act designated use is developed. This commenter urged us to require that streams be restored to protect both designated use and any additional uses needed to support newly listed species. We did not make any changes to the final rule as a result of this comment because it is adequately addressed in final rule § 816.97(b)(1)(ii) through (iii), which require the operator to promptly report the presence of any federally-listed species located within the permit or adjacent area to the regulatory authority. This requirement applies even if the species was not listed before permit issuance. The regulatory authority must coordinate with the U.S. Fish and Wildlife Service to determine whether and under what conditions the operation may proceed and to revise the permit as necessary.

We added final paragraph (g)(4)(ii) in response to a federal agency comment and a similar comment from another commenter that alleged that prohibiting activity from completely ''precluding'' a water use is ''an inordinately lax standard that would allow severe impairment of a stream.'' One of these commenters also suggested that we replace ''preclude'' with ''cause or contribute to the impairment of.'' In lieu of accepting the recommendation to replace ''preclude'' we have retained that terminology in final paragraph (g)(4)(i) and we have added final paragraph (g)(4)(ii). This paragraph clarifies that the standards for restoring ecological function must not prevent a stream segment from satisfying the anti-degradation requirements of the Clean Water Act as adopted by state or tribes or as established by a federal rulemaking under the Clean Water Act.

Final Paragraph (h): What finding must the regulatory authority make before approving a permit application under this section?

Final paragraph (h), previously proposed paragraph (e)(2), specifies that a permittee's application proposing to conduct surface mining activities in or within 100 feet of a perennial or intermittent stream may not be approved unless the regulatory authority makes a specific, written finding that the permittee has fully satisfied all of the applicable requirements of final paragraphs (c) through (f) of this section. Additionally, for the permit to be valid the regulatory authority must include a detailed rationale for the finding. We did not receive any comments on this paragraph and we are accepting it as proposed.

Final Paragraph (i): Programmatic Alternative

We have added final paragraph (i) to clarify that paragraphs (c) through (h) of this section will not apply if a regulatory authority amends its program to expressly prohibit all surface mining activities, including the construction of stream-channel diversions, that would result in more than a de minimis disturbance of land in or within 100 feet of a perennial or intermittent stream. We have added this alternative in response to comments advocating a complete ban on activities within 100 feet of any stream because the commenters viewed a ban as the most protective course of action. Although we are not adopting a complete ban as part of the final rule, we have concluded that the regulatory authority should retain the discretion to enact more stringent measures. Thus, we are clarifying that the regulatory authority has the option to enact such a prohibition.

Section 780.29: What information must I include in the surface-water runoff control plan?

As discussed in the preamble to the proposed rule, section 780.29 identifies the required information for surface water runoff control plans.[528] After evaluating the comments that we received, we have made several changes to the final rule.

Final paragraph (a)(1) requires an explanation of how you will handle surface-water runoff in a manner that will prevent flows from the proposed permit area, both during and after mining and reclamation, from exceeding the premining peak flow from the same area for the same-size precipitation event. In most cases, this will require monitoring peak surface water flows in existing natural drainage channels at or near the permit boundary.

One commenter alleged that offsite flooding as a result of uncontrolled surface water runoff is probably limited

[525] 33 U.S.C. 1313(c).

[526] 16 U.S.C. 1531 *et seq.*

[527] 16 U.S.C. 1531 *et seq.*

[528] 80 FR 44436, 44519 (Jul. 27, 2015).

to areas where during mining and postmining topography are significantly altered from the premining conditions, for example, in steep slope areas of Appalachia. The commenter opined that the requirements should be limited, either through geographic or slope based restrictions, to areas where they would be applicable. We disagree. Regardless of the premining topography of a mine site, surface water runoff characteristics are significantly altered during mining; hence, a surface water runoff control plan is necessary to ensure that surface water flows from the site during mining do not exceed premining peak flows. Unless specifically exempted, such as in special categories of mining, the permittee is required to restore the mine site to approximate original contour. Therefore, the postmining topography should not be significantly different from the premining conditions. However, it will still be necessary to verify that postmining surface water runoff does not exceed premining flows. This will protect both downstream populations and shield industry from liability because flows from the mine site will be documented.

Some commenters expressed concern about the proposed use of the Natural Resource Conservation Service's synthetic storm distribution method for estimating peak storm flows as required in the proposed rule. These commenters were particularly concerned about our allowing only one method to estimate peak storm flows when other methods may be acceptable. In response to this comment, we have modified the final rule at paragraph (a)(1) to include the phrase ''or another scientifically-defensible method approved by the regulatory authority that takes into account the time of concentration to estimate peak flow discharges.'' We recognize that other equally viable methods for estimating storm peak flows exist and this change in the final rule provides the regulatory authority the discretion to allow other valid methods. However, although we are not prescribing a specific method for characterizing surface water runoff from a mine site, you must use a scientifically defensible, repeatable method acceptable to the regulatory authority that adequately characterizes precipitation-related surface water runoff. It is imperative that storm duration for each drainage be based on its time of concentration. Time of concentration is defined as the time needed for water to flow from the most remote point in a watershed to the watershed discharge point. A precipitation event is typically described by the frequency of occurrence and duration; for example, the 10-year, 24-hour event. The duration must be selected based on the time of concentration of the drainage being evaluated. A site specific storm duration is required because shorter duration storms typically have greater precipitation intensities, and use of the appropriate duration in the analysis will result in the maximum flow for a given frequency of occurrence event.

One commenter stated that development of a surface water runoff control plan to evaluate peak flows cannot be done using National Pollutant Discharge Elimination System points or the monitoring points required in § 780.19, regarding baseline information on hydrology, geology, and aquatic biology. We agree that those monitoring points are intended to facilitate assessment of water quality and all of these points may not be the best locations for assessing peak discharge from the permit area. Also, the National Pollutant Discharge Elimination System monitoring points within the permit area are not required for surface water runoff analysis. However, it is necessary for the operator to measure peak surface water flows at or near the permit boundaries. Often peak surface water flow monitoring points coincide with the location of National Pollutant Discharge Elimination System monitoring points. Therefore, in response to the commenter, we point out that select National Pollutant Discharge Elimination System monitoring points may be useful in analyzing surface water runoff. Paragraph (b) requires a monitoring-point density that adequately represents the drainage pattern across the entire proposed permit area, with a minimum of one monitoring point per watershed discharge point. In the context of a surface water runoff control plan, a watershed discharge point refers to a point of discharge from the permit area. The associated watershed is the drainage area that contributes to that point. Potentially, and to the commenter's point, the watershed discharge point may also coincide with a National Pollutant Discharge Elimination System monitoring point. The essential factor is that the drainage pattern across the entire proposed permit area is adequately represented.

One commenter noted that peak flows at any given moment during the operation may be different than the flows reflected during baseline sample collection, as mandated by section 780.19. Therefore, according to the commenter, this could result in false designs and expectations. We agree that precipitation events of any specific ''size'' are unlikely to reoccur on multiple occasions at a site. However, over the baseline monitoring period, multiple precipitation events and associated peak flows should be observed. From these, the premining relationship between precipitation and peak flows can be determined. This hydrologic response relationship can be plotted as a curve, and used to estimate peak flows for precipitation events that differ from those measured during the baseline monitoring period. Consequently, § 780.19(c)(3)(i)(A) requires baseline measurement of peak flow magnitude and frequency and § 780.19(c)(5) requires measurement of precipitation events using on-site, self-recording devices or, at the discretion of the regulatory authority, a single device located to provide baseline data for multiple permits located close to each other. Results of these measurements can be used in the design of the surface water runoff control system.

One commenter alleged that discharge estimates are based on empirical models and methodology that require the engineer to fit the appropriate methodology to the study area being evaluated. We agree. Premining precipitation and peak flow information obtained as described above can be used in these models to establish the hydrologic response characteristics of each drainage area being considered. The data collected will allow the engineer to verify that model output approximates the observed relationship between precipitation and peak flows. During mining and reclamation, the measured precipitation for each drainage area can be input to the model, and the output observed. The only requirement is that the measured peak flows from the permit area do not exceed the estimated premining peak flow for the same event.

Proposed and final paragraph (b) set out the various requirements for a surface-water-runoff monitoring and inspection program including the requirement that the program ''provide sufficient precipitation and stormwater discharge data for the proposed permit area to evaluate the effectiveness of the surface-water runoff control practices under paragraph (a).'' A commenter asserted that it was impossible to imagine that premining and postmining peak flows from same-sized precipitation events would be the same. The commenter alleged that it is not the size of the discharge, but whether damage could occur as a result of the discharge that should be considered. We agree in part. It is virtually certain that, if not controlled, surface water flows

from an area during and after mining will differ from, and in most cases exceed, premining flows for the same precipitation event. It is equally certain that flows from a larger event will then result in offsite damage that would not have occurred absent the mining activities. This is the very situation that the surface water runoff control plan required by this section is intended to prevent. We are requiring the permittee to design and construct or install surface water runoff control structures, as well as develop and implement the reclamation plan, so that, at any given time the flows at the permit boundary and on adjacent areas do not exceed premining flows for any given precipitation event.

Another requirement in proposed and final paragraph (b) is that the program must contain ''a monitoring-point density that adequately represents the drainage pattern across the entire proposed permit area, with a minimum of one monitoring point per watershed discharge point.'' Upon review of the proposed rule and the comments received, we recognize that there may be confusion about the role of ephemeral streams in the monitoring and inspection program. While it is essential that the ephemeral stream drainage pattern should be similar to the premining conditions and surface water flows should be similar to premining flows prior to final bond release, in a surface water runoff context, it is not necessary to measure discharges of particular ephemeral streams either before, during, or after mining. The purpose of monitoring in this context is to ensure that flows during and after mining do not exceed premining flows. Monitoring each ephemeral stream would require many monitoring points, yet not provide significant useful information because the pre- and postmining locations of ephemeral streams will differ, in some cases significantly. During mining, the surface water that typically feeds these ephemeral streams will be captured by the drainage control system and conveyed to one or more discrete flow monitoring points that may be associated with a National Pollutant Discharge Elimination System monitoring point. Therefore, we do not require you to include headwater streams that emanate from the permit area as ephemeral streams when you determine the monitoring-point density under paragraph (b).

Some commenters suggested that a federally-mandated minimum monitoring-point density standard is unnecessary and that the regulatory authority should have flexibility to establish the minimum point density based on local conditions, type of mining, type of sediment control measures, and other factors. The commenters appear to take issue with the requirement in paragraph (b) that there be a minimum of one monitoring point per watershed discharge point. Since the purpose of the surface water runoff control plan is to prevent offsite damage, the requirement for one monitoring point per discharge is reasonable as the data will validate that the surface water runoff control plan is working and that it is preventing mining-related offsite flooding, stream scouring and damage to private property. To specifically address the requirements of paragraph (a), monitoring points should be located at the places where streams flow from the permit area, and would, in most cases, coincide with the locations of baseline surface water monitoring points.

Citing the above reasons for a federally mandated minimum sampling density, another commenter suggested that the current criteria for sampling density are sufficient for most permits and that the changes in the proposed rule should be limited to applicable areas based upon either geographical or slope based considerations. We are not altering the final rule as a result of this comment. SMCRA regulations currently contain no minimum sampling density criteria. Regardless of geographic location or topography, changes to ground cover and precipitation infiltration characteristics occur and often result in increased stormwater runoff from a site in comparison to conditions prior to disturbance. The intent of stormwater runoff monitoring is to prevent offsite flooding attributable to mining activities. One monitoring point at each point of discharge of a perennial or intermittent stream leaving the permit area is the minimum that could be effective.

A commenter suggested that the phrase ''watershed discharge point'' as used in paragraph (b) of the proposed rule, is not clear with respect to the corresponding drainage area associated with that point. Similarly, another commenter noted that we did not define the term ''watershed discharge point'' and that a common understanding of the term is not available. To clarify, a watershed discharge point is a selected point of interest within a stream channel, such as a culvert location or a stream channel at a permit boundary. The associated watershed is the land area that drains to that watershed discharge point. These terms are commonly accepted in hydrology and engineering disciplines.

Another commenter suggested that it is not necessary for us to require post-mining monitoring and inspection of each watershed to evaluate the quantity of flow after mining because the regulatory authority will be making monthly inspections and discharge issues should be identified at that time. We have not changed the final rule as a result of this comment. Monthly inspections performed by the regulatory authority are unlikely to coincide with storm events and do not include measurement of peak stormwater discharges associated with these events. Therefore, results of scheduled inspections that occur after a storm event cannot be used to determine if flooding resulted from mining activities or if it would have occurred even in the absence of mining.

Another commenter suggested that pursuant to the Clean Water Act stormwater program, stormwater at mine sites is already carefully controlled by multiple best management practices, technology requirements, erosion and sediment control practices, and buffer zones. The commenter alleged that the requirement for a surface-water runoff monitoring and inspection program conflicts with, and is duplicative of Clean Water Act requirements. We disagree and are not making any changes to the final rule in response to this comment because, despite the cited stormwater control measures, stormwater-related offsite damage frequently occurs. In addition, the cited measures do not specifically include monitoring of stormwater discharges at permit boundaries. Therefore, the monitoring and inspection program required in final paragraph (b) supplements, rather than conflicts with existing requirements.

In the final rule we are dividing proposed paragraph (c) into paragraphs (c) and (d). Final paragraph (c) now contains the requirement for the surface-water runoff control plan to include ''[d]escriptions, maps, and cross-sections of runoff-control structures.'' After reviewing the comments we have decided to add a definition to address confusion about the scope of the term ''runoff-control structures'' which we use both here and in § 816.34(d)(1), which relates to protecting the hydrologic balance. The definition makes clear that the term ''runoff-control structures'' includes the many different types of hydraulic structures that play roles in controlling runoff of surface water on a mine site. All conveyance channels, including drainage benches, diversion ditches, and groin ditches, control where surface runoff flows, and these structures

control the rate of runoff by their channel slope and resistance to flow, the latter of which is dependent on channel surface roughness. Siltation structures such as sedimentation ponds or ditches control the rate of discharge by storing water entering the structures and releasing it at a slower rate, controlled by the outlet structure. All of these structures work as a system, controlling flow of surface water on and across a mine site, and the rate at which it is discharged outside the permit area. Our definition recognizes that these structures are interdependent and that they function as a system to control surface water runoff.

Final paragraph (d) now contains the requirement for the surface-water runoff control plan to include an ''explanation of how diversions will be constructed in compliance with § 816.43''. In proposed paragraph (c), this provision applied not only to diversions but also to ''other channels to collect and convey surface water runoff'' even though § 816.43 applies only to diversions. We have removed this erroneous reference to ''other channels to collect and convey surface water runoff'' from the final rule.

Section 780.31: What information must I provide concerning the protection of publicly owned parks and historic places?

We are finalizing section 780.31 as proposed. We received no comments on this section.

Section 780.33: What information must I provide concerning the relocation or use of public roads?

We are finalizing § 780.33 as proposed. We received no comments on this section.

Section 780.35: What information must I provide concerning the minimization and disposal of excess spoil?

As discussed in the preamble to the proposed rule, § 780.35 identifies the required information for minimization and disposal of excess spoil.[529] In response to proposed § 780.35, one commenter recommended that we restrict proposed rule changes on the minimization and disposal of excess spoil to where they are appropriate based on geography. According to the commenter, this restriction is warranted because of the proposed rule's reliance on data from central Appalachia. We disagree and have not revised the final rule in response to this comment because final rule § 780.35 applies to any site, regardless of geography, where excess spoil is, or would be, generated. After evaluating the other comments that we received, we are adopting the section as proposed, with the following exceptions and responses to comments.

Final Paragraph (b): Demonstration of Minimization of Excess Spoil

One commenter expressed concern that the definition of excess spoil could be interpreted to require spoil from an initial cut to be stored and hauled a significant distance to the final cut, as opposed to allowing the initial cut spoil to be blended into the surrounding area. The commenter notes that it is common practice in the Midwest to blend the initial cut spoil into the final approximate original contour configuration and leave a final cut impoundment. The commenter opined that a change from this practice would be extremely costly. The commenter was concerned that this paragraph in conjunction with the definition of ''excess spoil'' in § 701.5, may result in material blended into the surrounding area being interpreted as ''excess spoil'' and therefore creation of an end cut impoundment would be prohibited. We agree with the commenter's concern, however, as discussed in the preamble to the definition of ''excess spoil,'' we have clarified that material used to blend the final configuration of the mined-out area with the surrounding terrain in non-steep slope areas in accordance with §§ 816.102(b)(3) and 817.102(b)(3) is not considered excess spoil. Thus, final cut impoundments are still allowable in the situation described by the commenter as long as all other requirements of the regulations are satisfied.

In paragraph (b)(1) of the final rule we are including a requirement for submission of a demonstration, with supporting calculations and other documentation, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate. One commenter expressed concern that the requirement to demonstrate that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate could be applied to temporary overburden stockpiles, such as those created by dozers, truck, loaders, shovels, or draglines, and which will be used for future reclamation. As discussed more fully in the preamble discussion of the definition of ''excess spoil'' in § 701.5, we added paragraph (5) to the definition of ''excess spoil'' to specifically exclude temporarily placed material from the definition. This modification will ensure that temporary overburden stockpiles are not subjected to this requirement.

In paragraph (b)(2)(iii), we proposed to limit postmining drainage structures, access roads, and berms on the perimeter of the backfilled area to a maximum width of 20 feet unless a need for greater width is demonstrated. In the proposed rule, we invited comment on whether the maximum width should be larger or smaller than 20 feet.[530] In response, a commenter suggested that the maximum width should be increased to 50–70 feet and that this increase would not place additional burden upon industry or the regulatory authority. Similarly, other commenters expressed concern that this limitation could result in unsafe conditions because, in their view, greater widths for roadways, along with safety berms and drainage structures, are necessary for safe operation during mining. In addition, some commenters questioned whether this limitation would be in conflict with typical state and federal safety regulations that are derived from typical mining and haulage equipment dimensions. We are adopting this paragraph as proposed. It is true that the widths of these structures may need to be greater during active mining to ensure safe operations and compliance with state or federal safety regulations. However, it is also true that adoption of this limitation should not impact safety because it is only applicable to the drainage structures, access roads, and berms on the perimeter of the backfilled area that remain after completion of mining and final grading. After final grading is complete, access to the perimeter of the backfilled area by mining or haulage equipment is not normally required. Moreover, in final paragraph (b)(2)(iii) we have now provided a narrow exception in cases where the permittee demonstrates an essential need to exceed the maximum width of 20 feet. We expect that the number of such cases will be very small because the 20 foot width is sufficient in most circumstances. Examples of an ''essential need'' would include a situation where there is no other alternative that will allow access to an area with a postmining land use that requires the use of large off-road or commercial vehicles.

Paragraph (b)(4) prohibits the creation of a permanent impoundment under § 816.49(b) or the placement of coal combustion residue or noncoal materials in the mine excavation if doing so would result in the creation of excess spoil. We received many

[529] 80 FR 44436, 44519–22 (Jul. 27, 2015).

[530] 80 FR 44436, 44520–44521 (Jul. 27, 2015).

comments about the correlation between the allowance of final cut impoundments and this section. A final cut impoundment results when no material is available to fill the final cut in an area mine. In most cases, material from the initial cut will have been used to blend the backfilled area into the surrounding topography. Although the term ''final cut impoundment'' is commonly used by industry and regulatory authorities, we have replaced it with the term ''permanent impoundment'' in the final rule to be consistent with section 515(b)(8) of SMCRA.[531] Some commenters opined that allowing these final cut impoundments to remain as permanent impoundments is contrary to the SMCRA requirement to achieve approximate original contour after mining is completed. We disagree. Permanent impoundments, of which final cut impoundments are one example, are specifically allowed in the definition of approximate original contour in paragraph (2) of section 701 of SMCRA.[532] However, the permittee is required to achieve approximate original contour on the remainder of the backfilled mined area.

A commenter alleged that we are attempting to limit the size of what the commenter characterized as ''final cut impoundments'' to no more than what is needed to support the approved postmining land use and that there is no legal basis for that limit. Although the comment was not clear, because the commenter referred to impoundments in connection with approved postmining land uses, we concluded that the commenter was referencing permanent impoundments. We disagree with commenter's assertion. Section 515(b)(8) of SMCRA [533] specifically links the size of an impoundment with its intended purpose. The allowable size of any permanent impoundment is based on its intended use as part of the postmining land use. However, there is nothing in the language of paragraph (b)(4) that explicitly or implicitly creates an additional limitation on permanent impoundment size.

Final Paragraph (c): Preferential Use of Preexisting Benches for Excess Spoil Disposal

After consideration of the comments related to performance standards about disposing of excess spoil on preexisting benches, we have added paragraph (c) to the final rule. This paragraph adds a permitting requirement to match the performance standards of final rule § 816.74. Paragraph (c) aids in the minimization of placement of excess spoil, to the extent possible, on undisturbed land. The previous regulations at § 816.74 allow, but do not require, placement of excess spoil on preexisting benches. Paragraph (c) requires that excess spoil placement on preexisting benches be maximized before any excess spoil fills can be constructed. Therefore, if surface mining is proposed in an area where mine benches from pre-law contour mining remain in the vicinity of the proposed permit, you must demonstrate how you will maximize placement of excess spoil on preexisting benches before you place any on undisturbed land.

Final Paragraph (e): Requirements Related to Perennial and Intermittent Streams

One commenter suggested we replace the term ''bankfull elevation'' with the term ''ordinary high water mark'' because the latter term is the one more commonly used and more easily measured. We agree and have revised paragraph (e) of the final rule so that the term ''ordinary high-water mark'' is used to represent the location on the cross section of a stream channel from which the 100-foot streamside vegetative corridor, which is now required by § 780.28(d), is measured. This change is consistent with the addition of the term ''ordinary high water mark'' throughout the final rule, including the final definition of ''ordinary high water mark'' in § 701.5.

Final Paragraph (f): Location and Profile

Proposed paragraph (e)(2), now final paragraph (f)(2), requires that fills be located on the most moderately sloping and naturally stable areas available. One commenter expressed concern that this requirement would encourage more fills in intermittent or perennial, rather than ephemeral streams. Paragraph (f)(2), however, should not be read in isolation and in fact requires the regulatory authority to determine the areas that are available for excess spoil fill construction after considering requirements of the Act,[534] and this chapter. These other requirements would include the stability requirements of paragraph (b) of § 816.71, relating to the disposition of excess spoil; the protections for perennial and intermittent streams as set out in § 780.28; and the requirement in § 816.71(a)(4) to minimize excess spoil and its adverse impacts on fish, wildlife, and other environmental values. Paragraph (b)(3) of this section, moreover, allows placement of spoil in the mined area to heights in excess of the premining elevation, whereas §§ 780.27(b)(2)(v) and 780.28(c)(2)(v) allow alteration of the premining drainage pattern in the mined area to accommodate construction of excess spoil fills. The intent of these provisions taken together is to minimize construction of excess spoil fills on undisturbed land, by moving spoil upslope, and to the extent possible, into the mined area, thereby minimizing the potential for spoil placement to impact streams, particularly perennial and intermittent streams.

The same commenter also alleged that this requirement would, in many cases, necessitate using the stream channel as a sediment conveyance. We disagree. Movement of excess spoil upslope, and into the mined area in conjunction with the requirement of § 816.57(h)(ii) to place siltation structures as near as possible to the toes of fills, will virtually eliminate the possibility of streams being used as sediment conveyances in connection with spoil placement.

Final Paragraph (h): Geotechnical Investigation

Proposed paragraph (g)(6), now paragraph (h)(6), requires the performance of stability analyses that addresses static, seismic, and post-earthquake (liquefaction) conditions because those conditions are part of a comprehensive stability analysis. One commenter stated that post-earthquake (liquefaction) conditions should not be a required part of a stability analysis because liquefaction is not a concern in coarse-sized mine spoil composed of a large fraction of rock material. Moreover, a liquefaction analysis would be a costly exercise with no apparent benefit.

We agree that the potential for liquefaction is primarily a concern in loose, saturated, relatively fine-grained soil materials, such as materials that are impounded in slurry impoundments and incorporated into upstream constructed impoundments. Excess spoil consists of soil and rock mixtures placed and compacted in an unsaturated state. Materials of this type, and placed in this manner, are not normally susceptible to liquefaction. Therefore, we have removed the requirement that the stability analysis include post-earthquake (liquefaction) conditions from the final rule. Excess spoil fills remain subject to all other slope stability requirements in final rule §§ 816.71 and 817.71, relating to disposal of excess spoil.

[531] 30 U.S.C. 1265(b)(8).

[532] 30 U.S.C. 1291(2).

[533] 30 U.S.C. 1265(b)(8).

[534] 30 U.S.C. 1265(b)(22)(E).

Section 780.37: What information must I provide concerning access and haul roads?

Final Paragraph (a): Design and Other Application Requirements

Paragraph (a)(4)(i) of final rule § 780.37 requires that the permit application identify each road that you propose to locate in or within 100 feet, measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark, of a perennial or intermittent stream. The final rule differs from the proposed rule in that it specifies that the measurement must begin at the ordinary high water mark of the stream, rather than at the bankfull elevation of the stream. A commenter on another rule with the 100-foot provision recommended this change because it is both more commonly used and readily determined than the bankfull elevation. We have made this change universally throughout our regulations.

Final paragraph (a)(5) requires that the permit application explain why the roads, fords, and stream crossings identified in paragraph (a)(4) are necessary and how they comply with the applicable requirements of § 780.28 and § 816.150(b)(5) and (d) and § 816.151(d)(2), (e)(5), and (e)(6). The final rule differs from the proposed and previous rules in that it adds fords, which are subject to the requirements of § 780.28 and thus should be included in the explanation required by paragraph (a)(5). The final rule also replaces the reference to section 515(b)(18) of SMCRA [535] in the proposed and previous rules with a reference to the regulations implementing that provision of SMCRA. This revision is nonsubstantive in nature because an applicant must comply with the referenced rules anyway, but adding the citations makes the rule more user-friendly, internally consistent, and easier to understand.

Final Paragraph (c): Standard Design and Plans

In response to proposed paragraph (c) a commenter pointed out that the cross reference to § 816.151(b) regarding factors of safety was in error and that the correct cross reference should be paragraph (c) of § 816.151. Likewise, the commenter noted the identical problem existed in proposed § 784.37(c) which similarly cited proposed § 817.151(b) instead of paragraph (c). We have made the necessary corrections to the final rule at both §§ 780.37(c) and 784.37(c).

[535] 30 U.S.C. 1265(b)(18).

Section 780.38: What information must I provide concerning support facilities?

We are finalizing § 780.38 as proposed. We received no comments on this section.

H. Part 783—Underground Mining Permit Applications—Minimum Requirements for Information on Environmental Resources and Conditions

Section 783.1: What does this part do?

With the exception of altering the title of this section for clarity, we are finalizing § 783.1 as proposed. We received no comments on this section.

Section 783.2: What is the objective of this part?

We are finalizing § 783.2 as proposed. We received no comments on this section.

Section 783.4: What responsibilities do I and government agencies have under this part?

We are finalizing section 783.4 as proposed. We received no comments on this section.

Section 783.10: Information Collection

Section 783.10 pertains to compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* We are adding contact information for persons who wish to comment on these aspects of part 783.

Previous § 783.11: General Requirements

Like proposed § 779.11, the surface mining counterpart to § 783.11, we have removed and reserved previous § 783.11 for the reasons discussed in the preamble to the proposed rule.[536]

Previous § 783.12: General Environmental Resources Information

Like proposed § 779.12, the surface mining counterpart to § 783.12, we have removed and reserved previous § 783.12 for the reasons discussed in the preamble to the proposed rule.[537]

Section 783.17: What information on cultural, historic, and archeological resources must I include in my permit application?

We are finalizing § 783.17 as proposed. We received no comments on this section.

[536] 80 FR 44436, 44482 (Jul. 27, 2015).

[537] 80 FR 44436, 44482 (Jul. 27, 2015).

Section 783.18: What information on climate must I include in my permit application?

We are finalizing § 783.17 as proposed. We received no comments on this section.

Section 783.19: What information on vegetation must I include in my permit application?

We have modified this section; however, these modifications are discussed in final rule § 779.19, which is the surface mining counterpart to § 783.19.

Section 783.20: What information on fish and wildlife resources must I include in my permit application?

We have modified this section; however, these modifications are discussed in final rule § 779.20, which is the surface mining counterpart to § 783.20.

Section 783.21: What information on soils must I include in my permit application?

Similar to its surface mining counterpart found at § 779.21, § 783.21 identifies the information on soils that must be included in a permit application. However, § 783.21 is exclusive to underground mining permits.

Several commenters urged us to increase prime farmland reconnaissance surveys to include areas beyond the permit area and to extend these surveys into the adjacent area for areas that will be undermined. Moreover, some commenters recommended that all applicable soil survey information, including information required for the permit area, be included if prime farmland is identified in the adjacent area. In addition, some commenters recommended that all standards required by § 785.17, related to prime farmland, as well as § 823.15, related to revegetation and restoration of soil productivity, be fully applicable if prime farmlands are damaged by subsidence in the adjacent area. We are not accepting the suggestions in these comments because impacts caused by surface mining on prime farmland soils differ from impacts caused by mine subsidence. In surface mining, soil layers must be removed prior to mining. Those soil layers are later replaced as part of reclamation as further explained in final rule § 816.22(e). This is fundamentally different from what occurs from the settling of the soil layers caused by mine subsidence. It would not be appropriate to salvage soil layers prior to subsidence. In fact, doing so would have far greater impact on the

soil resource than would normally be caused by mine subsidence. Moreover, damage caused by subsidence can be frequently mitigated without the need for any soil salvaging. This is not true when compared to impacts caused by surface mining or impacts related to mining activities on the permit area of underground mines that would result in the destruction of the soil resource should it not be appropriately salvaged as required by § 817.22. Therefore, the regulations governing the soils above areas that are undermined are appropriately different. The determination that different standards apply to soils for undermined areas is consistent with SMCRA, which recognizes the distinct difference between surface coal mining and underground coal mining.[538] The requirements at §§ 784.30 and 817.121 satisfactorily address the restoration of damages from underground mining caused to prime farmland as well as damage to any renewable resource lands. Moreover, any comments related to suggestions to amend the prime farmland regulations at §§ 785.17 or 823.15 are not germane to this rulemaking and would be better suited to consideration under a potential future rulemaking on that topic.

Section 783.22: What information on land use and productivity must I include in my permit application?

We have modified this section; however, these modifications are discussed in final rule § 779.22, which is the surface mining counterpart to § 783.22.

Section 783.24: What maps, plans, and cross-sections must I submit with my permit application?

Similar to its surface mining counterpart found at § 779.24, § 783.24 identifies what maps, plans, and cross-sections must be included in a permit application. However, § 783.24 is exclusive to underground mining permits.

As proposed, § 783.24(a)(23) would have required that the application include maps, plans, or cross-sections showing the location and extent of known workings of active, inactive, or abandoned underground mines located either within the proposed permit area or within a 2,000-foot radius in any direction of the proposed underground workings. One commenter stated this requirement conflicts with the ''reasonable possibility of adverse impacts in the adjacent area'' included in the definition of adjacent area within § 701.5. It is also inconsistent with a similar requirement in § 779.24(a)(23) which does not have the 2,000-foot stipulation. We agree with the commenter and have removed the 2,000-foot radius requirement from the final rule.

One commenter asserted that the water well data required in proposed § 783.24(a) is redundant, will not serve any substantial purpose, and will be time consuming and costly to obtain. It was suggested that the regulatory authority be allowed flexibility in determining what type and the volume of well data is necessary to be submitted in the permit application and that some of the data be allowed to be maintained at the mine site for review. While we recognize that the collection of groundwater data will have associated costs, the data are necessary to determine the hydrogeology of the proposed mine site and adjacent areas so the applicant may properly evaluate and prepare a comprehensive determination of the probable hydrologic consequences of the proposed operation. The data are also necessary to support development of the hydrologic reclamation plan required by final rule § 780.22 and the cumulative hydrologic impact assessment required by final rule § 780.21. Therefore, we have not modified the final rule in response to this comment.

Previous § 783.25: Cross Sections, Maps, and Plans

Like proposed § 779.25, the surface mining counterpart to § 783.25, we have removed and reserved previous § 783.25 for the reasons discussed in the preamble to the proposed rule.[539]

Section 783.26: May I submit permit application information in increments as mining progresses?

We received several comments urging us to allow applicants to submit permit application information for the adjacent area in stages, especially for underground mining operations. Commenters alleged that requiring information for the entire adjacent area would be exorbitantly expensive and result in collection of data that either would be outdated by the time that underground mining activities could affect areas located distant from the area in which mining initially begins or would be useless because of changes in mining plans. One commenter also urged us to allow incremental monitoring of the adjacent area. According to the commenter, the applicant would have to obtain property for well installations in areas that would not normally require property control, which would be incredibly costly and difficult to obtain.

After considering these comments, we added two new §§ 783.26 and 784.40, to the final rule to allow incremental submission of permit application information for underground mines and incremental initiation of monitoring of groundwater, surface water, and the biological condition of perennial and intermittent streams in the adjacent area of underground mines. We decided not to allow incremental submission of permit application information and incremental initiation of monitoring for surface mines because surface mining involves much more extensive surface disturbance than underground mining and because most surface mines have a much shorter life than underground mines.

The chief drawback of allowing incremental submission of permit application information is that there may be insufficient information for the regulatory authority to prepare the cumulative hydrologic impact assessment or to make the findings required for approval of a permit application. Therefore, final rule § 783.26(b) specifies that the regulatory authority has complete discretion in deciding whether to grant a request for incremental submission of permit application information. The final rule also establishes minimum requirements and criteria for both requests for incremental submission and processing of those requests.

Specifically, paragraph (b)(1) of the final rule provides that each increment must be clearly defined. It also requires that each increment include at least five years of anticipated mining. This time period is equivalent to the standard term of a permit under final rule § 773.19(c) and section 506(b) of SMCRA.[540]

Paragraph (b)(2) requires that the schedule include a map showing the limits of underground mining activity under each increment. It also requires establishment of those limits in a manner that will prevent any impact on the succeeding increment before the regulatory authority approves mining within that increment.

Paragraph (b)(3) requires submission of data for each successive increment at least one year in advance of any anticipated impacts of underground mining upon that increment. This time period is consistent with final rule § 784.19(b) and (c), which require a minimum of 12 months of baseline

[538] 30 U.S.C. 1266(a).

[539] 80 FR 44436, 44482 and 44523 (Jul. 27, 2015).

[540] 30 U.S.C. 1256(b).

monitoring data in each permit application.

Paragraph (b)(4)(i) provides that the regulatory authority must condition the permit to require that the permittee reevaluate the adequacy of the probable hydrologic consequences determination under § 784.20 and the hydrologic reclamation plan under § 784.22 as part of each submission. The absence of baseline permit application information for all increments at the time of permit application approval means that the permittee must use the baseline data collected for each successive increment to reevaluate the accuracy of the probable hydrologic consequences determination and the adequacy of the hydrologic reclamation plan before the mining operation may affect the new increment.

Similarly, paragraph (b)(4)(ii) provides that the regulatory authority must condition the permit to prohibit the conduct of any underground mining activity that might impact an increment before the regulatory authority reviews the information submitted for that increment, updates the cumulative hydrologic impact assessment prepared under § 784.21 to incorporate that information, and determines that the findings made at the time of approval of the permit application under § 773.15 remain accurate. If the regulatory authority cannot make this determination, it must require that the permittee either cease mining or revise the permit in a manner that will correct that problem and enable the regulatory authority to make the necessary findings.

Final rule § 784.40 provides that the requirements, procedures, and criteria of 30 CFR 783.26 apply with equal force to the permit application information requirements of part 784. In addition, in response to the comment discussed above, § 784.40(c) specifies that the plans submitted under § 784.23 for monitoring of groundwater, surface water, and the biological condition of perennial and intermittent streams may be structured and implemented in an incremental manner consistent with the schedule approved under paragraph (b).

I. Part 784—Underground Mining Permit Applications—Minimum Requirements for Operation and Reclamation Plans

Section 784.1: What does this part do?

With the exception of altering the title of this section for clarity, we are finalizing § 784.1 as proposed. We received no comments on this section.

Section 784.2: What is the objective of this part?

We are finalizing § 784.2 as proposed. We received no comments on this section.

Section 784.4: What responsibilities do I and government agencies have under this part?

We are finalizing § 784.4 as proposed. We received no comments on this section.

Section 784.10: Information Collection

Section 784.10 pertains to compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* We are adding contact information for persons who wish to comment on these aspects of part 784.

Section 784.11: What must I include in the general description of my proposed operations?

We are finalizing § 784.11 as proposed. We received no comments on this section.

Section 784.12: What must the reclamation plan include?

Final Paragraph (b): Reclamation Timetable

We received comments urging us to extend the requirements for reclamation plans to areas adjacent to the permit area including areas located above underground mine works. The commenters stated that the restoration plan and reclamation timetable should address restoration of the form of all perennial and intermittent stream segments through or beneath which mining will occur. These commenters suggested that under paragraph (b) we should require detailed timetables for the restoration of the form and function of streams that are damaged by subsidence and that reclamation plans should include lands disturbed within the area adjacent to the permit area. We are not adopting this suggestion because impacts caused by subsidence in the areas adjacent to underground mines are appropriately addressed in other sections of this regulation. As we discuss in § 783.21 and elsewhere within this preamble, under section 516(a) of SMCRA; [541] we are authorized to adopt regulations that consider the distinct differences between surface and underground mining. Specifically, § 784.30 identifies features, including certain structures and renewable resource lands that may be materially damaged by subsidence. Furthermore, in § 817.121, we require the development of plans to account for the correction of damages caused by subsidence to these features. In particular, § 817.121 requires repair of damages to wetlands, streams or other water bodies caused by subsidence.

Section 784.13: What additional maps and plans must I include in the reclamation plan?

We have modified this section; however, these modifications are discussed in final rule § 780.13, which is the surface mining counterpart to § 784.13.

Section 784.14: What requirements apply to the use of existing structures?

We have modified this section; however, these modifications are discussed in final rule § 780.14, which is the surface mining counterpart to § 784.14.

Section 784.16: What must I include in the fish and wildlife protection and enhancement plan?

Final Paragraph (d): Enhancement Measures

One commenter suggested that we clarify that the enhancement measures enumerated in proposed rule (d)(2), final rule paragraph (d)(3), are only necessary where there are actual long-term adverse impacts as opposed to only projected impacts before mining operations have begun. This commenter opined that the need for ''permanent'' enhancement measures cannot be established prior to beginning operations and until the potential resultant subsidence has actually occurred. The commenter misinterprets our rule. Paragraph (d) applies only to activities conducted on the surface of the land. Other commenters asserted that we made no distinction between surface and underground mines and that it is unclear if the required enhancement measures are applicable to the permit area only or to the permit area and the area overlying the underground workings. To clarify this point, we revised paragraph (d)(3)(i) to state, ''if you propose to conduct activities on the land surface that would result in'' to eliminate any confusion regarding underground mining. Subsidence impacts on streams are regulated under § 784.30 and 817.121. Activities subject to paragraph (d)(3) include, but are not limited to, the construction of refuse piles or slurry impoundments in intermittent or perennial streams.

[541] 30 U.S.C. 1266(a).

Previous § 784.17: Protection of Publicly Owned Parks and Historic Places

We have removed previous § 784.17 to final rule § 784.31. Section 784.17 is now reserved.

Previous § 784.18: Reclamation Plan: General Requirements

We have removed and reserved previous § 784.18. Like previous § 780.18, the surface mining counterpart to previous § 784.18, and as discussed in the preamble to the proposed rule we have moved and revised many aspects of previous § 784.18 to final rule § 780.12.[542]

Section 784.19: What baseline information on hydrology, geology, and aquatic biology must I provide?

In addition to the comments we received about baseline information for surface mining permits and comments that addressed both surface mining and underground mining permit applications baseline information, we received comments exclusive to the impact of the proposed rule upon underground mining. While we discussed the baseline information relative to surface mining in § 780.19, we are addressing the comments that are exclusive to underground mining in this section.

A commenter requested stream sampling to be restricted to streams over the shadow areas of underground mines that use planned subsidence (*i.e.,* longwall or high extraction room and pillar mining method). We have not made any changes in response to this comment. Although the typical room and pillar mining method leaves pillars in place to support the overlying overburden, all underground operations create mine voids that have the potential to result in a groundwater sink forming over large areas. Depending on the magnitude of the groundwater sink, impacts can range from none to full scale aquifer de-watering over large areas, especially if pillar or retreat mining occurs. The presence of fine grained lithology (silt and claystone), typically found in the overburden above coal seams, can mitigate the impacts experienced at the surface, but these geologic formations do not prevent all hydrologic impacts, especially in stream valleys with deep stress relief fractures, which can extend to 150 feet deep.[543] Any underground mine operating in overburden less than 150 feet deep or that experiences pillar failure can intercept those fractures and negatively impact the flow regime in overlying streams.

Another commenter noted a misplaced requirement in proposed paragraph (b)(6)(i)(C) that required monitoring points to be located in a representative number of ephemeral streams within the proposed permit and adjacent areas. Because that section of the regulations relates to groundwater information, final paragraph (b)(6)(i)(C) now specifies that a permit applicant locate monitoring points within the proposed permit area and the area overlying the proposed underground workings.

Final Paragraph (c): Surface-Water Information

One commenter alleged that no evidence of significant damage to streams resulting from longwall mining activity existed and that we provided no rationale for requiring operators to collect a substantial volume of environmental and engineering data that would support requiring stream assessments as proposed in paragraph (c)(6). Further, commenters claimed that the proposed assessments provided no specific purpose with respect to satisfying permit and bonding obligations. The commenters also indicated that the data collection would be costly and time consuming, and would provide neither the industry nor the regulatory agency with the information necessary to demonstrate whether or not streams have actually been damaged. We disagree with these comments. Numerous examples exist of longwall damage to streams both in United States and abroad, mostly in the form of dewatered stream channels.[544] For this reason, the data requests, engineering analysis, and hydrologic assessments are necessary to understand the geologic and hydrologic environment and to enable accurate hydrologic consequences and impact assessments.

Final Paragraph (c)(3): Surface-Water Quantity Descriptions

We modified the final rule at paragraph (c)(3) to remove the reference to ''ephemeral streams'' because this section applies only to perennial and intermittent streams. In response to proposed paragraph (c)(3)(D) about seepage-run sampling, one commenter stated that it is not reasonable to require seepage run analyses on ephemeral streams. We agree. Our removal of the reference to ''ephemeral streams'' addresses this concern. Other commenters expressed concern about the requirement for seepage analysis when longwall mining methods are employed beneath a perennial or intermittent stream. Specifically, one commenter favored the proposed language and suggested a seepage analysis for all coal mining operations adjacent to streams to help determine the interconnections between the surface and ground water systems and the proposed mine site. In a similar comment, another commenter suggested that seepage run analysis include all mining scenarios, not just longwall mining. We decline to add this language for all mining operations but note that sufficient flexibility exists for a regulatory authority to require such additional information if deemed necessary. A commenter commended us for requiring seepage run analysis, but recommended strengthening the language to include analysis of the entire length of an intermittent or perennial stream within and outside the permit area and performed at both low and high flow conditions to characterize the seepage under a variety of flow conditions. We have accepted this comment and have modified the rule language at § 784.19(c)(3)(D) to clarify where and when the seepage analysis is to occur. Another commenter requested that we clarify where, when, and how seepage analysis should be conducted. We decline to prescribe additional requirements as to where, when, and how the analysis should be done other than as described in paragraphs (c)(3), which requires all measurements to be made using generally-accepted professional techniques approved by the regulatory authority.

One commenter indicated the seepage run determinations do not take into account evaporation or uptake of water by plants and any analysis would necessarily be greatly influenced by temporal and seasonal weather events. The commenter opined that the proposed regulation would impose an onerous and costly sampling requirement that may not represent the actual reasons for changes in streamflow. We do not agree with the commenter because evapotranspiration is a minor component of the seepage analysis due to the location and depth of the water potentially moving toward

[542] 80 FR 44436, 44487–44493 (Jul. 27, 2015).

[543] Jay W. Hawkins et al., *Shallow Ground Water Flow in Unmined Regions of the Northern Appalachian Plateau: Part 1 and Part 2. Physical Characteristics.* 1996 Annual Meeting of the American Society for Surface Mining and Reclamation, Knoxville, TN (1996).

[544] *See, e.g.,* C.J. Booth, et al., *Hydrogeologic Impacts of Underground (Longwall) Mining in the Illinois Basin,* Proceedings: Third Workshop on Surface Subsidence Due to Underground Mining, Morgantown, W.Va., June 1–4, 1993, pp. 222–227; B.M. Stout, *Impact of longwall mining on headwater streams in northern West Virginia,* West Virginia Research Institute. Morgantown, W. Va. pg. 35 (2002), see also Wilkowske, 2007.

the mining. Stated another way, the water under analysis has already undergone evapotranspiration losses on its journey into the groundwater system. We also agree that groundwater is subject to seasonal and weather influences. However, the objective of the regulatory requirement for a seepage analysis is to document the interaction of proposed, and existing, mine pool(s) with the surface and groundwater systems adjacent and overlying the mined area. The regulatory authority has the discretion to decide the level of detail provided in the seepage analysis that accomplishes the objective.

One commenter opined that the problems associated with subsidence-induced stream loss were limited to the Appalachian region and should not be required throughout the country. They further suggested that each regulatory authority should have the latitude to decide the need for such analysis. We are not implementing these suggestions for several reasons. First, stream loss over longwall mined areas is not specific to the Appalachian Region. Stream de-watering has occurred in the Illinois coal basin, in the western United States, and abroad. Second, longwall mining causes subsidence in the overburden and induces fracturing in the overburden which can extend upwards from 24 to 54 times the mined height with a surface fracture zone extending from the land surface down to 50 feet.[545] Furthermore, these fractures can connect with natural stress relief fracturing in the valley floor which ultimately can produce impacts to the overlying aquifer units and surface water system. These impacts to overlying aquifers and surface water can cause stream de-watering as the hydrologic balance re-equilibrates to the new hydrologic stress imposed by the subsidence created by longwall panels. For these reasons, an assessment of the potential for underground mines to cause stream loss in overlying streams should be performed in all situations, regardless of region. Such an analysis is required to definitively state in the probable hydrologic consequences and cumulative hydrologic impact assessment and associated written findings that material damage to the hydrologic balance will not occur as a result of the proposed operation.

Final Paragraph (c)(6): Stream Assessments

Some commenters asserted that the information contained in proposed § 780.19(c)(6)(ii) and (iii) for a description of the riparian zone and for the biological condition of each stream segment is unnecessary in areas located above underground mine works. As proposed, these specific sections were only applicable to surface mining operations, while the counterpart to these provisions for underground mines was proposed within proposed § 784.19(c)(6)(ii) and (iii). Upon reconsideration, we have revised § 784.19(c)(6)(i) and (ii) in our final rule for underground mines to make it identical to § 780.19(c)(6)(ii) and (iii). For both sections, the data requirements are identical and pertain to permitted and adjacent area (for underground mines, the area overlying the underground works). In final rule paragraphs (c)(6)(ii) and (iii) of §§ 780.19 and 784.19, we removed the phrase ''riparian zone'' and replaced it with ''vegetation along the banks of each stream.'' We made this slight change to clarify the intent of the rule language and avoid confusion related to how ''riparian area'' would be interpreted.

Assessing the biological condition of each ephemeral, intermittent, or perennial stream that could be impacted by subsidence is critical with respect to determining potential impacts to aquatic communities and the possibility for material damage to the hydrologic balance outside the permit area. Therefore, we have retained requirements within the final rule at paragraphs (c)(6)(vii) and (viii), which requires biological condition assessments for underground mines. In § 784.19(c)(6)(v), we also added a requirement to identify the presence of and to assess the quality of wetlands adjoining streams on the permitted and adjacent areas. These two additions are in response to comments from other federal agencies requesting such and will provide further clarification about the level of detail needed to document baseline conditions. The additions will also ensure restoration of any streamside vegetative corridor and wetlands impacted by mining in or near streams. These assessment requirements are also consistent with 515(b)(19) of SMCRA [546] which requires establishment of ''a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.''

Final Paragraph (g): Exception for Operations That Avoid Streams

One commenter requested that we clarify the term ''modify'' in proposed paragraph (h)(3), now final paragraph (g)(3). That provision allows a waiver of the biological information requirements if it can be demonstrated to the regulatory authority's satisfaction that the proposed operation will not ''modify the baseflow of any perennial or intermittent stream.'' The common definition of ''modify'' as found in any dictionary is sufficient and the regulatory authority is in the best position to determine if the baseflow of a perennial or intermittent stream has been modified. We expect that the regulatory authority will broadly interpret the word ''modify'' in the context of baseflow changes but only to include changes likely to result from mining. Prudence dictates that the regulatory authority would require the operator to have obtained the necessary baseline data to support or defend potential impacts that may result from mining before granting this waiver. We also expect that underground mines that intend to undermine a stream will be required to conduct the baseline stream assessment regardless of any potential baseflow modification consistent with paragraphs (c)(1) and (c)(3)(i) of § 784.19.

Section 784.20: How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?

As discussed in the preamble to the proposed rule, § 784.20 explains the requirements of the determination of the probable hydrologic consequences of a proposed operation.[547] After evaluating the comments that we received exclusive to the impacts of underground mining, we are not making changes to the final rule.

Final Paragraph (a): Content of PHC Determination

Proposed § 784.20 is substantively identical to § 780.20, which pertains to surface mining, with the exception of paragraphs (a)(3), (a)(6), and (a)(7).

Some commenters suggested that we add specific language to § 784.20 to require that the probable hydrologic consequences determination contain a finding that the operation does not have the potential for causing subsidence-related dewatering that would lead to

[545] C.J. Coe & S.M. Stowe, *Evaluating the Impact of Longwall Mining on the Hydrologic Balance,* In: Proceedings, National Water Well Association Conference on the Impact of Mining on Ground Water, National Water Well Assoc. (1984).

[546] 30 U.S.C. 1265(b)(19).

[547] 80 FR 44436, 44526 (Jul. 27, 2015).

material damage to the hydrologic balance outside the permit area. Such a provision is not necessary. Our final rule at § 784.20(a)(6) requires the content of the probable hydrologic consequences to contain findings addressing the impact of subsidence from the proposed underground mining activities on perennial and intermittent streams. As stated at § 784.20(a), the probable hydrologic consequences determination must address the impacts of the proposed operation upon the quality and quantity of surface water and groundwater and upon the biology of intermittent and perennial streams under seasonal flow conditions for the proposed permit and the adjacent areas. The determination is based an analysis of baseline hydrologic, geologic, biological, and other information as required in final rule § 784.19. In addition, § 784.20(a)(1) requires a finding whether the operation may cause material damage to the hydrologic balance outside the permit area (*i.e.,* in the adjacent area, above the underground workings.) Thus, the probable hydrologic consequences determination includes an assessment of any potential for subsidence-related dewatering to cause material damage to the hydrologic balance outside the permit area. Any subsidence-induced dewatering impacts analyzed in the probable hydrologic consequences determination at § 784.20(a)(6) must also be addressed in the hydrologic reclamation plan established in § 784.22(a)(2).

Several commenters were concerned with the addition of § 784.20(a)(7). Paragraph (a)(7), requires that the probable hydrologic consequences determination include a finding on whether the proposed underground workings would flood after mine closure and, if so, a statement and explanation of the highest anticipated potentiometric surface of the mine pool after closure; whether, where, and when the mine pool is likely to result in a surface discharge; and the predicted quality of any discharge from the mine pool. The regulatory authority is to use this information, in combination with models and calculations of void space and adjacent mine barrier seepage, to predict the probability of a blowout, where and when blowouts might occur, and the likelihood that water discharged as a result of the blowout will require treatment to meet water quality standards or any applicable effluent limitations. Commenters stated that the prediction of mine pool hydrology and potential for discharges are speculative and challenging and would result in increased costs during preparation of the permit application. It was suggested that rather than requiring a determination, paragraph (a)(7) should require a discussion of the potential of the mine pool to discharge to the ground surface. Commenters also suggested that this analysis only be conducted as necessary on a case-by-case basis. We disagree, because before mining begins, it is important for the regulatory authority and applicant to understand what will happen at mine closure with the water quality and quantity of the mine pool. A primary environmental threat from an underground mine, other than subsidence, is the formation of a post-closure point source and non-point discharges, which often arise from water accumulating in the underground mind voids. These discharges may be acidic or alkaline in character, and contain unusually high metal concentrations or high total dissolved solids, resulting in elevated electrical conductivity in the receiving streams. The characteristic discharge can substantially degrade water quality and the biological condition of streams. The probable hydrologic consequences analysis is designed to address the anticipated effects of the planned mining operation and subsequent reclamation on the quality and quantity of surface water and groundwater systems within, and adjacent to, the proposed permit area, which should include water that accumulates in the mine pool. The analysis required by paragraph (a)(7) will, therefore provide the applicant with information regarding the likelihood that the proposed underground mining operation will create future noncompliant discharges of a perpetual nature that would require treatment. It will also allow the regulatory authority to prepare a better cumulative hydrologic impact assessment, which could lead to prevention measures or changes in the mining plan to avoid the creation a post-closure discharge that would cause material damage to the hydrologic balance outside the permit area in violation of section 510(b)(3) of SMCRA.[548]

One commenter also questioned the statutory support for paragraph (a)(7). Section 516(d) of SMCRA states that the permitting provisions of Title V of the Act are applicable to ''surface operations and surface impacts incident to an underground coal mine with such modifications to the permit application requirements, permit approval or denial procedures, and bond requirements as are necessary to accommodate the distinct difference between surface and underground coal mining.'' [549] This section establishes requirements for the probable hydrologic consequences determination, which is required by section 507(b)(11) of SMCRA.[550] The probable hydrologic consequences determination and the cumulative hydrologic impact assessment must address impacts of the proposed operation on surface and groundwater systems, both within and outside the proposed permit area. As discussed above, the information required by paragraph (a)(7) is necessary to assess the potential impacts of the underground mining operation on both surface water and groundwater. Thus, the information is within the scope of section 507(b)(11) of SMCRA.[551] In addition, because water accumulating in mine voids is a circumstance unique to underground mines, we are only requiring this information for proposed underground mining operations, which is consistent with section 516(d) of SMCRA,[552] which requires modification to the SMCRA section 507 permitting requirements as ''necessary to accommodate the distinct difference between surface and underground coal mining.'' [553]

Section 784.21: What requirements apply to preparation and review of the cumulative hydrologic impact assessment (CHIA)?

We have modified this section; however, these modifications are discussed in final rule § 780.21, which is the surface mining counterpart to § 784.21.

Section 784.22: What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water sources?

Section 784.22 sets out the information the operator must include in the hydrologic reclamation plan and the information that it must provide about alternative water sources. Although many aspects of this section are substantively identical to the surface mining counterpart found at § 780.22, there are several differences that resulted in unique comments from industry and the public, discussed below. In response to these comments we have made modifications to the final rule.

[548] 30 U.S.C. 1260(b)(3).

[549] 30 U.S.C. 1266(d).

[550] 30 U.S.C. 1257.

[551] *Id.*

[552] 30 U.S.C. 1266(d).

[553] 30 U.S.C. 1257.

Final Paragraph (a): Hydrologic Reclamation Plan

As discussed in more detail in the preamble to § 784.28, the final rule at § 784.22(a)(2)(ii) has been revised to indicate that the hydrologic reclamation plan ''must include remedial measures for any predicted diminution of streamflow or loss of wetlands as a result of subsidence'' and ''must discuss the results of past use of the proposed remedial measures in the vicinity of the proposed mining operation and under similar conditions elsewhere.'' In order to assess the likelihood that those remedial measures will be effective to correct subsidence-related stream dewatering, this provision requires the operator and the regulatory authority to consider actual results that the proposed remedial measures have achieved in similar conditions, where available information exists. If streams in similar conditions have not been adequately restored, the regulatory authority may choose to prohibit planned subsidence mining techniques that would result in subsidence to streams within the adjacent area overlying the underground workings in order to ensure the prevention of material damage to the hydrologic balance outside the permit area.

Final Paragraph (b): Alternative Water Source Information

One commenter was concerned about proposed paragraph (b)(1), asserting that the discussion of alternative water source information should specifically include extension of and connection to public water supply lines. We direct the commenter to the definition of ''replacement of water supply'' in our existing regulations and the preamble discussion to the final rule [554] implementing this definition which specifically identifies hooking-up a replacement water supply to a public or private water supply system as a cost to be paid by the permittee. We are not accepting the commenter's suggestion to incorporate this requirement here as it would be redundant.

Proposed and final (b)(1) require the applicant to demonstrate that alternative water sources are both ''available and feasible to develop.'' The same commenter opined that we should define the terms ''available'' and ''feasible.'' Instead of defining these terms, we have added paragraph (b)(1)(ii) which, for all uses protected under § 817.40, requires the applicant to submit, a water supply replacement plan that includes construction details, costs, and an implementation schedule. This water supply replacement plan will indicate whether the alternative water sources are ''available'' and ''feasible.''

Another commenter opined that an operator should be required to demonstrate in the permit application that a firm plan for a permanent replacement water supply system exists, that the plan should include details to support the furtherance of the plan, and that it should indicate that the permanent replacement water supply system will be installed and successfully operating no less than three years following water diminution. The commenter suggested that we implement a maximum three year period to resolve issues such as surface property access, pipeline rights-of-way concerns, as well as permitting and construction. It is more appropriate to require such a time limit in § 817.40 which describes the responsibility of the operator to replace water supplies. In the proposed rule at paragraph (c)(3) of section 817.40,[555] we required the operator to provide a permanent replacement water supply within two years of the date of receiving notice of an unanticipated loss or damage to a protected water supply impacted by subsidence. The three years suggested by the commenter is too long a period for the user or owner to go without a permanent water supply. However, we added text in final rule § 817.40(c)(3) that gives the regulatory authority the discretion to grant an extension if the operator has made a good faith effort to meet the deadline, but has been unable to do so for reasons beyond its control.

Section 784.23: What information must I include in plans for monitoring of groundwater, surface water, and the biological condition of streams during and after mining?

As discussed in the preamble to the proposed rule,[556] § 784.23 describes what the operator must include in plans for monitoring of groundwater and surface water, and the biological condition of streams during and after mining. After evaluating the comments that we received exclusive to the impacts of underground mining, we are not making and changes to the final rule not that were not addressed in the preamble discussion of § 780.23.

Final Paragraph (c): Biological Condition Monitoring Plan

This paragraph describes the biological condition monitoring plan. Commenters alleged that we do not have the statutory authority to require biological monitoring requirements for underground mining operations, and asked that we clarify the source of our authority. Our authority to require biological monitoring for underground mining operations is detailed in section 516(b)(11) of SMCRA.'' [557] Without biological monitoring for underground mining, the regulatory authority cannot reliably determine if disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values have been minimized or enhanced. Through biological monitoring, the regulatory authority gains a better understanding of the requirements necessary to minimize disturbance and adverse impacts and enhance, where practicable, fish, wildlife, and related environmental values.

Further, these commenters stated that the cause-effect relationships between nutrient stressors and biological responses, from which the designated use criteria are derived, can be highly uncertain and recommended that, before corrective action is assigned, the regulatory authority should consider natural annual variation of biological indices, as well as establish methods to evaluate these potential effects to better address regional conditions and experience and state-wide water quality criteria. The final rule in § 784.19(c)(6)(vii) states that the operator must adhere to a bioassessment protocol approved by the state or tribal agency responsible for preparing the water quality inventory required under section 305(b) of the Clean Water Act,[558] or other scientifically-defensible bioassessment protocol accepted by agencies responsible for implementing the Clean Water Act. This final rule language allows the regulatory authority to consider, if they choose, natural, annual variation of biological indices when approving the biological condition monitoring plan. While bioassessments will be required, the regulatory authority has discretion to address regional conditions and experience and state-wide water quality criteria.

Section 784.24: What requirements apply to the postmining land use?

We have modified this section; however, these modifications are discussed in final rule § 780.24, which is the surface mining counterpart to § 784.24.

[554] 60 FR 16672, 16676 (Mar. 31, 1995).

[555] 80 FR 44436, 44676–44677 (Jul. 27, 2015).

[556] 80 FR 44436, 44626 (Jul. 27, 2015).

[557] 30 U.S.C. 1266(b)(11).

[558] 33 U.S.C.1315(b).

Section 784.25: What information must I provide for siltation structures, impoundments, and refuse piles?

We have modified this section; however, these modifications are discussed in final rule § 780.25, which is the surface mining counterpart to § 784.25.

Section 784.26: What information must I provide if I plan to return coal processing waste to abandoned underground workings?

As proposed,[559] we are removing previous § 784.26 and redesignating previous § 784.25 as § 784.26 in revised form. We received several comments on the proposed rule that resulted in revisions to proposed § 784.26. One commenter urged us to be more consistent in our implementation of plain language principles, including application of those principles to provisions for which we proposed no substantive revisions. In response to this comment, we revised and restructured proposed § 784.26 to improve its clarity and organization, to streamline its contents, and to eliminate redundancies and ambiguities. Among other things, we combined proposed paragraphs (b) and (c) into a single paragraph (c) in the final rule because both proposed paragraphs (b) and (c) specified content requirements for the plan to return coal processing waste to abandoned underground mine workings.

In the preamble to proposed § 784.26, we invited comment on whether we should adopt similar requirements that would apply to backstowing of coal processing waste in abandoned underground mines when that activity occurs in connection with either a surface coal mine or a coal preparation plant regulated under 30 CFR 785.21. *See* 80 FR 44528 (Jul. 27, 2015). One commenter responded in the affirmative. Previous § 816.81(f) required that disposal of coal mine waste in underground mine workings as part of a surface mining operation were to be conducted in accordance with a plan approved under previous § 784.25. Final § 816.81(h), which corresponds to previous § 816.81(f), contains a similar requirement for disposal in accordance with final § 784.26, which replaces previous § 784.25. In addition, both previous § 827.12 and the version of § 827.12 that we are adopting as part of this final rule require that coal preparation plants comply with § 816.81. Therefore, previous § 827.12 already required that disposal of coal mine waste in underground mine workings in connection with a coal preparation plant be conducted in accordance with a plan approved under previous § 784.25, while final § 827.12 contains a similar requirement for disposal in accordance with final § 784.26. We revised paragraph (a) of proposed § 784.26 for consistency with these requirements. Specifically, final § 784.26(a) clarifies that, as provided in final §§ 816.81(h) and 817.81(h), the permittee may return coal processing waste from either surface-mined coal or underground-mined coal to abandoned underground mine workings for disposal only if the regulatory authority and the Mine Safety and Health Administration first approve the disposal plan. We also added a reference to § 816.41 to final § 784.26(b)(15) to accompany the existing reference to final § 817.41.

Proposed paragraph (b)(2) required that each plan for the return of coal processing waste to abandoned underground mine workings include a description of all chemicals used to process the coal, the quantity of those chemicals remaining in the coal processing waste, and the likely impact those chemicals would have on groundwater and any persons, aquatic life, or wildlife using or exposed to that groundwater. One commenter objected to the addition of this paragraph because many chemicals used to process coal are nonhazardous or nontoxic. The commenter also questioned whether monitoring of nonhazardous chemicals would be required under this rule.

Final paragraph (b)(2) retains the proposed requirement because information about the additives to coal processing waste is necessary to properly evaluate the potential of the injected material to affect water resources. The regulatory authority will determine whether the permittee must monitor groundwater for the presence of those chemicals. The commenter further alleged that the requirement to characterize these chemicals prior to their injection into underground workings would interfere with regulatory programs governing these discharges under laws other than SMCRA. We do not agree with the commenter because final paragraph (b)(2) simply requires disclosure of constituents and analyses of how those chemicals will impact the hydrologic balance. It does not establish discharge limits for those chemicals, although the final rule would prohibit approval of the permit application if the cumulative hydrologic impact assessment determines that disposal of coal processing waste in underground mine workings would result in material damage to the hydrologic balance outside the permit area.

One commenter misconstrued proposed paragraph (e) as allowing the regulatory authority to exempt pneumatic backstowing operations from compliance with the requirements of proposed paragraphs (a) through (d). According to the commenter, the regulatory authority cannot make a determination that backstowing will not have an adverse impact on hydrology without the information required by those paragraphs. Final paragraph (d) eliminates this ambiguity and clarifies that the regulatory authority may only waive the monitoring requirements of final paragraph (c), not the information requirements of final paragraphs (a) and (b). We anticipate that the regulatory authority will use the information submitted under paragraphs (a) and (b) in determining whether the applicant has adequately demonstrated that the proposed pneumatic backstowing operation will not adversely impact surface water, groundwater, or water supplies.

Section 784.27: What additional permitting requirements apply to proposed activities in or through ephemeral streams?

In the preamble to the proposed rule we discussed the unique characteristics of ephemeral streams and the vital importance of headwater streams, including ephemeral streams, in maintaining the ecological health and function of streams down gradient of headwater streams.[560] In the preamble to § 701.5 of the final rule, we discussed the revisions of the proposed definition of ''ephemeral stream.'' As revised, the final definition of ''ephemeral stream'' now includes those conveyances receiving runoff from snowmelt events and that have both a bed-and-bank configuration and an ordinary high water mark. The final rule also revises our definition of ''intermittent stream'' so that it no longer automatically includes streams draining a watershed of at least one-square mile. This change may result in a number of streams that were classified as ''intermittent'' under the previous regulations being categorized as ''ephemeral'' under the final rule. This is significant because permitting requirements for ephemeral streams differ from those for perennial and intermittent streams.

Because of the distinctions between ephemeral streams and other types of streams, we have added § 784.27 to the final rule to specifically address the permitting requirements for

[559] 80 FR 44436, 44528 (Jul. 27, 2015).

[560] 80 FR 44436, 44451–44453 (Jul. 27, 2015).

underground mining activities in or through ephemeral streams. Creating this distinct section also addresses commenters' concerns that it was difficult to discern when regulations applied strictly to ephemeral streams or applied to all streams.

Several commenters asserted that avoiding impacts to ephemeral streams would create an unnecessary and heavy financial burden that effectively curtails longwall mining and will result in stranded coal reserves. Further, these commenters contend that protecting ephemeral streams exceeds SMCRA authority because SMCRA does not contain a provision requiring avoidance of impacts to these streams. We direct commenters to our discussion of the financial burden of the final rule found within the accompanying RIA and the general comments in Part IV, F., above. However, as discussed within this preamble we are not affording the same protections to ephemeral streams as we do for intermittent and perennial streams. As this comment centers on the impacts from underlying underground operations due to subsidence, further discussion about subsidence and material damage to the hydrologic balance outside the permit area can be found in the discussion of general comments in Part IV, K of this preamble. Also, for further discussion on the protections afforded ephemeral streams versus intermittent and perennial streams, please refer Part IV, O of this preamble.

Final Paragraph (a): Clean Water Act Requirements

Similar to final rule § 780.27(a), if the proposed permit area includes waters subject to the jurisdiction of the Clean Water Act, including some ephemeral streams, the regulatory authority must condition the permit to prohibit initiation of mining-related activities in or affecting waters subject to the jurisdiction of the Clean Water Act before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act.[561]

Final Paragraph (b): Postmining Surface Drainage Pattern and Stream-Channel Configuration

Unlike the requirements for intermittent and perennial streams addressed in § 784.28, final rule paragraph (b) of this section only requires the restoration of a postmining surface drainage pattern that is *similar* to the premining drainage pattern, relatively stable, and in dynamic near-equilibrium and postmining stream-channel configurations that are *similar* to the premining ephemeral streams and relatively stable—*i.e.,* the form. It does not require the reestablishment of hydrologic or ecological function as required for perennial and intermittent streams. Paragraph (b)(2) also allows the regulatory authority to approve or require a drainage pattern or stream-channel configuration that differs from the premining pattern if appropriate to ensure stability, prevent or minimize downcutting of reconstructed stream channels, promote enhancement of fish and wildlife habitat, accommodate any anticipated temporary or permanent increase in surface runoff as a result of mining and reclamation, accommodate the construction of excess spoil fills, coal mine waste piles, or impounding structures, replace previously channelized or severely altered streams with a more natural and ecologically sound drainage pattern or configuration or reclaim a previously mined area. The drainage pattern and stream-channel configuration requirements need only be similar to the premining patterns and configurations. Some differences are allowable. You are not required to reconstruct all of the ephemeral streams that existed prior to mining to the same premining configuration.

These requirements ensure establishment of a postmining drainage pattern that is functionally equivalent to the premining pattern, while affording the regulatory authority the discretion to alter the drainage pattern in certain situations that would be better for the hydrologic balance. Under paragraph (b)(2), the regulatory authority may allow a variance from the requirements in paragraph (b)(1) for certain express purposes: To ensure stability; prevent or minimize downcutting or widening of reconstructed stream channels and control meander migration; promote enhancement of fish and wildlife habitat; accommodate any anticipated temporary or permanent increase in surface runoff as a result of mining and reclamation; accommodate the construction of excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures; replace a stream that was channelized or otherwise severely altered prior to submittal of the permit application with a more natural, relatively stable, and ecologically sound drainage pattern or stream-channel configuration; or reclaim a previously mined area.

Final Paragraph (c): Streamside Vegetative Corridors

As discussed previously in this preamble, throughout the final rule we have replaced the term ''riparian corridor'' as used in the proposed rule with ''streamside vegetative corridor''; this change is also incorporated into this section. The final rule is based on the current understanding of the contributions made by streamside vegetative corridors along ephemeral streams. As discussed above, although a permittee is not required to reconstruct all of the ephemeral streams mined in or through, those ephemeral streams that are reconstructed must include streamside vegetative corridors constructed in accordance with § 817.56 of the final rule.

Section 784.28: What additional permitting requirements apply to proposed surface activities in, through, or adjacent to perennial or intermittent streams?

Some commenters recommended that § 784.28(b) and (c) and § 817.57 be revised to require that streams be protected from dewatering by longwall and other high-extraction underground mining methods, and that, if dewatering does occur, corrective action should be taken to restore streamflow and protect the biological integrity of the dewatered stream. We agree with the commenters that streams should not be permanently dewatered by subsidence caused by underground mining operations; however, we decline to make changes to § 784.28(b) and (c) and § 817.57 as a result. Those sections do not regulate subsidence from underground mining activities; instead, those sections address direct surface impacts to streams from underground mining activities, such as placement of coal refuse within the 100 foot stream buffer zone. These surface facilities of an underground mine will impact streams and lands on the surface in much the same manner as a surface coal mining operation in that areas are disturbed directly by activities such as topsoil removal, grading of the existing surface to facilitate construction of buildings and other support facilities, construction of ventilation shafts and other entries, coal processing facilities, roads and disposal of coal refuse. Otherwise known as the disturbed area, the surface facilities of an underground mine are subject to the provisions of section 515(b)(10) of SMCRA,[562] which requires disturbances to the hydrologic balance to be minimized. Because surface facilities of underground mines are permitted as part of the permit area, which is defined at existing § 701.5 as ''the area of land, indicated on the approved map . . . required to be covered by the operator's performance

[561] 33 U.S.C. 1251 *et seq.*

[562] 30 U.S.C. 1265 (b)(10).

bond under subchapter J of this chapter and which shall include the area of land upon which the operator proposes to conduct surface coal mining and reclamation operations under the permit, including all disturbed areas;'' mining activities within this disturbed area are not subject to the provisions of section 510(b)(3) [563] where material damage to the hydrologic balance outside the permit area must be prevented. (See our general comment discussions about this topic at Part IV).

While it is true that the changes that commenters suggest to these regulations, which relate to surface facilities of underground mines, would be inappropriate, it is also true that SMCRA directs us to take into consideration the distinct differences between surface and underground mining operations.[564] One of these distinctions is the impacts from subsidence. Whereas the impacts from surface facilities of underground mines within the permit area are similar to the impacts of surface mines, subsidence impacts within the adjacent area of underground mines are distinctly different. These impacts to areas overlying the underground workings of an underground mine (the adjacent area) that are not otherwise disturbed to facilitate mining range from virtually indiscernible to a host of adverse impacts and damages to land and water resources, water supplies, and structures. These impacts can vary due to the local geology and mining method (room and pillar versus longwall). Subsidence impacts do not typically require conventional reclamation, such as large scale backfilling, grading, replacement of soil, and revegetation because the topsoil and overburden is not removed to access the coal. Yet, subsidence damages must be repaired in accordance with the subsidence provisions of SMCRA and the existing subsidence control regulations, which are found at §§ 784.20 (probable hydrologic consequences), 784.22 (hydrologic reclamation plan), and 817.121 (performance standards for the repair of lands and waters damaged by subsidence). In order to clarify that these provisions apply to streams, wetlands, and other bodies of water on the surface that may be impacted by subsidence, we have made changes to these regulations. These specific changes are discussed in greater detail at the preamble to those provisions.

[563] 30 U.S.C. 1260(b)(3).

[564] 30 U.S.C. 1266(a).

Section 784.29: What information must I include in the surface-water runoff control plan?

We have modified this section; however, these modifications are discussed in final rule § 780.29, which is the surface mining counterpart to section 784.29.

Section 784.30: When must I prepare a subsidence control plan and what information must that plan include?

Consistent with our revisions to the definition of material damage (in the context of the subsidence control provisions of §§ 784.30 and 817.121), our final rule has been revised at § 784.30(a) to require that the pre-subsidence survey include mapping of wetlands, streams, or water bodies and a narrative description indicating whether subsidence could cause material damage to or diminish the value or reasonably foreseeable use of such features. In addition, as explained in the discussion of general comments in Part IV.K. of this preamble, we have revised the requirements for subsidence control plans at § 784.30(c) to include wetlands, streams, or water bodies when describing the anticipated effects of planned subsidence and measures to be taken to mitigate or remedy any subsidence-related material damage to such features, whenever the pre-subsidence survey indicates the presence of wetlands, streams and water bodies that could be materially damaged by subsidence. These provisions are intended to ensure that subsidence related material damages to streams, and other water resources regulated in accordance with section 516 of SMCRA,[565] are effectively addressed in the applicants subsidence control plan.

Final Paragraph (a): Pre-Subsidence Survey

When previous 30 CFR 784.20(a)(3) was issued in 1995, it required a pre-subsidence survey of the condition of all noncommercial buildings or occupied residential dwellings and related structures that might be materially damaged by subsidence or have their reasonably foreseeable value diminished by subsidence, within the area encompassed by the angle of draw. 60 FR 16729–16730, 16748 (Mar. 31, 1995). This provision, however, was vacated by a court and has been suspended since December 22, 1999 (64 FR 71652–71653). *See also* 80 FR 44528 (citing *Nat'l Mining Ass'n* v. *Babbitt,* 173 F.3d 906 (D.C. Cir. 1999)). In an effort to remove regulations that had been suspended for over 15 years, we proposed to remove the previously suspended language.

We received comments concerning this proposed nonsubstantive change to previous 30 CFR 784.20(a)(3), which has been redesignated as 30 CFR 784.30(a)(3). These commenters requested that, instead of removing the suspended language, we should revise it consistent with the Court's decision. Although we agree with the commenters that we could correct the deficiency the court identified and require a pre-subsidence survey documenting the condition of all noncommercial buildings or occupied residential dwellings and related structures that might be materially damaged by subsidence or have their reasonably foreseeable value diminished, we decline to do so at this time because it is not related to the primary purpose of this rule (*i.e.,* protection of streams and related environmental values). Substantive changes of the type recommended by the commenters are better addressed in a potential future rulemaking.

Section 784.31: What information must I provide concerning the protection of publicly owned parks and historic places?

We are finalizing § 784.31 as proposed. We received no comments on this section.

Section 784.33: What information must I provide concerning the relocation or use of public roads?

We are finalizing § 784.33 as proposed. We received no comments on this section.

Section 784.35: What information must I provide concerning the minimization and disposal of excess spoil?

We have modified this section; however, these modifications are discussed in final rule § 780.35, which is the surface mining counterpart to § 784.35.

Section 784.37: What information must I provide concerning access and haul roads?

We have modified this section; however, these modifications are discussed in final rule § 780.37, which is the surface mining counterpart to § 784.37.

Section 784.38: What information must I provide concerning support facilities?

We are finalizing § 784.38 as proposed. We received no comments on this section.

[565] 30 U.S.C. 1266.

Section 784.40: May I submit permit application information in increments as mining progresses?

Please refer to the preamble for § 783.26 for a discussion of this part of the final rule and the comments that led to its adoption.

Previous § 784.200: Interpretative Rules Related to General Performance Standards

We have removed and reserved § 784.200 for the reasons discussed in the preamble to the proposed rule.[566]

J. Part 785—Requirements for Permits for Special Categories of Mining

Section 785.10: Information Collection

Section 785.10 pertains to compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* We are adding contact information for persons who wish to comment on these aspects of part 785.

Section 785.14: What special provisions apply to mountaintop removal mining operations?

This section implements section 515(c) of SMCRA,[567] which contains special performance standards related to mountaintop removal operations. Section 701.5 of this rule generally defines mountaintop removal operations as ''surface mining activities in which the mining operation extracts an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill . . . by removing substantially all overburden above the coal seam and using that overburden to create a level plateau or a gently rolling contour, with no highwalls remaining, that is capable of supporting one or more of the postmining land uses . . . .''

The majority of commenters expressed concern about how we proposed to give effect to section 515(c)(4)(D) of SMCRA.[568] Specifically, many commenters requested that we specifically require mountaintop removal operations to ensure that ''no damage will be done to natural watercourses'' as required by that section. These commenters alleged that our proposed rule did not go far enough and requested that the final rule contain an absolute prohibition on mining activities, including forbidding excess spoil fills and mining through streams, because these could result in damage to a natural watercourse.

We decline to adopt this suggestion. If we were to interpret section 515(c)(4)(D) of SMCRA in the manner suggested by the commenters, it would effectively ban mountaintop removal mining operations because streams could neither be filled with excess spoil nor mined through to recover the underlying coal. This is so, because, by definition, mountaintop removal mining operations remove all of the overburden overlying the coal beneath a mountain or ridgetop with the resultant creation of a level plateau or gently rolling contour in accordance with section 515(c)(2) of the Act,[569] necessarily damaging some streams or parts of streams in the process. Such a ban, however, would effectively nullify section 515(c)(2) of the Act,[570] which explicitly allows such operations. A ban would also be inconsistent with SMCRA and effectively nullify section 515(c)(4)(E),[571] which specifically provides that excess spoil not retained on the mountaintop must be placed in accordance with section 515(b)(22).[572] Section 515(b)(22)(E), in turn, allows the placement of this spoil in ''springs, natural water courses or wet weather seeps'' as long as ''lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented.''

At paragraph (b)(9), we proposed to reconcile these potentially conflicting statutory sections by requiring the applicant to demonstrate that the proposed mountaintop removal mining operation has been designed to meet three criteria to ensure that natural watercourses mined by a mountaintop removal mining operation are affected no more than natural watercourses mined by other surface mining methods and restored to approximate original contour under our other regulations. We are adopting this approach as proposed, with a few changes discussed below, because, by explaining what damage to natural watercourses means in the context of mountaintop removal mining operations, it reconciles the potentially conflicting requirements of SMCRA and gives effect to sections 515(c)(2), 515(c)(4)(D), and 515(c)(4)(E) of SMCRA.

Although we are generally adopting this section as proposed, in the preamble to the proposed rule, we invited comment on whether we should adopt a different approach to reconciling these provisions; *i.e.,* a rule that would allow the approval of mountaintop removal mining operations that would damage natural watercourses within the permit area if the applicant can demonstrate that the damage will be fully offset by implementation of the fish and wildlife enhancement measures proposed under section 780.16.[573] We received two comments on this topic, one supporting the alternative and one opposing it.

The commenter opposing the alternate approach opined that there is no good evidence that fish and wildlife enhancement measures can offset the damage caused by mining through streams. The commenter further alleged that ''numerous studies have demonstrated a lack of success in fully restoring the biological condition of streams once they have been damaged by coal mining or other activities, even when their physical conditions have been restored.'' The commenter cited several references allegedly supporting this assertion. The commenter in support of the alternate approach recommended that we adopt it within the final rule because it provides flexibility and allows a permittee may either to cause no net damage or allows for offsets.

As discussed above, we decline to adopt this approach in the final rule. In section 780.16 of the final rule, however, we allow fish and wildlife enhancement measures to offset other permanent impacts to wetlands and to intermittent and perennial streams, such as those resulting from the placement of excess spoil, provided that the scope of the enhancement measures is commensurate with the magnitude of the long-term adverse impacts of the proposed operation. The proposed permanent adverse impacts to wetlands and streams cannot be approved if the regulatory authority determines that the proposed enhancement measures will not meet this standard because of a lack of demonstrated ability to actually achieve the necessary commensurate enhancement. Because the final rule requires the use of fish and wildlife enhancements to offset specific damage to streams, we decided that we do not need to adopt another similar provision with regard to mountaintop removal mining operations.

Final Paragraph (b): Application and Approval Requirements

As proposed, final paragraph (b)(9) requires that, for mountaintop removal mining operations that seek a variance from approximate original contour restoration requirements, the applicant demonstrate that the proposed operation will not damage natural watercourses

[566] 80 FR 44436, 44528 (Jul. 27, 2015).

[567] 30 U.S.C. 1265(c).

[568] 30 U.S.C. 1265(c)(4)(D).

[569] *Id.*

[570] 30 U.S.C. 1265(c)(2).

[571] 30 U.S.C. 1265(c)(4)(E).

[572] 30 U.S.C. 1265(b)(22).

[573] 80 FR 44436, 44530 (Jul. 27, 2015).

within the permit or adjacent areas. Further, the paragraph specifies at least four criteria—final paragraphs (b)(9)(i) through (iv)—that must be met for a regulatory authority to determine that no damage will occur to natural watercourses. Together, these four criteria ensure that a mountaintop removal mining operation will not damage watercourses any more than a surface mining operation without an approximate original contour variance. In essence, they define ''damage'' in the context of section 515(c)(4)(D) of SMCRA.

While it is true that some commenters indicated that the approach taken in paragraph (b)(9) is not restrictive enough, it is also true that our proposed and final regulations address this issue and correct several deficiencies in our previous regulations, which did not require prevention of damage to natural watercourses above the lowest coal seam mined. First, we removed the limitation to watercourses below the lowest coal seam mined because the underlying statutory provision at section 515(c)(4)(D) of SMCRA does not contain such a limitation. The applicant now must demonstrate that the proposed operation will not damage natural watercourses within the proposed permit and adjacent areas, regardless of where the watercourse is located. Second, even for watercourses below the lowest coal seam mined, the previous regulations did not contain any criteria for determining whether an operation is likely to cause damage. To correct this deficiency, the proposed and final rules contain criteria that provide protection from the most likely adverse impacts that could occur within the watershed of the natural watercourses on the permit and adjacent areas.

While we discussed overall adverse impacts to aquatic and terrestrial ecology from surface mining operations in the preamble to the proposed rule,[574] mountaintop removal mining operations might create additional adverse impacts to streams because they often completely remove headwater streams within the mined-out area, extensively restructure the surface configuration and drainage patterns, bury additional stream segments below the mined-out area with significant quantities of excess spoil that is not being used to restore the approximate original contour, and remove expansive areas of native, typically forested, vegetation and replace it with an intensely modified, often pasture-like landscape. These drastic disturbances from mountaintop removal mining operations can result in the discharge of increased levels of pollutants to surface water or groundwater; changes in peak flows from the permit area that would cause an increase in flooding; and increased flow volumes that could adversely affect actual uses of surface water, designated uses of surface water under section 303(c) of the Clean Water Act,[575] or premining uses of groundwater outside the permit area. The criteria in final paragraph (b)(9) are designed to prevent adverse impacts to surface water and groundwater resources within the permit and adjacent areas of a mountaintop removal mining operation that would be greater than if the area was restored to approximate original contour.

To be consistent with SMCRA and other sections of the final rule, we added two criteria to the three included in the proposed rule. The first criterion we added is final paragraph (b)(9)(ii), and was also recommended by a commenter. That paragraph specifies that the regulatory authority must also consider the overall additional adverse impacts to the aquatic and terrestrial ecology that could result from granting a variance to approximate original contour restoration requirements. We also added final paragraph (b)(9)(v), which allows the regulatory authority to require additional demonstrations as necessary to determine that no damage to natural watercourses will occur. We agree with the commenter that suggested these additional requirements because they should provide adequate minimum standards that will allow the regulatory authority to determine whether damage to natural watercourses will in fact be prevented.

In addition to these new criteria, we have revised proposed paragraph (b)(9)(iii) so that final paragraph (b)(9)(iii) refers to changes in the size or frequency of peak flows that would cause an increase in ''flooding'' rather than an increase in ''damage from flooding'' as in the proposed rule. We made this change because determination of whether there would be an increase in flooding is easier and less speculative than a determination of whether there would be an increase in damage from flooding. Under the latter standard, the applicant would have to project future development downstream of the proposed permit area, which could be difficult and conjectural.

We divided proposed paragraph (b)(9)(iii), now final paragraph (b)(9)(iv), into an introductory paragraph and two separate subparagraphs. Paragraph (b)(9)(iv)(A) addresses surface flow and paragraph (b)(9)(iv)(B) addresses groundwater. Final paragraph (b)(9)(iv)(A) also differs from its counterpart in the proposed rule in that we removed references to ''reasonably foreseeable uses'' of surface water and groundwater. The final rule no longer includes the term ''reasonably foreseeable uses'' in contexts other than protection of reasonably foreseeable surface land uses from the adverse impacts of subsidence. Our reasons for deletion of this term are twofold. First, the term appears in SMCRA only in section 516(b)(1), which requires that operators of underground mines adopt subsidence control measures to, among other things, maintain the value and reasonably foreseeable use of surface lands. Section 717(b) of SMCRA establishes water supply replacement requirements for surface mines, including mountaintop removal mining operations. The regulations implementing section 717(b) of SMCRA [576] are found at 30 CFR 816.40. Second, we generally agree with the numerous commenters who opposed inclusion of the term ''reasonably foreseeable uses'' on the basis that it is too subjective, difficult to determine, and open to widely varying interpretations, which could result in inconsistent application throughout the coalfields.

We also revised proposed paragraph (b)(9)(iv)(A) to track more closely the language in our final definition of ''material damage to the hydrologic balance outside the permit area'' at section 701.5 about designated uses of surface water under the Clean Water Act. Finally, in response to comments from the U.S. Environmental Protection Agency, we replaced the term ''existing'' when referring to uses of surface water with ''any premining use of surface water outside the permit area.'' This change is intended to avoid any confusion or conflict between the terms we use in our regulations and the term ''existing uses'' under the regulations implementing the Clean Water Act.

Commenters also expressed concern that our proposal to remove the ''no damage to natural watercourses'' provision from the performance standards in section 824.11 and make it a permitting requirement does not comport with section 515 of SMCRA. We agree that this requirement should also be a performance standard, so the final rule restores that requirement to § 824.11, with revisions to refer to the new permitting provisions in § 785.14(b)(9).

[574] 80 FR 44436, 44439–44447 (Jul. 27, 2015).

[575] 33 U.S.C. 1313(c).

[576] 30 U.S.C. 717(b).

We received comments on proposed paragraph (b)(11), which would have required posting of a bond amount sufficient to restore the site of a mountaintop removal mining operation to approximate original contour if the approved postmining land use has not been implemented before expiration of the revegetation responsibility period under § 816.115. Commenters thought this requirement to be illogical because mountaintop removal mining operations are designed and approved to facilitate higher and better postmining land uses, which the Act limits to industrial, commercial, residential, public facility (including recreational facilities) and agricultural postmining land uses). Commenters were concerned that, with the exception of agricultural and some recreational postmining land uses, revegetation responsibility periods are inconsistent with implementation and attainment of the higher and better land uses proscribed by the other potential uses.

In response, we note that the intent of this provision is to ensure that mountaintop removal mining operations are approved only for legitimate immediate postmining land use needs. We find the 5-year revegetation responsibility period provides sufficient time for initiation of implementation of the approved postmining land use.

The preamble to proposed paragraph (b)(11) stated that we were considering an alternative to requiring that the amount of bond initially posted include an amount equal to the cost of restoring the area to the approximate original contour in the event the proposed land use is not implemented. That alternative would prohibit release of any bond amount for the entire permit until the approved postmining land use has been implemented. Upon further consideration, we decided to adopt this alternative as final paragraph (c)(2). We recognize that requiring that the amount of bond equal to the cost of restoring the area to the approximate original contour may be unduly burdensome and inconsistent with the principle under section 509 of SMCRA that the bond amount should be based upon the cost of completing the approved reclamation plan in the event of default. Therefore, final rule paragraph (c)(2) instead requires that the permit include a condition prohibiting the release of any part of the bond posted for the permit until substantial implementation of the approved postmining land use is underway. The rule specifies that the condition must provide that the prohibition does not apply to any portion of the bond that is in excess of an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented.

Final Paragraph (c): Additional Requirements for Permit Issuance

One commenter expressed concern that the proposed paragraph (c) would draw attention to mountaintop removal mining operations and would subject them to increased scrutiny because they would be more readily identifiable by outside interest groups. The existing regulations already require that mountaintop removal mining operations be clearly identified as such. The regulations finalized today merely add a requirement that, as proposed, the permit identify the acreage and location of the lands within the permit area upon which mountaintop removal mining operations will occur. We are adding this requirement because some permits combine mountaintop removal mining operations with other types of mining, such as area or contour mining. Because we are only adding additional detail to the existing identification already required, we do not agree that this additional information will subject the permit to additional scrutiny by outside interests. Furthermore, this type of information is in the public interest and only makes clear the location and the extent of the lands to which the approximate original contour variance applies within the permit.

Section 785.16: What special provisions apply to proposed variances from approximate original contour restoration requirements for steep-slope mining?

As discussed in the preamble to the proposed rule, we proposed to modify section 785.16.[577] After evaluating the comments that we received, we are adopting the section as proposed, with the following explanations and exceptions.

Final Paragraph (a): Application and Approval Requirements

We divided proposed paragraph (a)(9)(iii) into two separate paragraphs. Paragraph (A) addresses surface flow and paragraph (B) addresses ground water. Final paragraph (a)(9)(iii)(A) differs from the language of the proposed rule in that we have removed references to reasonably foreseeable uses of surface water and groundwater. The final rule no longer includes the term ''reasonably foreseeable uses'' in contexts other than protection of reasonably foreseeable surface land uses from the adverse impacts of subsidence. Our reasons for deletion of this term are twofold. First, the term appears in SMCRA only in section 516(b)(1), which requires that operators of underground mines adopt subsidence control measures to, among other things, maintain the value and reasonably foreseeable use of surface lands. Second, numerous commenters opposed inclusion of the term ''reasonably foreseeable uses'' on the basis that it is too subjective, difficult to determine, and open to widely varying interpretations, which could result in inconsistent application throughout the coalfields.

We have also revised paragraph (a)(9)(iii)(A) to track more closely the language in our definition of ''material damage to the hydrologic balance outside the permit area'' at § 701.5 concerning designated uses of surface water under the Clean Water Act. Finally, in response to comments from the U.S. Environmental Protection Agency, we have replaced the term ''existing'' when referring to uses of surface water with ''any actual use of surface water outside the permit area before mining.'' This change is intended to avoid any confusion or conflict between the terms we use in our regulations and the term ''existing uses'' under the regulations implementing the Clean Water Act.

As a result of a comment on a similar proposed rule provision at § 780.24(a)(6)(ii), we have deleted language in proposed paragraph (a)(10)(iii) of this section, which would have prohibited the surface owner from receiving any compensation for requesting a variance from approximate original contour. As discussed above, that comment stated that the proposed rule would not be effective in addressing the core issue, which is the failure of regulatory authorities to make an independent and fact-based determination that the proposed change in land use meets statutory requirements. This concern is germane here as well. We revised the final rule to require a copy of the landowner request.

In connection with paragraph (a)(13) of the proposed rule, we invited comment on whether we should prohibit release of any bond amount for the entire permit area until the postmining land use for which the approximate original contour variance was granted has been implemented.[578] In response to this invitation for comment, one commenter opined that bond should be retained and released as

[577] 80 FR 44436, 44530–32 (Jul. 27, 2015).

[578] 80 FR 44436, 44531 (Jul. 27, 2015).

it is currently done and that phased release of bonds should be allowed when those aspects of performance responsibility are satisfied. Another commenter suggested that bond release on approximate original contour variances should be based on the restoration of capability for the postmining land use and not implementation of that use because the permittee frequently has no control over implementation. Another commenter indicated that the approach suggested in the proposed rule is illogical because most of the postmining land uses involved in the approximate original contour variance would be higher or better uses. Another commenter recommended that, for both mountaintop removal mining operations and steep slope variances, no bond be released until the postmining land use has been successfully achieved on the area subject to the approximate original contour variance or exception.

We received a comment about paragraph (a)(13) of § 785.16 similar to a comment we received in response to proposed § 785.14(b)(11) about the requirement to post a bond sufficient to restore approximate original contour in areas that have been previously granted variances if the approved postmining land use has not been implemented before expiration of the revegetation responsibility period under § 816.115. Commenters thought this requirement to be illogical because these variances are granted in order to facilitate higher and better postmining land uses. Commenters were concerned that, with the exception of agricultural and some recreational postmining land uses, revegetation responsibility periods are inconsistent with implementation and attainment of the higher and better land uses proscribed by the other potential uses.

In response, we note that the intent of proposed paragraph (a)(13), which we are adopting in revised form as final paragraph (b)(2), was to ensure that the permittee made firm arrangements for implementation of the approved postmining land use and did not seek a variance just to avoid the higher cost of restoring the approximate original contour or to satisfy landowner desires. As discussed in the environmental impact statement for this rule, the proposed land uses used to justify approximate original contour variances have in some cases never materialized. Under our existing rules, land within the approximate original contour variance area must be revegetated and is subject to a period of responsibility, which usually varies from 5 to 10 years depending upon average annual precipitation. It is during this time, after the area has been backfilled and graded, and after vegetation has been established, that we expect the land use to actually be implemented. Five to ten years is a more than adequate time to actually implement the land use, and indeed that use may often be implemented in a shorter time.

We recognize that requiring that the amount of bond initially posted include an amount equal to the cost of restoring the variance area to the approximate original contour in the event the proposed land use is not implemented within the revegetation responsibility period, as we proposed, may be unduly burdensome and inconsistent with the principle under section 509 of SMCRA that the bond amount should be based upon the cost of completing the approved reclamation plan in the event of default. Therefore, the final rule instead requires that the permit include a condition prohibiting the release of any part of the bond posted for the permit until substantial implementation of the approved postmining land use is underway. The rule specifies that the condition must provide that the prohibition does not apply to any portion of the bond that is in excess of an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented.

Regarding phased bond release, the bond for any area subject to an approximate original contour variance, and therefore not restored to approximate original contour, cannot be released using the same process as for conventional reclamation, because this process would not result in retention of bond that can be used to return the land to its approximate original contour in the event the approved postmining land use is never implemented. With regard to employing land use capability as the standard for final release rather than actual implementation of the approved use, that standard does not protect against the needless drastic alteration of the landscape and associated environmental impacts. As discussed in the preamble to section 785.14, these provisions are intended to prevent abuses that have resulted in radical departures from conventional reclamation and to ensure that lands not actually used in accordance with the approved variance are restored to approximate original contour.

Final Paragraph (b): Additional Requirements for Permit Issuance

For clarity, we decided to split proposed paragraph (b) into three separate paragraphs (b) through (d). We are adopting paragraph (b)(1) as proposed. We are adopting proposed paragraph (a)(13) in revised form as paragraph (b)(2), as discussed above, because the provisions of proposed paragraph (a)(13) concern bond release, not the permit application, and thus are a better fit in paragraph (b). We are adopting proposed paragraphs (b)(2) and (3) as final paragraphs (c)(1) and (2) without change. We are adopting proposed paragraph (b)(4) as final paragraph (d) without change. Finally, we are not adopting proposed paragraph (b)(5) because that paragraph is subsumed within § 773.15(h), which requires a finding by the regulatory authority that the permit applicant has satisfied the requirements of Part 785.

Section 785.25: What special provisions apply to proposed operations on lands eligible for remining?

We received two comments on our proposed revisions [579] to § 785.25. One commenter supported proposed § 785.25 by emphasizing the value of remining in improving the health of streams and the aquatic community. The other commenter questioned the value of remining sites that currently support productive forestland as a result of natural revegetation over time. According to the commenter, remining those sites could be more environmentally disruptive than environmentally beneficial.

Section 701(34) of SMCRA [580] and 30 CFR 701.5 define ''lands eligible for remining'' as those lands that would otherwise be eligible for abandoned mine land reclamation program expenditures under section 404 or section 402(g)(4) of SMCRA.[581]'' In relevant part, those sections of SMCRA generally require that the land be affected by coal mining, that the land be left in an inadequate reclamation status before August 3, 1977, and that there be no continuing reclamation responsibility under state or federal laws. As a matter of law, permit applicants may avail themselves of the benefits available to operations on lands eligible for remining if the proposed permit area meets these criteria. Benefits are limited to a reduced revegetation responsibility period, reduced monitoring requirements, and qualification for the permit eligibility

[579] 80 FR 44436, 44529–30 (Jul. 27, 2015).

[580] 30 U.S.C. 1291(34).

[581] 30 U.S.C. 1234 and 1232(g)(4).

provisions of section 773.13 if unanticipated events or conditions occur.

K. Part 800—Performance Bond, Financial Assurance, and Insurance Requirements for Surface Coal Mining and Reclamation Operations

Section 800.1: Scope and Purpose

We are finalizing section 800.1 as proposed. We received no comments on this section.

Section 800.4: Regulatory Authority Responsibilities

Section 800.4 describes a regulatory authority's responsibilities with respect to bonding and liability insurance requirements for surface coal mining operations. As proposed, we added a reference to financial assurances to paragraphs (a) and (b) of § 800.4, consistent with our revision of part 800 to include criteria for financial assurances for long-term treatment of discharges and to clarify which provisions of part 800 apply to financial assurances. Final paragraphs (a) and (b) require that the regulatory authority prescribe and furnish forms for performance bonds and financial assurances and prescribe terms and conditions for performance bonds, financial assurances, and liability insurance policies.

Similarly, as proposed, we added a sentence to paragraph (c) to specify that the regulatory authority must determine the amount of financial assurance required under § 800.18 and adjust that amount as needed. In response to a comment, final paragraph (c) includes a requirement that the regulatory authority also monitor trust performance under a financial assurance.

Final paragraph (d) provides that the regulatory authority may accept a self-bond if the requirements of § 800.23 and any additional requirements in the regulatory program are met. Final paragraph (d) differs from the proposed rule in that it does not specify that the permittee itself must meet self-bonding requirements. We made this change because § 800.23 allows for third-party guarantors. For clarity, we also added a sentence reminding readers that state regulatory programs need not include provisions authorizing the use of self-bonds.

We adopted final paragraphs (e) and (f), which pertain to regulatory authority responsibilities for bond release and bond forfeiture, as proposed. We received no comments on those paragraphs.

As proposed, final paragraph (g) provides that the regulatory authority must require in the permit that adequate bond and financial assurance coverage be in effect at all times. It also specifies that, except as provided in § 800.30(b), operating without adequate bond or financial assurance is a violation of both the regulations and the terms and conditions of the permit. We revised the latter provision from the proposed rule, which erroneously referred to a violation of a condition of the rules. Conditions are established in the permit, not the rules.

Section 800.5: Definitions

Section 800.5 contains definitions of certain terms that appear in Part 800. We are adopting § 800.5 as proposed, with the exception of minor editorial revisions to the definitions of ''collateral bond'' and ''surety bond'' and one substantive revision to the definition of ''financial assurance.'' Some commenters found the proposed rule confusing because various provisions of proposed part 800 and the preambles to those provisions were inconsistent as to whether a financial assurance was a type of alternative bonding system or a funding mechanism distinct from the alternative bonding systems discussed in § 800.9. One commenter urged us to revise the definition to clearly specify that financial assurances are a type of alternative bonding system. We agree. Therefore, the final definition of ''financial assurance'' describes a financial assurance as a type of alternative bonding system. This change from the proposed rule is consistent with the preamble to our approval of the financial assurance provisions in the Tennessee federal program. *See* 72 FR 9616, 9618–9619 (Mar. 2, 2007). It also is consistent with the preamble to a decision notice for a Pennsylvania regulatory program amendment that included the use of treatment trusts, which correspond to financial assurances. We approved the use of those trusts as a type of alternative bonding system and responded favorably to a comment that treatment trusts could be approved only as an alternative bonding system. *See* 75 FR 48526, 48533–48535, 48536, 48537–48541 (Aug. 10, 2010).

One commenter recommended that financial assurances not be subject to the alternative bonding system requirements of § 800.9 and that we instead classify them as a hybrid of an alternative bonding system and a collateral bond. We do not agree. Under SMCRA, each performance bond instrument must be either a surety bond or collateral bond under section 509(b) [582] or an alternative bonding system or self-bond under section 509(c).[583] The alternative bonding system requirements are much more flexible and better-suited to financial assurance instruments than are the collateral bond requirements, as discussed in the preamble to our approval of the financial assurance provisions in the Tennessee federal program.[584]

One commenter expressed the opinion that, because annuities typically make payments at fixed intervals, an annuity, by itself, likely could not guarantee that funds always would be available immediately when needed to continue long-term treatment of a discharge, particularly if unexpected repair or replacement work must be performed without delay to keep the treatment system operational. For that reason, the commenter suggested that we revise our rules to allow use of an annuity only in combination with another mechanism that is able to cover all potential variations in treatment expenses. We did not revise our rules in the manner suggested by the commenter because we do not want to foreclose the possibility that an annuity could be structured to address the situation that the commenter describes. However, we revised the proposed definition of ''financial assurance'' to clarify that a financial assurance is a type of alternative bonding system, which means that it must meet the criteria of final § 800.9(a). Section 800.9(a)(1) provides that the alternative bonding system must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time. Furthermore, final § 800.18 establishes other criteria for financial assurances to ensure the availability of the funds needed for long-term treatment of discharges.

One commenter requested that we clarify whether existing treatment trusts would automatically be reclassified as financial assurances upon publication of this final rule. This rule is not retroactive, so it will not operate as an automatic reclassification of existing treatment trusts as financial assurances. However, nothing in this rule would prohibit the regulatory authority from using the criteria in this rule to reevaluate the adequacy of existing trusts.

Finally, a commenter recommended that we use the term ''trust'' in place of

[582] 30 U.S.C. 1259(b).

[583] 30 U.S.C. 1259(c).

[584] 72 FR 9616, 9618–9619 (Mar. 2, 2007).

''trust fund'' because the trust fund is only a part of a trust. We made the recommended change in the definition of ''financial assurance.''

Section 800.9: What requirements apply to alternative bonding systems?

Section 800.9 sets forth the requirements for creating an alternative bonding system, such as a bond pool or long-term treatment trust. As proposed, final paragraph (a) provides that we may approve an alternative bonding system as part of a state or federal regulatory program if the alternative will assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time, except as provided in paragraphs (c) and (d), and if the alternative provides a substantial economic incentive for the permittee to comply with all reclamation provisions.

We revised and reorganized proposed paragraph (b) to improve clarity and adherence to plain language principles and to avoid creating the impression that financial assurances need not necessarily comply with final section 800.18, which sets forth special provisions that apply to all financial guarantees (including financial assurances) for long-term treatment of discharges. Specifically, final paragraph (b)(1) provides that the alternative bonding system will apply in lieu of the requirements of §§ 800.12 through 800.23 ''with the exception of those provisions of § 800.18 of this part that apply to financial assurances,'' to the extent specified in the regulatory program provisions establishing the alternative bonding system and the terms under which we approved the system. As proposed, final paragraph (b)(2) provides that the alternative bonding system must include appropriate conforming modifications to the bond release provisions of §§ 800.40 through 800.44 and the bond forfeiture provisions of final § 800.50.

Final paragraph (c) provides that an alternative bonding system may be structured to include only certain phases of mining and reclamation under § 800.42, provided that the other phases of mining and reclamation are covered by one of the types of bond listed in § 800.12. Final paragraph (c) differs from proposed paragraph (c) in that we replaced ''forms'' with ''types'' for consistency with revisions to § 800.12.

Proposed paragraph (d)(1) would have prohibited alternative bonding systems from covering restoration of the ecological function of a perennial or intermittent stream through which a permittee mines. One commenter supported the proposed prohibition. Other commenters opposed proposed paragraph (d)(1) for reasons that included an alleged lack of justification, alleged inappropriate meddling in, and unnecessary disruption of, existing alternative bonding systems, and a desire to take advantage of the added security of an alternative bonding system. One commenter noted that the preamble to proposed paragraph (d)(1) provided little information on the time needed to restore the ecological function of a stream and did not explain the statement that the time needed to restore that function makes coverage of that obligation by an alternative bonding system inappropriate. The preamble to the proposed rule states that an alternative bonding system should not be allowed to cover restoration of the ecological function of streams because that cost was not anticipated when the alternative bonding system was established. The commenter did not find this argument compelling because the same rationale would apply to other stream restoration costs that could be covered by alternative bonding systems under the proposed rule. Similarly, the commenter found unpersuasive the statement in the preamble that proposed paragraph (d)(1) was justified because restoration of the ecological function of a stream is the responsibility of the entity doing the mining, not the alternative bonding system. The commenter noted that, under SMCRA, the permittee always is responsible for reclamation obligations, regardless of the nature of those obligations. Overall, the commenter argued that the proposed prohibition had no basis because there are no data to support the conclusion that alternative bonding systems cannot satisfactorily cover the obligation to restore the ecological function of streams.

After considering the arguments raised by commenters, we decided not to adopt proposed paragraph (d)(1). Thus, alternative bonding systems may provide coverage for restoration of the ecological function of a stream unless the state amends the regulations governing its alternative bonding system to provide otherwise. Once reconstruction of the form of the stream and restoration of hydrologic function are achieved, restoration of ecological function likely will involve few, if any, discrete activities or expenditures, with the possible exception of transplanting macroinvertebrates or fish to the re-established stream. As one commenter on the proposed rule observed, restoration of the ecological function of a stream for which the form and hydrologic function have been restored primarily means waiting for the streamside vegetation to mature and provide nutrients, habitat, and thermal regulation to the stream. We agree with that comment, with the exception of situations in which water quality problems resulting from the mining operation exist. In those cases, the permittee would be required to take measures to correct the water quality problem under other provisions of the final rule. Failure to correct the source of any water quality issue would result in the need for long-term treatment, in which case final paragraph (d)(2) would prohibit posting of a self-bond.

Thus, after further consideration, we anticipate that the direct cost of restoring the ecological function of a stream will be minimal, which means that the financial exposure of the alternative bonding system as a result of allowing use of self-bonding to guarantee restoration of ecological function is minimal. In addition, an alternative bonding system is a permanent entity, so the time required to document restoration of ecological function is not an issue. Therefore, we find that allowing an alternative bonding system to provide coverage for restoration of the ecological function of a stream poses little risk to the viability or financial health of the system.

Proposed paragraph (d)(2)(i) prohibited alternative bonding systems from covering long-term treatment of discharges that come into existence after the effective date of this final rule unless, upon discovery of the discharge, the permittee makes a cash contribution to the alternative bonding system in an amount that the regulatory authority determines would be sufficient to cover all future treatment costs. The proposed rule also required that the contribution be maintained in a separate account available only for treatment of the discharge for which the contribution was made.

Proposed paragraph (d)(2)(ii) specified that long-term treatment of discharges that came into existence before the effective date of the rule would continue to be covered by the alternative bonding system unless the state amends its alternative bonding system to provide otherwise. However, proposed paragraph (d)(2)(ii) also required that the permittee make a contribution to the alternative bonding system in an amount sufficient to cover all costs that the alternative bonding system will incur to treat the discharge in perpetuity.

Several commenters alleged that proposed paragraph (d)(2) was confusing because, on one hand, it

prohibited alternative bonding systems from covering long-term treatment of discharges, while, on the other hand, it listed financial assurances, which are a type of alternative bonding system, as an acceptable method of guaranteeing long-term treatment. In response, we revised proposed paragraph (d)(2), which is now paragraph (d)(1) of the final rule, to specify that financial assurances under section 800.18 may be used for long-term treatment of discharges, thus clarifying that the limitations in final paragraph (d)(1) on coverage of long-term treatment of discharges by alternative bonding systems do not apply to financial assurances.

One commenter expressed concern that proposed paragraph (d)(2) did not address either sites for which forfeiture occurs before the applicable regulatory program is amended to implement the final rule or sites for which bond forfeiture occurs after the effective date of the program amendment but before the permittee makes a contribution to the alternative bonding system fully covering the estimated costs of long-term treatment or replaces the alternative bonding system coverage with a collateral bond or financial assurance. The commenter noted that the scope of coverage of an existing alternative bonding system can only be changed through the submission and approval of a regulatory program amendment and even then can only be changed prospectively.

The commenter further expressed concern that proposed paragraph (d)(2)(ii) could allow the elimination of all alternative bonding system coverage of treatment obligations dating back to when the state attained primacy because the proposed rule would require continued coverage under the existing alternative bonding system ''unless the regulatory authority amends its program to specifically establish an earlier effective date.'' According to the commenter, this clause would enable a state to exclude all existing discharges requiring long-term treatment from coverage under the alternative bonding system by specifying the date of approval of the permanent regulatory program for the state as the ''earlier effective date'' to which proposed paragraph (d)(2)(ii) refers.

To cure these perceived defects in the proposed rule, the commenter recommended that the final rule specify that:

- The permittee's treatment obligation remains fully covered by any existing alternative bonding system unless and until a regulatory program amendment implementing section 800.9 takes effect and any existing (*i.e.,* pre-program amendment) coverage under the alternative bonding system is replaced by a sufficient site-specific financial guarantee or contribution.
- The alternative bonding system remains liable for the cost of treating the discharge for as long as necessary if the regulatory authority forfeits the permittee's bond before replacement of coverage occurs.
- The alternative bonding system remains liable for the amount of the shortfall if the permittee's bond, financial assurance, or cash contribution to the alternative bonding system proves adequate to cover only part of the cost of treating the discharge.

We extensively revised proposed paragraph (d)(2) to address the issues that the commenter identified. Paragraph (d)(1) of the final rule that we are publishing today, which is the primary successor to proposed paragraph (d)(2), applies uniform requirements to all discharges regardless of whether the discharge was discovered before or after the effective date of this final rule. Final paragraph (d)(1) provides that a discharge requiring long-term treatment is not eligible for coverage under an alternative bonding system, other than a financial assurance under section 800.18, unless the permittee contributes cash in an amount equal to the present value of all costs that the regulatory authority estimates that the alternative bonding system will incur to treat the discharge for as long as the discharge requires active or passive treatment, taking into account the expenses listed in section 800.18(c)(2)(i) through (v). Final paragraph (d)(1) also provides that, if the alternative bonding system will receive interest or other earnings on the cash contribution, the regulatory authority may deduct the present value of those estimated earnings from the present value of all estimated expenses when calculating the amount of the required cash contribution. Proposed paragraph (d)(2) required submission of a cash contribution ''sufficient'' to cover treatment costs, but it did not define or otherwise explain the meaning of ''sufficient.'' Final paragraph (d)(1) clarifies the meaning of ''sufficient,'' both by specifying the costs that must be included in the calculation and by specifying how those costs are to be used to determine the amount of the cash contribution.

We added paragraph (d)(2) to the final rule in response to the comment summarized above. Final paragraph (d)(2)(i) provides that the regulatory authority must amend an alternative bonding system (other than a financial assurance) that we approved as part of a regulatory program before the effective date of this final rule to specify that any permittee responsible for an existing discharge requiring long-term treatment must provide a cash contribution to the alternative bonding system to cover anticipated future treatment costs if the permittee elects to retain coverage of discharge treatment under the alternative bonding system. Final paragraph (d)(2)(i) differs from proposed paragraphs (d)(2)(i) and (ii) in that it would require use of the state program amendment process under 30 CFR 732.17 to establish the requirement that participants in alternative bonding systems make a cash contribution to the alternative bonding system to cover long-term treatment costs. The proposed rule would have bypassed the state program amendment process and imposed this requirement on all alternative bonding systems as of the effective date of the final rule. We agree with the commenter that use of the state program amendment process is more consistent with the principle of state primacy and part 732 of our regulations.

Final paragraph (d)(2)(ii) provides that an alternative bonding system (other than a financial assurance) that we approved as part of a regulatory program before the effective date of this final rule must continue to provide coverage for long-term treatment of discharges until we approve the program amendment to which final paragraph (d)(2)(i) refers and until the permittee either makes the cash contribution required by the state program counterpart to final paragraph (d)(1) or posts a separate financial assurance, collateral bond, or surety bond to cover treatment costs. Final paragraph (d)(2)(iii) provides that an alternative bonding system (other than a financial assurance) that we approved as part of a regulatory program before the effective date of this final rule must continue to provide coverage for long-term treatment of discharges if the permittee does not make the cash contribution required by the state program counterpart to final paragraph (d)(1), unless the permittee posts a separate financial assurance, collateral bond, or surety bond to cover treatment costs. Final paragraphs (d)(2)(ii) and (iii) should avoid any gap in coverage of discharges that require long-term treatment.

Final paragraph (d)(2)(iv) provides that final paragraphs (d)(2)(i) through (iii) do not apply to an alternative bonding system that we approved as part of a regulatory program if the system that we approved includes an

exclusion for coverage of discharges that require long-term treatment. Under those circumstances, the permittee is already required to provide separate coverage for treatment costs.

We decline to adopt the commenter's recommendation that the rule provide that the alternative bonding system remains liable for the amount of the shortfall if the financial assurance or bond posted by the permittee, or the cash contribution that the permittee makes to the alternative bonding system in lieu of posting a financial assurance or bond, proves inadequate to cover the full cost of treating the discharge. In the case of a cash contribution, the alternative bonding system already is responsible for treatment costs for all covered discharges in the event that the permittee defaults on that obligation. However, when the permittee posts a separate financial assurance or bond, the alternative bonding system would no longer be responsible for treatment costs because it no longer covers that discharge. As specified in final paragraph (d)(3), the alternative bonding system may elect to provide secondary coverage for a discharge covered by a separate financial assurance or bond, but it is not required to do so. It would be neither equitable nor legal to require that the alternative bonding system cover a shortfall for an obligation for which it is has neither provided coverage nor received revenue. If the permittee defaults on a discharge treatment obligation covered by a financial assurance or bond, the bond forfeiture provisions of section 800.50 would apply as they would in the case of default on any other reclamation obligation covered by a conventional bond. However, we anticipate that shortfalls would be rare, given the periodic adequacy reviews and adjustments required by §§ 800.15 and 800.18.

Another commenter observed that one consequence of adopting the proposed prohibition on alternative bonding system (other than financial assurances) coverage of long-term treatment of discharges would be to prevent the regulatory authority from relying on a statewide bond pool or similar mechanism for the limited purpose of bearing certain risks associated with a site-specific financial assurance (trust fund or annuity), such as the unpredicted failure of the treatment system or lower-than-expected returns. According to the commenter, the absence of a secondary risk-bearing mechanism means that the regulatory authority must require site-specific trust funds and annuities to hold conservative, low-risk investment portfolios, which would both reduce the expected rate of return and increase the amount of money that the permittee must deposit to establish the trust fund or annuity. As discussed in the preamble to final section 800.18, we agree with the commenter that site-specific trust funds and annuities should hold conservative, low-risk investment portfolios and we have revised section 800.18 to include that requirement. As discussed above, it would not be equitable to require bond pools and similar communal alternative bonding systems to provide secondary coverage for long-term treatment of discharges from operations that never participated in the alternative bonding system and never provided revenue to the system. However, in response to this comment, we added final paragraph (d)(3), which specifies that an alternative bonding system to which final paragraphs (d)(1) and (2) apply may elect to provide secondary coverage for long-term treatment of discharges when the permittee posts a financial assurance, collateral bond, or surety bond to cover estimated treatment costs instead of making the cash contribution required by paragraph (d)(1) to retain or obtain primary coverage under the alternative bonding system. Final paragraph (d)(3) also provides that the regulatory authority must establish terms and conditions for the secondary coverage to ensure that the coverage is consistent with the financial structure of the alternative bonding system.

One commenter asked why proposed paragraph (d)(2)(i) required that cash contributions for discharges discovered after the effective date of the final rule be in an amount sufficient to cover the cost of treating the discharge ''to meet Clean Water Act standards or the water quality requirements of this chapter,'' while proposed paragraph (d)(2)(ii) required that cash contributions for existing discharges be in an amount sufficient ''to treat the discharge in perpetuity.'' Some commenters opposed the language in proposed paragraph (d)(2)(ii), arguing that not all discharges require perpetual treatment and that the rule should be sufficiently flexible to accommodate advances in science and different treatment horizons.

Final paragraph (d)(1) addresses these concerns by replacing both of the proposed standards for duration of treatment with language requiring use of the cost calculation methodology set forth in section 800.18(c). Final paragraph (d)(1) provides that the amount of the cash contribution to the alternative bonding system must be in an amount equal to the present value of all costs that the regulatory authority estimates that the alternative bonding system will incur to treat the discharge for as long as the discharge requires active or passive treatment, taking into account the expenses listed in § 800.18(c)(2)(i) through (v). Final paragraph (d)(1) further provides that, if the alternative bonding system will receive interest or other earnings on the cash contribution, the regulatory authority may deduct the present value of those estimated earnings from the present value of all estimated expenses when calculating the amount of the required cash contribution. This approach also clarifies the meaning of ''sufficient'' in the proposed rule in a manner consistent with final section 800.18(d) for financial assurances and final section 800.18(c)(2) for collateral bonds and surety bonds posted for this purpose.

We did not adopt the provision in proposed paragraph (d)(2)(i) that would have required that the alternative bonding system place cash contributions in a separate account available only for treatment of the discharge for which the contribution is made. Some commenters alleged that this provision would be inconsistent with state accounting requirements and practices, as well as the pooling principle underlying most alternative bonding systems, other than financial assurances. After considering these arguments, we decided against adoption of the proposed provision because the alternative bonding system remains responsible for treatment of all discharges covered by the system, as well as completion of all other reclamation obligations of participating operations, in the event of permittee default, regardless of the method of accounting.

One commenter alleged that requiring participants in existing alternative bonding systems to make a cash contribution to the system or post separate financial assurances or bonds to cover treatment costs for discharges requiring long-term treatment was unfair because participants in alternative bonding systems have already paid entry fees and continue to pay whatever assessment is required to maintain participation in the system. According to the commenter, the proposed requirement would force participants to pay twice. We do not agree. The regulatory authority should not issue a permit for a proposed operation that would result in a discharge requiring long-term treatment. Therefore, typically, alternative bonding systems, like conventional bonds, are structured on the presumption that no such discharges will occur. If

unanticipated discharges requiring long-term treatment do occur, treatment costs could threaten the viability of the alternative bonding system or require increased assessments on participants with operations that do not result in discharges of that nature. Thus, a requirement that individual permittees bear the cost of treating unanticipated discharges requiring long-term treatment, either by posting a separate financial assurance, collateral bond, or surety bond or by making a cash contribution to the alternative bonding system, is the most equitable arrangement to avoid unfairly burdening other participants in the alternative bonding system. To the extent that an existing alternative bonding system may already require individual payments for future treatment of discharges of that nature, those payments may be deducted from the amount of the cash contribution.

Section 800.10: Information Collection

Section 800.10 pertains to compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* We are adding contact information for persons who wish to comment on these aspects of part 800.

Section 800.11: When and how must I file a performance bond?

Section 800.11 discusses when and how a permit applicant or permittee must file a performance bond. We are adopting section 800.11 as proposed, with one revision. Proposed paragraph (c)(3) required that a permittee using incremental bonding file additional bond or bonds with the regulatory authority to cover each succeeding increment before initiating and conducting surface coal mining operations on that increment. However, proposed paragraph (c)(3) was silent on whether bonds for increments other than the initial increment must comply with proposed paragraph (b), which provided that the bond must be in an amount determined under section 800.14, be on a form prescribed and furnished by the regulatory authority, be made payable to the regulatory authority, and be conditioned upon the faithful performance of all the requirements of the regulatory program and the permit, including the reclamation plan. Section 509(a) of SMCRA [585] requires that performance bonds posted before permit issuance comply with requirements substantively identical to those contained in section 800.11(b) of this final rule. It further states that the permittee must file bonds for future increments ''in accordance with this section.'' Therefore, to ensure consistency with section 509(a) of SMCRA and to correct the ambiguity in the proposed rule, final paragraph (c)(3) provides that the bond or bonds for successive increments must comply with paragraph (b) of this final rule.

Section 800.12: What types of performance bond are acceptable?

In this final rule, we are revising the section heading to refer to the type of performance bond allowed, rather than the form of the bond as in the proposed and previous rules. This revision corrects an error in the proposed and previous rules and removes an inconsistency with section 509(a) of SMCRA,[586] in which the term ''form'' refers to the document that constitutes the bond, not the various types of bonding mechanisms. For the same reason, the final rule replaces the term ''form'' in section 800.12 with ''type'' wherever the former term appeared in the proposed rule.

Similarly, we are not adopting proposed paragraph (a), which corresponds to the first sentence of previous § 800.12. That sentence stated that the regulatory authority must prescribe the form of the performance bond. Section 509(a) of SMCRA does indeed require that the bond be filed ''on a form prescribed and furnished by the regulatory authority,'' but § 800.11(b)(2) of this final rule already includes a counterpart to that requirement and there is no need to repeat it in § 800.12.

One commenter argued that section 800.12 should not include any mention of alternative bonding systems or financial assurances because the section heading refers only to performance bonds and readers might draw the erroneous conclusion that financial assurances are something other than a type of alternative bonding system. We disagree. Section 509 of SMCRA,[587] which contains provisions governing both conventional bonds and alternative bonding systems, is simply entitled ''Performance Bonds.'' Therefore, all types of bonding mechanisms, both conventional and alternative, are considered performance bonds for purposes of section 509 of SMCRA. The heading for § 800.12 of this final rule merely follows the statutory lead. Section 800.12 of this final rule is intended to provide a complete picture of available bonding options under 30 CFR part 800 and section 509 of SMCRA. We revised the definition of ''financial assurance'' in section 800.5 to specify that it is a type of alternative bonding system, so there should be no confusion as to which provisions of part 800 apply to financial assurances.

Final paragraph (a), like paragraph (b) of the proposed rule, lists the types of performance bonds that the regulatory authority may accept; *i.e.,* a surety bond, a collateral bond, a self-bond, or a combination of those types of bond. The final rule differs from the proposed rule in that the final rule replaces ''form'' with ''type'' and updates cross-references. The regulatory authority has the discretion to allow posting of fewer types of bond as part of its approved regulatory program. For example, the regulatory authority may decide not to include self-bonds as an allowable type of bond under its regulatory program.

Final paragraph (b), like proposed paragraph (c), specifies that an alternative bonding system approved under § 800.9 of this rule may accept either more or fewer types of bond than those listed in paragraph (a) of the final rule. Final paragraph (b) differs from proposed paragraph (c) in that the final rule replaces ''form'' with ''type'' and updates cross-references.

Proposed paragraph (d) would have allowed the regulatory authority to accept only a financial assurance or a collateral bond to guarantee treatment of a long-term discharge under § 800.18 of this rule. Several commenters opposed this limitation. One regulatory authority requested that we revise proposed paragraph (d) to also allow the use of surety bonds because the regulatory authority had long relied upon surety bonds for coverage of some discharges requiring long-term treatment. According to the commenter, when a surety bond is forfeited, the surety typically establishes a fully-funded trust rather than paying the bond amount to the state. We confirm that, as stated in the preamble to the proposed rule,[588] surety bonds are not the best means of guaranteeing treatment of postmining discharges because surety bonds are not designed to provide the income stream needed to fund ongoing treatment. However, based on the assertion by the regulatory authority, we have added surety bonds to the list of acceptable instruments for guaranteeing long-term treatment. Paragraph (c) of the final rule, which corresponds to paragraph (d) of the proposed rule, provides that the regulatory authority may accept a financial assurance, collateral bond, or surety bond to guarantee long-term treatment of discharges.

[585] 30 U.S.C. 1259(a).

[586] 30 U.S.C. 1259(a).

[587] 30 U.S.C. 509.

[588] 80 FR 44436, 44533 (Jul. 27, 2015).

One commenter alleged that the proposed rule provides no supporting evidence for provisions that would restrict financially sound companies from using the entire panoply of financial mechanisms, including self-bonding mechanisms consistent with the requirements of section 509(c) of SMCRA.[589] The commenter noted that state and federal bonding regulations require that the regulatory authority examine a company's finances at the time of permit renewal to ascertain if the company continues to qualify to self-bond and that the regulatory authority also may conduct this evaluation as part of the midterm permit review. According to the commenter, these reviews provide sufficient protection to the regulatory authority. We do not agree that the periodic review requirement for self-bonds provides a satisfactory level of assurance that the funds needed for treatment will be available if the permittee ceases treatment. The periodic reviews cited by the commenter may be too late to ensure that a self-bonded company in rapidly deteriorating financial health has either the resources to post the required replacement bond or the ability to complete the reclamation work itself. Under final section 800.23(g), a self-bonded permittee must notify the regulatory authority whenever it no longer meets self-bonding eligibility criteria. The permittee then has 90 days to post a replacement surety or collateral bond. However, a financially distressed company may be unable to obtain replacement bond coverage, especially the large sums required to guarantee long-term treatment of discharges.

In addition, the final rule does not allow posting of a self-bond to cover long-term treatment of discharges because self-bonds provide none of the tangible financial resources afforded by financial assurances, collateral bonds, or surety bonds. Financial assurances provide the income stream needed to fund treatment. Collateral bonds require the deposit of letters of credit, cash accounts, certificates of deposit, bonds, or real property, all of which can be used to fund treatment if the permittee fails to do so. Surety bonds provide a guarantee of payment of a sum certain from an independent company.

Proposed paragraph (e) provided that the regulatory authority may accept only a surety bond, a collateral bond, or a combination thereof to guarantee restoration of the ecological function of a perennial or intermittent stream under proposed §§ 780.28(c), 784.28(c), 816.57(b), and 817.57(b). Many commenters opposed this proposed rule and the underlying requirement to post a bond to guarantee restoration of the ecological function of perennial and intermittent streams through which the permittee mines. The reasons for opposition included uncertainty on how to determine the amount of the bond or the duration of the bond, a belief that the bond amount would be astronomical and financially ruinous, and concerns that this requirement would dry up the remaining sources of surety bonds for the reclamation of coal mines. An organization representing the surety industry noted that a surety bond covering this obligation might not be widely available in the market because, typically, there must be certainty regarding the scope and nature of the obligation and the duration of the obligation must be reasonable. According to the commenter, a surety would have great difficulty underwriting the new obligation because that obligation lacks an objective standard and appears susceptible to wide variability based on circumstances beyond the permittee's control. The commenter further explained that, when underwriting a bond, the surety makes a judgment about the operational and financial viability of the permittee—a judgment that becomes less certain and more risky as the obligation extends further into the future. In this case, according to the commenter, the duration of the obligation would be too long for the surety industry to underwrite.

We recognize that there are uncertainties associated with restoration of the ecological function of streams. We also recognize that some in the surety industry may be unwilling to underwrite bonds for this reclamation obligation. However, surety bonds are not the only available option. Collateral bonds are a possibility under final paragraph (d), as are alternative bonding systems under final § 800.9 in states that have those systems. Once reconstruction of the form of the stream and restoration of hydrologic function have been accomplished, we anticipate that subsequent restoration of ecological function likely will involve few, if any, discrete activities or expenditures, with the possible exception of transplanting macroinvertebrates or fish to the re-established stream.

One commenter on the proposed rule observed that restoration of the ecological function of perennial and intermittent streams, which the permittee must achieve prior to Phase III bond release, primarily means ensuring the performance standards for the streamside vegetation have been satisfied consistent with final section 816.115, ensuring the streamside vegetation has matured sufficiently to provide nutrients, habitat, and thermal regulation to the stream. The commenter is largely correct, because under our regulations most of the physical reconstruction necessary to reestablish the ecological function of the stream will have been completed at earlier phrases. Specifically, pursuant to final section 800.42(b)(1), the *form* of a stream, as defined in final § 701.5, must be restored prior to achieving Phase I bond release, while pursuant to final § 800.42(c)(1)(ii), the *hydrologic function* of the stream must be restored prior to achieving Phase II bond release. Also, prior to achieving Phase II bond release, revegetation, including successfully establishing the streamside vegetative corridor, pursuant to final § 800.42(c)(1)(iii) must occur. For these reasons, the final rule does not require that costs associated with reconstructing the stream channel and floodplain be included in the cost of restoring ecological function; those reconstruction costs are specifically included as part of the costs of some other element of the reclamation plan—most likely the cost of final grading and reestablishment of the surface drainage pattern and stream-channel configuration, which must be accomplished before Phase I bond release. Similarly, the final rule does not require that costs associated with establishment of the streamside vegetative corridor be included in the cost of restoring ecological function, because those costs are specifically included as part of the cost of implementing the revegetation plan approved in the permit, which must identify the type of vegetation and planting techniques required for establishment of streamside vegetative corridors, typical of Phase II bond release.

However, the commenter's point about revegetation should not be taken too far. Compliance with the performance standards for a streamside vegetative corridor is not the only consideration when regulatory authorities assess whether the permittee has restored the ecological function of perennial and intermittent streams. Restoration of ecological function includes restoration of the species richness, diversity, and extent of organisms for which the stream provides habitat, food, water, and shelter. Nonetheless, most of the reclamation work necessary to establish conditions favorable to restoration of

[589] 30 U.S.C. 1259(c).

these organisms will have occurred during Phase I or Phase II reclamation. We thus anticipate that the direct cost of Phase III reclamation, including restoring the ecological function of a perennial or intermittent stream, will be minimal in comparison to those incurred in connection with Phase I and Phase II reclamation. This means in turn that the amount of bond required to guarantee restoration of ecological function should be minimal. The regulatory authority may allow the permit applicant or permittee to post any type of performance bond for reclamation obligations other than restoration of the ecological function of a stream. However, the permit applicant or permittee must post a type of bond other than a self-bond to guarantee restoration of the ecological function of a stream. To be consistent with final § 800.42(c)(2), when determining the amount of bond that should be held to ensure restoration of ecological function, the regulatory authority must consider the amount of work necessary to facilitate restoration. Furthermore, mining companies can avoid this problem entirely if they do not mine through perennial or intermittent streams. Therefore, we are adopting proposed paragraph (e) as paragraph (d) of the final rule. Final paragraph (d), which is substantively identical to proposed paragraph (e), provides that the regulatory authority may accept any type of performance bond listed in paragraph (a) other than a self-bond to guarantee restoration of the ecological function of a perennial or intermittent stream under §§ 780.28(e) and (g), 784.28(e) and (g), 816.57(g), and 817.57(g).

One commenter alleged that eliminating self-bonding for mining through ephemeral streams would severely limit the ability to mine in the Powder River Basin because of the prevalence of self-bonds in that region. Our final rule does not require the restoration of ecological function for ephemeral streams. Therefore, the final rule would not have the effect alleged by the commenter.

Some commenters argued that there is no basis under SMCRA to limit the types of bond that the applicant or permittee may post to cover this obligation. According to another commenter, the preamble to the proposed rule did not justify the exclusion of self-bonds because it did not discuss regulatory authority experience with self-bonds or identify the time required for restoration of ecological function. The implication is that we have not shown that self-bonds cannot satisfactorily guarantee restoration of ecological function.

We do not agree with the commenters' assertion that we have no legal basis under SMCRA to prohibit the use of self-bonds to guarantee restoration of the ecological function of streams. Section 509(b) of SMCRA [590] grants the applicant or permittee the right to post a surety or collateral bond. However, language of section 509(c) of SMCRA [591] differs from that of section 509(b) in that section 509(c) provides that the regulatory authority ''may'' accept a self-bond. The term ''may'' is discretionary, which means that the regulatory authority has the authority to decline to accept a self-bond. In this case, we find it prudent to prohibit the use of self-bonds to guarantee restoration of the ecological function of streams because the requirement is new, the time needed to accomplish restoration of ecological function is uncertain, and there is little industry or other experience available for comparison.

Section 800.13: What is the liability period for a performance bond?

Proposed § 800.13(a)(1) provided that liability under the performance bond will be for the duration of the surface coal mining and reclamation operation and for a period coincident with the period of extended responsibility for successful revegetation under § 816.115 or § 817.115 or until achievement of the reclamation requirements of the regulatory program and the permit, whichever is later. We received no comments on this provision and are adopting it as proposed.

Proposed paragraph (a)(2) provided that, with the approval of regulatory authority, the applicant or permittee may post a performance bond to guarantee specific phases of reclamation within the permit area, provided that the sum of the phase bonds posted equals or exceeds the total amount required under §§ 800.14 and 800.15. We received no comments on this provision and are adopting it as proposed with minor editorial revisions.

Proposed paragraph (b) provided that isolated and clearly defined portions of the permit area that require extended liability may be separated from the original area and bonded separately with the approval of the regulatory authority. Proposed paragraph (b)(1) specified that these areas must be limited in extent and not constitute a scattered, intermittent, or checkerboard pattern of failure, while proposed paragraph (b)(3) provided that the regulatory authority must include any necessary access roads or routes in the area under extended liability. We received no comments on those proposed provisions. For the reasons discussed below, we are adopting proposed paragraph (b)(3) as final paragraph (b)(2). Otherwise, we are adopting paragraph (b) as proposed, with minor editorial revisions.

Proposed paragraph (b)(2) provided that the introductory text of proposed paragraph (b) and proposed paragraphs (b)(1) and (3) apply to the amount of bond posted to guarantee restoration of the ecological function of perennial and intermittent streams. We are not adopting proposed paragraph (b)(2) because it is unnecessary. The introductory text of final paragraph (b) and final paragraphs (b)(1) and (2) have no limitations in terms of applicability. Thus, there is no need to include language that merely identifies one situation (restoration of a stream's ecological function) that may require extended liability under the bond.

Proposed paragraph (c) provided that, if the regulatory authority approves a long-term, intensive agricultural postmining land use, the revegetation responsibility period specified under § 816.115 or § 817.115 will start on the date of initial planting for the long-term agricultural use. We received no comments on this paragraph and are adopting it as proposed.

Proposed paragraph (d)(1) provided that the bond liability of the permittee includes only those actions that the permittee is required to perform under the permit and regulatory program to complete the reclamation plan for the area covered by the bond. We received no comments on paragraph (d)(1) and are adopting it as proposed.

Proposed paragraph (d)(2) provided that the performance bond does not cover implementation of an alternative postmining land use approved under § 780.24(b) or § 784.24(b) when implementation of the land use is beyond the control of the permittee. It also specified that, except as provided in §§ 785.14(b)(11) and 785.16(a)(13), the permittee is responsible only for restoring the site to conditions capable of supporting the approved postmining land use. Upon further evaluation, we determined that proposed paragraph (d)(2) is not consistent with our previous, proposed, and final postmining land use regulations in §§ 816.133 and 817.133, all of which require that the permittee restore all disturbed areas in a timely manner to conditions that are capable of supporting either the uses they were

[590] 30 U.S.C. 1259(b).

[591] 30 U.S.C. 1259(c).

capable of supporting before any mining or higher or better uses. Our postmining land use regulations are based upon section 515(b)(2) of SMCRA,[592] which contains a substantively identical requirement. Two court decisions have held, in a slightly different context, that a requirement to implement the postmining land use is inconsistent with section 515(b)(2) of SMCRA and its legislative history, which only require that the permittee demonstrate the capability of the land to support the postmining land use and demonstrate restoration of premining productivity.[593]

The first sentence of proposed paragraph (d)(2) provided that the bond does not cover implementation of an approved alternative postmining land use that is beyond the control of the permittee. That language is inconsistent with the court decisions summarized above, which, in effect, held that SMCRA does not require that the permittee implement any approved postmining land use, regardless of whether that use is an alternative postmining land use. Therefore, we are not adopting the rule as proposed. The first sentence of final paragraph (d)(2) simply provides that the performance bond does not cover implementation of the approved postmining land use or uses.

For similar reasons, we are not adopting the second sentence of proposed paragraph (d)(2), which provided that the permittee is responsible only for restoring the site to conditions capable of supporting the approved postmining land use. As discussed above, section 515(b)(2) of SMCRA and §§ 816.133 and 817.133 of our final rule require restoration to a condition capable of supporting either the uses it could support before any mining or higher or better uses. Proposed paragraph (d)(2) is less stringent than those provisions because it specifies that the permittee's bond liability is limited to restoration of the land to a condition in which it is capable of supporting the approved postmining land use. Thus, it does not extend bond coverage to full restoration of the site's premining capability, which is, in part, what section 515(b)(2) of SMCRA and §§ 816.133 and 817.133 of our final rule require. In addition, the introductory clause of the second sentence of proposed paragraph (d)(2) created an exception for mountaintop removal mining operations and steep-slope variances from approximate original contour restoration requirements. Sections 515(c)(3) and (e)(2) of SMCRA [594] authorize approval of mountaintop removal mining operations and steep-slope variances only for certain types of postmining land uses, but SMCRA does not require that the permittee actually implement those uses as part of surface coal mining and reclamation operations. Therefore, we are not adopting the introductory clause of the second sentence of proposed paragraph (d)(2) as part of final paragraph (d)(2), which now simply states that the permittee is responsible only for restoring the site to conditions capable of supporting the uses specified in § 816.133 or § 817.133.

Finally, proposed paragraph (d)(4) provided that bond liability for treatment or abatement of long-term discharges is specified in § 800.18. However, while final § 800.18(b) allows the use of collateral and surety bonds to cover long-term treatment of discharges, it focuses on the use of financial assurances for that purpose. Financial assurances are a type of alternative bonding system. Therefore, final paragraph (d)(4) does not include the term ''bond.'' It simply provides that § 800.18 specifies the liability for long-term treatment or abatement of discharges.

Section 800.14: How will the regulatory authority determine the amount of performance bond required?

Proposed § 800.14(a) provided that the regulatory authority must determine the amount of the performance bond required for the permit or permit increment based upon, but not limited to, the requirements of the permit; the probable difficulty of reclamation, giving consideration to the topography, geology, hydrology, and revegetation potential of the permit area and the biological condition of perennial and intermittent streams within the permit and adjacent areas; and the estimated reclamation costs submitted by the permit applicant. Proposed paragraph (a) was substantively identical to previous paragraph (a) with the exception that proposed paragraph (a)(2) added the biological condition of perennial and intermittent streams within the permit and adjacent areas to the list of factors upon which the bond amount must be based. One commenter alleged that this addition would require that the bond cover impacts to adjacent areas, not just the permit area. This was not our intent. Upon reconsideration, we decided not to adopt the added phrase. Paragraph (a)(1), which requires consideration of the requirements of the permit, already covers costs associated with mining through and restoring perennial and intermittent streams, including restoration of the ecological function of those streams, as well as any measures taken to protect streams. Therefore, there is no need for specific mention of the biological condition of perennial and intermittent streams in paragraph (a)(2).

One commenter observed that the term ''probable difficulty of reclamation'' in proposed paragraph (a)(2) is not defined and is otherwise vague. The commenter recommended that we delay adoption of this provision until after we convene a panel of experts to consider this matter and develop the needed factors and methods. We do not agree. Section 509(a) of SMCRA [595] provides that ''[t]he amount of the bond required for each bonded area * * * shall reflect the probable difficulty of reclamation giving consideration to such factors as topography, geology of the site, hydrology, and revegetation potential.'' Previous § 800.14(a)(3) included an equivalent requirement. Calculation of bond amounts under these provisions has rarely been an issue in recent years. In practice, the regulatory authority typically calculates the amount of bond required by determining what it would cost the regulatory authority to complete the reclamation plan in the event of forfeiture. This method indirectly includes consideration of the listed factors. Therefore, we find that convening a panel of experts to flesh out the meaning of this statutory requirement is neither necessary nor an efficient use of resources.

Proposed paragraph (b)(1) provided that the amount of the performance bond must be sufficient to assure the completion of the reclamation plan if the work has to be performed by a third party under contract with the regulatory authority in the event of forfeiture. We received no comments on proposed paragraph (b)(1) and are adopting it as paragraph (b) of the final rule.

We are not adopting proposed paragraph (b)(2), which required that the calculations used to determine the

[592] 30 U.S.C. 1265(b)(2).

[593] *See In re: Permanent Surface Mining Regulation Litigation,* 14 Env't Rep.Cas. (BNA) 1083, 1106 (SMCRA does not require actual grazing or mandatory crop production on the reclaimed area to demonstrate that the land has been restored to a condition in which it is capable for use as pasture land or prime farmland), and 1108 (''The Act only requires an operator to demonstrate a reasonable likelihood of sustaining higher or better use.'' It does not support a requirement for letters of commitment or a firm written commitment from third parties to implement the use.) (D.D.C. Feb. 26, 1980). *see also In re Permanent Surface Mining Regulation Litigation* (Consolidated Action), 620 F. Supp. 1519, 1563 (D.D.C. 1985).

[594] 30 U.S.C. 1265(c)(3) and (e)(2).

[595] 30 U.S.C. 1259(a).

amount of bond required for the permit specifically identify the amount of bond needed to guarantee restoration of the ecological function of a perennial or intermittent stream under proposed §§ 780.28 and 816.57 or proposed §§ 784.28 and 817.57. Proposed paragraph (b)(2) further provided that the permittee must post either a separate bond for that amount or incorporate that amount into the bond posted for the entire permit or increment. Some commenters expressed concern about how to monetize costs for restoring the ecological function of a stream, which, one commenter noted, primarily involves waiting for the streamside vegetative corridor to mature. We agree that restoration of the ecological function of a stream, as opposed to reconstruction of the stream channel and planting of the streamside vegetative corridor, involves few, if any, discrete costs, with the possible exception of transplants of macroinvertebrates and fish. Therefore, we decided not to require a separate calculation of the cost of restoration of the ecological function of a stream.

Proposed paragraph (c) provided that, when the permit includes a variance from approximate original contour restoration requirements under section 785.16, the amount of the performance bond must be sufficient to restore the disturbed area to the approximate original contour if the approved postmining land use is not implemented by the end of the applicable revegetation responsibility period under § 816.115 or § 817.115. We are not adopting proposed paragraph (c) or its counterpart in section 785.16 for the reasons discussed in the preamble to proposed § 785.16(a)(13) and final § 785.16(b)(2). In lieu of proposed §§ 785.16(a)(13) and 800.14(c), final § 785.16(b)(2) provides that a permit that contains a variance from restoration of approximate original contour must include a condition prohibiting the release of any part of the bond posted for the permit until substantial implementation of the approved postmining land use is underway. The prohibition on bond release does not apply to any portion of the bond that is in excess of an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented.

Proposed paragraph (d) provided that the amount of financial assurance required for long-term treatment of discharges must be determined in accordance with section 800.18. Commenters recommended that we apply similar requirements to the determination of the amount of performance bond required when the permittee elects to post a collateral bond or surety bond instead of a financial assurance for this purpose. We agree and have added those bond calculation requirements to final section 800.18(c). We revised proposed paragraph (d) to reference collateral bonds and surety bonds to be consistent with this change. We also redesignated proposed paragraph (d) as final paragraph (c) to reflect our decision not to adopt proposed paragraph (c). Final paragraph (c) provides that the amount of financial assurance, collateral bond, or surety bond required to guarantee long-term treatment of discharges must be determined in accordance with § 800.18.

Proposed paragraph (e) provided that the total performance bond initially posted for the entire area under one permit may not be less than $10,000. Proposed paragraph (f) provided that the permittee's financial responsibility under § 817.121(c) for repairing or compensating for material damage resulting from subsidence may be satisfied by the liability insurance policy required under § 800.60. We received no comments on these proposed paragraphs and are adopting them as proposed, with the exception that we redesignated them as final paragraphs (d) and (e), respectively, to reflect our decision not to adopt proposed paragraph (c).

Section 800.15: When must the regulatory authority adjust the performance bond amount and when may I request adjustment of the bond amount?

Proposed § 800.15 contained procedures and criteria for adjustment of bond amounts after permit issuance. Final § 800.15 is substantively identical to proposed § 800.15, but, in the final rule, we revised and reorganized the paragraphs to improve clarity and to correct an inadvertent error in the proposed rule. With the exception of proposed paragraphs (a)(2)(ii) and (iii), proposed paragraph (a) applied only to situations in which the regulatory authority *must* adjust the bond amount. Proposed paragraph (a)(2)(ii) identified the circumstances under which the permittee *may* request a bond adjustment. To better distinguish between these two scenarios, we are adopting proposed paragraph (a)(2)(ii) as final paragraph (b). Proposed paragraph (a)(2)(iii) provided that the regulatory authority may not use the bond adjustment process to reduce the amount of the performance bond to reflect changes in the cost of reclamation resulting form completion of activities required under the reclamation plan. We are adopting proposed paragraph (a)(2)(iii) as paragraph (d) in the final rule because it applies to both adjustments initiated by the regulatory authority and adjustments initiated by the permittee.

Proposed paragraph (b) provided that the regulatory authority must notify the permittee, the surety, and any person with a property interest in collateral who has requested notification under § 800.21(f) of any proposed adjustment to the bond amount. It also specified that the regulatory authority must provide the permittee an opportunity for an informal conference on the adjustment. We are adopting proposed paragraph (b) as paragraph (e) in the final rule because it applies to both adjustments initiated by the regulatory authority and adjustments initiated by the permittee. We also are adding an introductory clause to final paragraph (e) to clarify that the paragraph sets forth notice and procedural requirements that the regulatory authority must follow before making any bond adjustment.

Proposed paragraph (c) provided that bond reductions under proposed paragraph (a) are not subject to the bond release requirements and procedures of §§ 800.40 through 800.44. We received no comments on this paragraph and are adopting it as proposed, with one conforming revision. Final paragraph (c) refers to bond reductions under paragraphs (a) and (b) to reflect the reorganization discussed above in which we revised proposed paragraph (a) to include just those provisions that pertain only to bond adjustments required by the regulatory authority in final paragraph (a) and moved those provisions of proposed paragraph (a) that pertain only to bond adjustments requested by the permittee to final paragraph (b).

The final rule redesignates proposed paragraphs (d), (e), and (f) as paragraphs (f), (g), and (h), respectively. Proposed paragraph (d) provided that, in the event that an approved permit is revised in accordance with subchapter G, the regulatory authority must review the bond amount for adequacy and, if necessary, require adjustment of the bond amount to conform to the permit as revised. It also included a reminder that the bond adjustment process may not be used to reduce bond amounts on the basis of completion of reclamation activities. We received no comments on proposed paragraph (d), which we are adopting as final paragraph (f), with minor editorial revisions for clarity.

Proposed paragraph (e) provided that the regulatory authority must require that the permittee post a bond or financial assurance in accordance with § 800.18 whenever a discharge that will require long-term treatment is identified. We received no comments on proposed paragraph (d). Final paragraph (g) is substantively identical to proposed paragraph (e), with minor changes to conform to plain language principles and to clarify that the bond must be either a collateral bond or a surety bond.

Proposed paragraph (f) provided that the regulatory authority may not reduce the bond amount when the permittee does not restore the approximate original contour as required or when the reclamation plan does not reflect the level of reclamation required under the regulatory program. We received no comments on proposed paragraph (f), which we are adopting as final paragraph (h).

Section 800.16: What are the general terms and conditions of a performance bond?

We are adopting section 800.16 as proposed. We received no comments on this section.

Previous § 800.17: Bonding Requirements for Underground Coal Mines and Long-Term Coal-Related Surface Facilities and Structures

We removed and reserved previous § 800.17 for the reasons discussed in the preamble to the proposed rule.[596] We received no comments specifically opposing our proposed removal of this section.

Section 800.18: What special provisions apply to financial guarantees for long-term treatment of discharges?

We received a wide range of comments on proposed § 800.18. Some commenters challenged the validity of the proposed rule on legal grounds, while others supported it, sometimes with caveats.

One commenter asked how the length of time that a financial assurance or bond must remain in place under § 800.18, which could be in perpetuity, is consistent with section 509(b) of SMCRA.[597] That section of the Act provides that ''[l]iability under the bond shall be for the duration of the surface coal mining and reclamation operation and for a period coincident with [the] operator's responsibility for revegetation requirements in section 515.'' Section 509(b) establishes a minimum liability period for a bond, not a maximum. Section 509(b) must be read in conjunction with section 519(c)(3),[598] which provides for ''the release of the remaining portion of the bond, but not before the expiration of the period specified for operator responsibility in section 515.'' Section 519(c)(3) further specifies that ''no bond shall be fully released until all reclamation requirements of this Act are fully met.''

One commenter noted that ''trust funds generally are [the] appropriate mechanism for guaranteeing indefinite and variable operation and maintenance expenses and periodic outlays for refurbishing or replacing capital equipment or improvements.'' We agree with this commenter's assessment because trusts are structured to provide the revenue stream needed to fund long-term treatment of discharges.

Another commenter recommended that we use the term ''trust'' in place of ''trust fund'' because the trust fund is only one element of a trust. We revised the rule as recommended.

We discuss other comments below in the context of the specific provisions to which they apply.

Final Paragraph (a): Applicability

Proposed paragraph (a)(1) provided that § 800.18 applies whenever surface coal mining operations, underground mining activities, or other activities or facilities regulated under SMCRA result in a discharge to surface water or groundwater that requires treatment and that continues or may reasonably be expected to continue after the completion of mining, backfilling, grading, and the establishment of revegetation. We received no comments specific to proposed paragraph (a)(1), which we are adopting as final with a few nonsubstantive editorial revisions to improve clarity. Final paragraph (a)(1) provides that § 800.18 applies to any discharge resulting from surface coal mining operations, underground mining activities, or other activities or facilities regulated under SMCRA whenever both the discharge and the need to treat the discharge continue or may reasonably be expected to continue after the completion of mining, backfilling, grading, and the establishment of revegetation. Consistent with proposed paragraph (a)(1), final paragraph (a)(1) also provides that the term ''discharge'' includes both discharges to surface water and discharges to groundwater.

Proposed paragraph (a)(2) provided that § 800.18 also applies whenever information available to the regulatory authority documents that a discharge of the nature described in paragraph (a)(1) will develop in the future, provided that the quantity and quality of the future discharge can be determined with reasonable probability. We are adopting proposed paragraph (a)(2) as final without change.

One commenter urged that final § 800.18 include language clarifying that it does not authorize approval of a permit application for a proposed operation that anticipates creating a discharge for which long-term treatment would be required. The commenter expressed concern that, otherwise, proposed paragraph (a)(2) could be interpreted as allowing approval and issuance of a permit with a predicted discharge of this nature. The commenter notes that approval of a permit application of this nature would be inconsistent with proposed § 773.15(n), which prohibits the regulatory authority from approving a permit application unless it finds that the proposed operation has been designed to prevent discharges requiring long-term treatment.

We agree with the commenter that a permit applicant may not circumvent § 773.15(n) and receive a permit for a site that is predicted to develop a discharge requiring long-term treatment by posting a financial assurance under § 800.18 to cover treatment costs. In response to this concern, we added paragraph (a)(3) to the final rule. That paragraph provides that § 800.18 applies only to discharges that are not anticipated at the time of permit application approval. It further states that nothing in § 800.18 authorizes approval of a permit application for a proposed operation that anticipates creating a discharge for which long-term treatment would be required.

Finally, we are adding paragraph (a)(4) to the final rule as a reminder that, under final § 800.18(g), the regulatory authority must require adjustment of the bond amount whenever it becomes aware of a situation described in paragraph (a)(1) or (2).

Final Paragraph (b): Type of Financial Instruments Allowed

Proposed paragraph (b)(1) provided that, except for permits covered by an alternative bonding system, the permittee must post a financial assurance instrument or a collateral bond to guarantee treatment or abatement of postmining discharges. One commenter opposed adoption of proposed paragraph (b)(1), alleging that ''[t]he record is devoid of any basis for restricting financially sound companies from using the entire panoply of financial mechanisms, including self-

[596] 80 FR 44436, 44537 (Jul. 27, 2015).

[597] 30 U.S.C. 1259(b).

[598] 30 U.S.C. 1269(c)(3).

bonding mechanisms consistent with the requirements of Section 509(c) of SMCRA.'' [599] The commenter noted that state and federal bonding regulations require that the regulatory authority examine a company's finances at the time of permit renewal to ascertain if the company continues to qualify to self-bond. The commenter further noted that the regulatory authority also can review a company's eligibility to self-bond at the time of the midterm permit review. Therefore, according to the commenter, there is neither a legal basis nor a need for proposed paragraph (b)(1).

We do not agree with the commenter that periodic review of a permittee's eligibility to self-bond provides a satisfactory level of assurance that the funds needed for treatment will be available if the permittee ceases treatment. The periodic reviews cited by the commenter may be too late to ensure that a self-bonded company in rapidly deteriorating financial health has either the resources to post the required replacement bond or the ability to complete the reclamation work itself. Under 30 CFR 800.23(g), a self-bonded permittee must notify the regulatory authority whenever it no longer meets self-bonding eligibility criteria. The permittee then has 90 days to post a replacement surety or collateral bond. However, a financially distressed company may be unable to obtain replacement bond coverage, especially the large sums required to guarantee long-term treatment of discharges.

In addition, the final rule does not allow posting of a self-bond to cover long-term treatment of discharges because self-bonds provide none of the tangible financial resources afforded by financial assurances, collateral bonds, or surety bonds. Financial assurances provide the income stream needed to fund treatment. Collateral bonds require the deposit of letters of credit, cash accounts, certificates of deposit, stocks, bonds, or real property, all of which can be used to fund treatment if the permittee fails to do so. Surety bonds provide a guarantee of payment of a sum certain from an independent company.

One regulatory authority requested that we revise the rule to also allow the use of surety bonds because it had long done so with success. As stated in the preamble to the proposed rule,[600] we continue to believe that surety bonds are not the best means of guaranteeing treatment of a postmining discharge because a surety bond is not designed to provide the income stream needed to fund ongoing treatment. However, based on the assertion of successful usage by the regulatory authority for this purpose, we have added surety bonds to the list of acceptable instruments for guaranteeing long-term treatment.

Another commenter suggested that we avoid use of the term ''financial assurance instrument'' because a financial assurance always consists of more than one instrument. At a minimum, according to the commenter, a financial assurance that relies upon a trust will include the indemnity agreement describing the terms of the assurance and the trust agreement governing the trust. We agree with the commenter's recommendation and rationale and revised proposed paragraph (b)(1) accordingly. Final paragraph (b)(1) uses the term ''financial assurance'' in place of ''financial assurance instrument.''

After the revisions discussed above, final paragraph (b)(1) provides that, except for discharges covered by alternative bonding systems other than financial assurances, the permittee must post a financial assurance, a collateral bond, or a surety bond to guarantee treatment or abatement of discharges that require long-term treatment. We replaced the term ''postmining discharges'' in proposed paragraph (b)(1) with ''discharges that require long-term treatment'' to improve clarity and to be consistent with the terminology used elsewhere in our regulations in this context.

Proposed paragraph (b)(2) provided that the amount of a collateral bond posted to guarantee treatment of a discharge must include the cost of treating the discharge during the time required to collect and liquidate the bond and convert the proceeds to a financial instrument that will generate funds in an amount sufficient to cover future treatment costs and associated administrative expenses. We extensively revised proposed paragraph (b)(2) in response to comments and incorporated it as part of final paragraph (c)(2). The preamble to final paragraph (c) discusses the comments received and the revisions made.

Proposed paragraph (b)(3) provided that operations with discharges in states with an approved alternative bonding system must comply with the requirements of proposed § 800.9(d)(2), which pertains to alternative bonding systems other than financial assurances. We received no comments specific to proposed paragraph (b)(3). We are adopting proposed paragraph (b)(3) in revised form as final paragraph (b)(2). We revised this paragraph for consistency with our revisions to section 800.9(d). We also added language to clarify that final paragraph (b)(2) does not apply to financial assurances, consistent with the intent of the proposed rule. Final paragraph (b)(2) provides that operations with discharges in states with an alternative bonding system (other than a financial assurance) approved under subchapter T must comply with the requirements of the applicable alternative bonding system.

Proposed Paragraph (c): Discharge Treatment Standards for Cost Calculation Purposes

Proposed paragraph (c) provided that calculation of the amount of financial assurance or collateral bond required must include the cost of treating the discharge to meet any applicable numerical standards or limits that are in effect at the time that the regulatory authority issues an order requiring posting of a financial assurance or bond, provided that the numerical standards or limits are established in the SMCRA permit, a permit or authorization issued under the Clean Water Act, or regulations implementing the Clean Water Act. Some commenters objected to this provision, alleging that a SMCRA permit cannot establish water quality standards or discharge limits. According to the commenters, only the U.S. Environmental Protection Agency and states with delegated authority under the Clean Water Act have the authority to set water quality standards. Nothing in the proposed rule was intended to imply that the SMCRA regulatory authority may establish water quality standards of the nature specified in the Clean Water Act. Upon further evaluation, we determined that proposed paragraph (c) is unnecessary. Therefore, the final rule does not include it. The regulatory authority will determine when a discharge requires long-term treatment, and we will not attempt to define all potential sources of treatment requirements in this rule.

One commenter on proposed paragraph (c) urged us to allow the use of cost data from the operation of existing water treatment facilities to project likely future costs of long-term treatment of discharges. No rule change is needed because nothing in section 800.18 prohibits the use of data from existing water treatment facilities to predict future treatment costs.

Final Paragraph (c): Calculation of Amount of Financial Assurance or Performance Bond

As discussed above, we did not adopt proposed paragraph (c). Instead, final paragraph (c) specifies how to

[599] 30 U.S.C. 1259(c).

[600] 80 FR 44436, 44533 (Jul. 27, 2015).

determine the amount of financial assurance or performance bond required to guarantee long-term treatment of a discharge. Proposed paragraph (d) already contained provisions governing calculation of the amount of financial assurance required, so final paragraph (c)(1) specifies that, if the permittee elects to post a financial assurance, the regulatory authority must calculate the amount of financial assurance required in the manner provided in final paragraph (d).

As also discussed above, we are adopting proposed paragraph (b)(2) in revised form as final paragraph (c)(2). Final paragraph (c)(2) establishes how the regulatory authority must calculate the amount of collateral bond or surety bond that a permittee electing that option must post. One commenter on proposed paragraph (b)(2) observed that the regulatory authority may not have the legal authority under state law to convert the bond forfeiture proceeds to a financial instrument that will generate funds. According to the commenter, a collateral bond may not be an appropriate mechanism for securing long-term treatment obligations if the applicable state law requires the regulatory authority to deposit bond forfeiture proceeds in an account that earns little or no interest. The commenter recommended that we revise proposed paragraph (b)(2) to provide that, in determining the amount of the collateral bond, the regulatory authority must account for how the moneys obtained by collecting and liquidating the bond will be managed.

We do not agree that a collateral bond may not be an appropriate mechanism for guaranteeing long-term treatment obligations. A collateral bond does not generate a revenue stream for treatment, but that does not matter as long as the permittee continues to treat the discharge and the amount of the bond is sufficient to cover future treatment costs in the event of forfeiture. Nor do we agree with the commenter's recommendation that we revise proposed paragraph (b)(2) to provide that, in determining the amount of the collateral bond, the regulatory authority must account for how the moneys obtained by collecting and liquidating the bond will be managed. Regulatory authorities have extensive experience managing bond forfeitures under SMCRA and we have no reason to believe that they are not capable of managing collateral bonds posted to guarantee long-term treatment of discharges.

Final paragraph (c)(2) requires that the amount of the bond be no less than the present value of the funds needed to pay for treatment of the discharge in perpetuity, together with related administrative, maintenance, renovation, replacement, and land reclamation expenses. In response to the commenter's concerns with respect to bond forfeiture and the handling of bond forfeiture proceeds, we revised our bond forfeiture regulations to clarify that, if the permittee defaults on treatment obligations, the regulatory authority must forfeit an amount of bond that is no less than the estimated total cost of achieving the reclamation plan requirements with respect to the discharge. We also revised our bond forfeiture regulations to specify that the regulatory authority must calculate the estimated total cost of achieving the reclamation plan requirements for long-term treatment of a discharge in a manner consistent with final § 800.18(c). *See* final § 800.50(a)(1)(ii). In addition, final § 800.50(b)(2) requires that the regulatory authority use the funds collected from bond forfeiture to complete the reclamation plan, or the portion of the reclamation plan covered by the bond, on the permit area or increment to which the bond applies. To further address the commenter's concerns, we replaced the phrase ''complete the reclamation plan, or portion thereof,'' in previous § 800.50(b)(2) with ''complete the reclamation plan, or the portion thereof covered by the bond,'' to clarify that the regulatory authority may not choose to ignore any element of the reclamation plan that is covered by the bond.

The commenter also recommended that we revise the provisions governing use of collateral bonds to guarantee long-term treatment to include provisions similar to those that apply to financial assurances under proposed paragraph (d). Most provisions of proposed and final paragraph (d) are specific to financial assurances and, thus, are not suitable for collateral bonds. However, we agree that certain provisions of proposed and final paragraph (d) that govern calculation of the amount of financial assurance that the permittee must post are transferable to determinations of the amount of collateral or surety bond that the permittee must post to ensure future treatment. (As previously discussed, in response to a different comment, we are adding surety bonds to the list of acceptable financial instruments to guarantee long-term treatment of discharges.)

Proposed paragraph (b)(2) envisioned that, after forfeiting a collateral bond, the regulatory authority would ''convert the proceeds to a financial instrument that will generate funds in an amount sufficient to cover future treatment costs and associated administrative expenses.'' As the commenter pointed out, state law may not allow this conversion, which means that the premise in the proposed rule for calculation of the bond amount is not correct. Even in those cases where state law may allow conversion of bond forfeiture proceeds into a financial instrument equivalent to a financial assurance, proposed paragraph (b)(2) did not specify how the regulatory authority must calculate the amount of bond that the permittee must post to be ''sufficient to cover future treatment costs and associated administrative expenses.'' We agree with the commenter that the method of calculation should be consistent with the method prescribed for financial assurances to ensure that the amount posted will be adequate to fully fund future treatment needs and associated costs.

In response to this comment, final paragraph (c)(2) establishes criteria for calculation of the amount of collateral bond or surety bond required. It provides that, if the permittee elects to post a collateral bond or surety bond, the bond amount must be no less than the present value of the funds needed to pay for—

(i) Treatment of the discharge in perpetuity, unless the permittee demonstrates, and the regulatory authority finds, based upon available evidence, that treatment will be needed for a lesser time, either because the discharge will attenuate or because its quality will improve. This paragraph corresponds to the first sentence of final paragraph (d)(1)(i) for financial assurances.

(ii) Treatment of the discharge during the time required to forfeit and collect the bond. This paragraph corresponds to and replaces proposed paragraph (b)(2).

(iii) Maintenance, renovation, and replacement of treatment and support facilities as needed. This paragraph corresponds to final paragraph (d)(1)(ii) for financial assurances.

(iv) Final reclamation of sites upon which treatment facilities are located and areas used in support of those facilities. This paragraph corresponds to final paragraph (d)(1)(iii) for financial assurances.

(v) Administrative costs borne by the regulatory authority. This paragraph corresponds to final paragraph (d)(1)(iv) for financial assurances.

The present value requirement reflects the fact that, unlike financial assurances, collateral and surety bonds do not provide an income stream to offset future treatment costs, nor do they

accrue interest or other earnings that are available to the regulatory authority, so the initial bond amount posted must be adequate to fund all future costs related to long-term treatment of discharges, which is why the rule requires the present value of those expenses as opposed to the net present value.

Final Paragraph (d): Requirements for Financial Assurances

For the reasons discussed below and in the preamble to the proposed rule, we are adopting proposed paragraph (d)(1)(i) as final with minor editorial revisions, the most significant of which replaces ''permit'' with ''permit or permit increment'' in recognition of the fact that permits may be bonded in increments, in which case the provisions of this paragraph apply only to the bond for the permit increment.

Proposed paragraph (d)(1)(i) provided that the trust fund or annuity must be established in a manner that guarantees that sufficient moneys will be available when needed to pay for treatment of discharges in perpetuity, unless the permittee demonstrates, and the regulatory authority finds, based upon available evidence, that treatment will be needed for a lesser time, either because the discharge will attenuate or because its quality will improve. A number of commenters opposed proposed paragraph (d)(1)(i) on the basis that there is insufficient evidence to justify an assumption that discharges will require treatment in perpetuity. We disagree. The preamble discussion of this issue in the proposed rule [601] explains that the prediction of future discharge quality is an imprecise science. This lack of precision and the variability in discharge quality, together with the potentially serious environmental impacts of toxic mine drainage on water quality and aquatic life, justify use of a worst-case scenario when establishing financial assurance requirements to ensure that adequate funds are available.

Some commenters misinterpreted the studies cited in the preamble to proposed paragraph (d)(1)(i). Those studies found that discharge quality improves over time for surface mines and below-drainage underground mines—and even for some above-drainage underground mines. According to the commenters, those studies demonstrate that the need for discharge treatment has an endpoint. However, the studies do not support the commenters' conclusion. While discharge quality improved, it did not necessarily improve to the point that the discharge no longer required treatment.

One commenter objected to the provision in proposed paragraph (d)(1)(i) that placed the burden on the permittee to demonstrate that a discharge will not continue to require treatment in perpetuity. The commenter asserted that the rule should establish the nature and level of proof needed to make that demonstration. We are not aware of any methodology that can reliably predict a precise endpoint for treatment of a particular discharge. Furthermore, section 510(a) of SMCRA [602] provides that the permit applicant ''shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program.'' In addition, including prescriptive provisions of the nature recommended by the commenter might be counterproductive in that they could prevent permittees from taking advantage of innovative technological and scientific advances.

The commenter also asserted that paragraph (d)(1)(i) should expressly state that software packages such as AMD Treat and data from existing water treatment facilities can be used to calculate total treatment costs over time. We see no need to include this statement in the rule. Nothing in the final rule precludes use of either data from existing treatment facilities or the AMD Treat software. However, the software inputs and assumptions must be consistent with the requirements of this final rule. As another commenter noted, the AMD Treat software uses a default value of 75 years for the life of the trust. That default value is inconsistent with this rule, which requires a default value of perpetuity in the absence of a demonstration that a shorter treatment period will be sufficient. We agree with the commenter's observation that spreadsheets can be created that rely upon the same formula as the AMD Treat software, but that replace the 75-year default value when performing the recapitalization cost present value calculations with an assumption that the treatment period will be of infinite duration.

Proposed paragraph (d)(1)(i) also provided that the regulatory authority may accept arrangements that allow the permittee to build the amount of the trust fund or annuity over time, provided that the permittee continues to treat the discharge during that time and the regulatory authority retains performance bonds posted for the permit until the trust fund or annuity reaches a self-sustaining level as determined by the regulatory authority. One commenter alleged that this provision of proposed paragraph (d)(1)(i) implies that the regulatory authority may withhold the release of a surety bond for the permit until a trust or annuity is fully funded. According to the commenter, this action represents a fundamental misunderstanding of surety law because it requires the surety to guarantee the permittee's financial performance, which effectively converts the surety bond to a financial guarantee. The commenter is concerned that this requirement will result in a great deal of difficulty in obtaining surety bonds. The commenter also alleged that the provision runs afoul of §§ 800.13 and 800.14, which, according to the commenter, provide that separate bonds may be written not only for ecological restoration, but for any other specific matter that a surety does not wish to cover.

Final paragraph (d)(1)(i)(B) expressly requires that the regulatory authority retain all performance bonds posted for the permit or permit increment until the trust or annuity reaches a self-sustaining level as determined by the regulatory authority. This provision is a logical implementation of section 509(a) of SMCRA,[603] which requires that the performance bond be conditioned upon ''faithful performance of all the requirements of this Act and the permit.'' Part IX.K.1. of the preamble to the proposed rule contains an extensive explanation of why long-term treatment of discharges is a requirement of SMCRA. *See* 80 FR 44436, 44532–44534 (Jul. 27, 2015). We acknowledge that the rule may decrease the willingness of the surety industry to underwrite performance bonds for the coal mining industry, but both SMCRA and the regulations authorize other types of bonds, such as collateral bonds. We reject the commenter's assertion that § 800.18(d) runs afoul of §§ 800.13 and 800.14, as well as the commenter's allegation that §§ 800.13 and 800.14 authorize separate bonds for any specific reclamation obligation that the surety does not wish to cover. The comment implies that the surety can unilaterally decide that its bond does not cover certain obligations under the permit, which has never been the case under any version of our regulations. The regulatory authority may, but is not required to, accept a bond that covers only certain reclamation obligations under the permit, provided that a different bond covers the other

[601] 80 FR 44436, 44532 (Jul. 27, 2015).

[602] 30 U.S.C. 1260(a).

[603] 30 U.S.C. 1259(a).

reclamation obligations. Final § 800.20 specifies that surety bonds are non-cancellable during their terms.

One commenter recommended that we add the following sentence after the first sentence of proposed paragraph (d)(1)(i): ''If the regulatory authority does not find that treatment will be needed for a lesser time, all calculations of the dollar amount of the financial assurance, or any component of that overall amount, must be based on an infinite treatment period.'' We find that the revision recommended by the commenter is unnecessary because, as proposed, paragraph (d)(1)(i) of the final rule provides that the regulatory authority must calculate the amount needed for the trust or annuity using an assumption that the discharge will require treatment in perpetuity, unless the permittee can demonstrate otherwise.

Proposed paragraph (d)(1)(ii) provided that the trust or annuity must be established in a manner that guarantees that sufficient moneys will be available when needed to pay for maintenance, renovation, and replacement of treatment and support facilities as needed. We are adopting proposed paragraph (d)(1)(ii) as final without change.

One commenter asserted that we should revise proposed paragraph (d)(1)(ii) to require that the financial assurance include a component to account for unpredicted events, including possible catastrophic failure of the treatment system or components of it, because the assumption of a zero risk of premature system failure is unreasonably rosy. According to the commenter, treatment systems, even passive ones, fail more often than we would hope, sometimes catastrophically, and sometimes far earlier than the predicted life cycle of the failed components. The commenter suggested that, in calculating the amount of financial assurance or bond required, the regulatory authority must account for not only predicted events but also the risks posed by unpredicted events, including premature failure of the treatment system or its components. According to the commenter, the regulatory authority may not rely on the permittee to provide additional funding over the long term because there is no guarantee that the permittee will be in existence for the long term.

We are aware of no realistic means of predicting the cost of unpredicted and unpredictable events. Therefore, we are not revising our rules in the manner sought by the commenter. Nothing in section 509 of SMCRA requires that the bond amount include a component for unpredicted events. Instead, section 509(e) of SMCRA and its implementing regulations at 30 CFR 800.15 require that the regulatory authority adjust the bond whenever the cost of future reclamation changes. Section 800.18(f) of the final rule includes similar requirements for financial assurances. Furthermore, final paragraph (f)(1) requires that the regulatory authority conduct an annual review of the adequacy of the trust or annuity and the assumptions upon which the trust or annuity is based. Final paragraph (f)(2) specifies that the regulatory authority must require that the permittee provide additional resources to the trust or annuity whenever the review conducted under paragraph (f)(1) or any other information available to the regulatory authority at any time demonstrates that the financial assurance is no longer adequate to meet the purpose for which it was established. The combination of these two requirements should be sufficient to address the commenter's concerns in most cases.

Proposed paragraph (d)(1)(iii) provided that the trust or annuity must be established in a manner that guarantees that sufficient moneys will be available when needed to pay for final reclamation of the sites upon which treatment facilities are located and areas used in support of those facilities. We received no comments specific to proposed paragraph (d)(1)(iii), which we are adopting it as final without change.

Proposed paragraph (d)(1)(iv) provided that the trust or annuity must be established in a manner that guarantees that sufficient moneys will be available when needed to pay for administrative costs borne by the regulatory authority or trustee to implement paragraphs (d)(1)(i) through (iii). We received no comments specific to proposed paragraph (d)(1)(iv), which we are adopting it as final without change.

Proposed paragraph (d)(2) provided that the regulatory authority must specify the investment objectives of the trust or annuity. One commenter asserted that a financial assurance that is not backstopped by some other form of treatment guarantee must demonstrate that it will be self-sustaining forever to provide a solid guarantee of treatment in perpetuity. The commenter alleged that increasing the risk level of the financial assurance's investment portfolio decreases the likelihood that the financial assurance will be self-sustaining forever. Therefore, according to the commenter, we must revise proposed paragraph (d)(2) to expressly require that a financial assurance hold a conservative, low-risk investment portfolio.

The commenter noted that proposed paragraph (d)(2) did not define ''investment objectives.'' According to the commenter, preceding provisions of proposed § 800.18(d) establish that the primary objective of the trust or annuity is to guarantee treatment of the discharge for as long as necessary, presumptively in perpetuity. Therefore, the commenter reasoned, any subsidiary objectives must serve that primary objective and the composition of the investment portfolio likewise must reflect the primary objective.

The commenter provided additional explanation, which we paraphrase as follows: Risk tolerance is at its lowest when a trust provides the only source of funding for an essential product or service. For example, a trust established to provide funding for a regular course of treatment like kidney dialysis in a setting where there is no secondary mechanism (*e.g.,* health insurance or a charitable hospital) that will provide the treatment if the trust comes up short would have an extremely low tolerance for risk. Three factors make mine drainage treatment trusts or annuities especially intolerant of risk. First, the liabilities they cover are both continuous and perpetual. As in the kidney dialysis example, even temporary interruptions are unacceptable, but the difference is that for the mine drainage trusts, the ''patient'' is assumed to live and need treatment forever. Second, they must supply a firm guarantee; *i.e.,* sufficient treatment funds must be immediately available whenever needed. Third, they must be self-sustaining because the permittees that establish them will not be around forever. By its nature, a guarantee is supposed to eliminate or minimize risk, not invite it. Accepting significant risk of underperformance or failure in exchange for higher potential returns on investment may be a reasonable decision in some circumstances, but not when the assets must provide a guarantee, and especially not when the guarantee is for a perpetual obligation. Greater risk in the investment portfolio also would be acceptable where there is some secondary financial guarantee immediately available to shield the public from the risk. However, the proposed rule would allow the permittee to establish a financial assurance as the lone guarantee of long-term treatment. As a result, according to the commenter, the risk tolerance of the financial assurance is extremely low.

The commenter asserted that proposed paragraphs (d)(2) and (3)

would allow the regulatory authority to specify that a trust invest exclusively in high-risk securities (*e.g.,* junk bonds), as long as it assigned a conservative anticipated rate of return to that high-risk portfolio. The commenter argued that no matter how conservative the predicted rate of return, the high-risk nature of the portfolio would be inappropriate for a financial assurance required to provide a solid guarantee of uninterrupted, perpetual treatment. The commenter recommended that we revise proposed paragraph (d)(2) to provide that the regulatory authority must require that the investment portfolio held by the financial assurance prudently account for (i) the expected duration of the treatment obligation; (ii) the need to provide a guarantee of uninterrupted treatment; and (iii) whether any other financial guarantee covers the treatment obligation. As an alternative, the commenter suggested that we revise proposed paragraph (d)(2) to provide that the regulatory authority must require that the investment portfolio held by the financial assurance prudently account for the risk tolerance of the trust fund or annuity. The commenter further asserted that under both alternatives, the final paragraph (d)(2) must specify that, if the financial assurance will provide the only financial guarantee of treatment, the regulatory authority must require that the financial assurance hold a low-risk investment portfolio.

We concur with the commenter that proposed paragraph (d)(2) is in need of revision for the reasons set forth in the comments submitted, as summarized above. After evaluating the two alternatives that the commenter provided, we determined that the first alternative provides more guidance and is less subjective and easier to understand than the second alternative. Therefore, as the commenter recommended, final paragraph (d)(2) provides that the regulatory authority must require that the investment portfolio held by the financial assurance prudently account for (i) the expected duration of the treatment obligation; (ii) the need to provide a guarantee of uninterrupted treatment; and (iii) whether any other financial guarantee covers the treatment obligation.

We also revised proposed paragraph (d)(2) to eliminate the reference to ''investment objectives.'' As the commenter noted, there is only one primary objective, which is to guarantee treatment of the discharge in perpetuity or for as long as treatment is necessary, as paragraph (d)(1) requires. Instead of simply requiring that the regulatory authority specify the objectives of the trust or annuity, as in proposed paragraph (d)(2), final paragraph (d)(2) establishes criteria for the composition of the investment portfolio to ensure attainment of that objective, as the commenter recommended. Specifically, final paragraph (d)(2) provides that the regulatory authority must require that the investment portfolio held by the trust or annuity prudently account for the expected duration of the treatment obligation, the need to provide a guarantee of uninterrupted treatment, and whether any other financial guarantee covers a portion of the treatment obligation. As the commenter recommended under either alternative, final paragraph (d)(2) also provides that, if the financial assurance will provide the only financial guarantee of treatment, the regulatory authority must require that the trust or annuity hold a low-risk investment portfolio.

Proposed paragraph (d)(3) provided that, in structuring the trust or annuity, the regulatory authority and the permittee must base calculations on a conservative anticipated rate of return on the proposed investments that is consistent with long-term historical rates of return for similar investments. One commenter expressed concern that the proposed rule did not address how the proposed investments would be proposed, reviewed, and approved.

We do not intend for these rules to be overly prescriptive. The regulatory authority may establish additional procedural requirements if it desires to do so, but we do not find that level of detail necessary or appropriate for this rule. Final paragraph (d)(2) establishes the three basic factors that the regulatory authority must consider in reviewing the investment portfolio of the trust fund or annuity; that requirement should be sufficient for purposes of this rule.

The commenter recommended that we revise proposed paragraph (d)(3) to expressly require that determination of the amount that the permittee must post for a trust fund or annuity be based on present value calculations. Present value calculations account for inflation, which means that they are based on real rather than nominal rates of return. According to the commenter, present value calculations also must account for any fees paid to the trustee or manager. The commenter notes that proposed § 800.18 does not specifically mention inflation or management fees and that proposed paragraph (d)(3) does not specify whether the anticipated rate of return to which it refers is real (reflecting adjustments for inflation) or nominal, net (reflecting a reduction for management fees) or gross. The commenter asserted that final paragraph (d)(3) must require that the calculation of the amount of the trust fund or annuity include adjustments for inflation and management fees; *i.e.,* the anticipated rate of return must be both real and net of management fees.

We agree with the commenter. Section 509(a) of SMCRA provides that the amount of a performance bond must be sufficient to assure the completion of the reclamation plan if the regulatory authority has to perform the work in the event of forfeiture. The revisions that the commenter recommends are necessary to ensure that sufficient funds will be available. Under section 509(c) of SMCRA, an alternative bonding system, which includes a financial assurance, must achieve the objectives and purposes of the bonding of the bonding program, of which the provision of section 509(a) described above is one. Therefore, final paragraph (d)(3) provides that, in determining the required amount of the trust or annuity, the regulatory authority must base present value calculations on a conservative anticipated real rate of return on the proposed investments. Final paragraph (d)(3) also specifies that the rate of return must be net of management or trustee fees.

The commenter also opposed the provision of proposed paragraph (d)(3) that would require that the anticipated rate of return used in calculating the amount of a financial assurance be ''consistent with long-term historical rates of return for similar investments.'' The commenter observed that historical rates of return are not necessarily predictive of future rates of return, which means that the only rates of return that matter are those that the investment portfolio will earn in the future. Therefore, the commenter argued, the rule should require use of the best objective forecast of future long-term rates of return on a given class of assets, even if that forecast is significantly below the historical average rate of return. The commenter suggested that we either delete all mention of historical rates of return from paragraph (d)(3) or require that the regulatory authority afford ''whatever consideration is appropriate'' to historical rates of return. We concur with the commenter's arguments against the proposed requirement that the anticipated rate of return be consistent with historical long-term rates of return. Final paragraph (d)(3) does not include that provision.

A commenter expressed concern about how regulatory authorities will determine whether a trust or annuity is fully funded when the trust includes

assets with contingent value; *e.g.,* coal reserves that can be converted to cash only if there is a willing purchaser or lessee. The commenter cited an example in which more than $3 million of a $7 million trust consisted of coal reserves pledged to the trust, but for which a purchaser or lessee never materialized, leaving the trust severely under-funded. Based on this example, the commenter asserted that final § 800.18(d) must ensure that the dollar value assigned to the assets held by a trust or annuity is properly discounted for any contingency. The commenter recommended that final § 800.18 include a provision that financial assurances may only hold assets that are immediately marketable and readily converted into cash. Alternatively, according to the commenter, final § 800.18 could specify that a financial assurance that holds assets that are not immediately marketable or readily convertible into cash may not be considered fully funded until those asserts are converted into either cash or assets that are immediately marketable and readily converted into cash (*i.e.,* until the contingency on their valuation is removed). Finally, the commenter suggested that final section 800.18(d) could include a provision similar to § 800.21(e)(1) governing collateral bonds. That provision draws a distinction between the bond value and the market value of the posted collateral, with the former taking into account the ''legal and liquidation fees, as well as value depreciation, marketability, and fluctuations that might affect the net cash available to the regulatory authority to complete reclamation.''

We agree with the commenter that real estate, including coal reserves, is an inappropriate element of a trust or annuity unless that real estate is of an income-producing nature. However, we see no need to adopt any of the rule changes that the commenter recommends. The investment portfolio criteria that we adopted as part of final § 800.18(d)(2) and the requirement in final § 800.18(d)(3) that the required amount of the trust fund or annuity be based upon present value calculations using a conservative anticipated real rate of return for investments should preclude a recurrence of the example cited by the commenter.

Proposed paragraph (d)(4) provided that the trust or annuity must be in a form approved by the regulatory authority and contain all terms and conditions required by the regulatory authority. One commenter requested that we clarify in the final rule how the trust will hold personal and real property associated with long-term treatment facilities because it will be difficult if not impossible for the trustee to ensure the continuation of treatment operations when the permittee ceases treatment if the trustee is not provided rights to the personal and real property involved. The commenter explained that it had encountered the need to transfer ownership of treatment facilities and equipment to the trustee so that if the permittee ceases to treat water at the site, the trustee can take possession of the personal property needed to continue the treatment operations. The commenter noted that it had seen state regulatory authorities require that permittees transfer treatment equipment to the trustee to hold in the event the trustee needs to take over water treatment. In the commenter's experience, a bill of sale of the treatment equipment to the trustee with a license back to the operator for use in water treatment operations worked successfully. The commenter recommended that we revise the final rule to provide a mechanism whereby the regulatory authority can require the permittee to grant the trustee the real and personal property rights necessary to continue water treatment in the event the permittee goes out of business or ceases water treatment for other reasons.

We agree with the commenter for the reasons set forth in the comment. Final paragraph (d)(4)(ii) provides that, when appropriate, the terms and conditions of the financial assurance must include a mechanism whereby the regulatory authority may require the permittee to grant the trustee the real and personal property rights necessary to continue treatment in the event that the permittee ceases treatment. These rights include, but are not limited to, access to and use of the treatment site and ownership of treatment facilities and equipment.

Proposed paragraph (d)(5) provided that the trust or annuity must irrevocably establish the regulatory authority as the beneficiary of the trust or of the proceeds from the annuity for the purpose of treating mine drainage or other mining-related discharges to protect the environment and users of surface water. We received no comments specific to proposed paragraph (d)(5), which we are adopting as final paragraph (d)(5) with minor editorial revisions.

Proposed paragraph (d)(6) specified that the trust or annuity must provide that disbursement of money from the trust or annuity may be made only upon written authorization from the regulatory authority or according to a schedule established in the agreement accompanying the trust or annuity. We received no comments specific to proposed paragraph (d)(6), which we are adopting as final paragraph (d)(6) with minor editorial revisions.

Proposed paragraph (d)(7) provided that a financial institution or company serving as a trustee or issuing an annuity must be a national bank chartered by the Office of the Comptroller of the Currency, an operating subsidiary of a national bank chartered by the Office of the Comptroller of the Currency, a bank or trust company chartered by the state in which the operation is located, an insurance company licensed or authorized to do business in the state in which the operation is located or designated by the pertinent regulatory body of that state as an eligible surplus lines insurer, or any other financial institution or company with trust powers and with offices located in the state in which the operation is located. With the exception discussed below, we are adopting proposed paragraph (d)(7) as part of the final rule.

One commenter opposed the mandate in proposed paragraph (d)(7)(v) that the financial institution or company be required to have an office located in the state in which the operation is located. According to the commenter, this provision is arbitrary, capricious, and an unconstitutional restraint on interstate commerce. The commenter also alleged that this provision would be an unwise policy choice because not every state that has long-term water treatment issues will have sufficient mine discharge problems for a company to justify the establishment of a physical office in that state. The commenter further alleged that the requirement for an office located in the state does not appear to be reasonably related to the goal of proposed paragraph (d)(7), which is to ensure that only competent and reliable companies are allowed to be trustees. According to the commenter, adoption of proposed paragraph (d)(7)(v) would run counter to this goal because it would likely to make it more difficult for competent and reliable companies that do not happen to have a physical office in a state to serve as a trustee. The commenter suggested that we revise proposed paragraph (d)(7)(v) by replacing the requirement for an office located in the state with a requirement that the company be authorized to do business in the state, have trust powers satisfactory to the regulatory authority, and be examined or regulated by a state or federal agency. We agree with the commenter's arguments and suggested revisions. Final paragraph (d)(7)(v)

incorporates all of the commenter's recommendations.

The commenter further recommended that the final rule clarify that the SMCRA regulatory authority may function as a ''state or federal agency'' under paragraph (d)(7)(v), which provides that the trustee must be a financial institution or company whose ''activities are examined or regulated by a state or federal agency.'' The commenter noted that the SMCRA regulatory authority provides the primary regulatory oversight in every state in which the commenter has established long-term treatment trusts. We decline to adopt this recommendation because final paragraph (d)(7)(v) applies to financial institutions and companies, which the SMCRA regulatory authority has neither the expertise nor the authority to oversee or regulate. However, adoption of this rule will not necessarily interfere with the commenter's operations because the commenter is a not-for-profit organization, which means that it is not subject to final paragraph (d)(7). Instead, it must meet the criteria for not-for-profit organizations under final paragraph (d)(8).

The commenter requested that the final rule clarify that a long-term treatment trust can consist of both a trustee and a separate custodian of the financial assets in the trust. According to the commenter, this approach works well for long-term treatment trusts because it provides an extra level of protection and separation between the purely financial aspects of the trust and management of the other aspects of trusts. We have no objection to this arrangement, but no rule change is necessary because nothing in the final rule prohibits this arrangement.

One commenter noted that adoption of proposed paragraph (d)(7) would prevent a not-for-profit organization from serving as a trustee, even though, at present, at least one such organization is successfully operating as a trustee for discharge treatment trusts. In response, we have added paragraph (d)(8), which provides that the regulatory authority may allow a not-for-profit organization under section 501(c)(3) of the Internal Revenue Code to serve as a trustee if the organization maintains appropriate professional liability insurance coverage and if the regulatory authority determines that the organization has demonstrated the financial and technical capability to manage trust funds and assume day-to-day operation of the trust and treatment facility in the event of a default.

Final paragraph (d)(9) is the counterpart to proposed paragraph (e)(4). A commenter recommended deletion of proposed paragraph (e)(4), which provided that the regulatory authority could terminate a trust or annuity upon a determination that the trustee's administration of the trust or annuity is unsatisfactory to the regulatory authority. According to the commenter, state law and trust instruments can make provision for changing trustees if trust performance is an issue. The commenter explained that termination of the trust may have unintended results, such as triggering disposition of the trust assets outside the trust, which means that they would no longer be available to cover treatment costs. The commenter further explained that trust instruments used by regulatory authorities have provisions for continuing the trust while obtaining a new trustee. Finally, the commenter noted that paragraph (e)(4) does not belong in paragraph (e) because paragraph (e)(4) pertains to replacement of the trustee, while paragraph (e) pertains to termination of the trust.

We concur with the commenter that proposed paragraph (e)(4) was improperly located, but we do not agree that the provision itself should be deleted entirely. We find merit in retaining a provision that requires replacement of the trustee when the regulatory authority determines that the trustee's performance is unsatisfactory. Therefore, while we are not adopting proposed paragraph (e)(4), we are adopting a similar provision as final paragraph (d)(9). Final paragraph (d)(9) provides that the permittee or the regulatory authority must procure a new trustee when the trustee's administration of the trust fund or annuity is unsatisfactory to the regulatory authority.

Final Paragraph (e): Termination of a Financial Assurance Instrument

Proposed paragraph (e) provided that termination of a trust or annuity may have occurred only upon the demise of the trustee or the company issuing the annuity or as specified by the regulatory authority upon a determination that one of the four situations described in paragraphs (e)(1) through (4) exists. Those situations are: (1) No further treatment or other reclamation measures are necessary; (2) a satisfactory replacement financial assurance or bond has been posted in accordance with paragraph (g); (3) the terms of the trust or annuity establish conditions for termination and those conditions have been met; and (4) the trustee's administration of the trust or annuity is unsatisfactory to the regulatory authority, in which case the permittee or the regulatory authority must procure a new trustee.

One commenter recommended that we delete the phrase ''demise of the trustee or the company issuing the annuity'' in the introductory text of proposed paragraph (e) because state law and trust instruments address substitution of trustees in the event of the demise of a trustee and that, thus, there is no need for the rule to address this situation. The commenter explained that, in her experience, a clause terminating the trust upon the demise of the trustee likely would create problems for the regulatory authority because it would terminate the authority of the regulatory authority to keep the assets of the trust within the trust, which means that the regulatory authority would lose the income-generating advantages of the trust. The commenter stated that a trust is intended to be as close to a perpetual instrument as is possible under current law. Therefore, according to the commenter, termination should be limited to situations in which there is no longer any need for the trust. The commenter explained that the trust instruments should cover all other situations. The commenter also asserted that, with respect to annuities, a regulatory authority may run the risk of compromising a claim against the liquidating underwriter of an annuity if the regulatory authority terminates that annuity.

Based on the information and explanation provided by the commenter, we did not include the phrase ''demise of the trustee or the company issuing the annuity'' in the introductory text of final paragraph (e). As previously discussed in the preamble to final paragraph (d)(9), we also are not adopting proposed paragraph (e)(4) because it concerns termination of the trustee rather than the trust. We are adopting paragraphs (e)(1) through (3) as proposed because termination of a trust or annuity under those circumstances is appropriate and will not have any adverse impacts. Final paragraph (e)(1) allows termination when no further treatment or other reclamation measures are necessary. Final paragraph (e)(2) allows termination when a satisfactory replacement financial assurance or bond has been posted. And final paragraph (e)(3) allows termination when the terms of the trust fund or annuity establish conditions for termination and those conditions have been met.

Final Paragraph (f): Regulatory Authority Review and Adjustment of Amount of Financial Assurance

Proposed paragraph (f)(1) provided that the regulatory authority must

establish a schedule for reviewing the performance of the trustee, the adequacy of the trust or annuity, and the accuracy of the assumptions upon which the trust or annuity is based. The proposed rule specified that this review must occur on at least an annual basis. Proposed paragraph (f)(2) provided that the regulatory authority must require that the permittee provide additional resources to the trust or annuity whenever the review conducted under paragraph (f)(1) or any other information available to the regulatory authority at any time demonstrates that the financial assurance is no longer adequate to meet the purpose for which it was established. We received no comments specific to proposed paragraphs (f)(1) and (2), which we are adopting in final form as proposed, with minor editorial revisions.

Final Paragraph (g): Replacement of Financial Assurance

Proposed paragraph (g) provided that a financial assurance may be replaced in accordance with the provisions of § 800.30(a), with the approval of the regulatory authority. We received no comments specific to this paragraph, which we are adopting in final form as proposed.

Final Paragraph (h): Release of Liability

Proposed paragraph (h) provided that release of reclamation liabilities and obligations under financial assurances is subject to the applicable bond release provisions of §§ 800.40 through 800.44. We received no comments specific to this paragraph, which we are adopting in final form as proposed.

Final Paragraph (i): Effect of Financial Assurance on Release of Bond

Proposed paragraph (i) provided that the permittee may apply for, and the regulatory authority may approve, release of any bonds posted for the permit or permit increment for which the regulatory authority has approved a financial assurance under this section, provided that the permittee and the regulatory authority comply with the bond release requirements and procedures in §§ 800.40 through 800.44. The proposed rule specified that this provision applies only if the financial assurance is both in place and fully funded; the permit or permit increment fully meets all applicable reclamation requirements, with the exception of the discharge and the presence of associated treatment and support facilities; and the financial assurance will serve as the bond for reclamation of the portion of the permit area required for postmining water treatment facilities and access to those facilities. We received no comments specific to this paragraph, which we are adopting in final form as proposed, with minor editorial revisions.

Section 800.20: What additional requirements apply to surety bonds?

Section 800.20 implements and fleshes out section 509(b) of SMCRA,[604] which specifies that ''[t]he bond shall be executed by the operator and a corporate surety licensed to do business in the State where such operation is located.'' Proposed paragraph (a) provided that a surety bond must be executed by the permittee and a corporate surety licensed to do business in the state where the operation is located. We received no comments specific to this paragraph, which we are adopting in final form as proposed.

Proposed paragraph (b) provided that surety bonds must be noncancellable during their terms, except that surety bond coverage for undisturbed lands may be cancelled with the prior consent of the regulatory authority. The proposed rule further provided that, within 30 days after receipt of a notice to cancel bond, the regulatory authority will advise the surety whether the bond may be cancelled on an undisturbed area. We received no comments specific to this paragraph, which we are adopting in final form as proposed, with minor editorial revisions. Final paragraph (c) consists of proposed § 800.30(a)(2) in revised form. We are adopting proposed § 800.30(a)(2) as part of final § 800.20 rather than as part of final § 800.30 because it pertains to sureties and, therefore, should apply to all surety bonds, regardless of whether they are proffered as replacement bonds. Proposed § 800.30(a)(2) provided that the regulatory authority may decline to accept a proposed replacement surety bond if, in the judgment of the regulatory authority, the new surety does not have adequate reinsurance or other resources sufficient to cover the default of one or more mining companies for which the surety has provided bond coverage. A few commenters expressed concern about the lack of criteria that the regulatory authority could use in determining whether to reject a surety. Another commenter found this provision problematic because regulatory authorities generally lack the expertise to review reinsurance contracts. According to the commenter, if a state department of insurance has licensed a surety to conduct business, that license should suffice and the regulatory authority should accept the surety bond.

In response to these comments, final § 800.20(c) no longer contains any mention of the adequacy of reinsurance. Our decision not to adopt this proposed provision should not be interpreted as a prohibition on regulatory authorities conducting an analysis of the adequacy of reinsurance if they have the ability to do so. We have instead revised the proposed rule to focus on our primary intent, which was to emphasize that the regulatory authority has the discretion to establish limits on its exposure to a single surety or the default of one or more companies bonded by a single surety.

Final § 800.20(c) provides that the regulatory authority may decline to accept a surety bond if, in the judgment of the regulatory authority, the surety does not have resources sufficient to cover the default of one or more mining companies for which the surety has provided bond coverage. This provision is completely discretionary and the criteria that the regulatory authority would use in deciding whether to accept a surety bond also are totally at the regulatory authority's discretion.

Section 800.21: What additional requirements apply to collateral bonds?

Proposed § 800.21 set forth the requirements that apply to various types of collateral that may be posted as a performance bond. Except as discussed below, we received no comments on proposed § 800.21. We are adopting proposed § 800.21 in final form as proposed, with minor editorial revisions, unless otherwise noted below.

The second sentence of proposed paragraph (b)(2) provided that the regulatory authority must forfeit and collect on a letter of credit used as security in areas requiring continuous bond coverage if the permittee has not replaced the letter with another letter of credit or other suitable bond at least 30 days before the letter's expiration date. According to a commenter with experience in the use of letters of credit as a collateral bond, forfeiture is not necessary because the regulatory authority can draw upon the letter and use the cash received to assure continuous bond coverage without forfeiting the bond. In response to this comment, we revised the second sentence of proposed paragraph (b)(2) and redesignated it as paragraph (b)(4) in the final rule. Final paragraph (b)(4) provides that, if the permittee has not replaced a letter of credit with another letter of credit or other suitable bond at least 30 days before the letter's expiration date, the regulatory authority

[604] 30 U.S.C 1259(b).

must draw upon the letter of credit and use the cash received as a replacement bond.

One commenter urged us to revise proposed paragraph (c) to clarify that, in determining the bond value of real property, the regulatory authority need not accept either the fair market value or the value placed on the property by the mining company, in keeping with previous preamble discussions that accord discretion to regulatory authorities in evaluating real estate posted as a collateral bond. The commenter noted that regulatory authorities have experienced great difficulty in collecting the bond value if a mining company defaults on a collateral bond guaranteed by real estate. She cited two instances in which the liquidation of real estate collateral yielded less than half of the bond value of the collateral. The commenter further explained that the administrative costs of liquidating real estate are high and frequently are accompanied by unanticipated costs such as unpaid taxes, maintenance issues, and the need to maintain insurance on the property. The commenter pointed out that appraisal principles recognize that forced sales will ordinarily not elicit a fair market value for real property because fair market value assumes both a willing buyer and a willing seller who are not under time constraints. Forced sales do not meet those conditions. Therefore, according to the commenter, the regulatory authority must discount the value of real estate posted as a collateral bond to account for administrative costs, property maintenance and insurance costs, and the potential adverse implications of a forced sale. Otherwise, the regulatory authority will not receive the funds necessary to complete reclamation under conditions of forfeiture.

To improve the probability that the regulatory authority will realize the bond value of real property under conditions of forfeiture, we revised proposed paragraph (c) to provide more specific safeguards when the permittee posts real property as a collateral bond. The revisions flesh out final paragraph (e)(1), which provides that the bond value of collateral is not the same as the market value and which requires that the bond value reflect legal and liquidation fees, as well as value depreciation, marketability, and fluctuations that might affect the net cash available to the regulatory authority to complete reclamation. Final paragraph (c)(4) details the meaning of final paragraph (e)(1) in the context of real property.

Specifically, final paragraph (c)(4) provides that the appraised fair market value of real estate, as determined under final paragraph (c)(2)(ii), is not the bond value of the real estate. Under final paragraph (c)(4), the regulatory authority must calculate the bond value of real estate by discounting the appraised fair market value to account for the administrative costs of liquidating real estate, the probability of a forced sale in the event of forfeiture, and a contingency reserve for unanticipated costs including, but not limited to, unpaid real estate taxes, liens, property maintenance expenses, and insurance premiums.

We also revised proposed paragraph (e)(1) in response to comments. Proposed paragraph (e)(1) required that a collateral bond be subject to a margin expressed as a ratio of bond value to market value. One commenter observed that this margin is not a ratio, but rather a premium or additional amount required to cover the costs to liquidate the collateral. The commenter requested that we eliminate the reference to a margin to improve accuracy and adherence to plain language principles. The final rule implements the commenter's recommendation. Final paragraph (e)(1) provides that the bond value (rather than the margin) of the collateral must reflect legal and liquidation fees, as well as value depreciation, marketability, and fluctuations that might affect the net cash available to the regulatory authority to complete reclamation.

Section 800.23: What additional requirements apply to self-bonds?

Under section 509 of SMCRA, a regulatory authority may accept the self-bond of an applicant, where the applicant demonstrates, among other things, a history of financial solvency and continuous operation sufficient for authorization to self-insure (self-bond).[605] The implementing federal regulations at 30 CFR 800.23 establish financial and other criteria for self-bonding as well as other requirements pertinent to self-bonding. Eighteen state regulatory programs allow self-bonding.

We proposed only one substantive revision to previous § 800.23—a revision of paragraph (b)(3)(i) to allow the use of any nationally recognized statistical rating organization registered with the Securities and Exchange Commission in determining eligibility to self-bond, rather than limiting acceptable rating agencies to Moody's Investor Service and Standard and Poor's. We received no comments in opposition to this proposed change, so we are adopting proposed § 800.23 as part of the final rule.

One commenter stated that there is a pressing need to reform the self-bonding rules more comprehensively, particularly in light of the dramatic decline of the western coal industry's financial stability and inadequacy of self-bonds in a time of major coal company bankruptcies. However, the commenter acknowledged that comprehensive changes to § 800.23 are beyond the scope of the present rulemaking. Another commenter urged us to revise § 800.23 to provide that no part of a corporation may qualify for a self-bond if any part of that corporation, including any subsidiary, does not meet the self-bonding eligibility requirements. As discussed below, we intend to address the issues raised by these commenters as part of a separate rulemaking because the proposed stream protection rule did not include or seek comment on changes of the nature that the commenters request.

As discussed in the final RIA and EIS, the energy industry is in the midst of a major transformation. Low domestic and global demand for coal, plentiful low-cost shale gas, the strong U.S. dollar, utility decisions to switch power plants from coal to natural gas, and coal power plant retirements by utilities have created significant challenges for the coal industry. Since the proposed stream protection rule was published in July 2015, several large coal companies with approximately $2.4 billion in self-bonds filed for bankruptcy protection.

On March 3, 2016, WildEarth Guardians filed a petition for rulemaking under 30 CFR 700.12 requesting that we amend our self-bonding regulations at 30 CFR 800.23 to ensure that companies with a history of financial insolvency, and their subsidiary companies, are no longer eligible to self-bond.[606] In its petition, WildEarth Guardians requested that we define ''ultimate parent corporation,'' specify that the total amount of existing and proposed self-bonds may not exceed 25 percent of the ultimate parent corporation's tangible net worth in the United States, require that both the self-bonding applicant and its parent corporation be eligible to self-bond, and prohibit self-bonding if either the applicant or its parent corporation filed for bankruptcy within the 5 years preceding the application to self-bond.

On September 7, 2016, we published a notice in the **Federal Register** granting the petition for rulemaking.[607] The

[605] 30 U.S.C. 1259(a).

[606] See 81 FR 31880–31881 (May 20, 2016).

[607] 81 FR 61612–61615 (Sept. 7, 2016).

notice stated that we do not intend to propose the specific rule changes identified in the petition because those changes did not address important issues such as the process for evaluating applications for self-bonds, monitoring the financial health of self-bonded entities, and providing a mechanism for replacing self-bonds with other types of financial assurances if the need arises. With respect to self-bonding, the notice provided that we anticipate reviewing the definitions in § 800.23(a) and the financial tests and documentation required under § 800.23(b) to ensure that the self-bond applicant is financially stable. The notice committed us to consider developing a systematic review process for ascertaining whether self-bonded entities remain financially healthy and for spotting any adverse trends that might necessitate replacing a self-bond with a different type of financial assurance. We also will consider if we need to provide an independent third party review of the self-bonding entity's annual financial reports and certification of the current and future financial ability of the self-bonding entity. We may propose additional procedures for replacing self-bonds in the event that a company no longer meets the financial tests and to clarify the penalties for an entity's failure to disclose a change in financial status. In addition, the notice stated that we are examining broader regulatory changes to part 800 to update our bonding regulations and ensure the completion of the reclamation plan if the regulatory authority has to perform the work in the event of forfeiture.

Final § 800.4(d) clarifies that regulatory authorities are under no obligation to include the self-bond option in their regulatory programs in the first instance. In addition, on August 5, 2016, the Director of OSMRE issued a policy advisory on self-bonding. The advisory states that ''regulatory authorities have discretion about whether to accept self-bonding,'' even if an applicant or permittee meets applicable eligibility criteria. According to the advisory, ''each regulatory authority should exercise its discretion and not accept new or additional self-bonds for any permit until coal production and consumption market conditions reach equilibrium, events which are not likely to occur until at least 2021.'' Consistent with that guidance, we encourage regulatory authorities to robustly evaluate the financial condition of self-bonded companies and parent or third-party guarantors on a regular basis and require replacement of self-bonds with surety or collateral bonds whenever a self-bonded entity no longer meets the financial or other criteria for self-bonding.

Section 800.30: When may I replace a performance bond or financial assurance and when must I do so?

Proposed paragraph (a) of this section contains requirements pertaining to replacement of performance bonds and financial assurances at the request of the permittee, while proposed paragraph (b) contains requirements pertaining to replacement of performance bonds and financial assurances by order of the regulatory authority. The preamble to proposed § 800.30 contains a discussion of how proposed §§ 800.30 differed from the previous rules.[608] Proposed paragraph (a) used the term ''financial assurance instruments.'' However, a commenter pointed out that it would be more accurate to refer to financial assurances, rather than to financial assurance instruments. We revised paragraph (a) in the manner that the commenter recommended because this paragraph concerns replacement of the entire financial assurance, not just one of the instruments associated with that assurance.

Proposed paragraph (a)(1) provided that the regulatory authority may allow the permittee to replace existing performance bonds and financial assurance instruments with other performance bonds and financial assurance instruments that provide equivalent coverage. We received no comments specific to this paragraph, which we are adopting as proposed, with the exception that final paragraph (a)(1) refers to ''financial assurances'' rather than ''financial assurance instruments'' for the reason discussed above.

Proposed paragraph (a)(2) provided that the regulatory authority may decline to accept a proposed replacement surety bond if, in the judgment of the regulatory authority, the new surety does not have adequate reinsurance or other resources sufficient to cover the default of one or more mining companies for which the surety has provided bond coverage. In this final rule, we moved proposed paragraph (a)(2) to final section 800.20(c) because there is no reason to limit its applicability to replacement bonds. The preamble to final § 800.20(c) discusses the comments that we received on proposed § 800.30(a)(2).

Proposed paragraph (a)(3) provided that the regulatory authority may not release any existing performance bond or financial assurance instrument until the permittee submits, and the regulatory authority approves, an acceptable replacement. We received no comments specific to proposed paragraph (a)(3), which we are adopting without change as final paragraph (a)(2), with the exception that final paragraph (a)(2) refers to a ''financial assurance'' rather than a ''financial assurance instrument'' for the reason discussed above.

Proposed paragraph (b) pertains to replacement of bonds by order of the regulatory authority. We received no comments specific to this paragraph. We are adopting paragraphs (b)(1) and (2) as proposed, with the exception that we revised proposed paragraph (b)(2) to clarify that the notification under § 800.16(e) to which that paragraph refers means a notification from a bank, surety, or other responsible financial entity. We also revised proposed paragraph (b)(3) as discussed below.

Proposed paragraph (b)(3) would have provided that, if the permittee does not post replacement bond or financial assurance coverage within the time established in an order issued under paragraph (b)(2), the regulatory authority must issue a notice of violation to the permittee requiring that the permittee post replacement bond or financial assurance coverage. Proposed paragraph (b)(3) also would have required that the notice of violation order a cessation of coal extraction and initiation of reclamation activities under §§ 816.132 or 817.132 if the permittee was actively conducting surface coal mining operations. However, upon further review, we realized that the proposed rule did not properly convey our intent, which was to require immediate cessation of all surface coal mining operations, not just coal extraction, followed by either posting of replacement bond or permanent reclamation of the site under §§ 816.132 or 817.132. We did not intend to require that the permittee both post a replacement bond or financial assurance and permanently reclaim the site. Therefore, we are not adopting the rule as proposed. Instead, final paragraph (b)(3) provides that, if the permittee does not post adequate bond or financial assurance by the end of the time allowed under final paragraph (b)(2), the regulatory authority must issue a notice of violation requiring that the permittee cease surface coal mining operations immediately. The notice of violation also must require that the permittee either post adequate bond or financial assurance coverage before resuming surface coal mining operations or reclaim the site in accordance with the provisions of §§ 816.132 or 817.132.

[608] 80 FR 44539 (Jul. 27, 2015).

Section 800.40: How do I apply for release of all or part of a performance bond?

Proposed § 800.40 corresponds to previous § 800.40(a). We are adopting § 800.40 as proposed, with the exception of minor editorial changes and the revisions discussed below.

Proposed paragraph (b)(1) required that the bond release application include the application form and information required by the regulatory authority. Final paragraph (b)(1) retains the requirement for an application form, but it further specifies that the application must be made on a form prescribed by the regulatory authority, consistent with other regulations. Specifically, final § 800.12(a) requires that the regulatory authority prescribe the form of the performance bond and final § 777.11(a)(3) requires that a permit application be filed in the format prescribed by the regulatory authority. We are extending this principle to applications for bond release.

Final paragraph (b)(2) is a combination of the part of proposed paragraph (b)(1) that required submittal of ''information required by the regulatory authority'' and the portion of proposed paragraph (b)(2)(vi) that requires a description of the results that the permittee has achieved under the approved reclamation plan and an analysis of the results of the monitoring of groundwater, surface water, and the biological condition of streams conducted under §§ 816.35 through 816.37 or §§ 817.35 through 817.37. In the proposed rule, the latter requirement appeared in paragraph (b)(2)(vi) as one of the elements of the newspaper advertisement. However, after evaluating the comments that we received, we determined that material of this nature is more appropriately considered to be part of the application than part of the newspaper advertisement.

In the final rule, we are adopting proposed paragraph (b)(2) as final paragraph (b)(3) because we divided proposed paragraph (b)(1) into final paragraphs (b)(1) and (2). The introductory text of proposed paragraph (b)(2) required that the application include a certified copy of an advertisement published at least once a week for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. The introductory text also provided that the permittee must submit the copy of the newspaper ad within 30 days after filing the application with the regulatory authority. The introductory text of final paragraph (b)(3) is nearly identical to the introductory text of proposed paragraph (b)(2), with two exceptions. In the first sentence, we replaced the term ''surface coal mining operation'' with ''surface coal mining and reclamation operation'' to reflect the fact that the site for which the application is filed is in reclamation and is no longer an active surface coal mining operation. In the second sentence, we replaced ''application'' with ''application form'' because final paragraph (b)(1) refers to the application form and because the application contains materials other than the form, including the copy of the advertisement required by final paragraph (b)(3), which does not need to be filed at the same time as the application form.

Proposed paragraphs (b)(2)(i) through (vii) required that the newspaper advertisement include the name of the permittee; the permit number and approval date; the number of acres and precise location of the land for which bond release is being requested; the type and amount of the bond filed and the portion for which release is being sought; the type and dates of reclamation work performed; a description of the results that the permittee achieved under the approved reclamation plan and an analysis of the results of the monitoring of groundwater, surface water, and the biological condition of streams conducted under §§ 816.35 through 816.37 or §§ 817.35 through 817.37; and the name and address of the regulatory authority. A few commenters suggested that the content requirements for the newspaper advertisement are excessive and ill-suited for a notice of that nature. According to the commenters, we should instead require that the advertisement refer readers to the location where the bond release application may be reviewed in detail. We acknowledge the merit of the comment, but, in general, we cannot adopt the recommendation because section 519(a) of SMCRA [609] specifically requires that the advertisement contain most of the elements listed in proposed paragraph (b)(2).

One exception is proposed paragraph (b)(2)(iv), which provided that, among the items that the permittee must include in an advertisement published in a local newspaper announcing submission of a bond release application was the type and amount of the bond filed and the portion for which release is sought. However, section 519(a) of SMCRA [610] requires only ''the amount of the bond filed and the portion sought to be released.'' We find that inclusion of the type of bond in the public notice would serve no useful purpose because the notice concerns an application for bond release, not an application for bond replacement. Therefore, final paragraph (b)(3)(iv) does not require that the notice include the type of bond.

Another exception is proposed paragraph (b)(2)(vi),which required that the public notice contain a description of the results achieved under the approved reclamation plan, including an analysis of the results of the monitoring conducted under §§ 816.35 through 816.37 or §§ 817.35 through 817.37. Several commenters opposed this proposed requirement, noting the expense of publishing what could be a very lengthy notice. One commenter asserted that publishing monitoring results might be beyond the capacity of local newspapers. Another commenter observed that the proposed rule did not specify how detailed this analysis should be or who determines what constitutes a sufficient analysis. The commenter recommended that we revise the notice requirement to simply refer readers to the regulatory authority for more information on the analyses. Another commenter urged deletion of proposed paragraph (b)(2)(vi) because the information required by that paragraph is inappropriate and unnecessary for a public notice. The commenter recommended that we move this provision to be a separate element of the bond release application. According to the commenter, this level of analysis is more appropriate for an application than for a public notice.

In response to these comments, we moved most of proposed paragraph (b)(2)(vi) to become part of the bond release application requirements of final paragraph (b)(2), with the level of detail to be determined by the regulatory authority. However, section 519(a) of SMCRA specifically requires that the public notice include ''a description of the results achieved as they relate to the operator's approved reclamation plan.'' Therefore, final paragraph (b)(3)(vi) retains a requirement that the public notice include a brief description of the results achieved under the approved reclamation plan. One commenter expressed concern that a resource issue may exist if the regulatory authority is responsible for determining the detail required for the analysis of monitoring results that the permittee must include in the bond release application. We do not agree. The regulatory authority can establish standard guidelines that all bond release applicants must follow. There is no need for a separate

[609] 30 U.S.C. 1269(a).

[610] 30 U.S.C. 1269(a).

determination of the analytical detail required for each application.

As discussed above, we agree that the information required by proposed paragraph (b)(2)(vi) is more appropriate for inclusion in the bond release application than in a public notice published in a newspaper. However, persons reading the notice should have sufficient contact information for the regulatory authority to enable them to readily make arrangements to review the application. To ensure that the reader has the information needed to make those arrangements, final paragraph (b)(3)(vii) includes a requirement that the public notice identify the location at which the application may be reviewed.

Section 800.41: How will the regulatory authority process my application for bond release?

Proposed § 800.41 corresponds to previous § 800.40(b)(1). We are adopting § 800.41 as proposed, with minor editorial changes to improve clarity. Specifically, we combined proposed paragraphs (a)(1) and (2) into final paragraph (a)(1) and redesignated proposed paragraph (a)(3) as final paragraph (a)(2). We received no comments on this section.

Section 800.42: What are the criteria for bond release?

Proposed § 800.42 corresponds to previous § 800.40(c). We have revised the proposed rule to improve clarity, to conform to other rule changes, and, as discussed below, in response to comments.

Some commenters opposed the proposed changes to our bond release criteria, especially those pertaining to restoring streams, alleging that the changes would create a vague and uncertain timeline for achievement of reclamation, which, in effect, would extend the bonding period, increase the regulatory and financial burden on permittees, decrease the availability of surety bonds, and delay return of full use of the reclaimed land to the landowner. We acknowledge that restoring the ecological function of perennial and intermittent streams as required by the final rule may take longer than the revegetation responsibility period and, thus, may result in a delay in final bond release for some time after the demonstration of revegetation success under § 816.116 or 817.116.[611] However, section 509(a) of SMCRA [612] requires that the bond amount be sufficient to assure completion of the reclamation plan approved in the permit. Stream restoration is part of that plan. Furthermore, permittees that avoid mining through perennial and intermittent streams should not experience these adverse impacts.

Many commenters opposed proposed paragraph (a)(2), which provided that the regulatory authority may not release any bond if, after an evaluation of the groundwater, surface water, and biological condition monitoring data submitted under §§ 816.35 through 816.37 or §§ 817.35 through 817.37, it determines that adverse trends exist that may result in material damage to the hydrologic balance outside the permit area. In general, commenters found the ''adverse trends'' standard in this paragraph to be too vague and undefined. They expressed concern that permittees would not be able to obtain timely bond release if this provision is adopted. One commenter alleged that this provision would give regulatory authorities unwarranted authority to halt the bond release process, with the practical result being that permittees would not be able to secure surety bonds because of the uncertainty involved with a subjective determination of whether adverse trends exist. The commenter noted that some companies are having increasing difficulty securing reclamation bonds because of bonding capacity limits. One regulatory authority noted that, to be defensible, regulatory authority decisions must be based upon known conditions rather than something that might happen. The commenter recommended deletion of this proposed requirement, or, in the alternative, replacement of the ''adverse trends'' standard with a statistically significant degradation standard based upon monitoring data.

Section 519(b) of SMCRA requires that, as part of the evaluation of each bond release application, the regulatory authority consider, among other things, whether ''pollution of surface and subsurface water is occurring, the probability of continuance of future occurrence of such pollution, and the estimated cost of abating such pollution.'' The analysis of monitoring results that proposed paragraph (b)(2) required is a logical extension of this statutory provision. Similarly, except as discussed below, the prohibition in proposed paragraph (b)(2) on the release of bond when the regulatory authority determines, based on a trend analysis of monitoring data, that adverse trends exist that may result in material damage to the hydrologic balance outside the permit area is a rational extension of section 510(b)(3) of SMCRA,[613] which prohibits the approval of a permit application unless the applicant demonstrates and the regulatory authority finds that the proposed operation had been designed to prevent material damage to the hydrologic balance outside the permit area. Release of any bond for an operation that is likely to result in material damage to the hydrologic balance outside the permit area in the future, would be irresponsible because the amount of bond remaining may be insufficient to remedy the problem when it ultimately occurs.

In response to the comments that we received, we revised proposed paragraph (a)(2) to remove the provision prohibiting bond release if the regulatory authority determines that ''adverse trends exist that may result in material damage to the hydrologic balance outside the permit area.'' We agree that ''may result'' is too subjective. Final paragraph (a)(2)(i) requires that the regulatory authority conduct a scientifically defensible trend analysis of the groundwater, surface water, and biological condition monitoring data submitted under §§ 816.35 through 816.37 or §§ 817.35 through 817.37 before releasing any bond amount. Each regulatory authority will determine what type of trend analysis is scientifically defensible. Final paragraph (a)(2)(ii) provides that the regulatory authority may not approve a bond release application if the analysis conducted under final paragraph (a)(2)(i) and other relevant information indicate that the operation is causing material damage to the hydrologic balance outside the permit area or is likely to do so in the future. We did not adopt the statistically significant degradation standard recommended by one commenter because we are not clear as to how such a standard would operate.

Proposed paragraph (a)(3) prohibited the release of any portion of the bond unless and until the permittee posts a financial assurance or collateral bond if a discharge requiring long-term treatment exists either on the permit area or at a point that is hydrologically connected to the permit area. One commenter opposed proposed paragraph (a)(3) based on a belief that surety bonds are not responsible for long-term treatment of discharges. The commenter characterized proposed paragraph (a)(3) as implying that the regulatory authority may forfeit a surety

[611] Karl Williard et al., *Stream-restoration—long term performance: A reassessment*. Final report for the Office of Surface Mining Cooperative Agreement S11AC20024 AS.

[612] 30 U.S.C. 1259(a).

[613] 30 U.S.C. 1260(b)(3).

bond to fund the long-term treatment obligations.

The principle that any type of bond may be forfeited to obtain the funds needed for long-term treatment of discharges has long been official OSMRE policy. See the discussion in the preamble to proposed paragraph (a)(3) at 80 FR 44540 (Jul. 27, 2015). The commenter also alleged that proposed paragraph (a)(3) conflicted with proposed *§* 800.12(d), which provides that the regulatory authority may only accept a financial assurance or collateral bond to guarantee treatment of a long-term discharge. Final section 800.12(c), which corresponds to proposed *§* 800.12(d), allows the use of surety bonds to guarantee long-term treatment of discharges. However, even in the absence of the revision, no conflict exists. Proposed *§* 800.12(d) and its successor, final section 800.12(c), apply to bonds specifically posted for long-term treatment after discovery of an unanticipated discharge, while § 800.42(a)(3) applies to the bond posted at the time of permit issuance or for a successive permit increment, at which time no discharges in need of long-term treatment would have been known or anticipated. However, if an unanticipated discharge requiring long-term treatment develops after permit issuance, the performance bond posted at the time of permit issuance or for a successive permit increment must cover all reclamation obligations, including long-term treatment of unanticipated discharges, unless and until the permittee posts a financial assurance, collateral bond, or surety bond to guarantee discharge treatment under final § 800.18.

Another commenter argued that proposed § 800.42(a)(3) improperly prohibited any bond release if the permittee incurs a long-term discharge treatment obligation. According to the commenter, this absolute prohibition fails to recognize the possibility that more than sufficient bond may be in place on a large mine site with a minimal impact discharge that requires long-term treatment. Final paragraph (a)(3) includes a provision that takes this possibility into account. Final paragraph (a)(3) also applies only to discharges for which the permittee is responsible. While not our intent, proposed paragraph (a)(3) applied to all discharges in need of long-term treatment, regardless of whether the permittee is responsible for the quality of the discharge. Final paragraph (a)(3) provides that a permittee responsible for a discharge that requires long-term treatment, regardless of whether the discharge emerges either on the permit area or at a point that is hydrologically connected to the permit area, must post a separate financial assurance or collateral or surety bond under final § 800.18 before any portion of the existing performance bond for the permit area may be released, unless the type and amount of bond remaining after the release would be adequate to meet the requirements of section 800.18 as well as any remaining land reclamation obligations. We added the reference to the type of bond remaining after the release because final § 800.18 does not allow the use of a self-bond to guarantee long-term treatment of a discharge. Therefore, if the type of bond remaining after the release is a self-bond, final paragraph (a)(3) requires that the permittee replace the self-bond with a financial assurance, collateral bond, or surety bond to provide coverage for long-term treatment.

Proposed paragraph (a)(4) provided that, if the permit area or increment includes a steep-slope variance from restoration of the approximate original contour under § 785.16, the portion of the performance bond described in § 785.16(a)(13) may not be released in whole or in part until the approved postmining land use is implemented or until the site is restored to the approximate original contour and revegetated. However, we did not adopt § 785.16(a)(13) as proposed. Instead, final § 785.16(b)(2) requires that the permit include a condition prohibiting the release of any part of the bond posted for the permit until substantial implementation of the approved postmining land use is underway. The rule specifies that the condition must provide that the prohibition does not apply to any portion of the bond that is in excess of an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented. Therefore, we did not adopt the language that we proposed in § 800.42(a)(4) as part of the final rule.

Instead, final § 800.42(a)(4) provides that, if the permit area or increment includes mountaintop removal mining operations under § 785.14 or a variance from restoration of the approximate original contour under section 785.16, the amount of bond that may be released is subject to the limitation specified in § 785.14(c)(2) for mountaintop removal mining operations or the limitation specified in § 785.16(b)(2) for a variance from restoration of the approximate original contour. We inadvertently omitted a reference to § 785.14 in proposed § 800.42(a)(4), an omission that the final rule corrects. Final § 800.42(a)(4) includes a reference to § 785.14(c)(2) because final §§ 785.14(c)(2) (mountaintop removal mining operations) and 785.16(b)(2) (steep slope variances) contain identical restrictions on bond release, which should be reflected in final § 800.42 for consistency. The rationale for applying final § 800.42(a)(4) to mountaintop removal mining operations is the same as the rationale provided in the preamble to the proposed rule for applying that provision to steep-slope variances. *See* 80 FR 44540 (Jul. 27, 2015). The only difference is that the statutory basis for applying paragraph (a)(4) to mountaintop removal mining operations is section 515(c)(5) of SMCRA,[614] which is substantively identical to the steep-slope variance provisions in section 515(e)(5) of SMCRA.[615]

One commenter observed that proposed paragraph (a)(4) would be especially onerous because reestablishing approximate original contour on a site that was prepared for a postmining land use that requires a different surface configuration would be extremely expensive, much more so than restoration of approximate original contour in the normal course of contemporaneous reclamation. We acknowledge that the cost of restoring a site to approximate original contour after it was originally graded to a different configuration may be high. However, one of SMCRA's fundamental principles is to ensure restoration of the approximate original contour, with limited exceptions.[616] Therefore, we find that final paragraph (a)(4) provides an appropriate safeguard against abuse of the exceptions that SMCRA establishes to facilitate certain postmining land uses. Final paragraph (a)(4) should ensure that permittees propose mountaintop removal mining operations and steep-slope variances only in those situations in which attainment of the underlying postmining land use is certain, rather than speculative.

One commenter suggested that we revise proposed paragraph (a)(4) to allow bond release as soon as implementation of the postmining land use begins. The proposed rule required full implementation of the postmining land use as a precondition to bond release. We agree with the commenter that this approach is too stringent. At the same time, however, we conclude that the approach the commenter recommended is too vague and subject

[614] 30 U.S.C. 1265(c)(5).

[615] 30 U.S.C. 1265(e)(5).

[616] *See* 30 U.S.C. 1265(b)(3).

to abuse. Under such a standard, the regulatory authority could allow bond release after only minimal implementation of the postmining land use, such as posting of a sign announcing a future industrial park, which may or may not come to pass. Instead, final paragraph (a)(4) takes a middle ground. Specifically, we replaced the phrase ''until the approved postmining land use is implemented'' in proposed paragraph (a)(4) with ''until substantial implementation of the postmining land use is underway'' in final paragraph (a)(4). Thus, the final rule requires that substantial implementation be underway before the regulatory authority may approve any bond release for mountaintop removal mining operations under § 785.14 or a site with a variance from restoration of the approximate original contour under § 785.16.

Proposed § 800.42(a)(5) provides that the bond amount described in § 780.24(d)(2) or § 784.24(d)(2) may not be released either until the structure is in use as part of the postmining land use or until the structure is removed and the site upon which it was located is reclaimed in accordance with part 816 or part 817. Sections 780.24(d)(2) and 784.24(d)(2) require that the bond posted for a permit include an amount sufficient to cover the cost of removing mining-related structures (other than roads and impoundments) and reclaiming the land upon which the structures were located to a condition capable of supporting the premining uses, even when the regulatory authority has approved retention of the structure as part of the postmining land use. Otherwise, the risk is too great that the structure will never be used for the postmining land use, that it will deteriorate and become an attractive nuisance, and that no funds will be available for demolition and removal, as we explain the preamble to the proposed rule. *See* 80 FR 44540 (Jul. 27, 2015).

One commenter argued that the final rule must provide additional flexibility for unique property use situations; *e.g.,* situations in which the property owner, sub-lessee, or authorized postmining land user may only be partially using a structure after mine closure as part of the approved postmining land use. According to the commenter, the authorized postmining land user may not have sufficient funding to proceed with complete implementation of the postmining land use before final bond release or implementation of the postmining land use may no longer be economically feasible. Several commenters alleged that the proposed rule could unfairly penalize the permittee for changing economic conditions beyond its control. Another commenter opposed this provision as a possible violation of landowner rights.

We did not revise proposed paragraph (a)(5) in response to these comments because final paragraph (a)(5) does not prohibit bond release in situations in which the structure is only partially in use by the time the remainder of the site is ready for final bond release. Partial use signifies a reasonable probability of future full utilization. We do not agree with the commenter that we should allow retention of the structure if the structure remains unused for financial or economic reasons. Those are prime examples of situations in which structures should not be retained because there is no reasonable certainty of future use. We also do not agree with the comment that final paragraph (a)(5) would violate landowner rights. The structure was built for mining purposes by the mining company. Therefore, the mining company is in a position to structure any agreements with the landowner concerning future use in a manner that takes the requirements of this rule into account.

Proposed paragraph (b) contained the criteria for Phase I bond release. One commenter objected to our proposed addition of language specifying that restoration of the form of perennial and intermittent stream segments that the permittee mines through is part of Phase I reclamation, which consists of backfilling, grading, and establishment of drainage control. According to the commenter, this language unlawfully amends section 519(c)(1) of SMCRA,[617] which authorizes the release of 60% of the reclamation bond for a permit area ''when the operator completes the backfilling, regrading, and drainage control.'' For the same reason, the commenter objected to the proposed requirement to retain sufficient bond after Phase I release to cover restoration of the ecological function of streams and completion of the fish and wildlife enhancement measures required in the permit.

We do not agree with the commenter's rationale. First, restoration of the form of perennial and intermittent streams that the operation mines through is a part of regrading and establishment of drainage control. Second, nothing in section 519 of SMCRA overrides the requirement in section 509(a) of SMCRA [618] that the amount of bond ''be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.'' That requirement applies at all times, including after Phase I bond release.

We are adopting paragraph (b) as proposed, with minor editorial changes and the two revisions discussed in this paragraph. We improved the clarity of final paragraph (b)(1) by specifying that Phase I reclamation includes construction of the postmining drainage pattern and stream-channel configuration required by §§ 816.56(b), 816.57(c)(1), 817.56(b), and 817.57(c)(1). This addition is consistent with the description of Phase I reclamation in section 519(c)(1) of SMCRA, which provides that Phase I reclamation consists of ''backfilling, regrading, and drainage control.'' Construction of the postmining drainage pattern and stream-channel configuration is part of both regrading and drainage control. In addition, final paragraph (b)(2) specifies that the regulatory authority must retain sufficient funds after Phase I bond release to cover restoration of both the hydrologic function and ecological function of perennial and intermittent streams, not just ecological function as in proposed paragraph (b)(2). The addition of hydrologic function is responsive to our revision of proposed paragraph (c) to classify restoration of hydrologic function as part of Phase II reclamation.

Section 800.42(c) establishes criteria for Phase II bond release. Final paragraphs (c)(1) and (2) differ from proposed paragraphs (c)(1) and (2) in several respects, apart from assorted minor editorial revisions. First, final paragraph (c)(1)(i) specifies that redistribution of organic materials is a part of Phase II reclamation, consistent with final § 816.22(f), which requires salvage and redistribution or reuse of most organic materials. Second, final paragraph (c)(1)(ii) provides that Phase II reclamation includes restoration of the hydrologic function of perennial and intermittent streams that the permittee mines through. This revision resolves an ambiguity in the proposed rule, which never specified whether restoration of hydrologic function was a part of restoration of the form of the stream or part of restoration of the ecological function of the stream. Restoration of hydrologic function is not properly classified as a part of Phase I reclamation because it is not necessarily a part of backfilling, regrading, or drainage control. Nor is it properly classified as part of the restoration of the ecological function of a stream because restoration of the hydrologic function is a prerequisite for restoration of the ecological function. Therefore, we

[617] 30 U.S.C. 1269(c)(1).

[618] 30 U.S.C. 1259(a).

decided that restoration of hydrologic function is best classified as part of Phase II reclamation. Third, final paragraph (c)(1)(iii) clarifies that the requirement for successful establishment of revegetation applies to streamside vegetative corridors. We have no reason to believe that proposed paragraph (c)(1)(iii) would have been interpreted differently, but the revision should resolve any questions on that point.

Final paragraphs (c)(3) through (5) contain only minor editorial revisions from their counterparts in the proposed rule. The principal revision is the clarification that final paragraph (c)(4) applies only to prime farmland historically used for cropland. This restriction is consistent with § 785.17(a) of our existing rules.

In the preamble to proposed § 800.42(c), we invited comment on whether we should provide national standards for establishment of vegetation for the purposes of Phase II bond release or whether establishment of standards for this purpose is best left to the regulatory authority, based on local conditions. *See* 80 FR 44541 (Jul. 27, 2015). We received few comments on this question, but those that we did receive generally supported leaving establishment of standards to the regulatory authority. One commenter found establishment of standards unnecessary because §§ 816.116 and 817.116 already establish revegetation success standards in more detail.

We decided to retain the current arrangement in which there are no national standards. Regulatory authorities have established these standards as part of their approved regulatory programs in the past and they will continue to do so. These standards apply only for purposes of determining when revegetation has been successfully established for purposes of Phase II bond release. They differ from the revegetation success standards to which §§ 816.116 and 817.116 apply in that standards developed in compliance with §§ 816.116 and 817.116 include the revegetation responsibility period specified in §§ 816.115 and 817.115 and determine, in part, when the regulatory authority may approve Phase III bond release. The regulatory authority has the discretion to apply identical standards to both Phase II and III bond release, but doing so would have the effect of creating little distinction between Phase II and III bond release. Elimination of this distinction would be inappropriate for a national rule because section 519(c)(2) clearly contemplates a distinction between ''successful reclamation'' for purposes of Phase II bond release and completion of the revegetation responsibility period. The only exception is prime farmland historically used for cropland, in which case, section 519(c)(2) of SMCRA [619] prohibits Phase II bond release until soil productivity for prime farmlands has returned to equivalent levels of yield as non-mined land of the same soil type in the surrounding area under equivalent management practices.

Section 800.42(d) establishes criteria for Phase III bond release. Under final § 700.11(d)(2), Phase III bond release equates to termination of jurisdiction under SMCRA. We are adopting § 800.42(d) as proposed, with minor editorial changes to improve clarity and correct cross-references. We received few comments on proposed paragraph (d). One commenter observed that demonstrating full restoration of the ecological function of a stream segment is difficult to quantify for purposes of Phase III bond release because no clear standards exist. Sections 780.28(g) and 784.28(g) of this final rule require that the regulatory authority establish standards for determining when the ecological function of a perennial or intermittent stream has been restored. The commenter also asked what science or management tools exists to define restoration of ecological function. Sections 780.28(g)(3) and 784.28(g)(3) of this final rule identify, and require use of, the best technology currently available for this purpose. Finally, the commenter inquired as to how this requirement would apply to ephemeral streams. The answer is that this requirement applies only to perennial and intermittent streams that the permittee mines through. It does not apply to ephemeral streams.

Another commenter complained that the proposed rule is not clear regarding the consideration of pre-existing impacts in making a bond release determination. The commenter requested that the final rule clarify that the permittee will not be responsible for pre-existing impacts. The commenter also asserted that we should convene a group of bonding experts and state agencies to discuss the issue of pre-existing conditions and how to best address it during the bond release process. The commenter did not identify any pre-existing impacts or explain what the term means. However, under SMCRA, the permittee is responsible only for impacts resulting from the mining operation. Therefore, we do not see a need to convene a group of experts to discuss this topic.

[619] 30 U.S.C. 1269(c)(2).

Section 800.43: When and how must the regulatory authority provide notification of its decision on a bond release application?

We are adopting § 800.43 as proposed, with minor editorial and organizational changes to improve clarity. We received no comments on this section.

Section 800.44: Who may file an objection to a bond release application and how must the regulatory authority respond to an objection?

We are adopting § 800.44 as proposed, with minor editorial changes to improve clarity. We received no comments on this section.

Section 800.50: When and how will a bond be forfeited?

We are adopting § 800.50 as proposed with the exception of two revisions resulting from comments that we received on proposed § 800.18(b). We received no comments specific to § 800.50.

In response to the comments that we received on proposed § 800.18(b), as discussed in the preamble to § 800.18(b), we revised § 800.50(a)(1) to clarify that, if the amount of bond to be forfeited is less than the total amount of bond posted, the amount forfeited must be no less than the estimated total cost of achieving the reclamation plan requirements. We also revised § 800.50(a)(1) to specify that the regulatory authority must calculate the estimated total cost of achieving the reclamation plan requirements for long-term treatment of a discharge in a manner consistent with final § 800.18(c). *See* final § 800.50(a)(1)(ii). In addition, we revised § 800.50(b)(2) to require that the regulatory authority use the funds collected from bond forfeiture to complete the reclamation plan, or the portion of the reclamation plan covered by the bond, on the permit area or increment to which the bond applies. We replaced the phrase ''complete the reclamation plan, or portion thereof,'' in previous § 800.50(b)(2) with ''complete the reclamation plan, or the portion thereof covered by the bond,'' to clarify that the regulatory authority may not choose to ignore any element of the reclamation plan that is covered by the bond.

Section 800.60: What liability insurance must I carry?

We are adopting § 800.60 as proposed. We received no comments on this section.

Section 800.70: What special bonding provisions apply to anthracite operations in Pennsylvania?

We are adopting § 800.70 as proposed. We received no comments on this section.

L. Part 816—Permanent Program Performance Standards—Surface Mining Activities

Section 816.1: What does this part do?

With the exception of altering the title of this section for clarity, we are finalizing § 816.1 as proposed. We received no comments on this section.

Section 816.2: What is the objective of this part?

We are finalizing § 816.2 as proposed. We received no comments on this section.

Section 816.10: Information Collection

Section 816.10 pertains to compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* We are adding contact information for persons who wish to comment on these aspects of part 816.

Section 816.11: What signs and markers must I post?

We are finalizing § 816.11 as proposed. We received no comments on this section.

Section 816.13: What special requirements apply to drilled holes, wells, and exposed underground openings?

We are finalizing § 816.13 as proposed. We received no comments on this section.

Section 816.22: How must I handle topsoil, subsoil, and other plant growth media?

As discussed in the preamble to the proposed rule,[620] we proposed to modify § 816.22 to require the salvage, protection, and redistribution of all soil materials to restore the site's capability to support the postmining land use and the uses that it supported before mining. After evaluating the comments that we received, we are adopting the section as proposed, with the following explanations and exceptions.

Many comments on proposed § 816.22 also cited or apply to the closely related provisions of proposed § 780.12(e), so we are including some discussion of those provisions here. Proposed § 780.12(e)(1)(i) required that the permit application include a plan and schedule for removal, storage, and redistribution of topsoil, subsoil, and other material to be used as a final growing medium in accordance with § 816.22. Proposed § 780.12(e)(1)(ii) specified that the permit application must include a plan requiring that the B horizon, C horizon, and other underlying strata, or portions thereof, be removed and segregated, stockpiled, and redistributed to achieve the optimal rooting depths required to restore premining land use capability or to comply with the revegetation requirements of §§ 816.111 and 816.116.

Final Paragraph (a): Removal and Salvage

Proposed § 816.22(a)(1) required that the permittee separately remove and salvage all topsoil and other soil materials identified for salvage and use as postmining plant growth media in the soil handling plan approved in the permit under § 780.12(e).

Some commenters claimed that there is no scientific support for the proposition that the recovery and redistribution of all topsoil and subsoil is necessary to achieve reclamation success in all situations. Another commenter alleged that some western soils do not contain multiple soil horizons. According to the commenter, topsoil is typically stripped as one layer down to unsuitable materials (bedrock or unsuitable soils, likely the C horizon). The commenter objected to the requirement to salvage and redistribute soil horizons separately because it would slow topsoil placement and complicate direct placement. The commenter urged us to revise the proposed rule to allow mixing of soil horizons. The commenter also argued that requiring additional segregation of horizons would increase costs, delay reclamation, and hinder long-term success because of increased handling and equipment traffic.

One commenter opposed the proposed requirement to salvage and redistribute all existing topsoil as scientifically and practically unsupported. According to the commenter, salvage and redistribution of topsoil in some areas, such as western North Dakota, would result in construction of a postmining soil that inhibits growth of many types of plants because of the high levels of sodium and other salts in that topsoil.

Another commenter expressed disappointment at the lack of a defined limit to the depths of soil horizons that the permittee must salvage and redistribute to construct a plant growth medium. The commenter explained that, in some regions, the proposed rule would require salvage and redistribution of soil to a greater depth than the previous rule allegedly required. According to the commenter, adoption of the proposed rule could lead to the need to stockpile substantially larger volumes of soil, which would involve added cost, both because of the increased volume of soil materials and because of the requirement to segregate the soil materials by horizon. The commenter noted that, in the Midwest, loess and drift soils can be more than 10 feet thick. The commenter questioned the benefit of salvaging that depth of soil. The commenter suggested that the rule should require the salvage and redistribution of additional topsoil and the B and C horizons only in those regions or states in which greater soil depth is required to establish a suitable plant growth medium.

The commenter further alleged that the rule may pose a problem for mining operations in the Southwest, because topsoil can be less than six inches thick. According to the commenter, the rule should allow the use of a topsoil-subsoil mixture in this situation.

We have made limited revisions to the proposed rule in response to these comments and other related comments on § 780.12(e). Final § 816.22(a)(1)(i), which we proposed as the first sentence of § 816.22(a)(1), no longer requires that soil horizons be separately removed and salvaged. Instead, we have added § 816.22(a)(1)(ii), which provides that the soil handling plan approved in the permit under § 780.12(e) will specify which soil horizons the permittee must separately remove and salvage. It also requires that the plan specify whether some or all of those soil horizons or other soil substitute materials may or must be blended to achieve an improved plant growth medium. The net effect is that the final rule allows for some flexibility in the removal, salvage, and use of topsoil and other soil materials, although it primarily relies upon the requirements for approval of soil substitutes and supplements in § 780.12(e)(2) in determining whether to allow the use of substitutes for existing soil horizons.

We also revised the second sentence of proposed § 816.22(a)(1), which is now final § 816.22(a)(1)(iii). We added an introductory phrase specifying that the requirement to complete removal and salvage of all soil materials before any drilling, blasting, mining, or other surface disturbance takes place in the area that is to be disturbed may be waived in the soil handling plan approved in the permit under final rule § 780.12(e). This change acknowledges the fact that in some cases where soil substitutes are approved for use in place

[620] 80 FR 44436, 44542–44543 (Jul. 27, 2015).

of the existing topsoil or subsoil, the substitute materials may not be available for salvage until later in the mining process. However, we do not anticipate that this situation will be commonplace.

In addition, as discussed in the preamble to § 780.12(e), we have revised the proposed requirements for soil handling plans in permit applications. Final § 780.12(e)(1)(ii) differs slightly from the proposed in that the final rule requires separate removal, stockpiling (if necessary), and redistribution of the B and C soil horizons and other underlying strata only ''to the extent and in the manner needed'' to achieve the optimal rooting depths required to restore premining land use capability and to comply with revegetation requirements. It does not require salvage and redistribution of ''all'' of those soil horizons and overburden strata.

New final § 780.12(e)(1)(iii) provides that the plan need not require salvage of soil horizons that the permittee demonstrates, to the satisfaction of the regulatory authority, are inferior to other soil horizons or overburden materials as a plant growth medium, provided that the permittee complies with the soil substitute requirements of paragraph (e)(2). We added this language in response to comments objecting to the proposed requirement for salvage, segregation, and redistribution of soil horizons when one or more of those horizons have physical or chemical characteristics that make them inferior to other overburden materials in creating a medium conducive to plant growth. We made this change in response to comments urging us to allow blending of soil horizons when experience has demonstrated that doing so results in a superior growing medium.

In response to comments supporting the blending of soil horizons, we added § 780.12(e)(1)(iv), which allows blending of the B horizon, C horizon, and underlying strata, or portions thereof, to the extent that research or prior experience under similar conditions has demonstrated that blending will not adversely affect soil productivity. In other words, blending of subsoil horizons does not require approval in accordance with the soil substitute and supplement requirements of paragraph (e)(2). However, any proposal to blend topsoil with other soil horizons must be approved as a topsoil substitute or supplement under paragraph (e)(2). We find that topsoil merits extra consideration because, in most areas, topsoil is uniquely valuable as a plant growth medium, with a structure and ecology that is difficult to restore or replicate.

Several commenters objected to the application of these requirements nationwide because, according to the commenters, salvage and redistribution of soil materials other than topsoil is only necessary to address conditions found in the Appalachian Region. One commenter alleged that the preamble to the proposed rule provided no rationale for the nationwide application of the rule except a research report from Appalachia and a guide to the reclamation of borrow sites used for transportation facilities in Alberta, Canada. According to the commenter, these two documents clearly do not represent the vast majority of mined and reclaimed lands throughout the United States. The commenter further alleges that the preamble fails to evaluate or discuss the postmining productivity of reclaimed lands on the tens of thousands of acres of mined and reclaimed land outside Appalachia where no subsoil has been salvaged.

We do not agree with these comments. A suitable growth medium, including an adequate root zone, is essential to establishing successful vegetation and demonstrating restoration of premining land use capability in every region. In those relatively rare cases in which restoration of a particular ecological community requires a shallow root zone or other specialized soil condition, § 816.22(e)(1)(v) authorizes variations in the depth of soil redistribution. See 71 FR 51684–51688 (Aug. 30, 2006) for an extensive discussion of this topic. Otherwise, as explained in the preamble to our proposed rule, scientific studies have determined that an adequate root zone is critical to plant growth and survival, and that topsoil alone typically does not provide an adequate root zone. See 80 FR 44436, 44488–44489 (Jul. 27, 2015). These studies, which are not limited to Appalachia, document that salvage and redistribution of topsoil alone will not necessarily restore the mine site to a condition in which it is capable of supporting the uses that it was capable of supporting before any mining, as required by section 515(b)(2) of SMCRA,[621] nor will it necessarily support the postmining land use. Therefore, salvage and redistribution of subsoil and other soil materials typically will be necessary to meet the requirements of section 515(b)(2) of SMCRA.

The Alberta publication to which the commenter refers contains a particularly cogent explanation of the importance of subsoil and an adequate root zone. We summarized that explanation in the preamble to the proposed rule, but it bears repeating here:

> Plant roots extend through the topsoil into the subsoil (root zone), which provides a substantial proportion of the plant's nutrient requirements. For example, field studies have shown that between 45 percent and 65 percent of nitrogen available to plants from the soil lies below a depth of 6 inches. During dry summer weather, many plants, especially deep-rooted plants like alfalfa and most trees, depend for their survival on moisture available in the subsoil. Alfalfa extracts 55 percent of its moisture requirements from soil materials deeper than one foot and is capable of extracting water from subsoil up to 6 feet in depth. Even medium-rooted crops like wheat and corn extract up to 40 percent of their moisture requirements from soil materials deeper than one foot. Finally, many plants depend on root penetration well into the subsoil for physical support, especially where topsoil is thin. If plant roots are unable to penetrate deeply into a reclaimed subsoil, soil capability for plant growth will be degraded.[622]

Alfalfa, corn, and wheat are widely grown crops, so the fact that this information appears in an Alberta publication in no way compromises its applicability throughout the coalfields.

Finally, the commenter did not provide references to studies on the postmining productivity of reclaimed lands outside Appalachia where no subsoil has been salvaged, and we are not aware of studies or data on this topic.

One commenter recommended that we revise proposed § 816.22(a)(1), which is now final § 816.22(a)(1)(iii), by removing the reference to drilling. According to the commenter, drilling may be necessary to install power poles and fence posts, the installation of which paragraph (a)(2)(i) exempts from soil salvage and removal requirements. We accepted this recommendation and made other revisions to the proposed rule to ensure consistency with final § 780.12(e) and other provisions of final § 816.22. Final paragraph (a)(1)(iii) now provides that, except as provided in the soil handling plan approved in the permit under § 780.12(e), the permittee must complete removal and salvage of topsoil, subsoil, and organic matter before any mining-related surface disturbance takes place on that area, other than the minor disturbances identified in paragraph (a)(2).

One commenter requested that we revise proposed paragraph (a)(2)(i) by

[621] 30 U.S.C. 1265(b)(2).

[622] 80 FR 44436, 44488–44489 (Jul. 27, 2015), citing Alberta Transp., *Alberta Transportation Guide to Reclaiming Borrow Excavations,* pp. 5–6 (Dec. 2015).

adding monitoring wells to the list of small structures that are considered minor disturbances and thus are exempt from the requirement to remove and salvage topsoil and other soil materials. According to the commenter, the extent of disturbance caused by the construction of monitoring wells is similar to the extent of disturbance caused by the construction of power poles, signs, and fence lines. We agree with this rationale and the commenter's recommendation. Final paragraph (a)(2)(i) provides that the removal and salvage of topsoil and other soil materials in advance of minor disturbances that occur at the site of small structures, such as power poles, signs, monitoring wells, or fence lines, is not necessary.

In addition, we restructured proposed paragraph (a)(2) to automatically exempt minor disturbances that meet the criteria of either paragraph (a)(2)(i) or paragraph (a)(2)(ii) from soil salvage requirements unless the regulatory authority specifies otherwise. Proposed paragraph (a)(2), like the previous rules, required affirmative regulatory authority approval as a prerequisite for exemption from the soil salvage requirements. This change will reduce burdens on both the permittee and the regulatory authority without any danger of environmental harm. Only very minor soil losses will occur from the construction of small structures like power poles, fence lines, signs, or monitoring wells under paragraph (a)(2)(i), while there will no soil loss at all under paragraph (a)(2)(ii), which applies only to activities that will not destroy the existing vegetation and will not cause erosion.

Final Paragraph (b): Handling and Storage

We revised proposed paragraph (b)(1) for clarity and consistency with other provisions of this section and § 780.12(e) concerning segregation of soil materials. Final paragraph (b)(1) now includes a new first sentence requiring that the permittee segregate and separately handle the materials removed under paragraph (a) to the extent required in the soil handling plan approved in the permit pursuant to § 780.12(e). Proposed paragraph (b)(1) required segregation of all soil materials, but final §§ 780.12(e) and 816.22 provide exceptions to that requirement under certain circumstances.

We received a number of comments on the provision in proposed paragraph (b)(2)(iii) requiring that stockpiled material ''[b]e protected from wind and water erosion through prompt establishment and maintenance of an effective, quick-growing, non-invasive vegetative cover or through other measures approved by the regulatory authority.'' One commenter alleged that many non-native, non-invasive plants can do a better job of protecting the stockpiles than native vegetation and suggested that we allow their use. Other commenters argued that it will be impossible to keep common non-native plants from colonizing the stockpiles. Another commenter noted that it may be impossible to keep stockpiles free of non-invasive species because stockpiles are often configured in a way that makes mowing, a common method of controlling non-invasive species, impractical.

We did not revise the proposed rule in response to these comments because we find that the rule already accommodates the commenters' concerns. When the permittee selects the vegetative cover method of controlling erosion, final paragraph (b)(2)(iii) requires the use of a ''non-invasive vegetative cover,'' which could include non-native plants that are non-invasive. Nothing in this paragraph would prohibit or require the control or eradication of volunteer non-native, non-invasive species that colonize the stockpiles. Finally, mowing is not the only means of controlling invasive species, nor is it necessarily the most effective. The permittee has the flexibility to implement other accepted control techniques when mowing is not practical. Finally, in the event that it is difficult or impossible to establish and maintain an effective, quick-growing, non-invasive vegetative cover, final paragraph (b)(2)(iii) allows the regulatory authority to approve the use of other measures to protect the stockpiles from wind and water erosion.

Final Paragraph (c): Soil Substitutes and Supplements

Paragraph (c) specifies that, if the soil handling plan approved in the permit in accordance with § 780.12(e) provides for the use of topsoil or subsoil substitutes or supplements, the permittee must salvage, store, and redistribute the overburden materials selected and approved for that purpose in a manner consistent with paragraphs (a), (b), and (e) of § 816.22. We discuss all comments received on the use of soil substitutes and supplements in the preamble to § 780.12(e).

Final Paragraph (d): Site Preparation

We did not adopt proposed paragraph (d)(1) because that paragraph pertained to backfilling and grading of spoil, which is the subject of § 816.102, not to the subject of § 816.22, which, in this context, is the placement and grading of soil materials. We adopted a revised version of proposed paragraph (d)(2) as final paragraph (d). In response to a comment, we added a reference to deep tillage as a method of alleviating compaction and preventing slippage between the spoil and the soil. We also replaced the reference to ''topsoil'' with a reference to ''soil materials'' in order to be consistent with the revisions to other provisions of this section that require the salvage and redistribution of both topsoil and subsoil, not just topsoil. Finally, we made assorted plain language changes and streamlined the rule text.

Final Paragraph (e): Redistribution

Final paragraph (e)(1)(ii) differs from proposed paragraph (e)(1)(ii) in that we replaced the word ''contours'' with the phrase ''final surface configuration.'' We made this change because the term ''contours'' could be interpreted as applying only to elevation differences, which is not our intent in this context. The phrase ''final surface configuration'' refers to the shape of the land surface and the features of that surface. This term is more encompassing, and thus more relevant, to soil redistribution. In addition, because the term ''general surface configuration'' appears as the core element of the definition of ''approximate original contour'' in section 701(2) of SMCRA [623] and 30 CFR 701.5, it is more appropriate for use in the context of redistribution of soil materials under final section 816.22(e). The term ''surface configuration'' or a variation thereof also appears in §§ 780.12(d), 780.20, 780.35, 816.102, 816.104, 816.105, 816.106, and 816.107, which lends support to replacement of ''contours'' with ''final surface configuration'' in the final rule.

We revised proposed paragraph (e)(1)(iii) to make that paragraph consistent with § 780.12(d)(2)(ii), which provides that the backfilling and grading plan must ''[l]imit compaction of topsoil and soil materials in the root zone to the minimum necessary to achieve stability.'' It also requires that the plan ''identify measures that will be used to alleviate soil compaction if necessary.'' Similarly, final paragraph (e)(1)(iii) requires that the permittee minimize compaction of the topsoil and soil materials in the root zone to the extent possible and alleviate any excess compaction that may occur. It further requires that the permittee limit use of measures that result in increased compaction to those situations in which added compaction is necessary to ensure stability. In response to a

[623] 30 U.S.C. 1291(2).

suggestion from the U.S. Environmental Protection Agency, we revised proposed paragraph (e)(1)(iv) by adding language clarifying that the standards referenced in the final rule are those that have been established under section 303(c) of the Clean Water Act, or other state or tribal water quality standards.

Final paragraph (e)(1)(v) requires redistribution of salvaged soil materials to achieve an approximately uniform and stable thickness when doing so is consistent with the approved postmining land use, the final surface configuration, surface-water drainage systems, and the requirement in § 816.133 that all disturbed areas be restored to conditions that are capable of supporting the uses they were capable of supporting before any mining or higher or better uses approved under final § 780.24(b) . Previous paragraph (d)(1)(i), which final paragraph (e)(1)(v) replaces, required redistribution of topsoil and topsoil substitutes and supplements to achieve an approximate uniform, stable thickness ''when consistent with the approved postmining land use, contours, and surface-water drainage systems.'' We inadvertently excluded the quoted language from the proposed rule. Final paragraph (e)(1)(v) incorporates the quoted language, with the exception that we replaced ''contours'' with ''the final surface configuration'' for the reasons discussed above in connection with final paragraph (e)(1)(ii). As explained in the preamble to the previous rule, the quoted language is intended to ''make clear that the uniform soil thickness provision is a function of the approved postmining land use, contours, and surface water drainage systems, and is not, in itself, an inflexible requirement.'' See 71 FR 51685 (Aug. 30, 2006).

We further revised the previous and proposed rules by adding language providing that the requirement to redistribute soil materials in a uniform thickness applies only when such redistribution is consistent with the requirement in section 816.133 to restore all disturbed areas to conditions that are capable of supporting the uses they were capable of supporting before any mining or higher or better uses approved under § 780.24(b). This additional proviso harmonizes this rule with our revised land use rules in final §§ 780.24 and 816.133 and with section 515(b)(2) of SMCRA, all of which require that the permittee restore mined land to a condition capable of supporting the uses that it was capable of supporting before any mining or higher or better uses of which there is reasonable likelihood. Soils are a critical element of restoration of land use capability. Without this provision, the requirement for uniform soil thickness would result in an inability to meet the postmining land use capability requirement on portions of the permit area where a reduction in soil thickness compared to premining conditions would result in diminished soil capability or productivity.

Final paragraph (e)(1)(v) also includes a provision allowing soil thicknesses to vary when those variations are necessary or desirable to achieve specific revegetation goals and ecological diversity. This provision is identical to corresponding provisions in both the proposed and previous rules.

One commenter suggested that we expressly provide an additional exception to allow for variability in underlying spoil quality, compatibility with the root zones, and land use. Except as discussed above, we have made no substantive changes to this provision because final paragraph (e)(1)(v) already allows for variations in thickness when such variations are consistent with the postmining land use and when variations are necessary or desirable to achieve specific revegetation goals and ecological diversity.

Final paragraph (e)(2) requires the use of a statistically valid sampling technique to document that soil materials have been redistributed in the locations and depths required by the soil handling plan approved in the permit in accordance with section 780.12(e). In the preamble to the proposed rule,[624] we encouraged the use of the U.S. Environmental Protection Agency's Data Quality Objectives seven-step method to statistically validate soil sampling techniques. Several commenters alleged that this technique is not necessary because state regulatory authorities have valid existing methods for documenting the redistribution of soil. The commenters urged us to provide regulatory authorities with the discretion to determine which statistical method to use. One commenter added that the U.S. Environmental Protection Agency's method is overly complex and intended for landfills, which, unlike mine sites, are highly controlled sites.

As in the proposed rule, final paragraph (e)(2) simply requires the use of a statistically valid sampling technique. It does not require use of the U.S. Environmental Protection Agency Data Quality Objectives method. We encourage use of the U.S. Environmental Protection Agency Data Quality Objectives method for the reasons discussed in the preamble to the proposed rule, but the permittee and the regulatory authority have the flexibility to choose another statistically valid technique.

Several commenters opposed proposed paragraph (e)(2) because it required the permittee to use a statistically valid technique to document that soil materials have been redistributed in the locations and depths required by the soil handling plan developed under § 780.12(e) and approved as part of the permit. According to the commenters, a requirement for soil depth mapping using statistically valid techniques is inappropriate because other means are available to verify soil replacement depths, including regulatory authority inspection reports that routinely document soil depths. We disagree with the commenters. Under the final rule, inspection reports are acceptable only if the inspectors use a statistically valid sampling technique and document the data in the reports. Because of the limited numbers of soil types likely to be present within the permit area, we do not anticipate the requirement in final paragraph (e)(2) to be onerous or expensive.

Final Paragraph (f): Organic Matter

Under the previous rules, permittees almost universally either burned or buried organic matter, which meant that the potential beneficial impacts of those materials on soil productivity were not realized. In addition, burning organic material releases greenhouse gases into the atmosphere. Proposed paragraph (f) required that the permittee salvage duff, other organic litter, and vegetative materials such as tree tops, small logs, and root balls. It also required that the permittee then redistribute those materials across the regraded surface or incorporate them into the soil to control erosion, promote growth of vegetation, serve as a source of native plant seeds and soil inoculants to speed restoration of the soil's ecological community, and increase the moisture retention capability of the soil. Proposed paragraph (f) banned the burying or burning of organic matter. However, as an alternative to redistribution, it allowed use of those materials for stream restoration purposes or to construct fish and wildlife enhancement features.

One commenter argued that topsoil and organic materials are frequently so closely integrated that separating the two into stockpiles and then subsequently distributing them separately is virtually impossible. We agree that segregation of topsoil and

[624] 80 FR 44436, 44543 (Jul. 27, 2015).

organic materials is not always easily accomplished. Therefore, we have added a sentence to final paragraph (f)(1)(i) to clarify that the permittee may salvage organic matter and topsoil in a single operation that blends those materials when doing so is practicable and consistent with the approved postmining land use.

Other commenters expressed concern about introducing weed seeds and root material which would complicate management of the site. One commenter opposed the use of organic materials from non-native species, such as Russian olive and Siberian elm, which may be present in windbreaks and shelterbelts, for stream restoration and fish and wildlife enhancement purposes. The commenter noted that adoption of the proposed rule, which would allow those uses, could spread invasive, non-native trees species.

In response to these comments, we reconsidered the impact of the proposed rule on the spread of invasive or noxious species. To reduce the potential impact, we have revised § 779.19(b)(3) to require that permit applicants identify those portions of the proposed permit area that support significant populations of non-native invasive or noxious species. This information will identify areas where the salvage of organic materials should be prohibited to prevent the spread of undesirable species. In concert with that requirement, we have added paragraph (f)(1)(ii) to the final rule. This new paragraph provides that the requirement to salvage organic materials does not apply to organic matter from areas identified under § 779.19(b) as containing significant populations of invasive or noxious non-native species. Final paragraph (f)(1)(ii) further provides that the permittee must bury organic matter from these areas in the backfill at a sufficient depth in order to prevent the regeneration or proliferation of undesirable species.

Numerous commenters opposed the proposed requirement to salvage, store, and redistribute organic materials. Many commenters alleged that this requirement would interfere with the use of mechanized equipment on cropland, land used for hay production, and some forestry plantations. Several commenters alleged that, while this practice may be applicable to reforestation of mined lands in Appalachia, it would definitely be detrimental to reclamation in other parts of the country. One commenter cited the example of the Northern Great Plains, where reclaimed lands are used for row crop and small grain production and where trunks, stumps, and brush from shelterbelts comprised mainly of non-native species planted decades ago are commonly piled and burned or buried to make way for improved crop production. Similarly, according to the commenter, the placement of tree tops, small logs and root balls on intensively grazed pastures on reclaimed land may not be appropriate and will likely be contrary to the private landowner's wishes. The commenter agreed that retention and replacement of the types of organic materials described in the proposed rule may enhance reclamation in many instances, especially in and near reclaimed streams, forests, and wildlife habitat. However, the commenter also asserted that we must recognize that this practice is not appropriate nationwide under all conditions and that it may, in fact, be unacceptable to the private surface owner. Therefore, the commenter recommended qualifying this requirement by requiring salvage and redistribution only ''where appropriate to enhance revegetation and fulfill the postmining land use.''

In response to these comments, we moved proposed paragraph (f)(3) to paragraph (f)(2)(ii) in the final rule. We then added a new paragraph (f)(3), which provides that the redistribution requirements for organic matter do not apply to those portions of the permit area identified in paragraphs (f)(3)(i)(A) through (C). Final paragraph (f)(3)(i)(A) creates an exception for those portions of the permit area upon which row crops will be planted as part of the postmining land use before final bond release. Final paragraph (f)(3)(i)(B) creates a similar exception for those portions of the permit area that will be intensively managed for hay production before final bond release. This exception does not extend to pasture land or other grazing land. Finally, as a technical clarification, we added final paragraph (f)(3)(i)(C), which creates an exception for lands upon which structures, roads, other impervious surfaces, or water impoundments have been or will be constructed as part of the postmining land use before final bond release.

We intend for these exceptions to be applied narrowly. Most sites with cropland or hayland postmining land uses have relatively little woody plant material present before mining, so there should be areas on the edge of fields or that are used for non-cropland purposes upon which those woody organic materials can be spread. We anticipate that non-woody organic materials can and would be salvaged and mixed with the topsoil for cropland and hayland in order to improve productivity without hampering the use of agricultural machinery. Therefore, we have added paragraph (f)(3)(ii) to the final rule. That paragraph provides that, when the circumstances described in paragraphs (f)(3)(i)(A) through (C) apply, the permittee must make reasonable efforts to redistribute the salvaged organic materials on other portions of the permit area or use them to construct stream improvement or fish and wildlife habitat enhancement features consistent with the approved postmining land use.

We recognize that there may be circumstances in which it is not reasonably possible to use all available organic materials for these purposes. Therefore, the last sentence of final paragraph (f)(3)(ii) allows the permittee to bury the remaining materials in the backfill, provided the permittee demonstrates, and the regulatory authority finds, that it is not reasonably possible to use all available organic materials. This provision also is responsive to other comments alleging that salvage of all available organic materials could result in a greater amount of material than can be reasonably and practically used. However, final paragraph (f)(4)(i) retains the proposed prohibition on burning of organic materials. Retention of this prohibition is appropriate because burial is a viable alternative method of disposal and because burial does not result in the greenhouse gas emissions produced by combustion.

Another commenter contended that the distribution of organic materials would make the use of mechanical tree planters impractical. As a result of this comment, we have added paragraph (f)(2)(iii) to the final rule. That paragraph allows the permittee to adjust the timing and pattern of the redistribution of large woody debris in order to accommodate the use of mechanized tree-planting equipment on sites with a forestry postmining land use.

Some commenters alleged that the requirement to salvage and redistribute organic materials conflicts with section 816.111(d)(2), which allows the use of suitable mulch as one method of stabilizing the surface and controlling erosion, but which requires that the mulch be free of weeds and noxious plant seeds. With respect to this last comment, we note that §§ 816.22(f) and 816.111(d)(2) serve different purposes. Section 816.111(d)(2) pertains to surface stabilization of newly planted areas. We do not anticipate that the organic materials to which § 816.22 pertains will be either suitable for or used for that purpose. Instead, they would either be mixed with the soil or redistributed on the surface separate from the mulch.

Another commenter argued that long-term storage of tree roots and logs can result in deterioration of those materials, rendering them of limited use. The commenter also alleged that segregating the organic material for storage would be costly and complex, while placement on temporary redistribution areas to prevent deterioration would cause reclamation costs to triple because the material would have to be moved three times. According to the commenter, the need for additional storage sites would result in increased disturbance. The commenter further noted that it is unlikely that this material could be shredded because of the presence of rocks in root balls.

We acknowledge that lengthy storage of organic materials is detrimental to their value as a source of seeds, mycorrhizae, fungi, and other forms of life that are important to soil ecology. For that reason, we encourage that an operation be designed so that organic material salvaged from one portion of the permit can be immediately redistributed as part of the reclamation of a different portion of the permit. Such a design would have the added benefit of reducing costs by requiring that the material be handled only once. However, when long-term storage is necessary, the stored materials would still be valuable as a soil additive in the form of compost or rotted organic matter that would improve the tilth of the soil. The final rule does not prescribe a storage method, so the permittee would not be required to use the most expensive method available.

Several commenters alleged that the removal, storage, and redistribution of organic matter would be very costly and argued that implementation of these measures is unnecessary to reconstruct productive postmining soil. Some commenters contended that reference to our Forest Reclamation Advisory No. 8,[625] which highlights the importance of re-spreading stumps, woody debris, and roots on the regraded area, is inappropriate because that document is not applicable outside Appalachia. The commenters acknowledge that Forest Reclamation Advisory No. 8 may serve as sound guidance for unique situations in which extreme measures are necessary, but assert that the approach outlined in this guidance does not represent the best technology currently available in other regions. Moreover, commenters claim that decades of data demonstrate that successful forest reclamation can be achieved without the handling of soils and organic matter as prescribed in the proposed rule.

We do not agree with the commenters that Forest Reclamation Advisory No. 8 serves as sound guidance only for unique situations in which extreme measures are necessary. The Advisory documents the importance of organic materials and native soils in supporting reforestation and forestry postmining land uses. However, we recognize that it will not apply in all situations nationwide. Therefore, our reference in the preamble to the proposed rule to the practices set out in the Forest Reclamation Advisory No. 8 should not be interpreted as a mandate to implement those practices in situations where it would be inappropriate to do so, as set forth in paragraphs (f)(3)(i)(A) through (C) of the final rule.

Several commenters asserted that the storage and redistribution of undecomposed organic material will hinder plant growth because bacteria responsible for decomposition often rob the soil of nutrients essential to plant growth. We agree with the commenter that, initially, the carbon-to-nitrogen ratio will rise, making less nitrogen available to plants. However, this rise is only temporary. Ultimately, the carbon-to-nitrogen ratio will decrease, making more nitrogen available for plant growth.[626] Studies have confirmed that salvage and redistribution of organic matter will greatly increase nutrient availability in the long term.[627]

Some commenters also asserted that salvage, storage, and redistribution of organic materials will require the use of new equipment, which will result in additional mining costs. While permittees may incur some additional handling costs, the equipment needed for these operations is readily available to the industry and should not result in any significant additional cost. The environmental benefits of salvaging and redistributing organic matter should outweigh any added operational cost.

One commenter noted that well-documented research has shown that appropriate equipment and reduced soil handling is critical to long-term reclamation success on mine sites. Several commenters alleged that the requirements for salvage and redistribution of organic matter will result in additional handling of soil materials and more equipment traffic over re-soiled sites, which could result in greater soil compaction. While increased soil compaction may be a possibility if redistribution occurs while soils are wet, the permittee can avoid excessive compaction by choosing to use proper equipment and by timing redistribution to avoid equipment traffic over wet soils. This approach will allow the site to both benefit from redistribution of the organic matter and avoid adverse impacts associated with excessive compaction.

Section 816.34: How must I protect the hydrologic balance?

As discussed in the preamble to the proposed rule, we proposed to add new § 816.34 to incorporate, consolidate, and reorganize portions of previous § 816.41, previously entitled, ''Hydrologic-balance protection.'' [628] We received comments expressing concern about the proposed rule that resulted in changes to the final rule, as discussed below. Additionally, we received comments supporting this new section, including one from another federal agency supporting proposed paragraph (a)(5) about the protection of existing water rights under state law. We have finalized paragraph (a)(5) as proposed.

One commenter questioned the use of the phrase ''best technology currently available'' as proposed in paragraphs (a)(8) and (a)(10) and suggested that we change this phrase to ''best management practices.'' The commenter asserted that at most mining operations the implementation of ''best management practices,'' such as minimizing the disturbed area, specially handling and placing acid and toxic materials, and ensuring timely revegetation, are sufficient to prevent the formation of acid and toxic drainage. We agree with the commenter and have replaced the term ''best technology currently available'' with the term ''best management practices'' for several reasons. First, the actions described above often require the use of earth moving equipment, and the term ''best management practice'' is typically used by those in the profession of backfilling and grading. Secondly, upon further review of these paragraphs, we have determined that this change will help eliminate confusion. The term ''best technology currently available'' is used

[625] J.C. Skousen, et al, *Forest Reclamation Advisory No. 8: Selecting Materials for Mine Soil Construction when Establishing Forests on Appalachian Mine Sites,* p. 2, (Jul. 2011). Available at: *http://arri.osmre.gov/FRA/Advisories/FRA_No.8%20Soil%20Materials.pdf* (last accessed Nov. 3, 2016).

[626] U.S. Dep't. of Agric., Natural Res. Conservation Serv., *Carbon to Nitrogen Ratios in Cropping Systems.* East National Technology Support Center, Greensboro, N.C., in cooperation with North Dakota NRCS. (2011). (This reference provides evidence for these temporary changes within crop fields; however, they also apply to reconstructed SMCRA soils as they are substantially altered by human activity).

[627] C.E. Zipper, et al., *Rebuilding Soils on Mined Land for Native Forest in Appalachia.* Soil Sci. Soc. Am. J. (77:337–349), p. 347 (2012).

[628] 80 FR 44436, 44543–45 (Jul. 27, 2015).

in SMCRA,[629] but in a context that is inapplicable to this section of the rule.

We also made additional changes to paragraphs (a)(8) and (a)(10) in response to this comment. Paragraph (a)(8) now states, ''The regulatory authority will determine the meaning of the term ''best management practices'' on a site-specific basis. At a minimum, the term includes equipment, devices, systems, methods, and techniques that are currently available anywhere, as determined by the Director determines to be best management practices.'' Paragraph (a)(10) requires the permittee to ''[p]rotect the surface-water quality by using best management practices, as described in paragraph (a)(8) of this section to handle earth materials, ground water discharges, and runoff . . . .''

These additions provide the regulatory authorities with discretion to determine the meaning of the term ''best management practices'' on a site-specific basis. This is important because methods for groundwater and surface water protection may vary by region. Consequently, the best management practices should be determined by the regulatory authorities. We have provided some guidance to help regulatory authorities in making this determination. At a minimum, the term includes equipment, devices, systems, methods and techniques that are currently available anywhere, even if they are not widely utilized.

A regulatory authority commenter expressed concern with the requirement at paragraph (a)(10)(i) that runoff be handled in a manner to ''avoid the formation'' of acid or toxic mine drainage. We agree with the commenter. Recognizing that the formation of acid or toxic mine drainage cannot be wholly avoided, we have revised the final rule to be clear that surface water quality must be protected in a manner that ''prevents postmining discharges of acid or toxic mine drainage.'' This revision more appropriately conforms to section 515(b)(10)(A) of SMCRA [630] which requires the operator to minimize the disturbances to the prevailing hydrologic balance at the mine site and associated offsite areas and to minimize the disturbances to the quality and quantity of water in surface water and groundwater systems during and after mining by avoiding acid and toxic mine drainage. The postmining *discharge* of acid mine drainage is what paragraph (a)(10)(i) was meant to address. This change to the final rule should clarify commenter's concern.

We have modified paragraph (a)(10)(ii) by adding the term ''best technology currently available'' to clarify that the operator should prevent contributions of suspended solids to surface stream flow using ''best technology currently available'' instead of ''best management practices.'' We made this change to be consistent with the language of SMCRA at section 515(b)(10)(B)(i).[631]

One commenter opined that the previous regulations were sufficient and proposed paragraph (a)(11) is unnecessary. We added this paragraph for informational purposes. It helps the regulated community locate other provisions in our regulations that protect surface-water quality and flow rates and reminds them of their obligations under those provisions. We are retaining it in the final rule because it provides a service in this regard to both to the regulated community and the public.

Paragraph (b)(1) requires that to the maximum extent practicable, operators must use mining and reclamation practices that minimize water pollution, changes in flow, and adverse impacts on stream biota rather than relying upon water treatment. We received many comments in support of this modification. However, one commenter questioned our authority to make this change. Section 515(b)(24) of SMCRA provides the authority to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, such as protecting the hydrologic balance.[632] In addition, section 515(b)(10) [633] of SMCRA requires the operator to minimize the disturbances to the prevailing hydrologic balance at the mine site and associated offsite areas and to the quality and quantity of water in surface water and groundwater systems. These sections provide us with the statutory authority to make the changes discussed in paragraph (b)(1).

Another commenter suggested that we revise ''maximum extent practicable'' to allow for greater permitting flexibility; however, the commenter did not explain why additional flexibility was necessary. Additional flexibility would weaken this requirement, making it more difficult to enforce mining and reclamation practices that minimize water pollution, changes in flow, and adverse impacts to stream biota. We have not accepted the suggestion and are adopting paragraph (b)(1) as proposed.

Final paragraph (d) establishes examination and reporting requirements for the surface runoff control structures identified in the surface water runoff control plan approved in the permit under section 780.29. To be consistent with final section 780.29, we modified proposed paragraphs (d)(1) and (d)(2), by changing the term ''hydraulic structures'' to ''runoff-control structures.'' Runoff control structures are any man-made structures designed to control or convey stormwater runoff on or across a mine site. As discussed in the preamble to § 780.29, this term encompasses the entire surface water control system and includes diversion ditches, drainage benches or terraces, drop structures or check dams, all types of conveyance channels, downdrains, and sedimentation and detention ponds and associated outlets. It does not include swales or reconstructed perennial, intermittent, or ephemeral stream channels.

Proposed paragraph (d)(1) required that after each occurrence of certain precipitation events, the permittee must examine the structures identified under § 780.29, and submit a report certified by a registered, professional engineer to the regulatory authority within 48 hours. Several commenters indicated that it might not be possible to inspect all structures and report upon the conditions within 48 hours because of the number of applicable structures or because of the difficulty in achieving access if the precipitation event created deteriorated site conditions. In consideration of these comments, we have modified paragraph (d)(1) to require the operator to examine all structures identified under § 780.29, within 72 hours of cessation of each occurrence of certain precipitation events.

Proposed paragraph (d)(1)(i) required the examination of runoff control structures after each occurrence of the 2-year recurrence interval, or greater flow event, in areas with an average annual precipitation of more than 26.0 inches. In the preamble to the proposed rule, we invited comment on whether a precipitation event with a 2-year recurrence interval is an appropriate threshold for requiring examination of sediment control systems in mesic regions or whether we should allow variations based upon differences in terrain, storm frequency, the nature of sedimentation control structures, and the frequency with which discharges from sedimentation control structures

[629] 30 U.S.C. 1265(b)(10) and (24) and 1266(b)(11).

[630] 30 U.S.C. 1265(b)(10).

[631] 30 U.S.C. 1265(b)(10)(B)(i).

[632] 30 U.S.C. 1265(b)(24).

[633] 30 U.S.C. 1265(b)(10).

occur.[634] Some commenters opined that the requirement for an inspection after every 2-year event was unnecessary. Other commenters asserted that the regulatory authority should have discretion to determine the inspection frequency because it should be based on experience and local conditions. After consideration we have retained the 2-year recurrence interval requirement of proposed paragraph (d)(1)(i). Regardless of the region, sediment control, flood potential, and flood-related damage remain a concern. Bankfull flow in a stream in any area generally occurs in response to a precipitation event with an average recurrence interval of 1.5 years.[635] Because a majority of sediment transport over time is accomplished at moderate flow rates,[636] we chose to require inspection of the sediment control structures following occurrence of a 2-year event in areas where precipitation is greater than 26 inches per year.

One regulatory authority commenter stated that it currently receives reports of significant precipitation events when there is a discharge or failure at a runoff control structure. Waiting until there has been a discharge or failure does not satisfy our intent in promulgating paragraph (d)(1). The final rule seeks to prevent discharges or failures that could harm the public, environment, or private property by specifying the threshold at which a precipitation event rises to the level of significance and the time when the mine operator must take action. Consequently, we have retained paragraph (d)(1)(i) as proposed.

In areas with an average annual precipitation of 26.0 inches or less, paragraph (d)(1)(ii) requires an examination after a significant flow event of a size specified by the regulatory authority. We invited comment on whether we should establish more specific criteria for examination of runoff control structures in arid and semiarid regions.[637] One commenter from a Western state regulatory authority claimed that the storm event should not be less than the 10-year recurrence interval. We recognize that there are limited discharges from runoff control structures in areas with an average annual precipitation of 26.0 inches or less, but the commenter provided no rationale for using a minimum recurrence interval of ten years. We are retaining in the final rule, proposed paragraph (d)(1)(ii), which gives the regulatory authority the responsibility to specify the size of a significant event for inspection in areas with an average annual precipitation of 26.0 inches or less because the regulatory authority is in the best decision to make determinations about their specific region.

Proposed paragraph (d)(2) required that within 48 hours of cessation of certain precipitation events, a report certified by a registered, professional engineer, must be submitted to the regulatory authority. One commenter noted that all precipitation events are reported on a monthly basis and are addressed by the field inspector as needed. Another commenter suggested that if a reporting requirement is retained, a more reasonable reporting requirement would be 14 days. We agree with commenters that although it is important to perform the inspection as soon as possible (but not longer than within the allotted 72 hours), it is not critical that the report be submitted immediately. Therefore, in consideration of these comments, we modified paragraph (d)(2)(i) to require that a report be submitted by the operator to the regulatory authority within 30 days of cessation of the applicable precipitation event.

To account for situations where a series of precipitation events occur in a short timeframe, we have added paragraph (d)(2)(ii) to allow the submission of one report to cover all precipitation events that occur within a 30-day period.

In response to proposed paragraph (d)(2), one commenter suggested that if the reporting requirement is retained as proposed, a professional engineer certification should not be required because an inspection by any qualified person should be sufficient. We disagree. For the same reasons discussed in the preamble of section 780.25, the examination report addressing the performance of the runoff control structures should be certified by a registered, professional engineer because it affords a strict level of accountability. This increased accountability is necessary given the hazard potential in the event of failure and it is imperative that these structures be in sound condition at the time the certification is made.

Section 816.35: How must I monitor groundwater?

As discussed in the preamble to the proposed rule, we proposed to modify groundwater monitoring requirements for surface mining.[638] After evaluating the comments that we received, we are adopting § 816.35 as proposed, with several modifications.

Numerous commenters expressed concern with proposed paragraph (a)(2). This proposed paragraph required groundwater monitoring throughout mining and reclamation until final bond release. Several regulatory authority commenters questioned the feasibility of the proposed monitoring requirements because proposed § 800.42(d) required that, among other requirements, monitoring wells be removed before an applicant can apply for final bond release.

The requirements for closing monitoring wells are found in § 816.39, which require a permittee to permanently seal exploratory and monitoring wells in a safe and environmentally sound manner in accordance with § 816.13 before the regulatory authority may approve final bond release. Commenters are correct that it would be impossible to continue groundwater monitoring until final bond release while simultaneously closing monitoring wells. Therefore, we have modified final paragraph (a)(2) to require that groundwater monitoring, at a minimum, must continue through mining, reclamation, and the revegetation responsibility period as prescribed by 816.115 of this part. Additionally, monitoring must continue beyond the minimum time frame, as necessary, for the monitoring results to meet the criteria required in 816.35(d)(1) and (2), as determined by the regulatory authority. These modifications ensure that groundwater monitoring will continue until the regulatory authority determines that requirements prescribed in this section are satisfied. Permittees may seek revisions to their monitoring plans, in certain circumstances, through the permit revision procedures contained in § 774.13.

We have modified paragraph (d)(2)(iii) to clarify that the permittee must demonstrate that the operation has preserved or restored the biological condition of the stream within the permit and adjacent areas to the biological condition determined during baseline data collection. We made this change to establish that the baseline conditions of the stream serve as the standard for stream preservation or restoration.

In paragraph (d)(2), we have replaced the terms ''existing'' and ''reasonably foreseeable'' with ''approved postmining land uses within the permit

[634] 80 FR 44436, 44545 (Jul. 27, 2015).

[635] Dave Rosgen. *Applied River Morphology,* Wildland Hydrology, Pagosa Springs, Colorado (1996).

[636] *Id.*

[637] *Id.*

[638] 80 FR 44436, 44545–46, 44650 (Jul. 27, 2015).

area.'' We evaluated our use of the term ''existing use'' throughout the rule and were concerned that, because the term ''existing use'' is also used in a Clean Water Act context, it might cause confusion. In response we deleted the term from the final rule. We deleted the term ''reasonably foreseeable uses'' from the final rule except in connection with the protection of reasonably foreseeable surface lands uses from the adverse impacts of subsidence. The term appears only in SMCRA in section 516(b)(1), which requires that operators of underground mines adopt subsidence control measures to, among other things, maintain the value and reasonably foreseeable use of surface lands. It is not appropriate for a more general context. Further, many commenters objected to the usage of ''reasonably foreseeable'' asserting that it is too subjective, difficult to assess, and open to varying interpretations, which could result in inconsistent application. Therefore, in a groundwater context we have replaced ''reasonably foreseeable use'' with the phrase ''approved postmining land uses within the permit area'' to avoid confusion with Clean Water Act terminology.

Several commenters requested that we allow a regulatory authority to discontinue monitoring when the regulatory authority determines it is no longer needed. Similarly, several commenters indicated that paragraph (d) should allow the regulatory authority the discretion to modify monitoring requirements based on the site specific knowledge and experience of the regulatory authority. As discussed above, paragraph (d) allows permittees to request revisions to a groundwater monitoring plan by using the permit revision procedures of § 774.13. The requested revision may include changes to the parameters covered and the sampling frequency. However, our obligation is to ensure that the monitoring requirements are applied consistently and objectively, and recognizing the difficulty in detecting and predicting impacts to groundwater, only permits which have demonstrated the required conditions as stated in paragraph (d) may be revised by a regulatory authority. Allowing monitoring modifications based on such subjective factors as a regulatory authority's experience and/or site knowledge would defeat this obligation.

Commenters stated that paragraph (e), which prescribes when the regulatory authority must require additional groundwater monitoring, should be modified to permit regulatory authorities to use their discretion regarding additional monitoring. Other commenters suggested that paragraph (e) is unnecessary as regulators already possess the inherent authority to require additional monitoring. Two coal organizations noted that additional monitoring is already done in many states and only enforcement of our previous rules is necessary. While we acknowledge that some states require additional monitoring, this is not a universal practice throughout all states and there are no regulations currently in place that require regulatory authorities to uniformly impose additional monitoring. Therefore, we have retained paragraph (e), with no change to the final rule.

Finally, one commenter stated that paragraph (f) does not allow the transfer of wells and may be inconsistent with landowner desires. The commenter is incorrect because our regulations expressly provide for the transfer of wells. Paragraph (f) states that the requirement to install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring groundwater should be consistent with §§ 816.13 and 816.39. Section 816.13 allows for retention and transfer of a drilled hole or groundwater monitoring well for use as a water well under the conditions set forth in § 816.39. Therefore, we have not modified paragraph (f) of the final rule.

Section 816.36: How must I monitor surface water?

As discussed in the preamble to the proposed rule, we proposed to modify the surface water monitoring requirements.[639] A commenter asserted that surface water monitoring and associated data collection need not continue indefinitely. The commenter opined that collecting water quality data long after reclamation is complete amounted to collecting and analyzing ambient stream flow conditions and is a waste of time, especially for large western surface mines. We declined to change the requirement that requires the operator to monitor surface water until final bond release. However, we have revised final paragraph (a)(2) to clarify that monitoring must continue through mining and reclamation until the regulatory authority approves release of the entire bond amount for the monitored area as required in §§ 800.40 through 800.43. This change ensures that the regulatory authority conducts the necessary steps outlined in §§ 800.40 through 800.43 related to the bond release criteria before surface water monitoring ceases. This requirement is important because hydrologic impacts can take years to develop given the slow movement of groundwater and its potential impact on surface water. Our experience has shown numerous instances where hydrologic issues develop after a site has reached Phase 1 or Phase 2 of reclamation and associated bond release. Also, discontinuing the data collection requirements prior to final bond release is contrary to the objectives found in SMCRA section 508(a)(13).[640]

We made several modifications to paragraph (d), which allows the permittee to use the permit revision procedures section 774.13 to request a modification of the surface-water monitoring requirements, provided that certain demonstrations are made. First, we modified paragraph (d)(2)(iii) to clarify that the operation must demonstrate that it has preserved or restored the biological condition of the stream to the condition determined during baseline data collection. We made this change to make clear the link between baseline conditions and the restoration or preservation standard, and to ensure the regulatory authority considers any baseline changes in advance of modifying the monitoring plan.

Second, we modified paragraph (d)(2)(iv) to remove the phrase ''reasonably foreseeable uses.'' The final rule no longer includes the term ''reasonably foreseeable uses'' in contexts other than protection of reasonably foreseeable surface land uses from the adverse impacts of subsidence. We have several rationales for removal of this term. First, the term appears in SMCRA only in section 516(b)(1),[641] which requires that operators of underground mines adopt subsidence control measures to, among other things, maintain the value and reasonably foreseeable use of surface lands. Sections 717(b) and 720(a)(2) of SMCRA [642] separately protect certain water uses. Additionally, numerous commenters opposed inclusion of the term ''reasonably foreseeable uses'' on a basis that is subjective, difficult to determine, and open to widely varying interpretations, which could result in inconsistent application throughout the coalfields. We also wanted to avoid any potential conflicts with the Clean Water Act authority in determining the applicability of reasonably foreseeable use(s).

[639] 80 FR 44436, 44546–47, 44650–51 (Jul. 27, 2015).

[640] 30 U.S.C. 1258(a)(13).

[641] 30 U.S.C. 1266(b)(1).

[642] 30 U.S.C. 1307(b) and 1309a(a)(2).

In paragraph (d)(2)(iv), we also added a requirement to demonstrate that the surface water availability and quality are maintained or restored to the extent necessary to support the approved postmining land uses within the permit area. This change was made to ensure that the regulatory authority does not approve a monitoring plan modification that would prevent a determination that the surface water retains the ability to support the postmining land use, as well as any actual uses of the surface water prior to mining. The previous rule at § 816.41(e)(3)(i) required a demonstration that the water quantity and quality are suitable to support approved postmining land uses. Proposed § 816.36(d)(2)(iv) would have replaced this provision with a requirement for a demonstration that the operation has maintained the availability and quality of surface water in a manner that can support existing and reasonably foreseeable uses of the water. However, as explained above, we have now decided not to include the reference to reasonably foreseeable uses in the final rule. Therefore, our rationale for deletion of the requirement in the proposed rule pertaining to postmining land uses, as set forth at 80 FR 44436, 44546–44547 (Jul. 27, 2015), no longer applies and we are retaining that requirement as part of our final rule.

Additionally, we have created two separate paragraphs to help clarify that there are two distinct requirements: One relating to support of the approved postmining land use (paragraph (d)(iv)) and the other relating to maintenance of all designated uses (paragraph (d)(v)). These paragraphs delineate the two related but distinctly different concepts. In paragraph (d)(v) we have added the word ''any'' before the words ''designated uses'' to address situations where more than one designated use applies to a stream.

One commenter responded to our solicitation for comments on whether we should place restrictions on the regulatory authority's ability to modify the approved monitoring plan. The commenter asserted that the regulatory authority should be able to modify the parameter list after a permit has been issued because it needs to consider the physical, climatological, and other characteristics of the site when making regulatory decisions on SMCRA sites. The commenter also opined that allowing the regulatory authority the discretion to make permit modifications to the monitoring plan allows the regulatory authority to adopt new testing methods as they become available without having to promulgate a state program regulatory change.

With respect to regulatory authority discretion to modify the monitoring plan, paragraph (d) allows permit revisions that include such modifications as long as the requirements of paragraphs (d)(2)(i) through (vi) are met. This latitude helps the regulatory authorities meet changing conditions in a watershed due to mining and non-mining related changes. To both protect the operator and to delineate the source of water quality changes that may occur in a watershed, we consider it vital to be able to modify the parameter list to ascertain impacts from all sources.

Section 816.37: How must I monitor the biological condition of streams?

As discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 816.37[643] to require monitoring of the biological condition of perennial and intermittent streams in the manner specified in the monitoring plan approved under proposed § 780.23(c).[644] After evaluating the comments that we received, we have revised the final rule. As discussed in the preamble to final § 780.19(c)(6), the requirements for assessing biological condition of intermittent streams apply only if a scientifically defensible bioassessment protocol has been established for assessment of intermittent streams in the state or region in which the stream is located. For all other intermittent streams the best control technology currently available consists of the establishment of standards that rely on restoring the ''form,'' ''hydrologic function,'' and water quality of the stream and the reestablishment of streamside vegetation as a surrogate for the biological condition of the stream. Therefore, in final rule § 816.37(a)(ii) we make clear that you must use the bioassessment protocol that complies with final rule § 780.19(c)(6)(vii).

Some commenters suggested that the regulatory authority should be granted discretion to modify or terminate monitoring based on site conditions, such as geology, hydrology, anticipated future water use, public need, or other natural resource management considerations. Section 780.23(d) of the final rule makes clear that the regulatory authority may waive or modify the biological condition monitoring plan requirements in two scenarios: (1) When lands are eligible for remining, and (2) for operations that avoid streams. As detailed in paragraph (a)(1)(i) of § 816.37, these exceptions also apply within this section of the final rule.

We are declining to adopt the commenters' suggestion. The exceptions discussed above are the only exceptions that are consistent with the purposes of SMCRA, as described in section 102 of the Act.[645] SMCRA section 102 (d) sets out the goal of ''assur[ing] that surface coal mining operations are so conducted as to protect the environment.''[646] Section 102(h) of SMCRA sets out a goal to ''promote the reclamation of mined areas left without adequate reclamation prior to August 3, 1977, and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public.''[647] We do not agree with the commenter that biological monitoring should be modified or terminated based on site conditions, or other issues such as anticipated future water use, natural resource management decisions, and public need. The biological condition monitoring plan requires the establishment of a sufficient number of appropriate monitoring locations up gradient and down gradient of the mine site and adjacent areas to provide the regulatory authority with the necessary data to determine the impacts of the operation upon the hydrologic balance. These measurements allow the regulatory authority to have the data necessary to make an informed decision as to whether a trend, emanating from the operation, may result in material damage to the hydrologic balance outside the permit area and whether the streams are trending toward ecological success. Further modifications or waivers to the monitoring of biological conditions of streams of the type that the commenters suggest would reduce the amount of data available to make informed decisions and would thus, reduce the effectiveness of monitoring. Therefore, we are not providing any further exceptions or waivers in §§ 816.37 or 780.23(d). For additional information on the exceptions for remining and operations that avoid streams, refer to the preamble discussion of § 780.23(d).

Several commenters objected to the requirement at paragraph (a)(2) that the permittee must continue monitoring throughout mining and during reclamation until the regulatory authority release the entire bond amount for the monitored area. Specifically, commenters stated that there is no need to monitor biological

[644] 80 FR 44436, 44547 (Jul. 27, 2015).

[645] 30 U.S.C. 1202(d).

[646] *Id.*

[647] 30 U.S.C. 1202(h).

activity in stream channels during the various phases of bond release for well-functioning streams, newly reclaimed streams, or until full reclamation has been achieved because the resources spent on such monitoring would be better allocated to other reclamation tasks. These commenters further suggest that the focus should be upon monitoring in other areas which the operator and the regulatory authority agree are of higher importance.

After careful consideration of these comments, we are retaining the final rule as proposed. We have determined that monitoring is important in all phases of mining and reclamation through final bond release, as required by §§ 800.40 through 800.43 of the final rule. Regulatory authorities cannot assess whether ecological function has been restored without biological monitoring. A snapshot sample after reclamation presents an incomplete picture and cannot demonstrate whether or not ecological success has been achieved. Annual, long-term monitoring of all restored perennial and intermittent stream channels is necessary to ensure the restoration of ecological function as required by the final rule. Long-term monitoring is also necessary to determine if the restoration is trending toward success and to give operators time to correct any negative trends before bond release is scheduled. The early identification of negative trends will allow the regulatory authority and the operator to identify and correct any negative trends before they present larger and more significant issues that could delay bond release, increase costs, or result in further corrective actions. In addition, we note that the final rule affords the regulatory authority discretion in determining how to assess restoration of ecological function, and the regulatory authority can use this discretion in considering the establishment of monitoring locations and sampling frequency as noted in § 780.23(c)(2)(ii) and (iii).

Other commenters expressed concern that there is currently insufficient scientific data to determine suitable timing for initiating the required monitoring in reclaimed streams. Still other commenters maintained that biological data are not reliable for determining trends toward reclamation success because biological data is overly influenced by seasonal conditions which render sampling methods imprecise. One commenter recommended that water quality parameters and stream form are valid indicators of the ability of a stream to support the necessary biota long-term.

While we acknowledge the variable nature of biological data, we find that it is necessary and appropriate to use this data to document the restoration of ecological function in perennial and intermittent streams, especially when the data is consistently collected before mining, during mining, and during reclamation, until the regulatory authority releases the entire bond amount for the monitored area under §§ 800.40 through 800.43. Rigorous quality assurance and quality control methods will reduce the imprecision associated with sampling. In addition, the monitoring required in this paragraph is just one part of the water monitoring requirements in this rule. Other parts of the water monitoring requirements, such as the groundwater and surface water monitoring requirements of §§ 816.35 and 816.36, will allow the operator and the regulatory authority to determine, in a timely manner, whether ecological function will be successful. Moreover, sampling of only water quality parameters and or stream form will suffice to determine the success of ecological condition. For these reasons, we have not changed the final rule in response to these comments.

A final commenter objected to paragraph (c), which, if the sample analysis demonstrates noncompliance, requires a permittee to notify the regulatory authority, take any actions required under § 773.17(e), and implement any applicable remedial measures required by the hydrologic reclamation plan. The commenter suggested that these requirements duplicate the reporting requirements of the Clean Water Act and that, as a result, they are burdensome. In the final rule, we have deleted proposed paragraph (c).

Sections 816.38: How must I handle acid-forming and toxic-forming materials?

As discussed in the preamble,[648] we proposed to modify § 816.38 to more completely implement two sections of SMCRA: Section 515(b)(14) of SMCRA,[649] which requires that all acid-forming materials and toxic materials be ''treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters,'' and section 515(b)(3) of SMCRA,[650] which provides that ''overburden or spoil shall be shaped and graded in such a way as to prevent slides, erosion, and water pollution.'' After evaluating the comments, we made several modifications and additions to the final rule. As discussed in the preamble to § 780.12(n), we determined that the requirements of proposed paragraphs (a) through (d)[651] of this section were more appropriately located in the permitting standards than in the performance standards. Therefore, we have moved these paragraphs to new paragraph (n) in § 780.12, which describes what should be included in the reclamation plan if the baseline data indicates the presence of acid-forming and toxic forming materials. We retained in § 816.38 the requirements related to performance standards for handling of acid-forming and toxic-forming materials and have combined and organized them into two paragraphs, (a) and (b). We have addressed all comments about the paragraphs moved to § 780.12 in the preamble to that section.

In final paragraph (a), to ensure that the permittee is taking all appropriate action to prevent the formation of acid or toxic mine drainage, we have specified that the permittee must use the best technology currently available to avoid the creation of acid or toxic mine drainage into surface water or groundwater. We have added nonsubstantive language to paragraph (a) to conform to plain language principles. In addition we require that the permittee comply with the reclamation plan approved in the permit in accordance with § 780.12(n). In addition, we incorporated proposed paragraph (f), about adhering to disposal, treatment, and storage practices, into final paragraph (a) with no changes. In proposed paragraph (e), now paragraph (b), we have replaced the term ''biological condition'' with ''biology'' in the final rule to conform to other provisions of the final rule. Specifically, we are no longer assessing the biological condition of all intermittent streams. However, as explained in the preamble discussion of final § 780.19(c)(6), we are requiring the cataloging and monitoring of the biology of those intermittent streams for which a biological condition assessment is not required. The term ''biology'' is sufficiently broad to encompass both streams for which assessment of the biological condition is required under § 780.19(c)(6) (all perennial streams and certain intermittent streams) and those streams for which assessment of the biological condition is not required.

In the preamble to the proposed rule, we invited comment on whether the

[648] 80 FR 44436, 44547–44548 (Jul. 27, 2015).

[649] 30 U.S.C. 1265(b)(14).

[650] 30 U.S.C. 1265(b)(3).

[651] 80 FR 44436, 44651 (Jul. 27, 2015).

final rule should require use of specific generally-accepted tests for identification of potential acid-forming and toxic-forming materials in the overburden strata.[652] Commenters did not identify any specific tests. Several commenters noted that the regulatory authority should have the discretion to determine the tests that are best suited for their region. Based in part on this response, we have decided not to include specific tests in the final rule. This decision also allows permit applicants and regulatory authorities to avail themselves of advances in technology without the need for a rule change.

Section 816.39: What must I do with exploratory or monitoring wells when I no longer need them?

To accommodate renumbering and final rule changes in part 800, we have renumbered references to part 800 in this section. With the exception of this renumbering, we are finalizing § 816.39 as proposed. We received no comments on this section.

Section 816.40: What responsibility do I have to replace water supplies?

We proposed to modify our regulations by adding a new § 816.40 to replace water supply definitions and requirements previously located in §§ 701.5, paragraphs (a) and (b) and 816.41(h).[653] Some commenters suggested that we delete this proposed section because it is unnecessary while other commenters supported the modifications. We considered the comments and determined that this section is necessary because it more fully implements the requirements of section 717(b) of SMCRA [654] by establishing performance standards for situations when damage to water supplies is anticipated (as allowed in paragraph (b) of final rule § 780.22) or when unanticipated damage to protected water supplies occurs.

We received one comment requesting that this section apply only to valid water rights existing at the time of permitting. However, this comment is outside the scope of the proposed rule because neither the proposed rule nor the final rule address or determine the validity of water rights. The final rule ensures that if a water right has been adversely impacted, there will be a mechanism to replace the adversely impacted water supply. Consequently, we are not modifying the final rule in response to this comment.

We are the adopting this section of the rule as proposed except for a minor, non-substantive word change in paragraph (a)(3) and a clarifying statement in paragraph (c)(3).

Final Paragraph (c): Measures To Address Unanticipated Adverse Impacts to Protected Water Supplies

In paragraph (c)(3), we added the following statement to the final rule, ''[t]he regulatory authority may grant an extension if you have made a good-faith effort to meet this deadline, but have been able to do so for reason beyond your control.'' Although we did not receive any comments on this section, we determined upon further review of the proposed rule that it would be appropriate for the regulatory authority to grant an extension of time to comply with water replacement requirements if the deadline for compliance cannot be met for reasons beyond the control of the operator, despite the operator's good-faith efforts.

Section 816.41: Under what conditions may I discharge water and other materials into an underground mine?

As discussed in the preamble to the proposed rule, we proposed to modify and expand previous § 816.41 [655] to set out the conditions under which an operator of a surface mine may discharge water and other materials into an underground mine and to more fully implement section 510(b)(3) of SMCRA,[656] which prohibits approval of a permit application unless the applicant demonstrates, and the regulatory authority finds, that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The U.S. Forest Service provided comments in support of the proposed rule. We are adopting the rule, as proposed, with minor modifications. We discuss these changes and responses to relevant comments below.

We have replaced the term ''biological condition'' with ''biology'' in paragraph (a)(1)(iii) to conform to other changes within the final rule. Specifically, we are no longer assessing the biological condition of all intermittent streams. However, as explained in the preamble discussion of final rule § 780.19(c)(6), we are requiring the cataloging and monitoring of the biology of intermittent streams.

In addition, we have modified paragraph (a)(2) by replacing ''result in'' with the ''cause or contribute to'' to better conform to language used in section 303(c) of the Clean Water Act.[657] This modification will improve implementation of the rule and provide increased clarity for the regulated public.

We proposed in paragraph (a)(3)(i) to require a demonstration that the discharge be at a known rate and of a quality that will meet the effluent limitations for pH and total suspended solids referenced in § 817.42. One commenter asserted that this provision appears to usurp the allowance and permit limits that would be approved under a Safe Drinking Water Act Underground Injection Control permit and conflicts with paragraph (b). The commenter's vague assertion that the section ''appears to usurp allowance and permit limits'' does not provide enough information to fully understand commenter's concern. The commenter recommended that the regulatory jurisdiction of the Safe Drinking Water Act Underground Injection Control program be recognized. We recognize the jurisdiction of the Safe Drinking Water Act and we emphasize again that our regulations do not supersede other federal laws. Paragraph (a)(3)(i) does not ''usurp'' the allowance and permit limits approved under commenter's Underground Injection Control permit. Rather, the provision implements section 510(b)(3) of the Act [658] which prohibits approval of a permit application unless the applicant demonstrates, and the regulatory authority finds, that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.[659] We have determined that paragraph (a)(3)(i) helps to prevent material damage to the hydrologic balance outside the permit area because exceeding pH and total suspended solid effluent limitations of section 816.42 can cause material damage to the hydrologic balance outside the permit area. The commenter has not provided any information suggesting that it does not, nor has the commenter provided any information to clarify how this provision conflicts with the Safe Drinking Water Act. Thus, based on our expertise and on the vagueness of the comment, we reject the commenter's assertion. Paragraph (a)(3)(i) fits within the context of the authority that the Act provides and complements Safe Drinking Water Act standards. We also address commenter's attention to Part IV of this preamble

[652] 80 FR 44436, 44547 (Jul. 27, 2015).
[653] 80 FR 44436, 44548 (Jul. 27, 2015).
[654] 30 U.S.C.1307(b).
[655] 80 FR 44436, 44549 (Jul. 27, 2015).
[656] 30 U.S.C. 1260(b)(3).
[657] 33 U.S.C. 1313(c).
[658] 30 U.S.C. 1260(b)(3).
[659] 30 U.S.C. 1260(b)(3).

discussing the relationship between the Act and other statutes.

Furthermore, the commenter has not provided a cogent argument as to why it believes that paragraph (3)(i) conflicts with paragraph (b). Paragraph (3)(i) provides for a demonstration that the discharge will be at a known rate and of a quality that will meet the effluent limitations for pH and total suspended solids referenced in § 816.42. Paragraph (b) provides that discharges are limited to the following materials: Water; coal processing waste; fly ash from a coal-fired facility; sludge from an acid-mine-drainage treatment facility; flue-gas desulfurization sludge; inert materials used for stabilizing underground mines; and underground mine development waste. The commenter merely asserts, without explanation or support, that these two provisions conflict and does not provide any information demonstrating how our regulations governing the rate and quality of discharge conflict with our regulations limiting the materials that can be discharged.

We proposed in paragraph (a)(5) to require the permittee to obtain written permission from the owner of the mine into which a discharge is to be made and provide a copy of the authorization to the regulatory authority. A regulatory authority commented that this is a contentious issue in Virginia and has been the subject of recent litigation. This regulatory authority opined that the application of paragraph (a)(5) to existing permits may cause problems. We appreciate the commenter's concern and understand the need to avoid disruptions. In the final rule § 701.16, we have clarified that the stream protection rule, with enumerated exceptions, does not apply retroactively to existing or approved permits and permit applications. The applicability criteria adopted in final rule § 701.16 increase regulatory certainty and address commenters' concerns about potential problems from the application of paragraph (a)(5) to existing permits.

Section 816.42: What Clean Water Act requirements apply to discharges of my operation?

This section requires discharges from surface coal mining operations to be in compliance with water quality standards and effluent limitations established in NDPES permits and that any discharges of overburden or fill material must be made in compliance with permits issued pursuant to section 404 of the Clean Water Act. As discussed in the preamble to the proposed rule, we proposed to re-designate and modify previous § 816.42.[660] We also proposed to replace the reference to the effluent limitations in 40 CFR part 434 with reference to the effluent limitations established in the NDPES permit for a specific operation. Many commenters, including one from another federal agency, supported the modifications because these changes make our regulations consistent with the policy and practice of the U.S. Environmental Protection Agency.

Several commenters requested that we modify the final rule to clarify that an operator must comply with the effluent limitations established in the NPDES permit and all other water quality standards. We agree that this distinction is necessary. In response to comments received, and to clarify who will enforce Clean Water Act requirements applicable to discharges associated with surface and underground mining activities, we have added new rule text at § 816.42(a)(1), (a)(2), (b), (c) and (d). These sections are discussed in more detail in the general comments found in Part IV.G., of this preamble. The language added to final rule § 816.42(d) requires the SMCRA regulatory authority to coordinate with the appropriate Clean Water Act authorities to determine whether there have been violations of the Clean Water Act. The SMCRA regulatory authority must take enforcement or other action as appropriate in accordance with the terms of the SMCRA permit. This section does not preclude the SMCRA regulatory authority from performing the statutory obligation to initiate immediate enforcement action when any ''permittee is in violation of any requirement of this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources . . . .'' [661]

Additionally we have modified paragraph (g) to better track the language of section 303(c) of the Clean Water Act.[662]

Section 816.43: How must I construct and maintain diversions?

As discussed in the preamble to the proposed rule, we proposed to modify our previous regulation at § 816.43.[663] After evaluating the comments that we received, we have made significant modifications to the final rule to categorize and clarify the specific requirements for each of the three different types of diversions. These changes and relevant comments are discussed below. Furthermore, as a result of these changes we have re-designated many of the proposed paragraphs within the final rule.

Additionally, we have added ''tribal'' to the list of laws and regulations at final paragraph (a)(5)(iv).

Final Paragraph (a): Classification

Several commenters expressed confusion about the relationship between § 816.43(a) and the provisions of §§ 780.28 and 816.57. Commenters' confusion appears to stem from the fact that ''diversion'' as it is defined in our existing regulations covers a variety of different types of water conveyance structures. ''Diversion'' is defined in § 701.5 of the existing regulations as a ''channel, embankment, or other manmade structure constructed to divert water from one area to another.'' This broad definition includes channels designed to keep water from entering the disturbed area, known as ''diversion ditches'' within the regulated community. Our definition also includes the internal drainage system conveyances and channels within the disturbed area that act to transport water for sedimentation control and surface water runoff control. Furthermore, still other diversions, including those discussed in §§ 780.28 and 816.57, are streams that have been relocated from their original position to allow for mining. All of these types of diversions may be further subdivided as ''permanent diversions'' or ''temporary diversions.'' In final rule § 701.5, we define ''temporary diversions'' to mean ''a channel constructed to convey streamflow or overland flow away from the site of actual or proposed coal exploration or surface coal mining and reclamation operations. The term includes only those channels not approved by the regulatory authority to remain after reclamation as part of the approved postmining land use.''

Because the definition of ''diversion'' under our regulations includes many types of manmade structures constructed to transport water, we have added paragraphs (a)(1), (2), and (3) to specifically categorize diversions. This should eliminate the confusion expressed by the commenters.

- In final paragraph (a)(1), we prescribe the requirements for diversion ditches. Diversion ditches may be temporary or permanent ditches that convey water not impacted by the mining operation around disturbed areas, bypassing siltation structures.

[660] 80 FR 44436, 44549 (Jul. 27, 2015).

[661] 30 U.S.C. 1271(a)(2).

[662] 33 U.S.C. 1313(c).

[663] 80 FR 44436, 44549–44550 (Jul. 27, 2015).

• In final paragraph (a)(2), we prescribe the requirements for stream diversions. Stream diversions are temporary or permanent stream relocations. Temporary stream diversions may be further characterized consistent with the requirements of § 780.28(f), which sets out specific requirements for temporary stream diversions in place for more than three years.

• In final paragraph (a)(3), we prescribe the requirements for conveyances or channels within the disturbed area. These diversions include all other conveyances, temporarily or permanently constructed, within the disturbed area to convey surface water runoff and other flows from or across disturbed areas to siltation structures during mining. Following mining and reclamation, permanent conveyances and channels that are retained to support the postmining land use will remain, but the siltation structures will be removed as required by the reclamation plan.

To clarify further, we have described the differences between temporary and permanent diversions for each of the three types of diversions. Paragraph (a) classifies each of the types of diversions, contains regulations applicable to all three types of diversions, the two subsets of each type—temporary and permanent diversions—and, as specified in paragraph (a)(2), references the additional requirements that apply if the diversion involves a perennial or intermittent stream, consistent with the requirements of final §§ 780.28 and 816.57.

As part of the clarification and classification, we have moved proposed paragraph (c) and divided it into two parts: Final paragraph (a)(1) entitled ''Diversion Ditches'' and final paragraph (a)(3), entitled ''Conveyances or Channels within the Disturbed Area.'' We did this because the conveyances or channels identified in proposed paragraph (c) included both flows diverted from disturbed areas as well as impacted flows from within the disturbed area. As commenters pointed out, discussing both types of diversions was confusing. In the final rule, by setting out the three categories of diversions in paragraph (a), we clearly distinguish between the various types of diversions based upon their specific functions. As commenters have asserted, it is important for us to make such distinctions so that the regulatory community can confidently identify the standards that apply to each type of diversion.

Several commenters claimed that using the term ''diversions'' of perennial and intermittent streams in proposed paragraph (b) was confusing because there is an alleged overlap and potential conflict between § 816.43 and proposed §§ 780.28 and 816.57, which prescribe requirements for stream relocations, also known as stream diversions. These commenters advocated removing references to stream relocations from this section. Our response is two-fold. First, the diversion classification system established in our final rule should eliminate the commenters' confusion. Second, there is no need to remove the requirements for stream relocations from this section. Final § 816.43 is broad in scope and sets out specific requirements for the design, location, construction, maintenance, and use of all the various types of diversion, including stream relocations. As discussed above, we identified three categories of diversions, each with two subsets: Temporary or permanent. Many of the requirements in this section apply to all or most of these categories. Therefore, it is logical for us to place these requirements in one section. In contrast, the relevant portions of §§ 780.28 and 816.57 that deal with stream diversions set forth additional permitting and performance standards that apply exclusively to perennial and intermittent streams. Paragraph (a)(2) of § 816.43 specifies that when a permittee diverts perennial and intermittent streams, it must satisfy not only the requirements of this section but also those of §§ 780.28 and 816.57.

Some commenters recommended that we consolidate proposed § 816.57(b)(3) and previous § 816.43(b)(4) which required a qualified professional engineer to certify that the stream diversion has been constructed in accordance with the design approved in the permit and to certify that it meets all the engineering-related requirements of the regulations. The commenters identified proposed § 816.43(b) as an appropriate place to do this. Similarly, another commenter asked for assurance that we require a qualified professional engineer to certify all diversions, especially diversions affecting streams. It is not necessary to incorporate redundant regulations in multiple locations. Because the requirements for engineer certification of diversions apply only to stream diversions, we have retained those requirements in final § 816.57(c)(2). Although we incorporate the requirement by reference in paragraph (a)(2) of final § 816.43, we do not repeat it. We also decline to require the certification of all diversions as one commenter suggested. As discussed more fully in the preamble to final rule § 816.57(c), we intend for the certification of stream diversions to verify that the permittee has re-established the ''form'' of the stream. Such a certification is essential for stream diversions because restoration of ''form'' is critical to the return of hydrologic function and ecological function. In contrast, we are not requiring restoration of hydrologic function and ecological function for diversion ditches and conveyances and channels within the disturbed area because these two types of diversions are not intended to serve as a surrogate for an existing intermittent and perennial stream. Rather, they are designed either to divert un-impacted water away from the disturbed area or to capture and transport water through the disturbed area to a siltation structure. Thus, the normal inspection process should adequately verify that diversion ditches and conveyances or channels within the disturbed area have been constructed and maintained as designed. We decline, consequently, to require engineer certification of diversion ditches and internal conveyances and channels.

As part of the classification and explanation of the three types of diversions we have moved and re-designated proposed paragraphs (a)(2) and (a)(7) to final paragraphs (c) and (d), respectively, because these requirements apply to all types of diversions.

Final Paragraph (b): Design Criteria

Several commenters maintained that the requirements related to design criteria for temporary diversions should not apply to existing or already approved, but not yet constructed, diversions. These commenters asserted that immediate imposition of these requirements will result in numerous permit revisions and will place a tremendous, unnecessary burden upon regulatory authorities, particularly in states that are currently implementing design criteria where no problems have occurred. In the final rule § 701.16, we have clarified that the stream protection rule, with enumerated exceptions, does not apply retroactively to existing or approved permits and permit applications. As discussed elsewhere in this preamble, the applicability criteria adopted in final rule § 701.16 increase regulatory certainty and address commenters' concerns about disruptions and costs for permit applicants and the regulatory authority.

Some commenters recommended that some of the design criteria imposed in

proposed § 816.43(a), now paragraph (b), should apply only to regions that are experiencing diversion failures. As discussed in the preamble to the proposed rule,[664] past diversion failures have significantly contributed to failures of larger structures downstream—such as siltation structures. In the past, the cumulative effect of a failure of a diversion followed by a failure of larger structures downstream has resulted in adverse social, economic, and environmental effects. Thus, the potential for diversion failures is a threat to the environment and surrounding communities absent reasonable regulation, such as the design criteria in final paragraph (b). Therefore, we proposed, and are finalizing, design criteria that reasonably minimize the potential for diversion failure, regardless of the location of the diversion. Minimizing the potential for diversion failure will reduce the possibility of failures to downstream siltation structures, and the resulting possibility of offsite impacts that could lead to material damage to the hydrologic balance outside the permit area. Commenters' suggestions that the criteria should apply only if diversion failures occur in a specific region is unreasonable and inconsistent with the purposes of the Act[665] because waiting for a failure to occur in an area before addressing failures is not an appropriate response to a known and demonstrated hazard. Aside from speculative comments that these events are purely regional issues, commenters did not attempt to demonstrate that the likelihood of diversion failures in their regions is so remote that these regulatory changes are unnecessary. Thus, with the exception of re-designation of the paragraphs and plain language modifications, we have finalized the design criteria as proposed.

As discussed in the preamble to proposed § 816.43(c),[666] we made two requests for comment. First, we asked for comment on whether we should revise proposed paragraph (c) to apply the same design criteria for temporary and permanent diversions of miscellaneous flows as we apply to temporary and permanent diversions of perennial and intermittent streams. This would result in temporary diversions of miscellaneous flows being designed and constructed to safely pass the peak runoff from a 10-year, 6-hour precipitation event, rather than a 2-year, 6-hour precipitation event. Additionally, this would require permanent diversions of miscellaneous flows to be designed and constructed to safely pass the peak runoff from a 100-year, 6-hour precipitation event as opposed to a 10-year, 6-hour precipitation event.

Several commenters opposed adopting increased design criteria for miscellaneous flows, and no commenters supported the change. We have eliminated references to ''miscellaneous flows'' in the final rule because this general term is now subsumed by the distinct categories of diversions we defined in paragraph (a) of the final rule. Final paragraph (b) prescribes a single set of design criteria to all three categories with one important distinction. That difference is that the flow capacity for stream diversions includes flow in the flood-prone area, while flow capacity for diversion ditches and conveyances or channels within the disturbed area includes only in-channel flow, with sufficient freeboard to prevent out-of-channel flow. This distinction is necessary because only stream diversions are intended to function as natural streams. We are also adopting separate design criteria standards for temporary and permanent diversions as proposed. Therefore, the design event for all temporary diversions will be the 2-year, 6-hour precipitation event and the design event for all permanent diversions will be a 10-year, 6-hour precipitation event.

We also invited comment on whether the design event for a temporary diversion should be raised from a 10-year, 6-hour precipitation event to a 25-year, 6-hour precipitation event to provide an added margin of safety. Many commenters opposed raising the design event. One commenter opined that a 25-year, 6-hour design event will result in larger channels, additional riprap, and higher costs. Another commenter stated that a typical diversion will result in a wider channel requiring increased cut and fill volumes for construction. The commenter added that it has not experienced any failures or breaches of temporary diversions designed for the 10-year 6-hour event and thus argued that altering the design criteria would not provide any additional environmental protection or benefit. Another commenter asserted that the regulatory authority should retain discretion to increase design standards based on sufficient local or regional data demonstrating the need. Some commenters argued that the increasing unpredictability of precipitation events necessitates a 25-year, 6-hour precipitation design event. However, precipitation events have been, and remain, inherently unpredictable.

After reviewing and considering all the comments we received in response, we have determined that the 10-year, 6-hour precipitation event is a sufficient minimum design criterion. We concur that a 25-year, 6-hour precipitation design event is not necessary to provide a sufficient added margin of safety. The final rule imposes new and more protective design and performance criteria for temporary diversions. Furthermore, sediment control measures within the permit area will may capture additional surface runoff. These additional measures will provide an added margin of safety without raising the design event.

We replaced the term ''biological condition'' with ''biology'' in paragraph (b)(1)(ii) of the final rule to conform to other changes within the final rule. Specifically, we are no longer assessing the biological condition of all intermittent streams. However, as explained in the preamble discussion of final rule § 780.19(c)(6), we are requiring the cataloging and monitoring of the biology of intermittent streams.

Section 816.45: What sediment control measures must I implement?

As discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 816.45[667] about the sediment control measures an operator must implement within the disturbed area of the permit. After evaluating the comments that we received, we are adopting the section as proposed, with the following explanations and exceptions.

Final paragraph (a) requires the use of the best technology currently available in the design, construction, and maintenance of sediment control measures. We have modified proposed paragraph (a)(2) by deleting the phrase ''more stringent of'' and replaced it with the phrase ''the applicable effluent limitations.'' This change renders the regulation consistent with paragraph (a) of § 816.42, which requires compliance with applicable water quality standards and effluent limitations.

In final paragraph (b), we listed seven potential sediment control methods. We made a minor word change in the introductory paragraph (b) to remove the phrase ''and adjacent to'' that could be misinterpreted to apply to undisturbed areas. This change makes it clear that sediment control measures are carried out only on the disturbed areas, unless otherwise provided.

[664] 80 FR 44436, 44549–44550 (Jul. 27, 2015).

[665] *See* 30 U.S.C. 1202(a).

[666] 80 FR 44436, 44550 (Jul. 27, 2015).

[667] 80 FR 44436, 44550 (Jul. 27, 2015).

We modified final paragraph (b)(4) by adding ''surface'' and ''from undisturbed areas'' to clarify that this paragraph refers only to surface runoff from undisturbed areas. Likewise, we revised paragraph (b)(5) to clarify that surface runoff from undisturbed areas is what is being conveyed.

As proposed, paragraph (b)(7) stated that ''treating with chemicals'' is allowed. This statement could have been misconstrued as allowing treatment of entrained sediment and suspended solids to occur outside of sediment ponds. Therefore, we have added language to clarify that this type of treatment of surface runoff must occur in sediment ponds and that treatment cannot be carried out by other means, such as by broadcasting chemicals on the ground, or within other conveyances. We have also revised this paragraph to allow the use of flocculants, as well as other types of chemicals.

We received comments that proposed paragraph (b)(8), ''treating mine drainage in underground sumps,'' is considered processing waste water and would not be subject to oversight under this section. We agree and deleted paragraph (b)(8) from the final rule.

Section 816.46: What requirements apply to siltation structures?

Final Paragraph (a): Scope

Paragraph (a) sets out the scope of the section. It provides specific exceptions to the requirements which follow. As proposed, paragraph (a) used the term ''disturbed areas'' to describe the areas subject to these exceptions. However, the term ''disturbed areas'' did not appear anywhere else in the section. Rather, as proposed, this section described the activities subject to the requirements of this section as activities that will ''disturb the land surface.'' For this reason in paragraph (a) of the final rule, we have substituted the phrase ''disturb the land surface'' for ''disturbed areas.''

Final Paragraph (c): Sediment Ponds

Paragraph (c)(1) includes a requirement that permittees locate sediment ponds as near as possible to the disturbed area and outside perennial or intermittent stream channels unless the regulatory authority approves of the location in accordance with §§ 780.28 and 816.57(h). In all cases, operators must construct sediment ponds as closely as possible to the downstream limit of the disturbed areas they serve. These requirements minimize, to the extent possible, adverse impacts to streams, particularly intermittent and perennial streams. Typically, sediment laden water is directed to the sediment ponds, and treated water is returned to the stream by constructed channels. Placing these structures as closely as possible to the outlet of the disturbed area will limit the length of these channels and help minimize any adverse effects. Shorter channels, moreover, require less maintenance, and are therefore, less susceptible to failure. Impacts to streams will also be minimized if sediment ponds are constructed outside perennial or intermittent channels. However, because it is not always possible to construct out-of-stream structures due to local topography, §§ 780.28 and 816.57(h) of this rule provide that the regulatory authority can approve construction in stream channels.

One commenter suggested that this paragraph be removed because the Clean Water Act, and not SMCRA, governs the location of sedimentation ponds. The commenter pointed out that the Environmental Protection Agency's recent Clean Water Rule: Definition of ''Waters of the United States'' [668] provides for locating structures of this type in these areas. The commenter implied that the Clean Water Act permit will be adequate for governing the placement of sediment ponds and alleged that this section supersedes the Clean Water Act authority, violates section 702 of SMCRA,[669] and must be removed from the final rule. We disagree. Section 507(b)(10) of SMCRA [670] requires operators to provide the name and location of the surface stream or tributary into which surface drainage will be discharged in the permit application. Since authorizations, certifications, and permits required under the Clean Water Act may be obtained during or after completion of the SMCRA application review process, it is necessary in many cases that locations of these structures be identified *before* the Clean Water Act authority has made a determination. The requirements of this paragraph ensure that, subject to subsequent approval by the Clean Water Act authority, impacts to the stream will be minimized. Alternatively, the applicant can postpone submittal of the permit application until siltation structure locations have been approved by the Clean Water Act Authority.

Final Paragraph (e): Exemptions

Paragraph (e) sets out conditions under which the regulatory authority may grant an exemption from the requirements of this section. The exemption applies when the area is small, and the operator can demonstrate that drainage from the disturbed area will comply with section 816.42. For small disturbed areas, more damage may be done by attempting to construct siltation structures than if the land was left undisturbed. Construction of siltation structures requires disturbance of land and, until vegetated, they contribute small amounts of sediment. As noted, the exemption does not apply if the drainage will not comply with section 816.42.

Section 816.47: What requirements apply to discharge structures for impoundments?

To conform to plain language principles we have made minor, nonsubstantive changes to final rule § 816.47. Otherwise, we are finalizing 816.47 as proposed. We received no comments on this section.

Section 816.49: What requirements apply to impoundments?

As discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 816.49, which set out the requirements for permanent and temporary impoundments.[671] After evaluating the comments we received, we are adopting the section as proposed, with the following exceptions: First, we are basing the requirements in paragraph (a) on Mine Safety and Health Administration requirements and guidance instead of upon a Natural Resource Conservation Service publication; second, we are moving the design certification requirement set out in proposed paragraph (a) to the permitting section; third, we have added a table to § 816.49(a)(3) to define the minimum freeboard hydrograph criteria for the design precipitation event and further clarified what adequate freeboard is; fourth, in response to comments from another federal agency we have modified the requirements for foundation investigations at paragraph (a)(4) and clarified that this includes abutments; and finally we have added the word ''features'' to paragraph (b)(9). These changes and relevant comments are discussed below.

[668] 80 FR 37054 (June 29, 2015).

[669] 30 U.S.C. 1292. (''Nothing in this chapter shall be construed as superseding, amending, modifying, or repealing the . . . Federal Water Pollution Control Act . . ., the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality.'').

[670] 30 U.S.C. 1257.

[671] 80 FR 44436, 44551–52 (Jul. 27, 2015).

Final Paragraph (a): Requirements That Apply to Both Permanent and Temporary Impoundments

We proposed to update the reference to the Natural Resource Conservation Service publication 210–VI–Technical Reference 60.[672] One commenter noted that these requirements are duplicative of those required by the Mine Safety and Health Administration. The commenter claimed that duplicative requirements could create conflict between the operator and regulating authorities and result in increased permitting delays and costs. We agree that there should be a clear demarcation of requirements between the regulatory authority and other federal agencies. In connection with our review of this comment, we have also determined that the Federal Emergency Management Administration has applicable guidance that pertains specifically to these kinds of impoundments and that the Mine Safety Health Administration references that Federal Emergency Management Administration guidance in the administration of its program. For that reason, we have deleted references to 210–VI–Technical Reference 60, added references to the Mine Safety and Health Administration regulations at 30 CFR 77.216, and added language to clarify that an impoundment that includes a dam with a significant or high hazard potential classification under § 780.25(a) of the final rule must comply with the requirements set forth by the Mine Safety and Health Administration. These changes will clearly distinguish between the requirements imposed by the SMCRA regulatory authority and those that are imposed by other federal agencies and ensure that the permittee follows all of the most recent and appropriate technical guidance. Although, as discussed above, we have deleted references to Technical Reference 60, we have added a table to § 816.49(a)(3) that defines the minimum spillway freeboard criteria for the design precipitation event based on Table 2–5 of Technical Reference 60 as those requirements are considered the minimum standard for such structures. We also require that impoundment embankments must have adequate freeboard to resist overtopping by waves in conjunction with a typical increase in water elevation at the downwind edge of any body of water, by sudden influxes of surface runoff from precipitation events, or by any combination of these effects.

To increase clarity, we have moved the design certification requirements of proposed paragraph (a)(3) to the permitting regulations at § 780.25(c)(1)(i). The design certification requirements at § 780.25(c)(1)(i) are substantively unchanged from proposed paragraph (a)(3).

At the suggestion of another federal agency and to improve clarity we have modified final paragraph (a)(4) about foundations. We have added ''abutments'' to the requirement to ensure precautions are taken to fully prevent failure of impounding structure foundations. Additionally, we have added the phrase ''and control of underseepage'' at final paragraph (a)(4)(ii) to ensure that seepage failures of the dam foundation are prevented. This would include the potential for piping failures.

Final Paragraph (b): Requirements That Apply Only to Permanent Impoundments

With the exceptions of changes to paragraphs (b)(2) and (b)(9), we have finalized paragraph (b) as proposed.

Upon further evaluation and in consultation with the U. S. Environmental Protection Agency, we modified paragraph (b)(2) by replacing ''meet'' with the phrase ''not cause or contribute to a violation of'' and referenced the applicable section of the Clean Water Act to better conform with language used in section 303(c) of the Clean Water Act.[673] Similar changes have been made throughout the final rule.

One commenter maintained that the requirements of proposed paragraphs (b)(7), (b)(8), and (b)(9) could delay reclamation or could make contemporaneous reclamation difficult because of an alleged additional need to haul large amounts of material at the end of mining. The commenter is mistaken because these provisions impose requirements that are merely clarifications and outgrowths of existing requirements. Paragraph (b)(7) requires a demonstration that approval of the impoundment will not result in retention of spoil piles or ridges that are inconsistent with the definition of approximate original contour. This demonstration adds no additional burden because § 816.102 already requires disturbed areas to be backfilled and graded to the approximate original contour. Paragraph (b)(8) requires a demonstration that approval of the impoundment will not result in the creation of an excess spoil fill elsewhere within the permit area. This provision is an outgrowth of existing § 816.71 which requires the permittee to demonstrate that it has minimized excess spoil and requires that the final configuration of a fill must be suitable for the approved postmining land use. It is also consistent with the practice followed by the vast majority of the regulatory authorities located in mining areas that generate excess spoil. Paragraph (b)(9) requires a demonstration that the impoundment has been designed with dimensions, features, and other characteristics that will enhance fish and wildlife habitat to the extent that doing so is not inconsistent with the intended use. This demonstration adds no additional burden because it is consistent with the requirements at § 780.16 to prepare, using the best technology currently available, a fish and wildlife protection and enhancement plan and § 816.97(a) to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible and achieve enhancement of those resources where practicable. Thus, these three provisions merely clarify existing requirements. Any burden on the operator would result from its failure to comply with previous regulations and not the effect of finalized paragraphs (b)(7), (b)(8), and (b)(9). Significantly, the commenter has provided no information to support its claim that these criteria would delay reclamation or make reclamation or contemporaneous reclamation difficult or impossible. Nor has the commenter provided any information to substantiate the claim that these criteria will create a need, which did not exist prior to the rule, to haul large amounts of material. Finally, backfilling and reclamation plans as required in § 780.12(d) must contain contour maps, models, and cross-sections that show in detail the final configuration of the permit area by proper planning and spoil handling. If the operator has complied with this provision and properly planned its operation it should be able to minimize any costs associated with haulage.

We have clarified paragraph (b)(9) by adding the word ''features'' so that this provision now reads ''[t]he impoundment has been designed with dimensions, features, and other characteristics that will enhance fish and wildlife habitat to the extent that doing so is not inconsistent with the intended use.'' This addition helps assure that the demonstration includes design features that promote habitat enhancement. As noted in the discussion of the definition of approximate original contour at § 701.5, we fully appreciate the value of

[672] *Id.*

[673] 33 U.S.C. 1313(c).

impoundment features but not at the loss of restoring the postmining surface configuration to its approximate original contour.

Some commenters claimed that § 816.49 inappropriately focuses upon Appalachia. We disagree. The construction of permanent impoundments postmining is conducted outside Appalachia as frequently, if not more frequently, than inside Appalachia. For example, in the Illinois Basin where the water table lies near the surface, permanent impoundments are commonly used as a fish and wildlife enhancement. Thus, § 816.49 will apply to all mining regions where permanent final pit impoundments are permitted.

Several commenters expressed concern that these regulations may affect local water rights. We disagree and do not anticipate any infringement of local water rights as a result of this rule. The demonstrations required in this section require an analysis of the impact that the impoundment would have on post mining land use. The regulatory authority, which is in the best position to make this decision, will have the final authority to determine if any impact to local water rights may occur. Furthermore, aside from vague suggestions that revisions to § 816.49 may affect water rights, commenters have provided no information, evidence, or analysis to indicate how revisions to § 816.49 would affect water rights.

Section 816.55: What must I do with sedimentation ponds, diversions, impoundments, and treatment facilities after I no longer need them?

In the previous and proposed rules, this regulation appeared in § 816.56, but we are redesignating it as § 816.55 in the final rule to accommodate the addition of a new § 816.56, which concerns ephemeral streams, adjacent to § 816.57, which concerns perennial and intermittent streams. One commenter asked us to draft more plain language revisions to our regulations in sections where we are making few or no substantive revisions. We have restructured and revised § 816.55 to implement that recommendation.

In addition, we have made three substantive revisions to the proposed rule. First, we removed language that could have been interpreted to allow abandonment of the permit as an alternative to seeking bond release. Abandonment of a permanent program permit before final bond release would be inconsistent with both the termination of jurisdiction provisions of § 700.11(d)(2) and the intent of section 519 of SMCRA [674] and §§ 800.40 through 800.44, which establish bond release procedures and criteria to ensure compliance with the reclamation requirements of SMCRA and the applicable regulatory program.

Second, we have replaced an ambiguous reference to ''bond release'' in the previous and proposed rules with a reference to final bond release under § 800.42(d). This revision is appropriate because § 816.55 requires the removal of temporary structures and the renovation of permanent structures to meet program requirements for retention. Clearly, these requirements could not apply to applications for Phase I and II bond release.

Third, we removed language that would have allowed retention of treatment facilities after final bond release. This language is inconsistent with final § 800.18, which requires reclamation of the sites upon which treatment facilities are located and areas used in support of those facilities. In particular, § 800.18(i)(3) specifies that the financial assurance will serve as the bond for reclamation of the portion of the permit area required for postmining water treatment facilities and access to those facilities.

Section 816.56: What additional performance standards apply to mining activities conducted in or through an ephemeral stream?

Several commenters suggested that we should make clear which requirements in the rule apply to which types of streams. Specifically, these commenters noted proposed § 816.57, which would have applied to activities in, through, or adjacent to perennial or intermittent streams, also contained cross-references to proposed § 780.28(b)(3), which would have addressed the establishment of riparian corridors for ephemeral streams. In response, we have added new § 816.56 that sets out the requirements specific to ephemeral streams, including the requirement to establish a 100-foot streamside vegetative corridor that complies with the standards in § 816.57(d)(1)(iv) through (4) if activities are conducted through an ephemeral stream. The comparable requirements for the streamside vegetative corridors for intermittent and perennial streams are still found in § 816.57.

In the proposed rule, we invited comment on whether we should extend to ephemeral streams all the protections we give to perennial and intermittent streams. We received a variety of comments advocating equal protection of all stream types and many comments opposing the extension to ephemeral streams of the protections we give to intermittent and perennial streams. After review of the comments, we have decided not to extend the same protections to ephemeral streams that we do to intermittent and perennial streams. However, consistent with Part VII of the preamble to the proposed rule,[675] in response to scientific literature about the benefits of headwaters to essential biological and ecological functions, we are extending some additional protections (postmining surface drainage pattern and stream-channel configuration and establishment of streamside vegetative corridors) to ephemeral streams that our previous rules do not afford.

Another commenter raised a concern that requiring uniform restoration of biological components in ephemeral streams is not feasible and asked for a clarification that this requirement does not apply to ephemeral streams. This commenter is correct that we did not propose to require the operator to restore the ecological function of ephemeral streams. For additional information as to the protections extended to ephemeral streams, you may review the preamble to the proposed rule at Part VII, B, ''What specific rule changes are we proposing with respect to ephemeral streams?'' [676]

One commenter suggested that a valid reason for not providing the same protection to ephemeral streams is the increased cost associated with protection and reconstruction to the same standard as intermittent and perennial streams. As previously stated, we are not affording the same protections to ephemeral streams as intermittent or perennial streams. Also we note that changes in the definitions of intermittent and ephemeral streams in the final rule, specifically the removal of the one square mile watershed criteria, will result in many streams, particularly those in the western region of the country, that were previously characterized as intermittent under the current definition being reclassified as ephemeral under the final rule. In circumstances where this occurs and where a stream is no longer defined as intermittent, the level of protection for that stream may be reduced, which could also reduce the cost necessary to protect or reconstruct it.

One commenter suggested that, if we did not extend the same protections to ephemeral streams that we do to intermittent and perennial streams, we

[674] 30 U.S.C. 1269.

[675] 80 FR 44436, 44451–44453 (Jul. 27, 2015).

[676] 80 FR 44436, 44452–44453 (Jul. 27, 2015).

should alternatively consider providing more stringent protections for ephemeral streams that are located within watersheds that are relatively undisturbed, diverse, part of functioning systems, or watersheds that support federally-protected aquatic species. Although we understand the commenter's concerns, the protections we have added for ephemeral streams will provide better protection than under the previous rule. In particular, scientific literature supports the protections that we are extending to ephemeral streams, particularly the reestablishment of the streamside vegetative corridor: These streams, along with their naturally occurring vegetation provide significant exports to the downstream habitat and higher order biomass that includes leaf litter breakdown and biomass production.[677] To the extent the commenter is concerned with aquatic species protected under the Endangered Species Act, this rule does not supersede the requirements of the Endangered Species Act. Compliance with that law may result in additional protections if a threatened or endangered species is present.

Section 816.57: What additional performance standards apply to mining activities conducted in or through a perennial or intermittent stream or on the surface of land within 100 feet of a perennial or intermittent stream?

We have changed the structure of § 816.57 in the final rule. In order to make it easier to track the responses to various comments received on proposed § 816.57, we are providing the following summary of the changes to this final section:

- We have clarified the title of § 816.57 to specify that this section applies only to mining activities conducted in, through, or on the surface of land within 100 feet of a *perennial* or *intermittent* stream.
- We have moved the general prohibition on mining within 100 feet of a perennial or intermittent stream from proposed paragraph (a)(1) to final paragraph (b), changed the title of final paragraph (b) to reflect the substance of the prohibition, and changed the term ''bankfull'' to ''ordinary high water mark'' in the same paragraph.
- We have moved the ''Clean Water Act requirements'' from proposed paragraph (a)(2) to final paragraph (a)(1), clarified the title of final paragraph (a)(1) to reflect plain language principles, and added final subparagraph (a)(2) to clarify that compliance with the Clean Water Act under final subparagraph (a)(1) requires compliance with applicable water quality standards.
- We have split the requirements of proposed paragraph (b) among multiple paragraphs. Proposed paragraph (b)(1) has been deleted in the final rule because it simply stated that you must comply with specific provisions of your permit, which goes without saying. Proposed paragraph (b)(2) is split among final paragraphs (d), (e), (f), and (g). Specifically, proposed paragraph (b)(2)(i) is final paragraph (e), part of proposed paragraph (b)(2)(ii) is final paragraph (d), part of proposed paragraph (b)(2)(ii)(A) is final paragraph (f), and proposed paragraphs (b)(2)(ii)(B) through (D) now form parts of final rule paragraphs (f) through (g).
- Because we have split paragraph (b) over multiple paragraphs, we have moved the prohibition on placement of sedimentation control structures from proposed paragraph (c) to final paragraph (h).
- We have changed the terms ''sedimentation control'' and ''sedimentation pond'' to ''siltation structure'' throughout final paragraph (h).
- We have added final paragraph (h)(1)(ii) in response to comment.
- We have modified final paragraph (h)(2), which was proposed paragraph (c)(2), in multiple places: First, we have added the requirement that the exceptions from the prohibitions only apply if approved in the permit; second, we have added coal mine waste refuse piles and coal mine waste impounding structures in steep slope areas as an exception; and third, we have added a demonstration requirement and a requirement that the regulatory authority make a written finding.
- We have added the term ''coal mine waste refuse pile'' to final paragraph (h)(3)(ii), which was proposed paragraph (c)(3)(ii).
- We have changed the term ''coal mine waste disposal structure'' to ''coal mine waste impounding structure'' in final paragraph (h)(3)(ii), which was proposed paragraph (c)(3)(ii).
- We have changed the phrase ''coal mine waste disposal structure'' in proposed paragraph (c)(3)(iii) to ''coal mine waste structure'' in final paragraph (h)(3)(iii).
- We have added final paragraph (h)(3)(iii)(A).
- We corrected cross-references as needed.

Before addressing some of these more specific changes, we address general comments about the section below.

Many commenters requested that we clarify what standards apply to perennial and intermittent streams and what standards apply to ephemeral streams. As discussed in the preamble to new § 816.56, we have removed the standards for ephemeral streams that were found in proposed § 816.57. As finalized, therefore, § 816.57 describes only additional performance standards that apply to activities in, through, or within 100 feet of a perennial or intermittent stream. Furthermore, we clarified in the title of § 816.57 that applies only to mining activities conducted in, through, or within 100 feet of a perennial or intermittent stream. We also changed the title of final paragraph (b) to reflect the substance of the prohibition in § 816.57: This section is a prohibition on mining in or within 100 feet of a *perennial* or *intermittent* stream. Commenters can now easily determine the standards applicable to perennial and intermittent streams and the standards applicable to ephemeral streams by reviewing the respective sections on each.

Some commenters requested that we clarify which stream types require the establishment of the 100-foot streamside vegetative corridor. This corridor is required for all stream types: Section 816.56(c) contains the requirements for ephemeral streams, and § 816.57(d) contains the requirements for intermittent and perennial streams.

Likewise, a commenter specifically asked for clarification as to which streams require restoration of ecological function. The restoration of ecological function is only required for perennial and intermittent streams; therefore, it is discussed only in §§ 816.57 (performance standards) and 780.28 (permit application requirements). Similarly, the requirements to restore or improve the form, hydrologic function (including flow regime), streamside vegetation, and ecological function of the stream after you have mined it apply to affected stream segments of perennial and intermittent streams.

One commenter claimed that this rulemaking does not reduce the destruction of streams or improve stream restoration, as allegedly demonstrated by the most recent assessment of the impacts from underground coal mining and mine subsidence on streams in Pennsylvania. We appreciate this comment as it highlights the fact that there is a real need to better protect streams because, under the *previous* regulations, streams are being impacted. This rulemaking

[677] Ralphael D. Mazor, et al., *Integrating intermittent streams into watershed assessments: Applicability of an index of biotic integrity.* Freshwater Science, 33.2. (2014) pgs. 459–474.

will address situations such as those cited by the commenter in a number of ways. First, final § 780.28(e)(1) requires that an operator make one or more of thirteen demonstrations to better ensure that the hydrologic function and ecological function of stream segments can be restored if the operator plans to mine though or permanently divert a stream, construct an excess spoil fill, coal mine waste refuse pile, or impounding structure, or conduct any other activity within or near a perennial or intermittent stream. Second, paragraphs (e), (f), and (g) requires an operator to demonstrate that physical form, hydrologic function, and ecological function of perennial or intermittent streams have been adequately restored after mining and reclamation are complete. These complementary requirements—increased planning to protect streams before they are affected and stronger reclamation standards for those that are affected—strike a balance that allows mining while ensuring that restoration of affected streams can be, and is being achieved.

A commenter argued that this section takes an unnecessary one-size-fits-all approach and that biological components of perennial, intermittent, and ephemeral streams differ significantly. For similar reasons, another commenter claimed that requiring the same protections for all streams, including ephemeral ones, is not practical. As noted above, we agree with these commenters only to the extent that the protections for ephemeral streams should be different than for perennial and intermittent streams and have clarified the different requirements by adding § 816.56, which specifies the requirements for ephemeral streams, and by revising this section to clarify that it applies to perennial and intermittent streams. These differing requirements are one example of why this rule does not approach the regulation of streams in a one-size-fits-all manner. More importantly, however, this section and § 780.28 do not create one-size-fits-all requirements for perennial or intermittent streams; instead, they incorporate site specific requirements and demonstrations when mining is planned in or near an intermittent or perennial stream, allowing for differences in topography, geology, and climate in the various regions of the country. For instance, paragraphs (c) and (d) of § 780.28 require that plans for individual mines be designed to restore the surface drainage patterns and stream channel configurations and establish vegetative corridors, and paragraphs (c) and (d) of this section require that these features actually be constructed consistent with these plans. Specific drainage patterns and vegetative corridors will vary and this rule allows for appropriate tailoring to individual circumstances while reducing adverse impacts to streams.

Several commenters questioned the requirement of this section to achieve ecological function. As support, these commenters often cited judicial decisions, such as *Ohio Valley Environmental Coalition (OVEC)* v. *Hurst,*[678] which they characterize as disallowing agencies' reliance on ''unproven and speculative mitigation measures.'' In *OVEC,* an agency issued a finding of no significant impact under the National Environmental Policy Act in reliance, in part, on a finding that mitigation measures would reduce the environmental impacts to an insignificant level. The court determined that this agency's consideration of mitigation measures as part of its cumulative impact analysis was inadequate because the agency did not support its claims that those mitigation measures would actually mitigate the impacts as claimed by the agency, or be successful. To the extent that this district court decision is even instructive to this rulemaking, we have adequately supported our approach and included measures to ensure its success. Notably, the final rule at paragraph (b) contains a general prohibition against mining through intermittent and perennial streams unless the permittee makes certain demonstrations prior to mining related to its ability to restore those streams. If the permittee cannot make those required demonstrations, the general prohibition on mining through those streams applies. This approach is supported by ample scientific literature that concludes that the most appropriate approach for protecting streams is a general prohibition of mining through perennial or intermittent streams but that exceptions can be made when streams can be restored to a certain level of stream health.[679] The same general approach existed in our previous rules, but the measures in the previous rules for ensuring successful reclamation to ensure stream health were general in nature and lacking in effectiveness, as evidenced by our own oversight reports.[680] The final rule clarifies and closely mirrors the requirements of sections 515(b)(10), (16), and (24) of SMCRA which require, among other things, the use of the best technology currently available to minimize disturbances and adverse impacts to fish and wildlife and other environmental values.

A commenter claimed that the proposed rule failed to address damage to the hydrologic balance from backfilling with coal combustion residues and that this constitutes a glaring omission. The commenter recommended that we establish a new part in the final rule text that addresses the placement of coal combustion residues in surface and underground mines. We did not include specific rule language addressing the placement of coal combustion residues because that activity is already indirectly covered in this rulemaking in sections such as § 780.12(d)(2)(iii), handling of acid-forming and toxic-forming materials to prevent the formation of acid or toxic drainage and to protect groundwater and surface water; § 780.20, determination of the probable hydrologic consequences; and § 780.21, preparation and review of the cumulative hydrologic impact assessment. However, in order to comprehensively address this issue, additional direct regulation of the placement of coal combustion residues on active and abandoned coal mines is better addressed in a separate rulemaking. Such a rulemaking is one of our priorities.[681]

Final Paragraph (a): Compliance With Federal, State, and Tribal Water Quality Laws and Regulations

Proposed paragraph (a)(2), now final paragraph (a)(1), requires permittees to conduct surface mining activities in or affecting waters subject to the jurisdiction of the Clean Water Act only if they first obtain all necessary authorizations, certifications, and permits under the Clean Water Act. In the final rule, we have split proposed paragraph (a)(2) into two parts. Paragraph (a)(1) in the final rule is

[678] 604 F. Supp. 2d 860 (S.D. W. Va. 2009).

[679] Colleen E. Bronner, et al., *An Assessment of U.S. Stream Compensatory Mitigation Policy: Necessary Changes to Protect Ecosystem Functions and Services.* Journal of the American Water Resources Association (JAWRA) 49(2):449- 462. DOI: 10.1111/jawr.12034. (2013) *See also* Palmer, Margaret A., and Kelly L. Hondula, *Restoration as mitigation: Analysis of stream mitigation for coal mining impacts in southern Appalachia.* Environmental science & technology 48.18 pgs.,10552–10560 (2014).

[680] Assessment of the WVDEP Trend Station 071, West Fork of Pond Fork Watershed, Boone County, West Virginia, September 21, 2011.

[681] 80 FR 77709, 77803 (Dec. 15, 2015). (Unified Agenda of Federal Regulatory and Deregulatory Actions); *see also* 72 FR 12026 (Mar. 14, 2007). (Advance Notice of Proposed Rulemaking, Placement of Coal Combustion Byproducts in Active and Abandoned Coal Mines).

substantively the same as proposed paragraph (a)(2), and specifies that all necessary authorizations, certifications, and permits required under the Clean Water Act must be obtained prior to conducting surface mining activities in or affecting an intermittent or perennial stream. For clarity, we added paragraph (a)(2) which requires that surface mining activities must comply with all applicable or state and tribal laws and regulations concerning surface water and groundwater. The use of the word applicable is important because these standards are not applicable to segments of streams that are buried, such as under an excess spoil fill, in accordance with the Clean Water Act and SMCRA. Additionally, in response to comments from other federal agencies we accounted for situations when states and tribes achieve primacy and implement laws or regulations related to surface water or groundwater.

Together, final paragraphs (a)(1) and (a)(2) make clear that the operator must obtain all necessary authorizations, certifications, and permits under the Clean Water Act and conduct the mining activities in a way that meets the approved water quality standards required under the Clean Water Act. Paragraph (a)(2) is an outgrowth of the requirement under final paragraph (a)(1) that was proposed in paragraph (a)(2). Thus, the addition of final paragraph (a)(2) in the final rule is a clarification of the proposed requirement.[682]

Final Paragraph (b): Prohibition on Mining in or Within 100 Feet of a Perennial and Intermittent Stream

As discussed above, in the final rule, we moved the general prohibition on mining in or within 100 feet of a perennial and intermittent stream from proposed paragraph (a)(1) to final paragraph (b), changed the title of final paragraph (b) to reflect the substance of the prohibition, and changed the term ''bankfull'' to ''ordinary high water mark'' in the same paragraph. Proposed paragraph (a)(1), now final paragraph (b), prohibits surface mining activities in or through a perennial or intermittent stream or that would disturb the surface of land within 100 feet of a perennial or intermittent stream unless the regulatory authority authorizes that activity in the permit. We did not receive any comments on proposed paragraph (a)(1), and, we are adopting the section as proposed as final paragraph (b) with the two exceptions discussed below. First, in final paragraph (b), we have changed the title of proposed paragraph (a)(1) ''General prohibition'' to ''Prohibition on mining in or within 100 feet of a perennial or intermittent stream.'' This change reflects the now clear separation between § 816.56, which applies only to ephemeral streams, and § 816.57. Second, as discussed in the preamble discussion of ''ordinary high water mark'' in § 701.5 of the final rule, one commenter suggested that the term ''ordinary high water mark'' is more commonly accepted and more easily determined than the term ''bankfull.'' We agree and have revised references to ''bankfull'' throughout the final rule. We now require that the 100-foot distance be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

Final Paragraph (c): Postmining Surface Drainage Pattern and Stream-Channel Configuration

In section 780.28 of the proposed rule, we set out requirements for an application that proposes to mine through or divert a perennial, intermittent, or ephemeral stream.[683] In order to make the applicable requirements clearer for the regulated public, we have added final § 816.57(c)(1), which is similar to proposed § 780.28(c). Final § 816.57(c)(1) clarifies that if you mine through or permanently divert a perennial or intermittent stream, you must construct a postmining surface drainage pattern and stream-channel configurations that are consistent with the surface drainage pattern and stream channel configurations approved in the permit in accordance with section 780.28. The language of paragraph (c)(1) has, for clarity, been modified in that it specifically points out that construction of both the postmining surface drainage pattern and stream-channel configuration must meet the requirements approved in the permit under § 780.28(c). The proposed language referenced some of the permitting requirements in § 780.28(c) but not all. This revision clarifies that the construction or reconstruction of the stream channel must meet all standards set forth in the permit.

Proposed paragraph (b)(3), now final paragraph (c)(2), requires the certification by a professional, qualified engineer that a stream channel diversion or reconstructed stream channel has been constructed in accordance with the permit and that it meets all engineering requirements. One commenter claimed that this requirement will increase engineering review and other administrative tasks and costs. Also, the commenter alleged that previous regulations only required streams with drainage areas in excess of one square mile of drainage to be certified. While we recognize that additional effort will be required to obtain this certification, we have retained the requirement in the final rule as it ensures that the plan required under § 780.28(c) will be fully implemented. Proper implementation is integral to the successful ecological development of the stream. Certifications are routinely required for other hydrology structures, such as siltation structures, sedimentation ponds, and impoundments; thus, this additional requirement would not require significantly more effort than was required under the previous regulations. We did, however, revise this section slightly to clarify that the certification requirement may be limited to the location, dimension, and physical characteristics of the stream diversion or channel.

Final Paragraph (d): Establishment of Streamside Vegetative Corridors

Final paragraph (d) now contains the performance standards that we listed in proposed § 780.28(b)(3). We made this change to reduce redundancy within §§ 780.27(c) and 780.28(d) and provide one location for streamside vegetative corridor requirements. As discussed above, requirements for streamside vegetative corridors for *ephemeral* streams are now included in new § 816.56(c). To the extent that the comments we received about performance standards are duplicative of comments received about the permitting section, such as comments inquiring why we refer to streamside vegetative corridors instead of the proposed term ''riparian corridors'' or the use of ''ordinary high water mark'' instead of ''bankfull elevation,'' please refer to the prior preamble discussions related to § 701.5 and part 780. The performance standards at final § 816.57(d) are substantially identical to the proposed language provided in § 780.28(b)(3) with the exceptions described below.

As discussed in the preamble to §§ 780.27(c) and 780.28(d) of this final rule, several commenters alleged that we selected the 100-foot width for the vegetative corridor arbitrarily. In the preamble to the proposed rule at §§ 780.16 and 816.57(a), we explained the ecological and historical support for

[682] *See* 80 FR 44436, 44656 (Jul. 27, 2015). (''You may conduct surface mining activities in waters of the United States only if you first obtain all necessary authorizations, certifications, and permits *under the Clean Water Act, 33 U.S.C. 1251 et seq.*'') (emphasis added).

[683] 80 FR 44436, 44610.

selecting this buffer zone width.[684] As we explained, this width is based upon scientific literature substantiating that a vegetative filter strip width of 100 feet generally will reduce sediment, thus eliminating many harmful pollutants. Additionally, studies of effective buffer widths for wildlife generally recommend wider buffers than those required for sediment control and protection of water quality. The minimum 100-foot buffer width we adopt in the final rule lies within the lower end of the range of recommended minimum widths for wildlife habitat and flood mitigation, in the middle of the range for sediment and nitrogen removal, and exceeds the range recommended for water temperature moderation, bank stabilization, and aquatic food web maintenance. Therefore, this width is an appropriate compromise that accomplishes various environmental and stability objectives and is consistent with section 102(f) of SMCRA, which requires a balance between environmental protection and the need for coal production.[685] Similar to proposed § 780.28(b)(3)(iii), final paragraph (d)(4) recognizes that streamside vegetative corridors are not required under certain circumstances such as when the land is prime farmland historically used for cropland.

Proposed § 780.28(b)(3)(ii) would have required that the streamside vegetative corridor use only native species. A few commenters opined that revegetation within the streamside vegetative corridor using only native species may contradict what is recommended or requested by a Clean Water Act authority or the National Resources Conservation Service. We agree with these commenters in part. Final § 816.57(d)(2)(i) requires the use of appropriate native species adapted to the area unless an agency responsible for implementation of section 404 of the Clean Water Act, 33 U.S.C. 1344, requires the use of a non-native species. The National Resources Conservation Service only issues recommendations. So, to the extent that a Clean Water Act authority requires the use of a recommendation to use non-native species made by the National Resources Conservation Service, it is allowable under our regulations. This change satisfies our objectives for improving reclamation while ensuring there is no conflict with the Clean Water Act.

Final paragraph (d)(2)(ii) ensures that the species planted during reclamation are consistent with the revegetation plan approved in the permit. This new requirement is provided for clarity to ensure those species planted within the streamside vegetative corridor are those approved in the permit and are consistent with final § 780.12 (g)(1)(v).

Many commenters argued that the proposed rule was too rigid and did not provide sufficient flexibility within the streamside corridor vegetation requirements to allow for differences in streams, soil, and climate conditions across the country. In response, final paragraph (d)(2)(iii) clarifies that the streamside vegetative corridors must include appropriate native hydrophytic vegetation, vegetation typical of floodplains, or hydrophilic vegetation characteristic of riparian areas and wetlands to the extent that the corridor contains suitable habitat for those species and the stream and the geomorphology of the area are capable of supporting vegetation of that nature. Similarly, paragraph (d)(3) waives the requirement of planting hydrophytic or hydrophilic species within those portions of streamside corridors where the stream, soils, or climate are incapable of providing the moisture or other growing conditions needed to support and sustain hydrophytic or hydrophilic species. However, the applicant must plant the corridor with appropriate native species that are consistent with the baseline information concerning natural streamside vegetation, unless otherwise directed by an agency responsible for implementing section 404 of the Clean Water Act.[686] These additions will allow operators and regulatory authorities more flexibility to revegetate the streamside corridors to account for regional differences in hydrology, ecology, and climate while also imposing a uniform national standard.

A commenter also requested that we revise proposed § 780.28(b)(3), which required establishment of a riparian corridor at least 100 feet wide on each side of a perennial, intermittent, or ephemeral stream if mining activities were conducted in or within 100 feet of the stream, to better reflect premining land uses or landowner preferences. The commenter specifically referred to premining situations where crops are planted within 100 feet on either side of an ephemeral, intermittent, or perennial stream or where the landowner would like for crops to be planted within 100 feet of a stream after reclamation. We find that no change is necessary in response to this comment. Proposed § 780.28(b)(3)(iii)(A) and (B), which we are adopting as final § 816.56(c)(4) for ephemeral streams and § 816.57(d)(4) for perennial and intermittent streams, adequately addresses the commenter's concerns. Specifically, final §§ 816.56(d)(4) and 816.57(d)(4) provide that the requirement for a streamside vegetative corridor does not apply to prime farmland historically used for cropland or to situations in which establishment of a streamside vegetative corridor comprised of native species would be incompatible with an approved postmining land use that is implemented before final bond release. Therefore, a landowner desiring to grow crops on land within 100 feet of a stream may do so, provided the regulatory authority approves a cropland postmining land use and the landowner actually implements that land use before final bond release.

This commenter also suggested we consider adopting the protocol outlined in the U.S. Army Corps of Engineers permitting process for compensatory mitigation. We do not agree that adoption of the suggested protocol is appropriate. The final rule implements section 515(b)(24) of SMCRA,[687] while the protocol suggested by the commenter governs implementation of section 404 of the Clean Water Act.[688] Section 515(b)(24) of SMCRA requires that, ''to the extent possible using the best technology currently available,'' surface coal mining and reclamation operations must ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.'' We find that adoption of a protocol intended for implementation of the Clean Water Act is not an appropriate means of implementing this provision of SMCRA, which does not mention compensatory mitigation. Moreover, our final rule is consistent with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment,[689] which mandates that the Department of the Interior, among other agencies, promote avoidance of impacts to ''land, water, wildlife, and other ecological resources (natural resources) caused by land and water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities.'' [690]

[684] 80 FR 44436, 44494 and 44552 (Jul. 27, 2015).

[685] 30 U.S.C. 1202(f).

[686] 33 U.S.C. 1344.

[687] 30 U.S.C. 1265(b)(24).

[688] 33 U.S.C. 1344.

[689] Presidential Memorandum issued November 3, 2015. *See also* Secretarial Order No. 3330, Improving Mitigation Policies and Practices of the Department of the Interior (October 31, 2013); 600 DM 6.

[690] *Id.* at Section 1.

As proposed, § 780.28(b)(3)(iii) listed three situations in which the streamside vegetative corridor requirements would not apply. With the exception of proposed § 780.28(b)(3)(iii), this paragraph has now been redesignated as final § 816.56(c)(4) for ephemeral streams and final § 816.57(d)(4) for perennial streams. We did not adopt proposed § 780.28(b)(3)(iii)(C), which expressly stated that the streamside vegetative corridor requirement does not apply to stream segments buried beneath an excess spoil fill, a coal mine waste refuse pile, or a coal mine waste impounding structure. We did not adopt this provision because it is self-evident that requirements specifically applicable to reconstructed streams, such as the streamside vegetative corridor revegetation requirements, do not apply to segments of streams that no longer exist because they have been buried as allowed by our regulations.

The U.S. Fish and Wildlife Service recommended that we add additional criteria to proposed paragraph (b)(2)(ii), now final paragraph (d), to explicitly state that riparian zone plantings must meet applicable performance standards for stocking and survival. We did not adopt this recommendation because § 816.116 applies to riparian zone plantings and contains sufficient standards for determining vegetation success. Thus, inclusion of revegetation success standards in § 816.57 would be redundant.

As mentioned above, proposed paragraph (b)(2) has been split between multiple paragraphs of the final rule. Proposed paragraph (b)(2)(i) is final paragraph (e), part of proposed paragraph (b)(2)(ii)(A) has moved to final paragraph (f), and proposed paragraphs (b)(2)(ii)(B) through (D) now form parts of final rule paragraphs (f) through (g). As discussed below, we changed the structure and substance of proposed paragraph (b)(2) to respond to comments.

Proposed paragraph (b)(2) set forth the proposed requirements to restore the form and function of stream segments. Many commenters expressed their views of the relationship between the form and function of a stream. On one hand, many commenters claimed that restoration of the stream form should be considered adequate to achievement of ecological function. On the other hand, a commenter opined that a stream's form is generally not a proxy for its function. Another commenter recommended that the final rule require an operator to restore hydrologic function in addition to ecological function to ensure protection for this essential element of stream health. Similarly, several commenters opined that for bond release, the regulatory authority must consider whether the form, hydrologic function, and ecological function of intermittent or perennial stream segments have been appropriately restored or reconstructed because all three (form, hydrologic function, and ecological function) are integral to the demonstration of successful reclamation.

As described at length in the preamble to the proposed rule, restoration of form alone has not been shown to provide assurance that function will return, especially when considering the extreme nature of the impacts of mining within the stream buffer.[691] Thus, we are not removing the requirement for restoration of stream function. We do, however, agree with the commenters that restoration of stream function would be more clearly expressed by including separate requirements for hydrologic function and ecological function. Therefore, we have divided proposed paragraph (b)(2) into three paragraphs in which we include requirements to restore form in paragraph (e) and divide the requirement to restore stream hydrologic function into paragraph (f) and paragraph (g) about the restoration of ecological function. Notably, the restoration of form is a prerequisite for the restoration of hydrologic function and the restoration of hydrologic function is a prerequisite for restoration of ecological function.

Final Paragraph (e): Restoration of Form

''Form'' for purposes of this section is defined in § 701.5. We received no comments on proposed paragraph (b)(2)(i), now final paragraph (e), relating specifically to the restoration of form. As mentioned above, several commenters suggested that both form and ecological function need to be included as part of the evaluation of a stream before bond release is accepted. We agree and have modified the Phase I bond release criteria at § 800.42(b)(1) to require the restoration of form of perennial and intermittent stream segments. We are reiterating this requirement in final paragraph (e), which also serves to incorporate a similar provision that was proposed as § 816.57(b)(2)(iii)(C), which required restoration of form for Phase I bond release.

Final Paragraph (f): Restoration of Hydrologic Function

As discussed above, proposed paragraph (b)(ii) would have required the restoration of stream form and function. Although the proposed rule included provisions to measure the biological condition of a restored or reconstructed stream, it did not specifically discuss the hydrologic function of the stream except to note at proposed paragraph (b)(ii)(B) that the postmining function ''must be adequate to support the uses of that stream segment that existed before mining and it must not preclude attainment of the designated uses of that stream segment under section 101(a) or 303(c) of the Clean Water Act before mining.'' Several commenters suggested that we should expand the provisions relating to stream function to include more hydrological information, such as the material composition of stream beds, flow patterns, water chemistry, and stream water temperature because ultimately, restoring ecological function is dependent on restoring these hydrological parameters. We agree that we should expand our treatment of stream function in order to properly account for conditions prior to mining and, as discussed, have divided stream function into hydrologic and ecological function. We have added paragraph (f) to require the restoration of hydrologic function. ''Hydrologic function'' is discussed in more detail in the preamble to the definition of that term in § 701.5. In sum, hydrologic function includes total flow volume, seasonal variations in streamflow and base flow, and provision of the water needed to maintain floodplains and wetlands associated with the stream. Taken together, the restoration or reconstruction of the prerequisite ''form'' in paragraph (e) and ''hydrologic function'' in paragraph (f), means that the stream will have similar physical characteristics, pattern, profile, and dimensions as the stream in which mining activities were conducted in, through, or near. As explained in the preamble discussion of the definition of ''form'' this will include but not be limited to, a similar flood-prone area to bankfull width ratio (entrenchment), channel width to depth ratio, channel slope, sinuosity, bankfull depth, dominant in-stream substrate, and capacity for riffles and pools, as the stream in which mining activities were conducted.[692] These additions clarify that hydrologic function includes, but is not limited to the restoration of the flow regime, except as otherwise approved by the regulatory authority under § 780.28(e)(2). They provide sufficient

[691] 80 FR 44436, 44438–44453 (Jul. 27, 2015).

[692] *See also,* Dave Rosgen, *Applied River Morphology,* Wildland Hydrology, Pagosa Springs, Colorado (1996).

guidance on what is required to restore or reconstruct the form and hydrologic function of a stream.

Final paragraph (f) also specifies that you must demonstrate restoration of the hydrologic function of a stream segment that has been affected by mining activities before you qualify for Phase II bond release under § 800.42(c)(1). This language was added in response to comments that requested we consider what types of information should be considered for bond release relative to the restoration of ''stream function.'' As discussed in the preamble discussion of paragraph (e), Phase I bond release will not be permitted until reconstruction of the form of the stream is demonstrated and certified. We have also revised § 800.42(c)(1)(ii), which establishes the criteria for bond release to include the requirement for the restoration of hydrologic function as a condition of Phase II bond release in order to better guarantee that reestablishment of hydrologic function is achieved. We are therefore requiring in § 780.28(g) that the regulatory authority develop criteria for determining restoration of ecological function on a permit-specific basis. These criteria will help determine whether restoration is possible and whether the permit allowing mining through streams should move forward. These standards must also be in place to determine if ecological function has been restored during reclamation as required by final rule §§ 780.28(g) and 816.57(g).

Final Paragraph (g): Restoration of Ecological Function

Proposed paragraph (b)(2) required the restoration of stream form and function. Specifically it required the restoration of ecological function. In addition, proposed paragraph (b)(2)(ii) referred to specific provisions in the permitting requirements of proposed § 780.28(e)(1), related to the restoration of biological condition. As explained above, in the final rule, we have split the requirements pertaining to the restoration of stream form and function into three paragraphs—paragraphs (e) through (g). As revised, final paragraph (g) requires the restoration of the ecological function of a perennial or intermittent stream before final bond release may occur. As revised, paragraph (g) no longer contains a specific reference to biological condition or criteria for measuring ecological function. Instead, it cross-references § 780.28(g), which contains these criteria. Consequently, all comments received on proposed §§ 816.57(b)(2)(ii)(B) through (D) that are related to determining whether ecological function has been restored are discussed in the preamble to § 780.28.

Numerous commenters objected to any requirement to demonstrate the restoration of the ecological function of perennial and intermittent streams. Some commenters suggested that a separate requirement for the restoration of ecologic function is not necessary because some western mines are already restoring the hydrologic form using geomorphic reclamation methods and some midwestern mines are restoring stream channels based on the U.S. Army Corps of Engineers permit requirements. These commenters allege that these practices should be sufficient to restore the stream to its form and function under SMCRA. We recognize that the techniques voluntarily employed in some western mines in the application of geomorphic reclamation principles and some midwestern mines that employ natural stream channel design for reconstructed or permanently diverted streams are the type of best technology currently available that this rule seeks to implement across all mining regions. We also understand that the frequency of mines using geomorphic reclamation is increasing and has been shown to result in more stable streams and facilitates reestablishment of ecological function. Even so, we do not have reliable evidence that reconstruction of the physical form or hydrologic function is common across all mining regions or that such reconstruction will necessarily result in successful restoration of ecological function. Thus, these voluntary techniques are not sufficient to negate the need for a separate requirement to demonstrate the restoration of ecological function. This requirement will also ensure consistency across the nation and provide guidance to the regulatory authorities on implementing measures to improve stream health.

Other commenters asserted that the requirement is too subjective. As an example, a commenter expressed concern with the allegedly subjective interpretation of the language in proposed paragraph (b)(2)(ii)(B) that biological condition of a stream must be restored to a level ''adequate to support the uses that existed prior to mining.'' They also opined that there is not sufficient consensus within the scientific community that ecological function after mining-related disturbances can be fully restored. Several commenters criticized the proposed rule because it would require that the regulatory authority establish standards for determining when ecological function has been restored; yet, according to the commenters, experts in the discipline of stream restoration, including some cited by us in the preamble to the proposed rule, have not been able to agree on the metrics of ecological function or whether such function can be restored. They also cite to a purported lack of agreement on how the baseline and the restored ecological function should be measured. Some commenters also cited this requirement as an example of flawed science and reasoning that they allege permeates the proposed rule because the proposed definition of ecological function relies on a draft U.S. Army Corps of Engineers document that, in addition to not being final after five years, is geared toward Appalachia. Although the specifics on establishing successful ecological function vary throughout the scientific community, it is generally accepted that ecological function is an essential ingredient in stream health.[693] However, the definition of ''ecological function'' neither mandates specific metrics nor is the definition specific to Appalachia. For example, U.S. Environmental Protection Agency publication discussing streams in the Southwest United States advocates for the restoration of ecological function by focusing on the importance of ''maintain[ing] water quality, overall watershed function or health, and provisioning of the essential and biological requirements of clean water.[694] Prescribing protocols, as we have done here, is the first step in achieving ecological function.[695]

Moreover, adopting the suggestion of the scientific community to retain the requirements to restore the ecological function of these streams will ensure that SMCRA is implemented more fully nationwide. For instance, section 515(b)(10) of SMCRA requires permittees to minimize disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal

[693] Margaret A. Palmer, *Standards for ecologically successful river restoration.* Journal of Applied Ecology. Vol. 42, pgs. 208–217 (2005).

[694] L. Levick, et al.,*The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest.* U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R–08/134, ARS/233046, pg.116 (2008).

[695] *Id.* and Colleen E. Bronner, et al., *An Assessment of U.S. Stream Compensatory Mitigation Policy: Necessary Changes to Protect Ecosystem Functions and Services.* Journal of the American Water Resources Association (JAWRA) 49(2):449–462. DOI: 10.1111/jawr.12034 (2013).

mining operations.[696] Section 515(b)(10) of SMCRA,[697] therefore, requires adequate protection of the quality and quantity of water both on the permit and off the permit, which includes ensuring the water quality and quantity is sufficient to maintain the health of organisms within the waters of the stream. Likewise, section 515(b)(24) of SMCRA [698] requires that the best technology currently available should be used to minimize disturbances and adverse impacts to fish and wildlife. Despite these statutory requirements, it is beyond dispute that mining activities under the previous regulations have been directly linked to degradation of stream biological health.[699]

Although we understand commenters' concerns about consensus within the scientific community, the final rule adopts the best science currently available to provide a concrete definition of ecological function. Ecological function is defined in § 701.5 as ''the species richness, diversity, and extent of plants, insects, amphibians, reptiles, fish, birds, and mammals and other organisms for which the stream provides habitat, food, water or shelter. The biological condition of a stream is one way to describe its ecological function.'' The final rule also provides guidance on measuring the ecological function. As the preamble to the definition of ecological function explains, for purposes of measuring the restoration of ecological function of perennial and intermittent streams that are mined in or through, a regulatory authority may use the baseline data on the biology of the restored or reconstructed stream to determine the restoration success. The final rule also reasonably imposes several requirements, including the requirement for a streamside vegetative corridor and baseline sampling to measure ecological function of streams prior to mining so that restoration of ecological function following mining can be measured. The final rule also imposes several measures to ensure the use of the best technology currently available to minimize or prevent impacts. These provisions of the final rule provide clear guidance that ensures that a restored or reconstructed stream is not simply physically restored in form and hydrologic function but also it is restored to its position in the ecosystem. The provisions address the direct link between mining and the degradation of a stream's biological health and implement the requirements of SMCRA. Thus, we are including the requirement for restoration of ecological function in the final rule.

Final paragraph (g)—paragraph (b)(2)(iii)(D) of the proposal—also specifies that if a permittee cannot restore the ecological function of a reconstructed perennial or intermittent stream as established by the regulatory authority under § 780.28(g)(1), that permittee cannot achieve final bond release. Our regulations create a phased approach to stream restoration. Phase I bond release requires the demonstration of successful restoration of form; Phase II bond release requires the demonstration of successful restoration of hydrologic function as provided in paragraphs (e) and (f); and final bond release requires the restoration of ecological function. This approach makes the permittee accountable for the establishment of an acceptable level of ecological function.

Many commenters opposed the prohibition on final bond release until after the permittee has demonstrated the restoration of ecological function. They claim that it is impossible to determine the cost of restoring the ecological function and, because of this, it will be impossible to capture the cost of such restoration when calculating the bond, as required by proposed § 800.14(b)(2). Similarly, some commenters suggested that, because ecological function cannot be controlled, it is impossible to accurately predict when, if ever, such function will be restored, which would mean that bonds could be held for an indefinite amount of time. These commenters allege that the possibility of an indefinite bond would create a substantial new risk for sureties and make it difficult for operators to obtain a bond.

We agree that the restoration of ecological function may take a long time, particularly if this restoration requires establishment of substantial canopy cover over the stream, but we maintain that SMCRA does require bonding until that function is restored. There is a direct connection between SMCRA and inclusion of ecological function restoration in the performance bond. The reclamation plan in § 780.12(h) requires compliance with the stream protection, stream reconstruction, and functional restoration requirements of §§ 780.28 and 816.57 of this chapter for perennial and intermittent streams. SMCRA section 508(a)(13)(A) [700] requires that the reclamation plan have ''sufficient details of the description of the measures to be taken during the mining and reclamation process to assure the protection of the quality of surface and ground water systems.'' Further, section 509(a) SMCRA [701] requires a performance bond to be sufficient to assure the completion of the approved reclamation plan. These SMCRA provisions make clear that functional stream restoration is to be part of the performance bond. We do, however, point out that in § 780.28(g)(3)(ii)(A) the reconstructed stream segment does not have to have precisely the same biological condition or biota as the stream segment did before mining in order to demonstrate the restoration of ecological function. So the regulatory authority, which is in the best position to make that determination, can decide what constitutes an acceptable level of ecological function to satisfy the regulatory requirements. Although we are retaining the requirement for bond release, as discussed further in the preamble to Part 800, we agree with the commenters that raised concerns about potential for harm to the permitting process if we retained a proposed requirement to permit and bond streams separately. Therefore, we have removed the requirements in § 800.14(b)(2) that required a separate bond calculation for the restoration of stream's ecological function.

One commenter expressed concern that the requirement to return ecological function to intermittent and perennial streams would be misconstrued as also applying to ephemeral streams. The commenter further asserted that, because ephemeral streams only flow in response to precipitation events, the need to assess the biological component of ephemeral streams is unnecessary. We agree and, as discussed above, have clarified that section applies only to intermittent and perennial streams. Requirements for ephemeral streams, which do not include the restoration of ecological function, are now located in § 816.56.

A commenter noted that we did not propose to require that a stream segment have precisely the same biological condition as it had before mining and suggested that we should revise the rule to explicitly identify the acceptable level of variations in the parameters that are connected with the ecological function of stream segments. We have determined that the regulatory authority is in the best position to make that determination because they have the proper expertise with respect to the local ecological regimes and would, along with the Clean Water Act authority, be the best judge as to the

[696] 30 U.S.C 1265(b)(10).

[697] *Id.*

[698] 30 U.S.C. 1265(b)(24).

[699] 80 FR 44436, 44439–44441 (Jul 27, 2015).

[700] 30 U.S.C. 1258(a)(13).

[701] 30 U.S.C. 1259(a).

level of change that is permissible within the confines of SMCRA. For further information on how restoration of ecological function is measured in the final rule, please refer to the preamble discussion of § 780.28(g)(3)(ii).

Many commenters opined that streams are difficult to replace and that there is little scientific evidence that a stream can be successfully restored to its previous ecological function. As discussed in the preamble to the proposed rule,[702] we acknowledge that restoration of ecological function may be difficult, but as documented by successes in Illinois, it is possible.[703] We recognize the important role streams play in the ecosystem and the difficulties in restoring that role after mining activities have occurred in or through a stream; therefore, we are adopting what could be termed an avoidance and minimization policy. This approach is the best solution currently available to eliminate potential impacts to stream resources while satisfying the purposes of SMCRA found at sections 102(c) and (d).[704] Additionally, studies demonstrate that ''incentives for avoidance and minimization'' are the key to success and ''federal policy [being] revised to minimize the loss of stream functions and services'' [705] is paramount. Therefore, the regulations at § 780.28(g) and § 816.57(g) implement those recommendations made by scientists and other experts examining streams. Scientists consider the first step in restoring ecological function is to mandate that ecological function be restored, yet provide flexibility in how this will be achieved. Recommendations made by Bonner, et al. are consistent with our final regulations; in particular, ensuring that surface mining operations are conducted only where reclamation to the degree required by the Act is feasible.[706]

Final Paragraph (h): Prohibition on Placement of Siltation Structures in Perennial or Intermittent Streams

Proposed § 816.57(c), now § 816.57(h), prohibits construction of siltation structures in a perennial or intermittent stream or the use of perennial or intermittent streams as waste treatment systems to convey surface runoff from the disturbed area to a siltation structure except as provided in paragraphs (h)(1)(ii) and (h)(2).

In the proposed rule, the terms ''sedimentation pond'' and ''siltation structure'' were used interchangeably throughout § 816.57. To provide consistency and clarity, we have either changed the term ''sedimentation pond'' to ''siltation structure'' or added the term ''siltation structure'' to the applicable regulation. This makes it clear that the forms of siltation structures can vary; a sedimentation pond being only one type of siltation structure. These changes in terminology clarify that the rule covers all types of siltation structures and not just sedimentation ponds.

A commenter expressed concern that the general prohibition upon placement of siltation structures or the use of streams to convey surface runoff extends to ephemeral streams. Similarly, other commenters explained that ephemeral streams are prevalent in many areas of western mining operations, and the only way to effectively provide sediment control for those operations is to construct siltation structures downstream of the mine in various areas along minor native and reclaimed ephemeral draws. As previously discussed in this section, we have removed the provisions of proposed § 816.57 that applied to ephemeral streams and moved them to new § 816.56. As a result, § 816.57 applies only to perennial and intermittent streams. Notably, within § 816.56, there is no comparable provision to paragraph (h) of this section, which makes clear that we are not prohibiting the use of an ephemeral stream segment inside a mined area to be used to convey surface water.

Final paragraph (h)(1) contains the general prohibition, subject to exceptions, on the placement of siltation structures in perennial and intermittent streams. Many commenters disagreed with this general prohibition. Some commenters proffered that, in the arid west, wildlife use and opportunities for fish habitat can be created or increased if a sedimentation pond in perennial or intermittent streams is converted to a pond after mining and reclamation. Yet another commenter asserted that retaining siltation structures postmining is beneficial for habitat enhancement. Additional commenters indicated that a prohibition on sediment control ponds in perennial or intermittent streams may have the opposite effect of what we intended because it will result in more, not less, land disturbance since the diversions will have to be constructed on both sides of a stream. Similarly, another commenter noted that this proposed prohibition would significantly alter the typical drainage control practices currently in use, and the effect will be to require construction of many additional drainage control diversions and additional sediment basins with associated costs. Commenters further noted that allowing construction of a sedimentation pond or siltation structure in an intermittent or perennial stream is an efficient and cost effective way to control the flow of surface water within the mined area.

While retention of a siltation structure outside of an intermittent or perennial stream may be beneficial after mining, it is also true that a siltation structure situated in an intermittent or perennial stream segment would not protect the postmining stream habitat. Permanent retention of a pond in an intermittent or perennial stream requires significant long-term maintenance, which cannot be assured after final bond release and termination of jurisdiction. For this and other reasons, such as potential liability in the event of failure and impacts to stream health, the U.S. Army Corps of Engineers has historically shown reluctance to grant such retentions.

As long as it is not retained after reclamation, however, we agree that construction of a sedimentation pond in a stream during mining should be allowed provided that the fish and wildlife measures and enhancements required in § 780.16 are met. Therefore, we have added paragraph (h)(1)(ii) to allow siltation structures to be constructed in perennial and intermittent streams immediately downstream of a stream segment that has been mined through.

A commenter objected to the requirement in proposed paragraph (c)(1), now paragraph (h)(1), which prohibits the retention of siltation structures postmining. The commenter claimed that this requirement is not reasonable as sediment control structures, especially on ephemeral streams, are commonly left in place after mining and reclamation has been completed because they can be beneficial to wildlife habitat and water for livestock. As previously discussed, the prohibition on the construction of siltation structures within streams applies only to perennial and intermittent streams; thus, the situation described by the commenter would not be prohibited by this section because it concerns a siltation structure in an ephemeral stream. Moreover, we agree

[702] 80 FR 44436, 44440 (Jul. 27, 2015).

[703] J.W. Nawrot, and W.G. O'Leary, *Illinois stream restoration—opportunities or habitat enhancement: Policy and principles, and practices.* Proceedings of the 2009 Geomorphic Reclamation and Natural Stream Design at Cao Mines: A Technical Interactive Forum 28–30. Bristol, Virginia, pgs. 183–195 (2009).

[704] 30 U.S.C. 1202(c) and (d).

[705] Colleen E. Bronner, et al., *An Assessment of U.S. Stream Compensatory Mitigation Policy: Necessary Changes to Protect Ecosystem Functions and Services.* Journal of the American Water Resources Association (JAWRA) 49(2):449–462. DOI: 10.1111/jawr.12034. (2013).

[706] 30 U.S.C. 1202(f).

that siltation structures in intermittent or perennial streams can be beneficial and, as discussed above, have added paragraph (h)(1)(ii) to allow the construction of a siltation structure in a stream channel immediately downstream of a stream segment that is mined through. However, we are retaining the prohibition of retention of siltation structures postmining in the final rule.

As proposed in paragraph (c)(2), now paragraph (h)(2), the prohibition on placement of siltation structures in intermittent or perennial streams does not apply to siltation structures related to excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures in steep-slope areas. We have replaced the term, ''coal mine waste disposal facilities'' in paragraph (h)(2) with, ''coal mine waste refuse piles'' and, ''coal mine waste impounding structures'' to clarify that this exemption applies to siltation structures associated with both of these types of facilities. After the completion of construction and revegetation of the fill or coal mine waste refuse pile or impounding structure. However, new paragraph (h)(3)(iii)(A) requires that all accumulated sediment be removed from the siltation structure and any stream segment between the siltation structure and the toe of the fill or coal mine waste disposal structure. Once the siltation structure has served its treatment purpose, the permittee must remove it as required in paragraph (h)(3)(iii)(B) and restore the stream as required in paragraph (h)(3)(iii)(C) so as to achieve the higher functionality of the natural stream condition and eliminate the risks inherent in an unmaintained structure.

Final Paragraph (i): Programmatic Alternative

We have added § 816.57(i) to the final rule to clarify that paragraphs (b) through (h) of this section will not apply if a regulatory authority amends its program to expressly prohibit all surface mining activities, including the construction of stream-channel diversions, that would result in more than a de minimis disturbance of land in or within 100 feet of a perennial or intermittent stream. We have added this alternative in response to comments advocating a complete ban on activities within 100 feet of any stream as the most stream protective course of action. Thus, we are granting the regulatory authority the option to enact such a prohibition.

Section 816.59: How must I maximize coal recovery?

We are finalizing § 816.59 as proposed. We received no comments on this section.

Section 816.61: Use of Explosives: General Requirements

Final Paragraph (d): Blast Design

We are adopting this section as proposed except to correct an inadvertent error in paragraph (d)(2). Previous paragraph (d)(2) stated that the blast design ''may be presented as part of a permit application or at a time, before the blast, approved by the regulatory authority.'' The proposed rule interpreted this language as meaning that the regulatory authority must approve the blast design either as part of the decision on the initial permit application or at a later time before the blast. However, the preamble to the previous rule explains that we never intended to require regulatory approval of blast designs:

> The intent of the design is not primarily for public or regulatory review; rather it serves as a tool for the operator, blaster, and the blasting crew to understand the blast layout and implementation and for the regulatory authority to be advised of the blast parameters and timing, to initiate monitoring, if appropriate, and to ensure compliance with performance standards.[707]

Therefore, we are not adopting paragraph (d)(2) in the form in which it was proposed. Instead, final paragraph (d)(2) returns to the intent of the previous (1983) rule, but without the ambiguity of the previous rule. Among other things, the last sentence of final paragraph (d)(2) reads: ''Regulatory authority approval of the blast design is not required, but, as provided in paragraph (d)(5) of this section, the regulatory authority may require changes to the design.''

Section 816.62: Use of Explosives: Preblasting Survey

We are finalizing § 816.62 as proposed. We received no comments on this section.

Section 816.64: Use of Explosives: Blasting Schedule

We are finalizing § 816.64 as proposed. We received no comments on this section.

Section 816.66: Use of Explosives: Blasting Signs, Warnings, and Access Control

We are finalizing § 816.66 as proposed. We received no comments on this section.

Section 816.67: Use of Explosives: Control of Adverse Effects

Final Paragraph (b): Airblast.—(1) Limits

The published version of the proposed rule inadvertently omitted the second column in the table in section 816.67(b)(1)(i), which meant that the table included no airblast limits. Final paragraph (b)(1)(i) restores that column and the airblast limits to the table.

One regulatory authority noted the error and recommended restoration of the airblast limits. However, the commenter also stated that the table and the airblast limits are no longer needed because of standardization of microphones. The commenter recommended that we consider replacing the table with a 133 dB (linear peak) maximum limit on airblast levels. Linear peak is the maximum level of air pressure fluctuation measured in decibels without frequency weighting to ensure the measured parameter is indicative of the level experienced by the human auditory system. Frequency weighting is not applied to airblast measurements because much of the sound from an airblast is at inaudible frequencies and would therefore be excluded.

We commend the commenter for suggesting this update, but we cannot adopt it as part of this final rule because our proposed rule did not give sufficient notice that we might revise the airblast limits and the suggested revision is not a logical outgrowth of other rule changes, a correction of an error, or a nonsubstantive editorial change.

Section 816.68: Use of Explosives: Records of Blasting Operations

We are finalizing § 816.68 as proposed. We received no comments on this section.

Section 816.71: How must I dispose of excess spoil?

As discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 816.71.[708] After evaluating the comments that we received, we are adopting the section as proposed, with the following modifications.

A commenter noted that this section does not distinguish between excess spoil and fill placed in, near, or outside a stream. No real distinction exists in this context. Fill placed in, near, or outside of a stream, is considered excess spoil. The standards in this section, however, ensure that the design and placement of any excess spoil fill

[707] 48 FR 9792 (Mar. 8, 1983).

[708] 80 FR 44436, 44555–61 (Jul. 27, 2015).

satisfies the minimum performance standards, generally related to stability, which are necessary to ensure the safety of an excess spoil fill wherever it is located. The permitting requirements in §§ 780.27 and 780.28, which minimize adverse impacts to streams, apply to all excess spoil fills that encroach upon any part of a stream.

A commenter alleged that the process of restoring streams to their original elevations and enhancing the flood plain widths in their approximate original locations will increase the generation of additional spoil and elevations of spoil in the graded reclamation areas. Although specifically referencing proposed rule § 816.71, about disposal of excess spoil, the commenter appears to be referring to § 780.28(c) about the permitting requirements for restoring the approximate premining surface drainage pattern and stream-channel configuration of intermittent and perennial streams and § 816.57, which includes associated performance standards. Nevertheless, we are addressing the comment in this section because of the impacts on spoil handling. We do agree that implementing the requirements of §§ 780.28 and 816.57 may result in a different handling plan than currently used because the reestablishment of stream channels will require additional blending of spoil material into the backfilled areas than is currently performed. We disagree with the comment that excess spoil will be created when the stream drainage patterns are restored because the volume of spoil generated is dependent on the mining scenario (depth to the coal seam, bulking factors, blasting patterns, etc.). However, we do agree that additional spoil handling will be required to restore the drainage pattern, including additional grading and blending necessary to create stream drainage patterns that are consistent with form. Nevertheless, we are not modifying the final rule in response to this comment our clarification here and explanations in final rule §§ 780.28 and 816.57 are sufficient.

The same commenter alleged that restoring wetlands at grade could result in the generation of additional spoil because spoil has to be relocated to keep wetland elevations low in the reclaimed area. We decline to make any changes as a result of this comment. It appears that this issue would, for the most part, affect areas with shallow groundwater, such as occurs in parts of the midcontinent region. It also appears that restoring wetlands at grade would tend to result in more spoil being placed in the backfilled area, rather than generation of additional excess spoil. Final paragraph (h)(3)(ii), discussed in more detail below, allows the final elevation of the backfilled area to exceed the premining elevation, so, in cases where maintenance of wetlands would be an issue it is more likely that displaced spoil will be placed in the backfilled area rather than an excess spoil fill.

This commenter also alleged that the proposed rule would increase the need for additional spoil storage and increase mining costs to the point where many areas will not be practical to mine. We decline to make any changes as a result of this comment. The required volume of spoil storage is dependent on the volume and nature of overburden that the operator must remove to access the coal, and will not be affected by the rule. Section 780.35(b) requires that the operator demonstrate how you will minimize generation of excess spoil. Therefore, the rule should decrease the need to develop additional spoil storage sites.

Finally, this commenter alleged that many of these backfilling requirements are not feasible or necessary in regions outside of Appalachia. It is true that excess spoil is generated predominantly in Appalachia; however, it is generated, and should be minimized, in other regions as well. The requirements of this section do not apply at sites where excess spoil is not generated.

Another commenter noted that dry valleys are common in the arid and semi-arid West and suggested that excess spoil placement should be allowed in those areas where there are no streams to impact. In response, we note that none of the requirements in this section would preclude the placement of material in dry valleys as suggested by the commenter, as long as the other requirements of the section are satisfied. Specifically, paragraphs (a)(3), (h)(1), and (h)(3) require that the final configuration be compatible with the postmining land use and be capable of supporting appropriate vegetation, that the topography blend with the surrounding terrain, and that the drainage pattern be similar to the premining pattern.

Final Paragraph (a): General Requirements

We modified paragraph (a)(1) by clarifying that the permittee must minimize the adverse effects of a coal mine waste disposal facility on groundwater and aquatic life, in addition to surface water. The specific reference to ''aquatic life'' will more thoroughly implement section 515(b)(24) of SMCRA,[709] which requires operators to minimize adverse impacts on fish, wildlife, and related environmental values.

Additionally, in paragraph (a)(5), in response to comments, we have deleted the language ''damage from'' as it pertains to flooding. As explained more fully above in connection with final § 780.21(b)(9)(ii), we have made this change in order to clarify that we are not requiring an investigation of premining flood events in order to assess the potential for damage from flooding. This revision focuses the assessment upon peak flows that could result in flooding and not damage from flooding.

Further, in paragraph (a)(6), we have replaced the terms ''existing uses'' with the term ''premining uses'' and removed the term ''reasonably foreseeable uses'' when referencing foreseeable uses of groundwater. We replaced the term ''existing use'' with ''premining use'' because the U.S. Environmental Protection Agency expressed concern about our use of the term ''existing use'' throughout the proposed rule and suggested that, because the term ''existing use'' is also used in a Clean Water Act context, it might cause confusion to use it in this context. In response we have deleted the term from the final rule. We have deleted the term ''reasonably foreseeable uses'' from the final rule except in connection with the protection of reasonably foreseeable surface lands uses from the adverse impacts of subsidence. The term appears only in SMCRA in section 516(b)(1), which requires that operators of underground mines adopt subsidence control measures to, among other things, maintain the value and reasonably foreseeable use of surface lands. It is not appropriate for a more general context. Further, many commenters objected to the usage of ''reasonably foreseeable'' asserting that it is too subjective, difficult to assess, and open to varying interpretations, which could result in inconsistent application.

We have removed the reference to ''surface water'' from paragraph (a)(6) because we address surface water in final paragraph (a)(7). In the proposed rule we used the terms ''exceedance'' and ''violation'' interchangeably. We determined that we should select one term for consistency. Therefore, in paragraph (a)(7), we have replaced the word ''exceedance'' with the word ''violation'' to be consistent with the terminology used throughout the final rule. In addition, we added the phrase ''adopted under the authority of section

[709] 30 U.S.C. 1265(b)(24).

303(c) of the Clean Water Act,[710] for surface water downstream of the toe of the fill'' to paragraph (a)(7). We added this language to paragraph (a)(7), to clarify, that water emanating from the toe of the fill should not violate any applicable water-quality standards adopted under the authority of section 303(c) of the Clean Water Act.

Final Paragraph (d): Requirements for Handling Organic Matter and Soil Materials

This section requires that a permittee remove all vegetation, other organic matter, and soil materials from the disposal area prior to placement of the excess spoil. A commenter requested that the final rule include a provision allowing the regulatory authority to waive the requirement of this paragraph for the removal of topsoil and organic matter in areas of steep slopes. According to the commenter, this requirement could present safety concerns in steep slope areas. We are not including such an exemption in the rule because, in our experience, steep slope areas used for disposal of excess spoil are usually no greater in slope than the location where coal extraction occurs. If the permittee is able to safely remove this soil and organic material from the mined area, it should also be able to do so from the disposal area. Furthermore, if left in place, this matter may decompose and form a weak zone that is likely to fail in steep areas.

Final Paragraph (e): Surface Runoff Control Requirements

In the preamble to proposed § 816.71(e)(1), we stated that we do not consider surface runoff channels constructed under § 816.71(e)(1) to be stream channel diversions or restored streams and thus, these structures would not qualify as fish and wildlife enhancement measures.[711] One commenter alleged that this statement is contrary to the U.S. Army Corps of Engineers' past position that some diversions may qualify as mitigation. We decline to make any changes as a result of this comment. Because these structures are designed channels to convey only surface water flow, within the channel, with no flood-prone area or specifically planned vegetative corridor, they do not qualify as a type of enhancement that would fully and permanently offset the long-term adverse effects of the placement of excess spoil or coal mine waste facilities, which is required to meet the permittee's obligations pursuant to final §§ 780.16 and 780.28.

Final Paragraph (f): Control of Water Within the Footprint of the Fill

Final paragraph (f) prescribes the requirements for constructing underdrains and temporary diversions to control erosion, prevent water infiltration, and ensure stability of the excess spoil disposal fill. Paragraph (f)(3)(iii) sets forth the criteria that must be used to select rock that is resistant to weathering for underdrain construction. Our rule requires use of the Los Angeles Abrasion test and the Sulfate Soundness test for choosing rock. One commenter asserted that these two tests are more elaborate and expensive testing methods than the Slake Durability Index Test, which is commonly used under the existing regulations. This commenter alleged that the proposed tests do not provide any added value. We are not modifying the final rule as a result of this comment. Our previous regulations allowed for end dumped durable rock fills and the Slake Durability Index test was appropriate because it can be used to determine the percentage of material in an excess spoil fill that is ''durable.'' The final rule at § 816.71(g)(2), however, prohibits durable rock fills and instead at 816.71(f)(1) requires that the permittee ''design and construct underdrains and temporary diversions as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.'' Because of this change, we are requiring the use of tests that are more appropriate for evaluating the materials that will be used in excess spoil fill underdrains. The two tests specified in the final rule are designed to assess the resilience of rock used to construct underdrains. The primary mechanisms that cause breakdown of material used in excess spoil fill underdrains are abrasion due to truck traffic and freezing and thawing, both of which can occur before the underdrain is adequately covered. The tests we are requiring specifically address these mechanisms. The Los Angeles Abrasion test is used to evaluate rock material breakdown resulting from abrasion, and the Sulfate Soundness test is used to evaluate the resistance of rock materials due to breakdown resulting from freezing and thawing.

Another commenter recommended that only the Los Angeles Abrasion test should be required in circumstances where the underdrain rock is placed in interior or deep portions of an excess spoil fill and would not be subjected to freeze and thaw cycles, as well as in warm climates where freezing conditions are unlikely to occur. As we acknowledged in the preamble to the proposed rule, freezing of water in rocks and soil does not occur in all climates and is limited to a relatively shallow depth below the surface.[712] Therefore, freezing and thawing are not processes that would affect most underdrains after they are buried. However, during construction, the underdrains are exposed to the surface and, in some cases, multiple freeze-and-thaw cycles occur before they are covered sufficiently to prevent freezing. Moreover, an underdrain is only as good as its weakest point, and failure of an underdrain could have catastrophic consequences, which could occur years after bond release. Finally, we note that, excess spoil fills are primarily found in the states of West Virginia, Kentucky, and Virginia, with a few fills constructed in Alaska. All of these mining regions experience freeze and thaw cycles. The use of the Sulfate Soundness test is both appropriate and necessary in these regions. Therefore, we decline to make any changes as a result of this comment.

Final Paragraph (g): Placement of Excess Spoil

Final paragraph (g) specifies the requirements for proper transport and placement of excess spoil in a controlled manner in horizontal lifts not exceeding four feet in thickness. The spoil must be concurrently compacted to ensure mass stability and to prevent mass movement during and after construction. Finally, the paragraph prescribes grading techniques to ensure that surface and subsurface drainage is compatible with the natural surroundings. A commenter requested that we revise this paragraph to allow the regulatory authority to allow an excess spoil fill that involves the placement of material in lifts greater than four feet when supported by an alternative engineering design. Another commenter indicated that the proposed provision is unworkable and unrealistic in mining operations where the spoil can include single boulders that exceed four feet in diameter. The commenter further stated that it has successfully created excess spoil fills without this provision for decades and should be allowed to continue to do so. As we explained in the preamble for section 816.71(g) of the proposed rule, the purpose of this provision is to minimize voids in the fill and thus, reduce impacts to fish and wildlife resources.[713] The commenter appears to

[710] 33 U.S.C. 1313(c).

[711] 80 FR 44436, 44556–44557 (Jul. 27, 2015).

[712] 80 FR 44436, 44559 (Jul. 27, 2015).

[713] 80 FR 44436, 44687 (Jul. 27, 2015)

equate ''successful'' excess spoil fill construction strictly based on stability. Although lifts greater than four feet may be stable, allowing this exemption would be contrary to the purpose of this rulemaking, which is to better protect streams. Therefore, we decline to make any changes as a result of this comment.

Paragraph (g)(2), as mentioned above, contains a prohibition on so-called ''durable rock fills.'' It forbids any excess spoil transport and placement techniques that do not involve the controlled placement of spoil, including end-dumping, wing-dumping, cast-blasting, gravity placement, or casting spoil downslope. A commenter expressed concern that under the rule, the use of trucks for spoil transport would not be considered to be controlled placement under section 515(b)(22)(A) of SMCRA because the spoil would be dumped from the back of a truck, which the commenter interpreted as ''end dumping''.[714] The commenter stated that a strict interpretation of this provision could render entire truck fleets un-usable for excess spoil transport, even if the spoil was subsequently spread and compacted. In response to this comment, we note that we do not intend to prohibit the mechanical transport of spoil. The use of trucks to transport and place material, via dumping, from the bed of the truck is permissible under the final rule. This final rule simply prohibits the dumping of material down the face of a fill to its final location.

Final Paragraph (h): Final Configuration

Paragraph (h) identifies the requirements for final fill configuration. Specifically, paragraph (h)(3)(i) requires that geomorphic reclamation principles be used to establish the final surface configuration of the fill. Specifically, the permittee must grade the top surface of the fill to create a topography that includes ridgelines and valleys with varied hillslope configurations when such configurations are practicable, compatible with stability and postmining land use considerations, and generally consistent with the topography of the area before any mining. One commenter questioned the rationale for requiring the use of geomorphic reclamation principles. In paragraph (h) we are requiring a final surface configuration that not only promotes greater erosional stability but also has more ecological benefits than other techniques. Although section 816.71 includes other requirements to ensure long term stability and to minimize discharges, we are encouraging the geomorphic reclamation technique, where appropriate, because of its demonstrated success. This technique has resulted in less maintenance than traditional reclamation techniques. It has enabled the creation of a diverse and natural-looking wildlife habitat and similar natural drainage patterns. However, we recognize that the geomorphic reclamation technique is not appropriate for all sites. We encourage the use of geomorphic reclamation techniques ''when practicable'' and grant discretion to the regulatory authority to determine the extent to which this requirement can be implemented on a site specific basis. Therefore, we decline to make any changes as a result of this comment.

Final Paragraph (k): Inspections and Examinations

This paragraph prescribes the inspection and documentation required during construction of the excess spoil fill. We modified paragraph (k)(1) to clarify that inspections will occur at least quarterly during construction, with additional complete inspections conducted during critical construction periods. We invited comment on whether the final rule should require additional specific oversight by a qualified engineer when segregated, graded, natural material is used to construct the filter system.[715] In response, one commenter noted that additional inspection is not necessary and should not be included in the final rule. The commenter added that the requirement to perform daily inspections during placement of excess spoil material is onerous and requested we remove it. This commenter further asserted that because construction of excess spoil fills is time intensive and may occur 24 hours per day, daily inspections and recordkeeping for spoil placement and compaction are unnecessary, costly, and especially unwarranted when the postmining land use is range land. The commenter makes a valid point that, as proposed, numerous inspections of the excess spoil placement in four-foot lifts would be required. It is true that placement in the lower portions of the fill may result in more than one lift completed every day. In response, we have revised the final rule to provide an alternative to the daily inspection requirement. In final paragraph (k)(2)(i), the permittee may choose to have inspections conducted by a qualified engineer or specialist on a weekly basis rather than a daily basis, provided that daily photographic evidence is captured by a mine representative. These photographs must clearly verify that the requirement for the four-foot lift thickness has been achieved and document the elevation and location of the photograph. An example of visual evidence of the location can be a global positioning system-tagged photograph with latitude, longitude, and elevation clearly displayed as well as a map with these photographs embedded and tagged. Also, this photographic documentation, along with the weekly examination reports, must be included in the quarterly report required under section (k)(3) of this section.

A regulatory authority stated that the daily inspections required by § 816.71(k)(2)(i) would result in more report reviews and place additional resource burdens on regulatory authorities. While it is true that the quarterly reports required under final paragraph (k)(3) will be more extensive, they will also provide a more comprehensive record than is currently required. Further, these records will be available on-site for regulatory authority inspection. Since the time interval between an inspection, partial or complete, may be several weeks or longer, a significant volume of excess spoil can be placed in a fill during that time period. The only way for the inspector to be certain that the lift requirement has been fulfilled is through the documentation supplied by this provision. Thus, the additional review time that this provision will require is ancillary to the benefit of attaining better oversight of the operation by the regulatory authority. The regulatory authority also referenced proposed §§ 780.19(k) and 784.19(k) which provided that a permit will be void from the date of issuance if it is issued on the basis of what the regulatory authority later determines to be substantially inaccurate baseline information. The regulatory authority alleged that daily inspections could increase the likelihood of permit nullifications, especially if the term ''substantially inaccurate'' is too broadly interpreted. In response we note first that, as discussed in the preamble to final rule §§ 780.19 and 784.19, we have removed the two paragraphs that the commenter referenced. Second, however, the scenario described does not seem plausible; we fail to see how an increased frequency of inspection of excess spoil placement could lead a regulatory authority to determine that the baseline information a permittee submitted at the time of permit

[714] 30 U.S. 1265(b)(22)(A).

[715] 80 FR 44436, 44560 (Jul. 27, 2015).

application was substantially inaccurate.

Final Paragraph (l): Coal Mine Waste

Final paragraph (l)(1) allows disposal of coal refuse in an excess spoil fill, subject to specific requirements. As proposed, paragraph (l)(1) required the permittee to demonstrate that no credible evidence existed that the disposal of coal mine waste in an excess spoil fill will cause or contribute to a violation of applicable water quality standards as prescribed by section 303(c) of the Clean Water Act or effluent limitations. Furthermore, the disposal of the waste must not result in material damage to the hydrologic balance outside the permit area. A commenter stated that the term ''credible evidence'' is too vague and suggested we adopt ''weight of the evidence'' as a better standard. At the suggestion of another commenter, we have removed any reference to a standard of evidence and now require that you demonstrate, and the regulatory authority find in writing, that the disposal of coal mine waste in the excess spoil fill will not cause or contribute to a violation of applicable water quality standards adopted under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), other state or tribal water quality standards, or effluent limitations or result in material damage to the hydrologic balance outside the permit area.

Why did we remove the provision for rock-core chimney drains in previous 30 CFR 816.72(b)?

As we proposed in the preamble to the proposed rule,[716] we have removed previous § 816.72(b) because mine operators are no longer constructing fills with rock-core chimney drains. We received no comments in response to our proposal to remove this abandoned practice.

A rock-core chimney drain is a vertical wall of durable rock within the fill, extending along the centerline from the toe of the fill to the head of the fill and from the base of the fill to the surface of the fill. To clarify, our removal of this paragraph will not prohibit construction of head-of-hollow or valley fills. However, applications for fills including rock-core chimney drains will not be approved. Any proposed excess spoil fills must satisfy the permitting requirements of §§ 780.28 and 780.35. If approved, excess spoil fill disposal must comport with the performance standards of § 816.71.

Why did we remove the provisions for durable rock fills in previous 30 CFR 816.73?

This section of the existing regulations was deleted as part of this rulemaking. As explained in the preamble to § 816.71(g) of the proposed and final rules, we are removing this section as proposed.

Section 816.74: What special requirements apply to the disposal of excess spoil on a preexisting bench?

We are finalizing § 816.74 as proposed. We received no comments on this section.

Section 816.79: What measures must I take to protect underground mines in the vicinity of my surface mine?

We are finalizing § 816.79 as proposed. We received no comments on this section.

Section 816.81: How must I dispose of coal mine waste?

As discussed in the preamble to the proposed rule,[717] we proposed to modify our regulations at § 816.81. We are adopting the section as proposed with some minor language modifications for clarity, consistency with other sections of the final rule, and the requirements of SMCRA.

Final Paragraph (b): Basic Performance Standards

We have modified paragraph (b)(1) by clarifying that the permittee must minimize the adverse effects of a coal mine waste disposal facility on groundwater, surface water, and aquatic life. We have replaced ''biological condition'' with ''aquatic life'' to be more comprehensive as only certain streams are assessed using bioassessment protocols associated with biological condition. The specific reference to ''aquatic life'' will more thoroughly implement section 515(b)(24) of SMCRA,[718] which requires minimal adverse impacts on fish, wildlife, and related environmental values.

In paragraph (b)(6) we have deleted the language ''damage from'' as it pertains to flooding to ensure that the occurrence and extent of flooding should be minimized, not just the resulting damage.

In paragraph (b)(7), we have replaced the terms ''existing'' and ''reasonably foreseeable'' use of groundwater and replaced it with any ''premining'' use of groundwater. The U.S. Environmental Protection Agency expressed concern about our use throughout the rule of the term ''existing use'' and suggested that, because the term ''existing use'' is also used in a Clean Water Act context, in relationship to surface water, it might cause confusion for us to use it here. In response we have deleted the term from the final rule. We have deleted the term ''reasonably foreseeable uses'' from the final rule except in connection with the protection of reasonably foreseeable surface lands uses from the adverse impacts of subsidence. The term appears only in SMCRA in section 516(b)(1), which requires that operators of underground mines adopt subsidence control measures to, among other things, maintain the value and reasonably foreseeable use of surface lands. It is not appropriate for a more general context. Further, many commenters objected to the usage of ''reasonably foreseeable'' asserting that it is too subjective, difficult to assess, and open to varying interpretations, which could result in inconsistent application. Therefore, in a groundwater context we have replaced ''reasonably foreseeable use ''with the term ''premining use'' to avoid confusion with Clean Water Act terminology.

Finally, in paragraph (b)(7) we have removed ''surface water'' because we address surface water in final paragraph (8). In paragraph (b)(8), we have clarified that a coal mine waste disposal facility may not cause, or contribute to a violation of section 303(c) of the Clean Water Act,[719] of the surface water downstream of the facility.

Final Paragraph (e): Foundation Investigations

Similar to the modifications we made at final §§ 816.49(a)(4), about foundations, at the suggestion of another federal agency and to improve clarity we have modified final paragraph (e) about foundation investigations. We have added ''abutment'' to the requirement to ensure precautions are taken to fully prevent failure of impounding structure foundations. Additionally, we have added the phrase ''and control of underseepage'' to ensure that seepage failures of the dam foundation are prevented. This would include the potential for piping failures.

Section 816.83: What special requirements apply to coal mine waste refuse piles?

We are finalizing § 816.83 as proposed. We received no comments on this section.

[716] 80 FR 44436, 44561 (Jul. 27, 2015).

[717] 80 FR 44436, 44562–44563 (Jul. 27, 2015).

[718] 30 U.S.C. 1265(b)(24).

[719] 33 U.S.C. 1313(c).

Section 816.84: What special requirements apply to coal mine waste impounding structures?

We are finalizing § 816.84 as proposed. We received no comments on this section.

Section 816.87: What special performance requirements apply to burning and burned coal mine waste?

We are finalizing § 816.87 as proposed. We received no comments on this section.

Section 816.89: How must I dispose of noncoal mine wastes?

We are finalizing § 816.89 as proposed. We received no comments on this section.

Section 816.95: How must I protect surface areas from wind and water erosion?

Section 816.95 explains the additional performance standards that apply to protect topsoil from erosion and air pollution attendant to erosion. We proposed to revise § 816.95 from the previous regulation to replace the references to topsoil with the terms soil and soil substitutes.[720] This change is consistent with §§ 780.12(e) and 816.22(c) which allow for the use of topsoil and subsoil substitutes.

In response to the proposed rule we did not receive any specific comments about this section. However, in response to general comments made by the U.S. Environmental Protection Agency, we modified paragraph (b)(1)(ii) referencing applicable water quality standards adopted under the authority of section 303(c) of the Clean Water Act.[721] This addition was necessary to maintain consistency with changes made elsewhere in the final rule.

Section 816.97: How must I protect and enhance fish, wildlife, and related environmental values?

One commenter on this section recommended that we require permittees to avoid impacts to the extent possible instead of requiring the minimization of impacts. The commenter pointed out that using an avoidance standard is guaranteed to prevent impacts, whereas there is a risk of failure associated with minimization, even if it is followed by restoration and enhancement. We are not accepting this suggestion. As we described in the preamble to our proposed rule, our substantive revisions to § 816.97[722] are intended to more fully implement section 515(b)(24) of SMCRA,[723] which provides that, ''to the extent possible using the best technology currently available,'' surface coal mining and reclamation operations must be conducted so as to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.'' Thus, SMCRA only requires minimization, not avoidance, of adverse impacts to fish, wildlife, and related environmental values. Congress was very specific when it selected the phrase ''minimize disturbances and adverse impacts'' in section 515(b)(24) of SMCRA as opposed to using the term ''avoid'' as it did in other environmental protection performance standards such as section 515(b)(10)(A) and (E) of SMCRA.[724] Clearly, it was the intent of Congress to allow a degree of impact, not the greatest possible reduction of impact as the commenter presupposes.

A few commenters requested that we ensure that our fish and wildlife enhancement measures do not interfere, contradict, or incorporate conservation measures contained in voluntary conservation programs as approved by state or federal agencies. These commenters further explain that incorporating voluntary conservation program agreements into a SMCRA permit would impinge on the ''voluntary'' status of the conservation measures and potentially render these voluntary conservation agreements ineligible for mitigation credits. We are not changing the rule in response to this request. We recommend that these measures be discussed during coordination with the appropriate state and federal agencies during the permitting process described in §§ 779.20(b) and 783.20(b).

Final Paragraph (b): Requirements Related to Federal, State, and Tribal Endangered Species Laws

As proposed, paragraph (b) prohibited surface mining activities that are likely to jeopardize the continued existence of threatened or endangered species listed by the Secretary of the Interior or proposed for listing, or that are likely to result in the destruction or adverse modification of designated critical habitat in violation of the Endangered Species Act. One commenter recommended that we modify the language to prohibit operations that ''may affect'' listed species instead of jeopardizing their continued existence. We recognize that jeopardy is too low of a standard because it allows for more impacts than SMCRA 515(b)(24)[725] intends. On the other hand, the ''may affect'' standard is too stringent because there are situations in which a mining operation may affect a listed species, but as a result of protective measures designed during consultation, material damage of the hydrologic balance is avoided. The commenter's suggested modification would also prohibit activities that may affect, but are not likely to adversely affect, species. In order to address these issues, we have modified the language in paragraph (b)(1)(i) to clarify that no surface mining activities may violate the Endangered Species Act and that nothing in our regulations authorizes the taking of a species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* unless the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as applicable, authorizes the taking under 16 U.S.C. 1536(b)(4). We also added reference to the National Marine Fisheries Service to this regulation in the event that a species under its jurisdiction may be impacted by mining activities. *See* 16 U.S.C. 1532(15).

One commenter stated that it is unclear what actions the regulatory authority would take in the event a species is unexpectedly found in the permit area or adjacent area, as described in paragraph (b)(1)(ii). The commenter also stated that such a discovery could conceivably shut down an ongoing operation at great expense. However, § 817.97(b) in the current regulations already requires operators to ''promptly report'' the presence of any listed or threatened species within the permit area when the operator becomes aware of it. This section of the current regulations also specifies that upon such notification, ''the regulatory authority shall consult with the appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.'' Operators have not raised concerns about this existing requirement, and we are unaware of any instances where the requirement has been overly burdensome. Furthermore, the risk of unexpected occurrences of listed species can be minimized by gathering the best possible data and coordinating with the relevant agencies at the permit application and approval stages. *See* § 773.15(j)(1) (requiring operators to provide documentation that the proposed permit area and adjacent area

[720] 80 FR 44436, 44564 (Jul. 27, 2015).

[721] 33 U.S.C. 1313(c).

[722] 80 FR 44436 (Jul. 27, 2015).

[723] 30 U.S.C. 1265(b)(24).

[724] *Id.* and 30 U.S.C. 1265(b)(10)(A) and (E).

[725] 30 U.S.C. 1265(b)(24).

do not contain threatened or endangered species).

We invited comment on whether to limit the notification requirement of proposed paragraph (b)(1)(ii) to the active mining phase of the operation. Specifically, we sought comment on whether the final rule should explicitly state that the notification requirement expires at the time of Phase II bond release, since there is typically a lack of activity on the site after that stage of reclamation. We received comments in support of and in opposition to terminating the notification requirement at Phase II bond release. Those in favor of terminating the requirement argued that it would save government and industry resources, since impacts would be less likely after this stage and because habitat restoration is generally in place—or at least in process—at the time of Phase I bond release. These commenters stated that most of the major earth moving and planting operations are complete at that point, and no major activity would be taking place after Phase I bond release. Those who argued against terminating the requirement voiced concern that risks to listed species continue after active mining and require long-term treatment. The U.S. Fish and Wildlife Service recommended that we not limit the notification requirement because information about the new or increased occupancy of the site or adjacent area is useful in understanding the recovery of areas affected by the mining activity. After consideration of the comments, we have determined that continued notification after Phase II bond release is not a burdensome requirement as the notification requirement does not also require prescribed searches or assessments of the area and that there is continued value to these notices as it would allow the appropriate agencies to gather data on these species is data after Phase II; therefore, we have not limited the notification requirement. Furthermore, we note that the requirement is limited to notification. If the operation is unlikely to cause any harm to the newly found species, no action will be required. In contrast, not requiring disclosure could result in unquantified harm to species and expose operators to liability under the Endangered Species Act. Therefore, we have not limited the notification requirement.

Commenters supported the requirement in paragraph (b)(1)(iv), to comply with any species-specific protection measures required by the regulatory authority in coordination with the U.S. Fish and Wildlife Service. The only change we have made to this paragraph is to add a reference to the National Marine Fisheries Service in the event that a species under its jurisdiction may be impacted by mining activities.

Other commenters stated that our final rule at paragraph (b)(2) should not contain analogous requirements for state listed species. We decline to eliminate these requirements because they are necessary to comply with section 515(b)(24) of SMCRA, which requires operators to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.'' [726] In response to paragraph (b)(2), which requires operators to notify the regulatory authority of any state or tribal-listed, threatened or endangered species within the permit area or the adjacent area of which the permittee becomes aware, regardless of whether the species was listed before or after permit issuance, we received a comment that neither the SMCRA nor the Endangered Species Act provides protection for state-listed species. As stated in the proposed preamble,[727] paragraph (b)(2) was established to set forth the requirements for state listed species under state statutes protecting state listed, threatened, and endangered species. In addition, in *In re: Permanent Surface Mining Regulation Litigation,* No. 79–1144, slip op, at pp. 58–63 (D.C. Cir. 1984), a federal district court ruled that section 515(b)(24) of SMCRA [728] is not limited to Federally-listed species. Therefore, under SMCRA, operators are required to minimize disturbances to state, tribal, and federally-listed endangered or threatened species. We have made additional changes to final paragraphs (b)(2)(ii)(A) and (B) provide clarity on the process of coordination with the appropriate agencies, the process for proceeding with activities, and process for revising the permit when a state-listed species is found within the permitted site.

Final Paragraph (c): Bald and Golden Eagles

One commenter recommended that we remove § 816.97(c), which describes the process of protecting bald and golden eagles, their nests, and eggs, and the process of reporting and addressing the presence of bald and golden eagle nests. This commenter claimed that this provision would usurp the authority that Congress delegated to the U.S. Fish and Wildlife Service under the Bald and Golden Eagle Protection Act [729] and that this effort to expand our jurisdiction is unlawful. We disagree. This paragraph does not expand our jurisdiction; it merely describes the process of alerting the U.S. Fish and Wildlife Service of the presence of bald or golden eagles, their eggs, or nests and the responsibilities of the operator and the regulatory agency in this process. This requirement was present in the previous regulations and has been retained unedited in the final rule.

Final Paragraph (d): Miscellaneous Protective Measures for Other Species of Fish and Wildlife

In paragraph (d)(1), we proposed to delete the clause in our existing regulations that allowed regulatory authorities to waive, if they determined it was unnecessary, the requirement that electric power transmission lines and other transmission facilities used for, or incidental to, surface mining activities on the permit area be designed and constructed to minimize electrocution hazards to raptors and other avian species with large wingspans. We are not aware of any situations in which these precautions are not necessary or appropriate. We received comments supporting this change and are finalizing it as proposed.

One commenter requested that we delete paragraph (d)(4), which requires the exclusion of wildlife from ponds that contain hazardous concentrations of toxic or toxic-forming materials. This requirement has been part of our existing regulations since December 11, 1987. This provision was once deleted from the regulations, as we maintained that there was little evidence of harm to wildlife as a result of unprotected toxic ponds on the site of any mining operation. We stated at the time the requirements to minimize disturbances and adverse impacts on wildlife by utilizing the best technology currently available would be sufficient to protect wildlife from toxic ponds. But the court in *In re: Permanent Surface Mining Regulation Litigation,* No. 79–1144, slip op, at pp. 58–63 (D.C. Cir. 1984) rejected these arguments, stating that the absence of evidence of harm to wildlife supported the retention of the fencing requirement. The court believed the regulations specific to utilizing the best technology currently available did not provide regulatory authorities with sufficient guidance. Therefore, until we are further directed by the courts or presented with sufficient scientific evidence, we will keep this provision within the regulations.

[726] 30 U.S.C. 1265(b)(24).

[727] 80 FR 44436, 44465 (Jul. 27, 2015).

[728] 30 U.S.C. 1265(b)(24).

[729] 16 U.S.C. 668–668d.

Another commenter objected to proposed paragraph (d)(4) asserting that many ponds in the Appalachian and Illinois Basins are treated with chemicals because of acidity, iron, and manganese levels and some are being treated with a ''proprietary mix'' of treatment chemicals. The commenters assert that proposed paragraph (d)(4) is not fully protective because we have not stated the standard for ''toxic or toxic-forming materials.'' We disagree. In existing 30 CFR 701.5 we define toxic-forming materials as ''earth materials or waste which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soil or water that are detrimental to biota and or uses of water.'' The preamble to our 1979 implementing regulations explains the basis for the wording found in the definition.[730] Accordingly, we have not made any changes to the final rule based on this comment.

Another commenter objected to paragraph (d)(5) under the mistaken impression that it would require operators to reforest lands that were forested or that would have reverted to forest under conditions of natural succession at the time of permit application, regardless of the approved postmining land use. We have made no change in the final rule because the rule allows for non-forestry vegetation and other land uses, such as those described in § 816.97(g) for the cropland postmining land use.

Similarly, a commenter asked if we were deleting the fish and wildlife postmining land use category because proposed paragraph (d)(5) states that, ''to the extent possible,'' the operator must ''reclaim and reforest lands that were forested at the time of application and lands that would revert to forest under conditions of natural succession in a manner that enhances recovery of the native forest ecosystem as expeditiously as practicable.'' Fish and wildlife habitat land use is still a suitable post mining land use category. Section 701.5 defines both ''land use'' and ''fish and wildlife habitat'' land use. These definitions in § 701.5 are used in conjunction with §§ 780.24 and 784.24 to determine the requirements that apply to postmining land use. The requirements of § 816.97 and 817.97 provide additional protection and enhancement measures that should be implemented to the extent possible, using the best technology currently available. Therefore, we are not making any changes in response to this comment.

[730] 44 FR 14941 (Mar. 13, 1979).

Final Paragraph (e): Wetlands

We proposed to redesignate § 816.97(f) of our previous regulations as paragraph (e) within the final rule and revise it for clarity and consistency with section 515(b)(24) of SMCRA.[731] The previous rule was not fully consistent with section 515(b)(24) of SMCRA,[732] which requires both minimization of disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible and enhancement of those resources where practicable. Proposed paragraph (e) was drafted to align with 515(b)(24) of SMCRA [733] by requiring the permittee to avoid disturbances ''[t]o the extent possible, using the best technology currently available. . .'' and ''. . .where practical, enhance wetlands.'' One commenter objected to the proposed changes and interpreted the proposed rule to require all three actions, *i.e.,* avoidance, restoration or replacement, and enhancement, wherever wetlands exist on the permitted site. This is not an accurate reading of the requirements. If possible, the operator must avoid disturbances to wetlands. If this is not possible, then restoration or replacement of that affected wetland is required. Finally, in all instances, if it is practical, the operator is to enhance the wetlands within the permitted area. The previous regulations, as described within the preamble to the proposed rule,[734] allow the permittee to choose from one of these options, which, as described above, is inconsistent with 515(b)(24) of SMCRA. We did not make changes due to this comment, although to further align with SMCRA at 515(b)(24), we have added ''. . . using the best technology currently available . . .'' to the final rule within this paragraph.

For additional clarification and compliance with the Clean Water Act, 33 U.S.C. 1344, we have added an additional provision in paragraph (e)(2) stating that nothing in paragraph (e)(1) of this section authorizes destruction or degradation of wetlands in violation of section 404 of the Clean Water Act.[735]

Final Paragraph (f): Habitat of Unusually High Value for Fish and Wildlife

We have moved portions of proposed paragraph (e) related to habitat of unusually high value for fish and wildlife to final paragraph (f). This change was made to reduce confusion between wetlands and habitats of unusually high value for fish and wildlife. Paragraph (f) paragraph now requires operators to ''avoid disturbances to, restore or replace, and, where practicable, enhance riparian and other native vegetation along rivers and streams, lentic vegetation bordering ponds and lakes, and habitat of unusually high value for fish and wildlife, as described in § 779.20(c)(3) . . . .''

[731] 30 U.S. 1265(b)(24).

[732] *Id.*

[733] *Id.*

[734] 80 FR 44436, 44566 (Jul. 27, 2015).

[735] 33 U.S.C. 1344.

Final Paragraph (g): Vegetation Requirements for Fish and Wildlife Habitat Postmining Land Use

In proposed paragraph (f), now redesignated as paragraph (g) in the final rule, we proposed to require, among other things, the exclusive use of native vegetation where fish and wildlife habitat is a postmining land use. We received many comments in support of this requirement. As discussed elsewhere in the preamble, we have, within the final rule, made allowances for the use of non-natives that are both non-invasive and necessary to achieve the approved postmining land use.[736] In addition, § 780.12(g)(4) allows for the short-term use of non-natives when necessary to achieve a quick-growing, temporary, stabilizing cover on disturbed and regraded areas, as long as the species selected to achieve this purpose are consistent with measures to establish permanent vegetation. Several commenters stated that non-native annual crops can be used to supplement natural food sources for wildlife. We acknowledge that this is true. However, we do not agree that the use of non-native species is necessary to successfully reclaim the site to the ''fish and wildlife habitat'' land use category. This land use category is defined within § 701.5 as land that is ''dedicated wholly or partially to the production, protection, or management of species of fish or wildlife.'' This definition does not allow for a focus on game species to the detriment of other species, and there are no other aspects of this land use category that would necessitate the use of non-native plant species. Therefore, an exception for the use of non-natives for this land use category is not warranted.

Another commenter stated that exceptions should be made where native species are not commercially available. We do not find this argument persuasive for a number of reasons. First, the use of native species is a best practice in SMCRA and non-SMCRA regulated reclamation across the United States, and substantial progress

[736] 30 CFR 780.12(g)(3)(i)

continues to be made in the availability and diversity of native species. Best practices also include contracting growers to produce seed from the premining vegetation or adjacent (and appropriate) areas for use in reclamation. This enhances the establishment and the survivability of the native species that are used. In § 780.12(g)(4), we have described circumstances under which the need to provide stabilization of disturbed and regraded areas makes it necessary for the regulatory authority to allow quick-growing, temporary, stabilizing cover on disturbed and regraded areas, provided that the species selected to achieve this purpose are consistent with measures to establish permanent vegetation. These requirements are consistent with section 515(b)(19) of SMCRA,[737] which provides that permanent vegetative cover must be of the same seasonal variety native to the area of land to be affected and capable of self-regeneration. This section of SMCRA allows for the use of introduced species in the revegetation process where desirable and necessary to achieve the approved postmining land use plan.[738]

Final Paragraph (h): Vegetation Requirements for Cropland Postmining Land Use

A commenter objected to proposed paragraph (g), now final paragraph (h), and requested it be amended to clarify that the operator and surface owner may determine whether trees, hedges, and fence rows are appropriate for planned postmining, crop-management practices. The proposed rule requirement applies only ''where appropriate for wildlife-management and crop-management practices.'' Given this exception, no revision is necessary to accommodate trees, hedges, and fence rows if they are appropriate for planned postmining, crop-management practices.

Final Paragraph (i): Vegetation Requirements for Forestry Postmining Land Uses

One commenter objected to our requirement within proposed paragraph (h), now final paragraph (i), to plant understory species on lands managed for forestry as the postmining land use. The commenter claimed that this requirement was ''not sensible,'' as the rationale for a forest post mine land use is to provide forest resources for wildlife and for potential future harvesting of these resources. We disagree that the requirement is ''not sensible'' and are finalizing it as proposed. Interspersion of high value trees and shrubs further enhances the function and resources of the site for wildlife and increases its overall environmental and aesthetic value. Through proper forestry management techniques, the inclusion of shrubs within a forestry post mining land use would improve implementation of the revegetation requirements of 515(b)(19) of SMCRA [739] and the provisions of section 515(b)(24) of SMCRA [740] concerning protection and enhancement of fish, wildlife, and related environmental values. The proposed, and now final regulations require this practice to the extent that it is not inconsistent with the type of forestry conducted as part of the postmining land use.

Final Paragraph (j): Vegetation Requirements for Other Postmining Land Uses

A commenter objected to the requirement in proposed paragraph (i)(1), now paragraph (j)(1), to intersperse greenbelts and plantings of non-invasive native plants that provide food or cover for wildlife in sites that are otherwise approved for residential, public service, commercial, industrial, or intensive recreational uses. These commenters expressed concern over the potential for conflicts between greenbelts and the features, for example power lines, of the selected land use. This concern is exaggerated. Pursuant to the requirements of § 780.12(g), the revegetation plan must be approved by the regulatory authority. The requirement in paragraph (j)(1) will be satisfied if this plan is followed. Moreover, the regulation states that greenbelts are not required if their use would be inconsistent with the approved postmining land use plan for that site. Even so, in most cases, greenbelts could be situated to avoid conflict with other necessary features of the approved land use.

Section 816.99: What measures must I take to prevent and remediate landslides?

We are finalizing § 816.99 as proposed. We received no comments on this section.

Section 816.100: What are the standards for conducting reclamation contemporaneously with mining?

As discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 816.100 to add stream restoration to the list of reclamation activities that are subject to the contemporaneous reclamation requirement.[741] We received expressions of support for this change, including from the U.S. Forest Service; therefore, we are maintaining this addition in the final rule.

Section 816.102: How must I backfill the mined area and grade and configure the land surface?

As discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 816.102.[742] We have amended the language of the proposed rule to reflect that there are allowable deviations from the general requirement to return all land disturbed by coal mining operations to its approximate original contour prior to any mining. Additionally, after evaluating the comments that we received, we have corrected and added citations to statutory and regulatory authority provisions; added § 816.102(a)(3)(iv)(B),(C),and (D); and deleted a provision in section 816.102(a)(5). We discuss these changes and responses to relevant comments below.

We proposed to revise the introductory language of paragraph (a) to clarify that the requirement to backfill applies only to mined areas.[743] We noted that, although the existing rule applies the backfilling requirement to the entire disturbed area, this is inappropriate because ''those portions of the disturbed area outside the mined area do not contain a pit or similar excavation that requires backfilling.'' [744] To support this statement, we referred the public to the preamble discussion of the proposed definition of ''backfill'' in 30 CFR 701.5 [745] which we derived from *A Dictionary of Mining, Mineral, and Related Terms* (U.S. Bureau of Mines, 1968). Specifically, we proposed to define ''backfill'' as ''the spoil and waste materials used to fill the void resulting from an excavation created for the purpose of extracting coal from the earth.'' We simultaneously proposed to define the action of ''backfilling'' as ''the process of filling that void.'' [746] In response, one commenter argued that our proposed definitions were inaccurate because many mining companies in North Dakota excavate areas to construct sediment ponds—and not to extract coal— and these must be backfilled when they are no longer needed. Although the term ''backfill'' is

[737] 30 U.S.C. 1265(b)(19).

[738] 30 U.S.C. 1265(b)(10).

[739] 30 U.S.C. 1265(b)(19).

[740] 30 U.S.C. 1265(b)(24).

[741] 80 FR 44436, 44567 (Jul. 27, 2015).

[742] 80 FR 44436, 44567–44570 (Jul. 27, 2015).

[743] 80 FR 44436, 44567 (Jul. 27, 2015).

[744] *Id.*

[745] *Id.*

[746] 80 FR 44436, 44468 (Jul. 27, 2015).

commonly used in the manner suggested by the commenter outside the mining context, in the mining context, the term refers to material placed in the mined area and to the related act of placing that material in the void created by mining. In the mining context, the filling in of sediment ponds or other excavations when they are no longer needed is referred to as ''reclaiming'' the site to its approximate original contour. Thus, our proposed definitions are accurate.

In new § 816.102(a)(1), we have replaced the phrase ''except in the following circumstances with deviations from the approximate original contour restoration requirements are allowed in the following situations.'' This change should make it clear to permit applicants and to state regulatory authorities that an exemption from the approximate original contour restoration requirements cannot be claimed by the permittee when a permanent impoundment is created or when one of the other situations enumerated in § 816.102(a)(1) are present. We discuss this point in more detail below.

The proposed deviations from the general approximate original contour restoration requirements generated numerous comments. One commenter argued that the definition of ''approximate original contour'' in paragraph (a)(1) was ambiguous and could lead to a loophole around the statutory requirement to backfill and grade. The commenter noted a recent administrative decision [747] documenting testimony by a geologist with a state regulatory authority who claimed that the slopes of impoundments above the level of the water should not be considered in evaluating whether a mining company has backfilled and graded in a manner that achieves the approximate original contour. The commenter asserted that SMCRA, the previous regulations, and the proposed regulations cannot be read to support the state engineer's testimony. The commenter argued that this approach would allow mine operators to create ponds in front of highwalls or leave unreclaimed pits as ''supposed impoundments'' and then contend that the land forms do not need to conform to the approximate original contour requirements. To prevent a misreading of the statute or regulations, the commenter recommended that we clarify that slopes of impoundments *are* a part of the contour of a mine site. The commenter also noted that many impoundments have been created for the purpose of avoiding the costs associated with spoil transport.

The commenter is correct that the term ''approximate original contour'' is often misconstrued and misapplied. As that commenter noted, the previously-referenced state geologist incorrectly excluded so-called ''impoundment slopes'' from his approximate original contour analysis because he apparently believed that any slope leading down to the water level of a permanent impoundment is part of the design criteria for a permanent impoundment.[748] He therefore interpreted our previous regulations as providing an exemption for these slopes from the requirement to restore the land to its approximate original contour for areas around permanent impoundments. This interpretation was erroneous, and we agree with the commenter that the postmining contours of the entire permit area should be evaluated for approximate original contour compliance.

It is not appropriate to create permanent impoundments merely for the purpose of avoiding the true cost of reclaiming the mined out area and restoring its approximate original contour. As the commenter suggests, the regulatory and statutory provisions dealing with impoundments, highwall elimination, spoil pile elimination, and drainage patterns should all be read together and applied together so that land affected by a surface coal mining and reclamation operation will be returned to the same approximate configuration that existed prior to any mining. In other words, land that was generally flat prior to any mining should be generally flat after the mining and reclamation operations are complete, although there may be some variations in site elevation after mining. The permittee should not propose, and the regulatory authority should not approve, the creation of land forms that were not present within the permit area prior to any mining. After reclamation operations are complete, the mined out area and the area affected by surface coal mining and reclamation operations should closely resemble the contours of the land that existed prior to any mining.

Permanent impoundments are allowable deviations from approximate original contour, but they are not an exemption from the requirement to return land to the approximate original contour that existed prior to any mining.[749] Permanent impoundments of an appropriate size and proper depth can provide significant wildlife habitat and recreational value. However, this does not mean permanent impoundments can be as large and as deep as a surface owner or a permittee might like them to be. The size and depth of permanent impoundments are limited by the requirements of final rule §§ 780.24 and 816.102(a)(3)(ii).

We have previously approved highwall retention provisions as part of the New Mexico and Utah regulatory programs.[750] Our proposed rule allowed for the retention of modified highwalls under limited circumstances. We received many comments on this proposal. Some commenters urged us to eliminate the proposed retention of modified highwalls. The commenters argued that highwalls are not natural and that, while they may serve as habitat for some wildlife, such as raptors, they present significant danger to inhabitants, livestock, and other wildlife. Other commenters opposed our proposed highwall retention provisions because, in the commenters' view, those provisions are not applicable to other regions and could be used as a loophole to circumvent the approximate original contour restoration requirement. Other commenters opined that a national rule was not needed because similar highwall retention provisions have been approved in state regulatory programs where the limited retention of highwalls is an acceptable method of restoring mined land to its approximate original contour.

Section 816.102(a)(3)(iii) of the final rule still allows for the retention of modified highwalls under limited circumstances. However, we have changed the rule in response to the commenters' concerns by addressing: (1) The nature of highwalls, (2) the effect of highwalls on wildlife, and (3) the danger that highwalls represent. We explain these changes further below.

We disagree that our proposed highwall retention provisions are inapplicable in regions outside of New Mexico and Utah, as commenters contended. Although the New Mexico and Utah programs allow for highwall retention under limited circumstances,

[747] *Farrell-Cooper Mining Company* v. *OSMRE,* OHA Docket No. 2013–1–R (Amended Decision of ALJ Sweitzer at 30, 31).

[748] So-called impoundment slopes are not part of the design criteria for permanent impoundments because such slopes play no role in the water-holding capacity of the impoundment. Only a small portion of the slope of an impoundment above the normal water line—the ''embankment slope''—is properly a part of the design criteria of an impoundment. The embankment slope is the slope from the normal waterline of the impoundment to the maximum water level where the water flows out the emergency spillway. *Id.*

[749] Permanent impoundments are allowed by section 515(b)(8) of SMCRA, 30 U.S.C. 1265(b)(8).

[750] 45 FR 86459 (Dec. 31, 1980), and 58 FR 48600 (Sept. 17, 1993), respectively.

New Mexico and Utah are not the only states where there are cliffs. This rule will have application any time a naturally occurring feature like a cliff is destroyed by coal mining operations, as long as the requirements of § 816.102(a)(3)(iii) are met. While our rule has nationwide applicability, we acknowledge that it will only affect regions and areas with cliffs. These provisions will have no effect at all on regions or areas where naturally occurring cliffs are not present.

We also disagree that this new regulatory provision could provide a ''loophole'' around the requirement to restore the land to its approximate original contour. As we explain below, the retention of modified highwalls is actually in harmony with the requirement to restore to approximate original contour.

While we agree that highwalls created as a part of a mining operation are not natural features, highwalls retained pursuant to paragraph (a)(3)(iv) are consistent with approximate original contour because they are allowed only when they are replacing natural cliffs which existed prior to any mining and then only if they are modified to simulate the preexisting cliffs.

Highwalls that are allowable postmining features are not formed by natural processes and must be modified, in some cases significantly, to closely resemble a natural landform. To ensure that this occurs, final § 816.106(a)(3)(iv)(A) requires the regulatory authority to establish conditions to ensure that the retained segment resembles similar premining landforms. As we discussed in the preamble to the proposed rule, the rule allows retention of modified highwall segments only if they replace cliffs and bluffs that existed prior to any mining.[751] We also clarified in the preamble to the proposed rule that we intend the rule to reconcile the potential conflict between the requirement to restore the approximate original contour and the requirement to eliminate all highwalls.[752] In effect, this means that the retention of highwalls is limited to a very specific set of circumstances and carries with it certain responsibilities.

As we proposed,[753] a permittee can only retain a highwall if the permittee destroyed naturally-occurring cliffs or bluffs while mining. Even then, a permittee must modify the highwall segments to *closely* resemble the features destroyed by mining.[754] This means that regulatory authorities must establish permit conditions to ensure that the retained segment restores the form of the destroyed natural cliff or bluff.[755] As we stated in the preamble to the proposed rule, this may require blasting ledges into the highwall face or creating microhabitats at the base of the highwall remnant.[756] Although we mentioned these two examples in the preamble to the proposed rule, we emphasize here that these examples are not intended to be exhaustive, and they will often not be sufficient to ensure that the retained segment resembles similar premining landforms.

Paragraph (a)(3)(iv)(A) further ensures that highwalls closely resemble the replaced features by making it clear that modified highwall segments are not authorized in excess of the number, length, and height needed to replace similar premining landforms. As a simple illustration, a two hundred foot cliff cannot be replaced with two one hundred foot highwalls. Likewise, five twenty foot bluffs cannot be replaced with a one hundred foot highwall. Rather, a highwall segment may be retained only if, under section (a)(3)(iv), it replaces similar natural landforms, and if, under (a)(3)(iv)(A), it closely resembles those similar premining landforms.

To avoid any confusion about the word ''similar'' in this context, we emphasize, as we did in the preamble to the proposed rule, that retained highwall segments must be modified to closely resemble *the features destroyed by mining* and to restore the ecological functions of *those features.*[757] Any attempt to replace a natural landform with a landform that is different in scale or type from the one destroyed by mining is inconsistent with the purpose and intent of this regulation.

As mentioned above, several commenters asserted that the retention of highwalls will have a negative effect on wildlife. For instance, commenters argued that, although highwalls may create habitat for raptors and cliff-dwelling wildlife, they may pose a danger to livestock and grassland wildlife. We share commenters' concern for the effect of highwalls on wildlife and note that this concern is addressed in the final rule. Final section 816.102(a)(3)(iv)(A) requires the regulatory authority to establish conditions to ensure that the retained segment *restores* the ecological niches that the premining landforms provided. If a cliff, prior to mining, provided an ecological niche for wildlife, the regulatory authority *must* establish conditions ensuring that the replacement highwall provides the same ecological niche. In the preamble to the proposed rule, we mentioned that permittees may need to blast ledges into the highwall face to provide nesting habitat for raptors and other cliff-dwelling habitat or create microhabitats at the base of a highwall remnant. Again, these examples are not exhaustive. Additionally, we added final paragraphs (a)(3)(iv)(B) and (C), which require that the retained highwall be stable and not create a safety hazard compared to the premining feature that it replaces.

We disagree with commenters who argue that limited highwall retention will not comply with SMCRA Section 515(b)(24). That section requires that surface coal mining and reclamation operations use the best technology currently available to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and to achieve enhancement of those resources where practicable. As we did in the preamble to the proposed rule,[758] we emphasize that the requirement to restore ecological niches will improve implementation of SMCRA 515(b)(24). In order to comply with both SMCRA and the final rule, operators must use the best technology available to identify ecological niches prior to mining and to restore them after mining. We also believe that the commenters' confusion about impacts on wildlife and habitat may stem from confusion surrounding the term ''ecological niches.'' The term is not defined in the regulation and is only used in §§ 816.102 and 817.102. In the proposed rule, we used the term without defining it, but intended it to be understood as it is used in common scientific parlance. We have retained that approach in the final rule.

As we discussed in the preamble to the proposed rule, ''ecological niche'' includes the wildlife habitat and ecological functions of the feature. Thus, no highwalls can be retained, as a commenter suggested, in areas where no cliffs or bluffs existed premining because such a highwall would provide a different ecological niche than premining landforms. Nor can a highwall be retained if it fails to fully restore the variety of environmental values provided by the destroyed premining landform. Succinctly, in order to restore an ecological niche, it is necessary to understand where the premining landforms provided

[751] 80 FR 44436, 444569 (Jul. 27, 2015).

[752] *Id.*

[753] *Id.*

[754] *Id.*

[755] *See Id.*

[756] *See Id.*

[757] 80 FF 44436, 44569 (Jul. 27, 2015).

[758] 80 FR 44436, 44569 (Jul. 27, 2015).

important environmental functions, how the premining landforms provided environmental values, and how a retained highwall segment must be modified to provide the *same* environmental values. The regulatory authority, for its part, must establish conditions ensuring that these values are understood and restored.

Some commenters suggested that, if highwalls are allowed to be retained, they should be no greater in length than the natural cliffs that existed prior to mining. These commenters further suggested that trails be cut through retained highwalls at intervals to allow for the passage of livestock and wildlife. We address the commenters' concern in final section 816.102(a)(3)(iv)(A). As previously discussed, this paragraph prohibits the retention of modified highwall segments that are longer than the premining landform. Again, as discussed above, this requirement cannot be avoided by combining or dividing the dimensions of premining natural landforms. Furthermore, we note that if trails are necessary to restoring the ecological niches provided by premining landforms, then those trails would be authorized under paragraph (a)(3)(iv)(A).

In response to concerns about the dangers posed by highwalls, we added paragraph (a)(3)(iv)(B). Commenters argued that due to the nature of some sedimentary geological formations, highwalls might prove to be unstable because they are susceptible to weathering. Paragraph (a)(3)(iv)(B) requires the regulatory authority to establish conditions to ensure that the retained segment is stable. To address similar safety concerns we also added paragraph (a)(3)(iv)(C). This provision requires the regulatory authority to establish conditions to ensure that the retained segment does not create an increased safety hazard compared to the premining feature that it replaces. The commenters further claimed that leaving highwalls would allow for the exposure of water bearing formations. In response, we added paragraph (a)(3)(iv)(D), which requires the regulatory authority to establish conditions to ensure that any exposure of water-bearing strata in the retained segment does not adversely affect the hydrologic balance.

Some commenters supported the principle of allowing remnant highwall features to replace cliffs destroyed during the mining process but questioned why it was necessary to include it in the federal final rule when several states have successfully incorporated this into their programs without a corresponding federal regulation. As we discussed in the preamble to the proposed rule, the rule harmonizes SMCRA section 515(b)(3)'s requirements to eliminate highwalls and restore the approximate original contour and clarifies any potential conflict between these requirements.[759] A federal final rule is necessary to ensure that these two provisions are properly harmonized, to avoid regulatory loopholes, and to provide consistency and clarity to affected regulated entities and the public. We understand that some states have incorporated elements of the final rule into their programs without a corresponding federal regulation, but that does not preclude us from adopting these provisions in our federal rule.

Many commenters argued that these provisions should be implemented at the discretion of state regulatory authorities. Regulatory authorities retain their traditional discretion under SMCRA to adopt provision that are no less stringent than SMCRA and no less effective than the Secretary's regulations in meeting the requirements of the Act. This final rule sets appropriate baseline requirements for regulatory authorities. Regulatory authorities must establish conditions to ensure that the retained segment: (1) Closely resembles the landforms that existed before any mining; (2) restores the ecological niches that those landforms provided; (3) is stable; (4) does not create an increased safety hazard compared to the feature that existed before any mining; and (5) does not adversely impact the hydrologic balance through the exposure of water-bearing strata. These are reasonable requirements that enhance implementation of SMCRA section 515(b)(3) and protect both the natural and human environment. Furthermore, state regulatory authorities retain their discretion to establish conditions that accomplish these requirements.

Some commenters argued that we should require public notice, a public hearing, and a comment period on any permit application, revision, or renewal that proposes to retain modified highwalls pursuant to paragraph (a)(3)(iv) in order to give local residents an opportunity to comment on potential changes to the local landscape. We have declined to change § 816.102 in response to this recommendation. Existing § 773.6 already provides these rights.[760]

Section 816.102(a)(5) requires permittees and operators to minimize erosion and water pollution. One commenter recommended that we revise this section to require the permittee or operator to ''significantly'' minimize erosion and water pollution. We have declined to make this revision, as it is unnecessary. The word ''minimize'' is used alone throughout the performance standards of SMCRA.[761] We are adopting this term in our regulations to more closely follow the mandates of SMCRA. Moreover, the word ''minimize,'' as commonly understood, indicates that the permittee or operator must reduce erosion and water pollution to the extent possible. Adding ''significantly'' would be redundant in this context. Thus, we are not accepting the commenter's suggestion to include the word ''significantly.''

Finally, in § 816.102(a)(5), we proposed to require that backfilling and grading be conducted to minimize water pollution, including discharges of parameters of concern for which no numerical effluent limitation or water quality standards have been established. One commenter argued that proposed § 816.102(a)(5) was too vague to implement. This commenter claimed that a permittee would not be able to understand, without numerical effluent limitations or water quality standards, how compliance will be determined, what effluent limits are appropriate, and whether grading and backfilling were being conducted appropriately. We understand the commenter's concern and deleted this language from the final rule. With this revision, § 816.102(a)(5) now requires the permittee to ''[m]inimize erosion and water pollution both on and off the site.'' As we stated in the preamble to the proposed rule, however, SMCRA requires the permittee to ''minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.'' [762] This statutory requirement continues to apply to permittees regardless of changes to the regulatory text in this final rule.

Section 816.104: What special provisions for backfilling, grading, and surface configuration apply to sites with thin overburden?

We are finalizing section 816.104 as proposed. We received no comments on this section.

[759] 80 FR 44436, 44569 (Jul. 27, 2015).

[760] 30 CFR 773.6.

[761] 30 U.S.C. 1265.

[762] 30 U.S.C. 1265(b)(10).

Section 816.105: What special provisions for backfilling, grading, and surface configuration apply to sites with thick overburden?

As discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 816.105,[763] which details special requirements applicable for operations with thick overburden. After evaluating the comments that we received, we are adopting the section as proposed.

Final Paragraph (b): Performance Standards

Two commenters expressed concern about the requirement in proposed paragraph (b)(1) that operators backfill the mined-out area to approximate original contour and then place the remaining spoil and waste materials on top of the backfilled area. One commenter alleged that because of this language, it was unclear whether the proposed rule allowed ''blending.'' Blending involves placing spoil material outside of the mined area as a transition between the location where overburden is removed, considering spoil swell factors, and the undisturbed surrounding terrain. The purpose of blending is to avoid any abrupt or potentially hazardous changes in elevation between the mined area and the existing, surrounding terrain. Blending can have beneficial impacts, such as reduced slope steepness throughout the reclaimed area. Spoil used for blending the reclaimed area into the surrounding terrain also helps to minimize the potential for excess spoil that would cause the burial of streams. This commenter stated that if blending is not allowed, it will greatly increase the spoil elevation in many areas. The commenter further opined that any provision prohibiting the practice of ''blending'' conflicts with SMCRA, which, according to the commenter, allows blending to achieve approximate original contour. In response, we direct the commenter to subpart (5) of this section, which requires the final surface configuration to ''blend[] into and complement[] the drainage pattern of the surrounding terrain to the extent possible.'' This language specifically allows blending. We also note that this section applies only to sites with thick overburden.

Another commenter indicated that the language of paragraph (b)(2) is contradictory. That paragraph states that operators must ''grade the backfilled area to the lowest practicable grade that is ecologically sound, consistent with the postmining land use, and compatible with the surrounding region.'' It further states that ''[n]o slope may exceed the angle of repose.'' The commenter specifically states that allowing the overstacking of backfill to a height greater than the approximate original contour, but never more than the angle of repose, conflicts with achieving the lowest practicable grade. In response, we note that the commenter appears to misunderstand the purpose of this section. Section 816.105 only applies to the limited circumstance of a surface mine with thick overburden. This section was specifically intended to recognize that in the limited circumstance of thick overburden, it may not be possible to achieve the approximate original contour configuration that would otherwise be required. In the limited situation of thick overburden, § 816.105 allows for placement of spoil within the mined area in a surface configuration in a manner that will probably not closely resemble the general surface configuration of the land prior to any mining. As a result, the final reclaimed surface configurations might exceed, in both contour height and slope steepness, a normal approximate original contour configuration for mine sites that do not have thick overburden. However, while this regulation specifically allows the placement and overstacking of spoil within the mined area at these sites, it recognizes there are additional factors that must be considered before placing spoil beyond normally allowable limits. These additional factors include the avoidance of the creation of slopes that would be considered unstable—but never to exceed the angle-of-repose— and the avoidance of the creation of slopes that would be considered ecologically unsound. Moreover, even though steeper-than-normal slopes would likely be created for surface mining operations that have thick overburden, the grading of spoil materials to the lowest practicable grade is still a reasonable overall target. These qualifiers to the grading of overstacked spoil will offer reasonable protection in areas of thick overburden.

Section 816.106: What special provisions for backfilling, grading, and surface configuration apply to previously mined areas with a preexisting highwall?

We are finalizing section 816.106 as proposed. We received no comments on this section.

Section 816.107: What special provisions for backfilling, grading, and surface configuration apply to operations on steep slopes?

We received no comments on this section. Nevertheless, we made one modification from the proposed rule. Proposed paragraph (d) provided that, ''you must handle woody materials in accordance with § 816.22(f) of this part. You may not bury them in the backfill.'' [764] We have removed the last sentence because it is in conflict with § 816.22(f)(ii) of the final rule. Section 816.22(f)(ii) provides an exception that allows material to be buried in the backfill when significant populations of invasive or noxious non-native species are present and it is necessary to bury the material at a sufficient depth to prevent regeneration or proliferation of undesirable species. Removal of ''[y]ou many not bury them in the backfill'' makes §§ 816.107 and 816.22 consistent in their handling of organic matter.

Section 816.111: How must I revegetate areas disturbed by mining activities?

We proposed to revise and restructure previous § 816.111.[765] After evaluating the comments that we received, we are adopting the section as proposed, with a few modifications. Some commenters expressed concern that this section does not require the vegetative cover to be ''of the same seasonal variety native to the area of land to be affected,'' as required by section 515(b)(19) of SMCRA.[766] Previous § 816.111(b)(2) required that vegetation have the same ''seasonal characteristics of growth'' as the native plant communities they replace. This requirement was part of a rule that was promulgated in 1983.[767] We did not change this requirement in the final rule. Final § 780.12(g)(3)(iv) retains the phrase ''seasonal characteristics of growth.'' The basis for the use of the term ''seasonal characteristics of growth'' instead of ''seasonal variety'' is set forth in the 1982 preamble to the proposed rule that resulted in, the 1983 final rule. In that preamble, we explained that ''seasonal variety'' in section 515(b)(19) of SMCRA [768] and ''seasonal characteristics of growth'' have essentially the same meaning, but that ''seasonal characteristics of growth'' is more easily understood, and refers to the major season of growth for herbaceous species.[769] This is still true;

[763] 80 FR 44436, 44571 (Jul. 27, 2015).

[764] 80 FR 44436, 44668 (Jul. 27, 2015).

[765] 80 FR 44436, 44572–73 (Jul. 27, 2015).

[766] 30 U.S.C. 1265(b)(19).

[767] 48 FR 40140, 40145 (Sept. 2,1983).

[768] 30 U.S.C. 1265(b)(19).

[769] 47 FR 12596 (Mar. 23, 1982).

therefore, we have not made modifications to the final rule in response to the commenter's concern.

Some commenters claimed that the proposed rule appeared to have little applicability outside Appalachia and suggested that revegetation issues should be resolved on a state-by-state basis. Section 780.12(g) is sufficiently flexible to accommodate special circumstances in any location within the nation, as well as geographic variability within an individual state program. Our reference to circumstances or research from Appalachia or other areas of the nation should not be misconstrued to mean those locations are the sole focus of these regulations.

Several commenters recommended that we not codify the revegetation requirements in the national regulations, but instead encourage the development of rules, policies, or procedures on a state-by-state basis. We have declined to make this change. The regulations provide sufficient discretion for individual states and tribes to accommodate their unique conditions. For instance, the revegetation plan permitting requirements within § 780.12(g)(2)(i) mandate that the proposed vegetative cover be consistent with the plant communities described in the permit application. The reference to ''native'' plant communities in this section makes clear that the revegetation requirements are based on site-specific conditions. Therefore, we have not made changes to the rule as a result of these comments.

Several commenters alleged that § 816.111 is inconsistent with sections 515(b)(19) and (20) of SMCRA.[770] SMCRA section 515(b)(19) allows the use of ''introduced species'' instead of native species where such use is ''desirable and necessary to achieve the approved postmining land use plan.'' SMCRA section 515(b)(20) creates another limited exception to the requirement to use native species when the regulatory authority issues ''a written finding approving a long-term, intensive, agricultural postmining land use.'' According to these commenters, the statute provides no other exception from the requirement to establish a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area. These commenters argue that § 816.111(a)(3) and (a)(4) are inconsistent with SMCRA because they would create exceptions to the revegetation requirements for rock piles, water areas, and other non-vegetation features and for any approved ''impervious surface'' in support of the postmining land use.

We disagree that there is any inconsistency. Our regulations at § 816.111 are fully consistent with SMCRA. SMCRA recognizes the legitimacy of appurtenant features that support the postmining land use that might not support any vegetation, such as water features, rock piles for wildlife habitat, or parking lots. These non-vegetative features are authorized by section 515(b)(2) of SMCRA,[771] which allows for higher or better postmining land uses. These features are allowable pursuant to § 701.5, which defines ''land use'' as ''specific uses or management-related activities . . . [which] may include land used for support facilities that are an integral part of the use.'' Additionally, it would be unreasonable to expect parking lots and other impervious surfaces or water features such as stock ponds that are legitimate and integral parts of the approved postmining land use to support vegetation.[772]

One commenter expressed concern about the apparent removal of language relative to the revegetation of lands designated for cropland postmining land use. Several commenters stated that the proposed rule is problematic because sixty percent of all permitted land is cropland, and exemptions are necessary in order to use non-native species to accommodate cropland postmining land uses. In response, we note that provisions containing exceptions to the general requirement to use native species in order to achieve the postmining land use, including cropland use, have been retained in the rule. The language relating to cropland revegetation previously found within § 816.111 has been relocated from the performance standards to the permit requirements and is now part of the revegetation plan requirements at § 780.24(a)(2). The provisions related to postmining land uses (including cropland) can now be found in the final rule at § 780.12(g)(3)(i) and (g)(5) (proposed as § 780.12(g)(6)).

Proposed paragraph (b) requires that the reestablished vegetative cover comply with the revegetation plan approved in accordance with proposed § 780.12(g). It further requires in paragraph (b)(4) that vegetative cover ''[b]e capable of stabilizing the soil surface and, in the long term, preventing erosion in excess of what would have occurred naturally had the site not been disturbed.'' Paragraph (b)(5) requires that the vegetative cover ''[n]ot inhibit the establishment of trees and shrubs when the revegetation plan approved in the permit requires the use of woody plants.'' We invited comment on whether proposed paragraphs (b)(4) and (5) strike the proper balance between controlling erosion and promoting the establishment of native trees and shrubs. Commenters indicated that the language provided sufficient balance, and we are adopting the rule as proposed.

We received comments that the requirement in paragraph (b)(4), which is discussed above, is subjective and would be impossible to achieve. We acknowledge that background erosion levels on undisturbed sites vary from region to region and site to site, depending on geology, soils, topography, and climate. The final rule provides an exception for unavoidable erosion that is a consequence of the natural conditions of the site, if the extent of unavoidable erosion is determinable by comparison to other undisturbed areas with the same or similar conditions. This requirement is reasonable and allows the regulator to consider regional differences. We are not changing the rule in response to this comment.

In response to paragraph (b)(5), a commenter inquired as to who decides whether the re-established vegetative cover inhibits the establishment of trees and shrubs. The regulatory authority, based on state specific regulations contained in the approved program, has the discretion to make this determination.

Commenters also objected to the requirement in proposed paragraph (d)(2) to use native hay mulch to the extent it is commercially available. While noting that ''hay mulch'' is not a defined term, these commenters stated that the term typically refers to grass and legumes cut, dried, and stored for use with livestock, and not to straw mulch (baled stalks of a harvested wheat or similar crop), which is more typically used to protect soils. A commenter also raised a question regarding commercial availability of native hay seed stock for revegetation and questioned the efficacy of this requirement. We agree with the commenters that the use of ''hay mulch,'' in consideration of its commonly understood meaning, is not preferred as a mechanism for protecting soils, and certainly should not be mandated. Therefore, we have eliminated the requirement to use ''native hay mulch.''

[770] 30 U.S.C. 1265(b)(19) and (20).

[771] 30 U.S.C. 1265(b)(2).

[772] 30 U.S.C. 1265(b)(19).

Previous § 816.113: Revegetation: Timing

We have removed and reserved previous § 816.113 for the reasons discussed in the preamble to the proposed rule. Specifically, previous § 816.113 has been redesignated and moved to final rule § 816.111.[773]

Previous § 816.114: Revegetation: Mulching and Other Soil Stabilizing Practices

We have removed and reserved previous § 816.114 for the reasons discussed in the preamble to the proposed rule. Specifically, previous § 816.114 has been redesignated moved to final rule § 816.111.[774]

Section 816.115: How long am I responsible for revegetation after planting?

We are finalizing § 816.115 as proposed. We received no comments on this section.

Section 816.116: What requirements apply to standards for determining revegetation success?

As discussed in the preamble to the proposed rule, we proposed to modify our regulations at § 816.116 about the standards for determining revegetation success.[775] After evaluating the comments that we received, we are adopting the section as proposed, with the following exceptions and explanations.

We proposed to reorient our previous regulations concerning revegetation success standards away from a focus on a single postmining land use, which may or may not be implemented, toward standards pertinent to a determination of whether the site has been restored ''to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood,'' as required by section 515(b)(2) of SMCRA.[776] Commenters disagreed with this proposed switch in focus and claimed that it would be contrary to statutory requirements. The commenters opined that sections 515(b)(19) and (20)[777] set the minimum requirements for revegetation, and we may not establish different requirements through a rulemaking. Similarly and without elaboration, commenters also opined that the proposed standards for determining revegetation success—that the vegetation be ''adequate to demonstrate restoration of premining land use capability and must reflect'' the revegetation plan—are inconsistent with 515(b)(19) of SMCRA. We disagree; this section, along with other sections of the final rule, actually implements both of these statutory sections. In particular, this section defines how the regulatory authority will determine that the reclamation performed at the site complies with these sections 515(b)(19) and (20) of SMCRA:[778] Through standards for evaluating revegetation success and statistically valid sampling techniques for measuring revegetation success. Other sections of the rule, such as § 780.12(g), which is cross-referenced in paragraph (b), require a diverse, effective, permanent vegetative cover that is consistent with the native vegetative plant communities and natural succession process within the permitted and surrounding areas.

Additionally, some commenters asserted that the proposed regulations, which focus on establishing native vegetation, do not sufficiently allow for the variety of postmining land uses that exist outside the forested regions of Appalachia. These commenters suggested that the regulations do not provide for a variety of agricultural lands, reestablishment of native grasslands, certain types of managed wildlife areas, industrial lands, commercial lands, or recreational lands. The commenters also claimed these requirements have nothing to do with stream protection. In response, we note that the reestablishment of native species vegetation is of primary importance in reclaiming mined lands, and that the reclamation of these lands can have significant impacts on a stream's watershed and the health of that stream. Benefits to streams from the revegetation of terrestrial lands include the return of the appropriate surface water flow regimes and reestablishment of the proper nutrients and organic matter to the aquatic habitat. Regardless of the postmining land use, the final regulations are sufficiently flexible to allow planting of appropriate plant species specific to the various regions and local habitats, within limitations identified at § 780.12(g).

Final paragraph (a) is substantively identical to our previous regulation and provides the regulatory authority the discretion to select standards for revegetation success and statistically valid sampling techniques for measuring that success. One commenter requested that we remove the requirement that statistically valid sampling techniques must be used to measure revegetation success because it may be difficult to comply with this requirement in small areas with a limited sample size. We are not making any changes as a result of this comment. For a sample to be scientifically valid, it must present results within acceptable bounds of statistical certainty. Each regulatory authority retains the discretion to approve a model appropriate to the circumstances, as long as it uses statistically valid sampling techniques. For example, current practices, when appropriate, allow for small areas to be analyzed along with other areas; this type of grouping provides the larger sample size that will support the use of valid sampling techniques.

Commenters also expressed concern about the requirement in proposed § 816.116(b) to demonstrate restoration of premining land use capability using revegetation success standards. These commenters alleged that this requirement would impose an unnecessary burden placed on the operators and regulatory authorities, as these standards would be hard to quantify other than by planting and sampling the vegetation of many different seed mixes to determine if the premining capability has returned. After consideration, we agree and have eliminated the reference to revegetation success as part of an adequate demonstration of the affected land's premining capability.

Section 816.116(b)(4) provides that the standards of revegetation success must reflect the postmining land use established under section 780.24, but only to the extent that the approved postmining land use will be implemented before final bond release under §§ 800.40 through 800.43 of this chapter. Otherwise, the site must be revegetated in a manner that will restore native plant communities, and the revegetation success standards for the site must reflect this requirement. Commenters claim that this paragraph inappropriately allows the regulatory authority to create exceptions to the requirements of section 515(b)(19).[779] These commenters also asserted that sections 515(b)(19) and 515(b)(20) of SMCRA[780] strictly limit exceptions to the revegetation requirements to only two situations; where the permittee may use introduced species when desirable and necessary to achieve the approved postmining land use plan, and where the regulatory authority has approved a long-term, intensive, agricultural postmining land use. These commenters

[773] 80 FR 44436, 44574 (Jul. 27, 2015).
[774] 80 FR 44436, 44574 (Jul. 27, 2015).
[775] 80 FR 44436, 44574–76 (Jul. 27, 2015).
[776] 30 U.S.C. 1265(b)(2).
[777] 30 U.S.C. 1265(b)(19) and (20).
[778] 30 U.S.C. 1265(b)(19) and (20).
[779] 30 U.S.C. 1265(b)(19).
[780] 30 U.S.C. 1265(b)(19) and (20).

also opposed the exemption, now in final rule 816.116(c)(3), for ''land actually used for cropland'' because cropland is not one of the two exemptions from the revegetation requirements set out in SMCRA sections 515(b)(19) and 515(b)(20).[781] We are not changing the rule in response to these comments because they fail to take into account other relevant portions of the statute. As we discussed in our response to comments made on § 816.111, which is closely related to § 816.116, our regulations at § 816.116(b)(4), (c)(3), and (g) are also directly and specifically authorized by section 515(b)(19) of SMCRA.[782] These paragraphs base revegetation success standards on the postmining land use that is achieved at the time of final bond release. If the permittee achieves postmining land use before final bond release, consistent with section 515(b)(19) of SMCRA,[783] its success in doing so will count toward the measurement of its revegetation success. If, however, it does not achieve the postmining land by that time, it will need to return the site to native plants. This is consistent with section 515(b)(19) of SMCRA [784] because it allows the permittee to use introduced species only as necessary to achieve the postmining land use. Of course, our regulations at paragraph (c)(3), as described in the preamble discussion of § 816.111, also include an exception for ''long-term intensive agricultural postmining land use'' to give effect to section 515(b)(20) of SMCRA.[785]

In addition to failing to give effect to section 515(b)(19) of SMCRA,[786] the interpretation espoused by the commenters fails to give effect to section 515(b)(2) of SMCRA [787] which, as previously mentioned, requires restoration of land ''to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is a reasonable likelihood. . . .'' As explained in Part V of the preamble to the proposed rule,[788] this section is consistent with section 515(b)(2), (19), and (20) [789] by requiring revegetation success standards that support uses which the site was capable of supporting prior to any mining or reasonably likely higher or better uses.[790] Thus, the regulation as we are finalizing, is designed in accordance with the Act.

Some commenters requested that we retain the existing regulations in § 816.116 regulations pertaining to revegetation standards and introduced species because they adhere much more closely to SMCRA than the proposed regulations. According to the commenters, SMCRA requires revegetation standards to focus on the approved postmining land use. We disagree. Proposed and final rule § 816.116(b) takes into account both the postmining land use approved by the regulatory authority and the premining land use capability of the permitted site. These shared goals appear within SMCRA at sections 515(b)(19) and 515(b)(2).[791] These commenters also claim that under SMCRA a native vegetative cover is necessary, but ''introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan'' regardless of when that plan is completed; therefore, under SMCRA, revegetation with native species is only necessary where there is no approved post-mining land use, and conversely, when there is a post-mining use, revegetation should be consistent with that use and not require native vegetation. We disagree. These commenters have misinterpreted SMCRA. In all cases, sections 508(a)(3) and (4) of SMCRA [792] require identification of a postmining land use before a permit is approved; therefore, to require native species only when there is no postmining land use is illogical. We have further discussed native species use in this preamble within final rule § 780.16(c), above.

Other commenters criticized paragraph (d) for allegedly being contrary to section 515(b)(19) of SMCRA.[793] Paragraph (d) provides that ''ground cover, production, and stocking of the revegetated area will be considered equal to the approved success standards for those parameters when the measured values are not less than 90 percent of the success standard.'' These commenters interpret section 515(b)(19) of SMCRA [794] to require that the minimum revegetation success rate needs to be at least equal in extent of cover to the natural vegetation of the area. We are adopting this section as proposed. Paragraph (d), however, which was previously located at § 816.116(a)(2), has been a part of our rules since 1979 and has not been substantively changed since that time. The preamble to the 1979 rule explains that we adopted the 90% equivalency provision in recognition of the fact that climatic variations may affect productivity in the two consecutive growing seasons during which production is measured to determine revegetation success.[795] After review, we have determined that this reasoning is still valid and are retaining this provision.

Finally, the commenters considered paragraph (g) to be inconsistent with § 515(b)(19) because, according to them, it would inappropriately exempt areas that are ''to be developed for industrial, commercial, or residential use'' from the revegetation requirements. We are adopting paragraph (g) as proposed. Paragraph (g) exempts areas with impervious surfaces like roads, parking lots, and other structures, which are frequently part of industrial, commercial, and residential uses, from counting against the measurement of revegetation success. Removing this requirement is impracticable because it is impossible to revegetate these types of surfaces. To the extent that portions of the site are not covered in an impervious surface, those portions must be revegetated sufficient to ''control erosion.''

In addition to comments received about how this section relates to sections 515(b)(19) and (20) of SMCRA,[796] we received five other comments on this section. First, a commenter requested that we use the term ''reclamation'' instead of ''restoration'' in the introductory language to paragraph (b). As discussed above, we have deleted the clause to which the commenter was referring. As revised, this paragraph requires assessment of the success of revegetation in relation to establishing approved postmining mining land use; it does not require that the vegetation demonstrate that premining capability has been restored.

Second, a commenter expressed concern that the proposed rule would require reclamation that will support both the premining land use and any higher or better uses selected in the reclamation plan. Specifically, the commenter explained that if the ''approved postmining land use is pasture, but the land was used for cropland before mining, proposed §§ 780.12(e) and 816.22, require that the soil be reconstructed in a manner that would restore the site's capability to support cropland.'' The commenter

[781] 30 U.S.C. 1265(b)(19) and (20).
[782] *Id.*
[783] 30 U.S.C. 1265(b)(19).
[784] *Id.*
[785] 30 U.S.C. 1265(b)(20).
[786] 30 U.S.C. 1265(b)(19).
[787] 30 U.S.C. 1265(b)(2).
[788] 80 FR 44436, 44446 (Jul. 27, 2015).
[789] 30 U.S.C. 1265(b)(2), (19), and (20).
[790] 30 U.S.C. 1265(b)(2).
[791] 30 U.S.C. 1265(b)(2) and (b)(19).
[792] 30 U.S.C. 1258(a)(3) and (4).
[793] 30 U.S.C. 1265(b)(19).
[794] 30 U.S.C. 1265(b)(19).
[795] 44 FR 14902,15237 (Mar. 13, 1979).
[796] 30 U.S.C. 1265(b)(19) and (20).

disagreed with this requirement because it requires additional reclamation on the basis of pure speculation that the site might one day support a different land use. We decline to make changes to § 811.116 based on the comment. Section 508(a)(2) of SMCRA [797] requires the development of a reclamation plan demonstrating the capability of the land prior to any mining to support a variety of uses. Similarly, section 515(b)(2) of SMCRA [798] requires that the reclamation actually ''restore land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, as long as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants' declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of Federal, State, or local law [;]''. Therefore, our regulations requiring the restoration of the premining capability of the land is in harmony with SMCRA. In most cases, all that is needed to restore the premining capability of the land is to restore appropriate topsoil thickness and rooting medium—not revegetation. As explained, restoring the capability of the land to support a variety of postmining land uses beyond the immediately selected postmining land use is in fact what SMCRA requires. The revegetation requirements apply only to the postmining land use, not to other uses that the land would have been capable of before mining.

Third, several commenters suggested that proposed paragraph (b)(4), which would have required the establishment of certain types of vegetation before the end of the vegetation responsibility liability period, should be changed to require establishment of that vegetation ''prior to bond release.'' These commenters noted that certain land uses, such as industrial or commercial uses, have no vegetation responsibility period. To address this comment, we are changing the language within paragraph (b)(4) to require the achievement of all postmining land use requirements prior to final bond release instead of the expiration of the revegetation liability period. We also point out, however, that although certain features, such as buildings, roads, parking lots, and bodies of water that do not support vegetation are not directly subject to the revegetation requirements, industrial and commercial postmining land uses may include areas that require revegetation and are subject to the revegetation requirements.

Fourth, several commenters encouraged us not to set national revegetation standards because of drastic differences between the regions with respect to vegetation types, precipitation amounts, humidity, and temperature. We recognize the differences in vegetation across the nation. The final rule includes minimum requirements for native species that allow for the differences between the regions with specific exceptions for introduced species as established within § 780.12(g)(3) and (4). Moreover, we have retained the measured values of the success standards from our previous regulations. As prescribed in § 780.12(g), it is primarily mine operators who will determine the types of vegetation at each site as approved by the regulatory authority.

Finally, a fifth commenter asserted, with respect to paragraph (c), that while it is possible after mining to establish native plant communities that provide a diverse, effective, and permanent vegetative cover comprised of species native to the area, those plant communities often differ significantly from the ones that existed prior to mining, primarily because of the requirements in our rules to replace the topsoil in a uniform thickness. However, in § 816.22(e)(1)(v) of our rule, we have provided an exception to this requirement that allows the thickness to vary when consistent with the postmining land use and when variations are necessary or desirable to achieve specific revegetation goals and ecological diversity, as set forth in the revegetation plan developed under § 780.12(g) of this chapter and approved as part of the permit. Therefore, uniform soil thickness should not be a barrier to the revegetation requirements in § 780.12(g).

Paragraphs (c)(1) and (2) require the description of the diversity and the areal extent of species respectively. One commenter recommended that these requirements not apply to land actually used for cropland after the completion of regrading and redistribution of soil materials. We disagree because these data are necessary to demonstrate compliance with the § 816.97(g) performance standards. Under that provision, in instances where cropland is the postmining land use and where appropriate for wildlife-management and crop-management practices, the operator must intersperse the crop fields with trees, hedges, or fence rows to break up large blocks of monoculture and to diversify habitat types for birds and other animals. Thus, we are retaining paragraphs (c)(1) and (2) as proposed.

A commenter requested that we define the phrase ''areal distribution,'' as used in paragraph (c)(2) where we require that the standards for determining revegetation success include the areal distribution of species required to be present. We disagree that a specific regulatory definition of this term is needed. In general, this paragraph requires that the replanting of the vegetation needs to resemble the general spatial distribution of plant species as they would be found in a natural setting. For example, some species may clump or grow in clusters, while others may be scattered or more evenly distributed; this premining vegetative characteristic should be exhibited within the reclaimed area as well.

Proposed paragraph (d) was substantively identical to the second sentence of paragraph (a)(2) of our previously existing regulations which established statistical confidence requirements for revegetation sampling techniques and statistical adequacy standards for determining when revegetation success standards have been met for ground cover, production, and stocking. In paragraph (d) of the preamble,[799] we invited comment on whether our statistical confidence interval requirements are appropriate in all situations. Several commenters responded that the current statistical confidence intervals are effective; some of these commenters who supported them also considered them unnecessary in some cases. Other commenters considered them ineffective and unnecessary. Commenters suggested that due to regional variability, a single statistical confidence interval would not be appropriate nationally. Statistical confidence is important to prove whether revegetation has been successful. A confidence interval is a range of values describing the uncertainty surrounding an estimate, so it is merely a way to numerically represent the certainty or uncertainty in any given situation. Our regulation requires revegetation that is ''not less than 90 percent of the success standard, using a 90-percent statistical confidence interval.'' It is the mining operator and the regulatory authority who will determine what that ''success standard''

[797] 30 U.S.C. 1258(a)(2).

[798] 30 U.S.C. 1265(b)(2).

[799] *See* 80 FR 44436, 44575 (Jul. 27, 2015).

is, a standard that should take into account regional concerns and ecological conditions. It is also the mining operator and the regulatory authority that, in the reclamation plan, will choose the actual vegetation type or density that the operator must achieve. Our rule merely establishes in a way that is statistically valid throughout the country that the permittee has complied with that plan. We have, therefore, made no change to the requirement and are adopting this provision as proposed.

Section 816.131: What actions must I take when I temporarily cease mining operations?

We are finalizing § 816.131 as proposed. We received no comments on this section.

Section 816.132: What actions must I take when I permanently cease mining operations?

We are finalizing § 816.132 as proposed. We received no comments on this section.

Section 816.133: What provisions concerning postmining land use apply to my operation?

We are finalizing § 816.133 as proposed. We received no comments on this section.

Section 816.150: What are the general requirements for haul and access roads?

Final Paragraph (b): Performance Standards

Proposed paragraph (b)(4) prohibited all haul or access roads from causing or contributing to, directly or indirectly, violations of water standards applicable to receiving waters. We have revised final paragraph (b)(4) to clarify, that each road must be located, designed, constructed, used, maintained, and reclaimed so that it does not violate *any* applicable water-quality standards adopted under the authority of section 303(c) of the Clean Water Act, not just applicable receiving waters. This is consistent with the remainder of the final rule. We received no comments on this section.

Section 816.151: What additional requirements apply to primary roads?

We are finalizing § 816.151 as proposed. We received no comments on this section.

Section 816.180: To what extent must I protect utility installations?

We are finalizing § 816.180 as proposed. We received no comments on this section.

Section 816.181: What requirements apply to support facilities?

We are finalizing § 816.181 as proposed. We received no comments on this section.

Previous § 816.200: Interpretative Rules Related to General Performance Standards

We have removed and reserved previous § 816.200 for the reasons discussed in the preamble to the proposed rule.[800]

M. Part 817—Permanent Program Performance Standards—Underground Mining Activities

Section 817.1: What does this part do?

With the exception of altering the title of this section for clarity, we are finalizing § 817.1 as proposed. We received no comments on this section.

Section 817.2: What is the objective of this part?

We are finalizing § 817.2 as proposed. We received no comments on this section.

Section 817.10: Information Collection

Section 817.10 pertains to compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* We are adding contact information for persons who wish to comment on these aspects of part 817.

Section 817.11: What signs and markers must I post?

Final Paragraph (a): General Specifications

We inadvertently referred to ''surface'' mining activities in the proposed rule. In the final rule we have replaced ''surface'' with ''underground.'' With the exception of this modification, we are finalizing § 817.11 as proposed. We received no comments on this section.

Section 817.13: What special requirements apply to drilled holes, wells, and exposed underground openings?

This section requires the mine operator to cap, seal, backfill, or otherwise properly manage each shaft, drift, adit, tunnel, exploratory hole, entryway, or other opening to the surface from underground. A commenter alleged that the proposed rule should be updated to provide clarification on performance standard requirements where an abandoned mine land site exists (and associated sinkholes, drifts, adits) within an active permit area, but the applicant has no intention to re-mine or otherwise disturb the abandoned mine land. The commenter suggested that the applicant should not be required to reclaim an abandoned mine land site just because it is located within an active permit. Final paragraph (e)(1) requires that the permittee permanently seal any underground opening unless the regulatory authority approves use of the hole or well for water monitoring purposes or authorizes other management of the hole or well. Final paragraph (f)(1) requires that the permittee seal these underground openings unless the regulatory authority approves another use and finds that it will not adversely affect the environment or public health and safety. An opening to an underground mine, pre-law or not, presents a risk to public health and safety. For this reason, we are finalizing § 817.13 as proposed.

Section 817.22: How must I handle topsoil, subsoil, and other plant growth media?

We have modified this section; however, these modifications are discussed in final rule § 816.22, which is the surface mining counterpart to § 817.22.

Section 817.34: How must I protect the hydrologic balance?

We have modified this section; however, these modifications are discussed in final rule § 816.34, which is the surface mining counterpart to § 817.34. In addition, as discussed in the general comments Section IV. K. we have added language to final rule § 817.34(a)(2). This new language makes it clear that while underground operations must prevent material damage to the hydrologic balance outside the permit area, if a regulatory authority determines that the permit application affirmatively demonstrates that the proposed operation, which may include temporary subsidence that can be repaired, has been designed to prevent material damage of the hydrologic balance outside the permit area, pursuant to § 817.121(c), the permit may be issued.

Section 817.35: How must I monitor groundwater?

We have modified this section; however, these modifications are discussed in final rule § 816.35, which is the surface mining counterpart to § 817.35.

[800] 80 FR 44436, 44576 (Jul. 27, 2015).

Section 817.36: How must I monitor surface water?

We have modified this section; however, these modifications are discussed in final rule § 816.36, which is the surface mining counterpart to § 817.36.

Section 817.37: How must I monitor the biological condition of streams?

We have modified this section; however, these modifications are discussed in final rule § 816.37, which is the surface mining counterpart to § 817.37.

Section 817.38: How must I handle acid-forming and toxic-forming materials?

Section 817.38 describes how the operator must handle acid-forming and toxic-forming materials. Although many aspects of this section are substantively identical to the surface mining counterpart found at § 816.38, there are several differences that resulted in unique comments for this section. We received several comments from regulatory authorities and operators, recommending that we delete paragraph (a) of this section. Commenters asserted that paragraph (a) erroneously presupposes that all coal seams and the pit floor are acid forming and toxic forming materials. The commenters were particularly concerned with the requirement to specify that exposed coal seams and the stratum immediately beneath the lowest coal seam mined must be covered with a layer of compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent less-compacted spoil to minimize contact and interaction with water. For the same reasons set forth in our preamble to § 816.38, we agree in part with the commenters.

We are revising proposed paragraph (a) to align more with underground mining issues related to the handling acid-forming or toxic forming materials. We are retaining the first part of paragraph (a) with a few changes that are specific to underground mining. We have revised paragraph (a) to clarify that for the face-up area you must identify potential acid-forming and toxic-forming materials in overburden strata and the stratum immediately below the coal seam to be mined. If the stratum immediately below the coal seam to be mined contains acid-forming or toxic-forming material, you must develop a plan to prevent any adverse hydrologic impacts that might otherwise develop as a result of exposure of that stratum.

The rationale for requiring a plan to prevent any adverse hydrologic impacts that might otherwise develop as a result of exposure of that stratum is the same discussed in preamble for § 816.38.

Several commenters questioned why paragraph (c) was included in § 817.38 of the proposed rule. They asserted that these requirements apply to surface coal mining not underground mining. We agree. The inclusion of paragraph (c) was an error and we have deleted paragraph (c) from the final rule and renumbered the other paragraphs accordingly.

Section 817.39: What must I do with exploratory or monitoring wells when I no longer need them?

To accommodate renumbering and final rule changes in part 800, we have renumbered references to part 800 in this section. With the exception of this renumbering, we are finalizing § 817.39 as proposed. We received no comments on this section.

Section 817.40: What responsibility do I have to replace water supplies?

We have modified this section; however, these modifications are discussed in final rule § 816.40, which is the surface mining counterpart to § 817.40.

Section 817.41: Under what conditions may I discharge water and other materials into an underground mine?

We have modified this section; however, these modifications are discussed in final rule § 816.41, which is the surface mining counterpart to § 817.41.

Section 817.42: What Clean Water Act requirements apply to discharges from my operation?

We have modified this section, including the title; however, these modifications are discussed in final rule § 816.42, which is the surface mining counterpart to § 817.42.

Section 817.43: How must I construct and maintain diversions?

We have modified this section; however, these modifications are discussed in final rule § 816.43, which is the surface mining counterpart to § 817.43.

Section 817.44: What restrictions apply to gravity discharges from underground mines?

We are finalizing § 817.44 as proposed. We received no comments on this section.

Section 817.45: What sediment control measures must I implement?

We have modified this section; however, these modifications are discussed in final rule § 816.45, which is the surface mining counterpart to § 817.45.

Section 817.46: What requirements apply to siltation structures?

We have modified this section; however, these modifications are discussed in final rule § 816.46, which is the surface mining counterpart to § 817.46.

Section 817.47: What requirements apply to discharge structures for impoundments?

We have modified this section; however, these modifications are discussed in final rule § 816.47, which is the surface mining counterpart to § 817.47.

Section 817.49: What requirements apply to impoundments?

We have modified this section; however, these modifications are discussed in final rule § 816.49, which is the surface mining counterpart to § 817.49.

Section 817.55: What must I do with sedimentation ponds, diversions, impoundments, and treatment facilities after I no longer need them?

We have modified this section; however, these modifications are discussed in final rule § 816.55, which is the surface mining counterpart to § 817.55.

Section 817.56: What additional performance standards apply to mining activities conducted in or through an ephemeral stream?

Section 817.56, like § 816.56, is a new section that we have added to address confusion expressed by commenters about which requirements in the rule apply to the various types of streams. Specifically, these commenters noted that proposed § 816.57, which would have applied to surface mining activities in, through, or adjacent to perennial or intermittent streams, also contained cross-references to proposed § n 780.28(b)(3), which would have addressed the establishment of riparian corridors for ephemeral streams. (These sections have counterparts in §§ 817.57 and 784.28 that address streams impacted by surface activities conducted in conjunction with underground mining.) To alleviate any confusion, we have added new § 817.56 which sets out the requirements for ephemeral streams. These include requirements that are counterparts to those for intermittent and perennial streams such as requirements to comply with the Clean Water Act, establish a

postmining drainage pattern and stream channel configuration that is consistent with the approved permit, and establish a 100-foot streamside vegetative corridor that complies with the standards in § 817.57(d)(1)(iv) through (4) if activities are conducted through an ephemeral stream. The comparable requirements for the streamside vegetative corridors for intermittent and perennial streams are still found in § 817.57.

Section 817.57: What additional performance standards apply to mining activities conducted in or through a perennial or intermittent stream or on the surface of land within 100 feet of a perennial or intermittent stream?

We have modified this section; however, these modifications are discussed in final rule § 816.57, which is the surface mining counterpart to § 817.57.

Section 817.59: How must I maximize coal recovery?

We are finalizing § 817.59 as proposed. We received no comments on this section.

Section 817.61: Use of Explosives: General Requirements

We have modified this section; however, these modifications are discussed in final rule § 816.61, which is the surface mining counterpart to section 817.61.

Section 817.62: Use of Explosives: Preblasting Survey

We are finalizing § 817.62 as proposed. We received no comments on this section.

Section 817.64: Use of Explosives: General Performance Standards

We are finalizing § 817.64 as proposed. We received no comments on this section.

Section 817.66: Use of Explosives: Blasting Signs, Warnings, and Access Control

We are finalizing § 817.66 as proposed. We received no comments on this section.

Section 817.67: Use of Explosives: Control of Adverse Effects

We are finalizing § 817.67 as proposed. We received no comments on this section.

Section 817.68: Use of Explosives: Records of Blasting Operations

We are finalizing § 817.68 as proposed. We received no comments on this section.

Section 817.71: How must I dispose of excess spoil?

We have modified this section; however, these modifications are discussed in final rule § 816.71, which is the surface mining counterpart to section 817.71.

Section 817.74: What special requirements apply to disposal of excess spoil on a preexisting bench?

We are finalizing § 817.74 as proposed. We received no comments on this section.

Section 817.81: How must I dispose of coal mine waste?

We have modified this section; however, these modifications are discussed in final rule § 816.81, which is the surface mining counterpart to § 817.81.

Section 817.83: What special requirements apply to coal mine waste refuse piles?

We are finalizing § 817.83 as proposed. We received no comments on this section.

Section 817.84: What special requirements apply to coal mine waste impounding structures?

We are finalizing § 817.84 as proposed. We received no comments on this section.

Section 817.87: What special requirements apply to burning and burned coal mine waste?

We are finalizing § 817.87 as proposed. We received no comments on this section.

Section 817.89: How must I dispose of noncoal mine wastes?

We are finalizing § 817.89 as proposed. We received no comments on this section.

Section 817.95: How must I protect surface areas from wind and water erosion?

We have modified this section; however, these modifications are discussed in final rule § 816.95, which is the surface mining counterpart to section 817.95.

Section 817.97: How must I protect and enhance fish, wildlife, and related environmental values?

We have modified this section; however, these modifications are discussed in final rule § 816.97, which is the surface mining counterpart to § 817.97.

Section 817.99: What measures must I take to prevent and remediate landslides?

We are finalizing § 817.99 as proposed. We received no comments on this section.

Section 817.100: What are the standards for conducting reclamation contemporaneously with mining?

We are finalizing § 817.100 as proposed. We received no comments on this section.

Section 817.102: How must I backfill surface excavations and grade and configure the land surface?

We have modified this section; however, these modifications are discussed in final rule § 816.102, which is the surface mining counterpart to § 817.102.

Section 817.106: What special provisions for backfilling, grading, and surface configuration apply to previously mined areas with a preexisting highwall?

We are finalizing § 817.106 as proposed. We received no comments on this section.

Section 817.107: What special provisions for backfilling, grading, and surface configuration apply to operations on steep slopes?

We have modified this section; however, these modifications are discussed in final rule § 816.107, which is the surface mining counterpart to § 817.107.

Section 817.111: How must I revegetate areas disturbed by mining activities?

We have modified this section; however, these modifications are discussed in final rule § 816.111, which is the surface mining counterpart to § 817.111.

Previous § 817.113: Revegetation: Timing

Like section 816.113, this section's surface mining counterpart, we have removed and reserved previous § 817.113 for the reasons discussed in the preamble to the proposed rule. Specifically, previous § 817.113 has been redesignated and moved to final rule § 817.111.[801]

Previous § 817.114: Revegetation: Mulching and Other Soil Stabilizing

Like § 816.114, this section's surface mining counterpart, we have removed and reserved previous § 817.114 for the reasons discussed in the preamble to the

[801] 80 FR 44436, 44574 (Jul. 27, 2015).

proposed rule. Specifically, previous § 817.114 has been redesignated and moved to final rule § 817.111.[802]

Section 817.115: How long am I responsible for revegetation after planting?

We are finalizing § 817.115 as proposed. We received no comments on this section.

Section 817.116: What requirements apply to standards for determining revegetation success?

We have modified this section; however, these modifications are discussed in final rule § 816.116, which is the surface mining counterpart to § 817.116.

Section 817.121: What measures must I take to prevent, control, or correct damage resulting from subsidence?

Consistent with the discussion about our revisions to the definition of material damage (in the context of the subsidence control provisions of §§ 784.30 and 817.121), our final paragraph (c) has been revised to specify that measures to prevent, control, or correct damage resulting from subsidence also applies to wetlands, streams and water bodies whenever the subsidence control standards are applicable to surface lands. These changes are consistent with our revised definition of material damage in the context of the subsidence provision of our regulations and the revisions to the subsidence control plan regulations at § 784.30.

Final Paragraph (c): Repair of Damage to Surface Lands and Waters

Final paragraph (c)(1) provides that to the extent technologically and economically feasible, the permittee must correct any subsidence-related material damage to surface lands, wetlands, streams, or water bodies by restoring the land and water features to a condition capable of maintaining the value and reasonably foreseeable uses that the land was capable of supporting before the subsidence-related damage occurred. Final paragraph (c)(1) is substantively identical to the corresponding provisions in previous § 817.121(c)(1). The primary revision is the addition of explicit references to surface water features, consistent with the preamble to the previous definition of ''material damage'' in § 701.5, which states that the definition'' covers damage to the surface and to surface features, such as wetlands, streams, and bodies of water, and to structures or facilities.'' [803] As part of this final rule, we revised the definition of ''material damage'' to incorporate the preamble language.

Some commenters suggested that the regulations specify that the regulatory authority must consider the repair of the damage to be technologically and economically infeasible when a permittee has attempted to repair surface lands or waters for two years without achieving complete success. According to the commenters, the regulatory authority should then require the permittee to perform appropriate mitigation work. In response to these comments, we added § 817.121(g)(3)(ii), which requires that the regulatory authority initiate bond forfeiture proceedings if the permittee has not completed correction or repair of material damage to surface lands or waters or replaced adversely impacted protected water supplies within 2 years following the occurrence of that damage. Paragraph (g)(3)(ii) also requires that the regulatory authority use the funds collected to repair the surface lands and waters or replace the protected water supplies. In addition, we added § 817.121(c)(2), which requires that the permittee implement fish and wildlife enhancement measures, as approved by the regulatory authority in a permit revision, to offset subsidence-related material damage to wetlands or a perennial or intermittent stream when correction of that damage is technologically and economically infeasible. Paragraph (c)(2) is analogous to the fish and wildlife enhancement requirements in §§ 780.16(d)(3) and 784.16(d)(3) that apply when mining activities conducted on the land surface result in the permanent loss of wetlands or a segment of a perennial or intermittent stream.

Previous Paragraph (c): Removal of Suspended Provisions

We proposed to remove all of previous paragraph (c)(4), except previous paragraph (c)(4)(v) because those provisions were vacated by a court and have been suspended since December 22, 1999 (64 FR 71652–71653). *See also* 80 FR 44528 (citing *Nat'l Mining Ass'n* v. *Babbitt,* 173 F.3d 906 (D.C. Cir. 1999)). Several commenters requested that we instead revise those provisions in a manner consistent with the reasoning in the court's decision. We decline to make this revision at this time. Substantive changes of the type recommended by the commenters, especially ones related to evidentiary presumptions (*see, e.g., Nat'l Mining Ass'n* v. *Babbitt,* 173 F.3d at 912), are better addressed in future rulemaking subject to full notice and opportunity to comment.

Final Paragraph (d): Repair or Compensation for Damage to Non-Commercial Buildings, Occupied Residential Dwellings, and Related Structures

We also received comments that we should revise the proposed rule at paragraph (d) with regard to repair or compensation for damage to non-commercial buildings, dwellings, and related structures to ensure that the choice between repair and compensation rests with the person whose property has suffered damage, not the permittee causing the subsidence damage. We have not made any changes as a result of this comment because there appears to be a misunderstanding of the revisions we made in the proposed rule; our revisions were merely intended to adopt plain language principles by use of the word ''you'' instead of ''permittee'', in doing so we did not revise the previous language or intent with regard to this issue.

Final Paragraph (g): Adjustment of Bond Amount for Subsidence Damage

Final paragraph (g)(1) provides that, when subsidence-related material damage to land (including wetlands, streams, and water bodies), structures or facilities protected under paragraphs (c) through (e) occurs, or when contamination, diminution, or interruption to a water supply protected under § 817.40 occurs, the regulatory authority must require the permittee to post additional performance bond until the repair, compensation, or replacement is completed. Apart from the clarification that the term ''land'' includes wetlands, streams, and water bodies, consistent with the preamble to the previous rule, this paragraph is substantively identical to the corresponding requirement in previous § 817.121(c)(5).

Final paragraph (g)(2) explains how the bond amount must be calculated. This paragraph is substantively identical to the corresponding provisions in previous § 817.121(c)(5) with one exception. We added final paragraph (g)(2)(iii) to specify that, for material damage to lands and waters, the amount of the bond must equal the estimated cost of restoring the land and waters to a condition capable of maintaining the value and reasonably foreseeable uses that they were capable of supporting before the material damage occurred. The previous rule

[802] 80 FR 44436, 44574 (Jul. 27, 2015).

[803] 62 FR 16724 (Mar. 31, 1995).

required that the bond amount for damage to land equal repair costs, without elaborating on what ''repair'' means in the context of damage to land or waters.

Final paragraph (g)(3)(i) provides that the bond requirements of paragraph (g)(1) do not apply if repair, compensation, or replacement is completed within 90 days of the occurrence of damage. Final paragraph (g)(3)(i) also establishes criteria for extension of the 90-day period that are substantively identical to the corresponding provisions of the previous rule at § 817.121(c)(5).

Final paragraph (g)(3)(ii)(A) provides that, if the permittee has not completed correction or repair of material damage to surface lands or waters or replaced adversely impacted protected water supplies within two years following the occurrence of that damage, the regulatory authority must initiate bond forfeiture proceedings under § 800.50 and use the funds collected to repair the surface lands and waters or replace the protected water supplies. We added paragraph (g)(3)(ii)(A) to the final rule to place a cap on the length of time that the bond may remain in place without any effort to correct the material damage or replace the adversely impacted water supply. Final paragraph (g)(3)(iii)(B) provides two exceptions to the requirement for initiation of bond forfeiture after two years. If either exception applies, the regulatory authority has the discretion to determine when the bond should be released. The first exception applies if the landowner refuses to allow access to implement the appropriate corrective actions. The second exception applies if the permittee demonstrates, and the regulatory authority finds, that correction or repair of the material damage to surface lands or waters is not technologically or economically feasible. When the latter exception applies, final paragraph (g)(3)(iii)(B)(*2*) provides that the permittee must complete the enhancement measures required under final paragraph (c)(2). Final paragraph (c)(2) requires that the permittee implement fish and wildlife enhancement measures, as approved by the regulatory authority in a permit revision, to offset material damage to a perennial or intermittent stream when correction of that damage is technologically and economically infeasible. We added final paragraph (c)(2) and the enhancement provision in final paragraph (g)(3)(iii)(B)(*2*) to discourage abuse of this exception.

Section 817.122: How and when must I provide notice of planned underground mining?

We are finalizing § 817.122 as proposed. We received no comments on this section.

Section 817.131: What actions must I take when I temporarily cease mining operations?

We are finalizing § 817.131 as proposed. We received no comments on this section.

Section 817.132: What actions must I take when I permanently cease mining operations?

We are finalizing § 817.132 as proposed. We received no comments on this section.

Section 817.133: What provisions concerning postmining land use apply to my operation?

We are finalizing § 817.133 as proposed. We received no comments on this section.

Section 817.150: What are the general requirements for haul and access roads?

We have modified this section; however, these modifications are discussed in final rule § 816.150, which is the surface mining counterpart to § 817.150.

Section 817.151: What additional requirements apply to primary roads?

We are finalizing § 817.151 as proposed. We received no comments on this section.

Section 817.180: To what extent must I protect utility installations?

We are finalizing § 817.180 as proposed. We received no comments on this section.

Section 817.181: What requirements apply to support facilities?

We are finalizing § 817.181 as proposed. We received no comments on this section.

Previous § 817.200: Interpretative Rules Related to General Performance Standards

We have removed and reserved previous § 817.200 for the reasons discussed in the preamble to the proposed rule.[804]

[804] 80 FR 44436, 44578 (Jul. 27, 2015).

N. Part 824—Special Permanent Program Performance Standards—Mountaintop Removal Mining Operations

Section 824.11: What special performance standards apply to mountaintop removal mining operations?

As discussed in the preamble to final rule § 785.14, explaining what special provisions apply to mountaintop removal mining operations, we revised § 824.11 to include a new paragraph (b)(6) in response to a comment. The language adopted in this final rule therefore includes text requiring the prevention of ''damage to natural watercourses in accordance with the finding made by the regulatory authority under § 785.14 of this chapter.''

O. Part 827—Special Permanent Program Performance Standards—Coal Preparation Plants Not Located Within the Permit Area of a Mine

Section 827.12: What performance standards apply to coal preparation plants?

We are finalizing § 827.12 as proposed. We received no comments on this section.

VII. What effect would this rule have in federal program states and on Indian lands?

The final rule that we are adopting today applies to all non-Indian lands in states with a federal regulatory program. States with federal regulatory programs include Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. These programs are codified at 30 CFR parts 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. In general, there will be no need to amend the approved federal program because, with limited exceptions, each program cross-references 30 CFR parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827.

Tennessee is the only federal program state with active coal production and, thus, is the only state in which the rule would have immediate impact. Tennessee law already sharply restricts most significant mining activities in or near perennial and intermittent streams, which means that the provisions of proposed 30 CFR 780.28, 784.28, 816.57, and 817.57 pertaining to mining in, through, or near a perennial or intermittent stream, are unlikely to have much effect on mining within that state. For example, section 69–3–108(f) of the

Tennessee Code Annotated, as amended by the Responsible Mining Act of 2009, prohibits issuance of any permit for the removal of coal by surface mining methods or for surface access points to underground mining within 100 feet of the ordinary high water mark of a stream. It also prohibits issuance of a permit that would allow placement of overburden or waste from a surface mine within that buffer zone.

The federal rule adopted today will have some impacts in Tennessee, For instance, unlike the final rule, the state law does not apply to stream crossings, to operations that improve the quality of stream segments previously disturbed by mining, or to coal mine waste from underground mines or coal preparation plants. Likewise, unlike the federal rule, the state law does not apply to coal transportation, storage, preparation and processing, loading, and shipping operations when necessary because of site-specific conditions, provided that those activities and operations do not cause the loss of stream function.

The following parts of the final rule also would apply to Indian lands by virtue of cross-references in 30 CFR part 750:

- 30 CFR 750.12(c)(1) includes the permitting provisions of parts 773, 774, 777, 779, 780, 783, 784, and 785 by cross-reference. There are no substantive revisions to the exceptions listed in 30 CFR 750.12(c)(2).
- 30 CFR 750.17 includes the bond and insurance provisions of subchapter J (part 800) by cross-reference.
- 30 CFR 750.16 includes the performance standards of parts 816, 817, 824, and 827 by cross-reference.

The revisions to parts 700 and 701 also would apply to Indian lands by virtue of 30 CFR 700.1(a), which prescribes that subchapter A of 30 CFR chapter VII contains ''regulatory requirements and definitions generally applicable to the programs and persons covered by the Act.'' After a tribe receives approval of a tribal regulatory program under section 710(j) of SMCRA,[805] we will treat tribe as a state for regulatory program purposes. Once that occurs, Part VIII of this preamble (state regulatory programs) will apply in place of Part VII of this preamble for any Indian lands with an approved tribal regulatory program.

VIII. How would this rule affect state regulatory programs?

Adoption of this final rule will not have any immediate effect on approved state regulatory programs. Each state with primacy will need to propose and adopt counterpart revisions to its regulations and other state program provisions and submit them for review by OSMRE and the public as a program amendment under 30 CFR 732.17. Under 30 CFR 732.17(g)(9), no change to state law or regulations making up the approved program may take effect for purposes of a state program until that change is approved by OSMRE as a program amendment.

We will evaluate each state regulatory program approved under 30 CFR part 732 and section 503 of the Act[806] to determine whether any changes in the state program are necessary to maintain consistency with federal requirements. If we determine that a state program provision needs to be amended as a result of revisions to the corresponding federal rule, we will notify the state in accordance with 30 CFR 732.17(d).

Section 505(a) of the Act[807] and 30 CFR 730.11(a) provide that SMCRA and federal regulations adopted under SMCRA do not supersede any state law or regulation unless that law or regulation is inconsistent with the Act or the federal regulations adopted under the Act. Section 505(b) of the Act[808] and 30 CFR 730.11(b) provide that we may not construe existing state laws and regulations, or state laws and regulations adopted in the future, as inconsistent with SMCRA or the federal regulations if these state laws and regulations either provide for more stringent land use and environmental controls and regulations or have no counterpart in the Act or the federal regulations.

Under 30 CFR 732.15(a), each state regulatory program must provide for the state to carry out the provisions and meet the purposes of the Act and its implementing regulations. In addition, that rule requires that state laws and regulations be in accordance with the provisions of the Act and consistent with the federal regulations. As defined in 30 CFR 730.5, ''consistent with'' and ''in accordance with'' mean that the state laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act. The definition also provides that these terms mean that the state laws and regulations are no less effective than the federal regulations in meeting the requirements of the Act. Under 30 CFR 732.17(e)(1), we may require a state program amendment if, as a result of changes in SMCRA or the federal regulations, the approved state regulatory program no longer meets the requirements of SMCRA or the federal regulations.

IX. Procedural Matters and Required Determinations

A. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. This final rule is considered a ''significant regulatory action'' under Executive Order 12866 because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order and therefore is subject to review by the Office of Management and Budget (OMB).

OMB has also found that this rule is not likely to have an annual effect of $100 million or more on the economy. We prepared a final environmental impact statement and regulatory impact analysis, which analyzed, among other things, the costs and benefits of the rule, including costs and benefits associated with environmental impacts, human health impacts, energy market effects, compliance costs, regulatory costs, coal market welfare, economic activity, coal prices, electricity production, employment, and severance taxes.[809] As further discussed in those documents, the rule will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this final rule in a manner consistent with these requirements.

We have prepared a final RIA and submitted it to OMB. Based upon the final RIA, we do not project that the final rule will prohibit mining in excess

[805] 30 U.S.C. 1300(j).

[806] 30 U.S.C. 1253.

[807] 30 U.S.C. 1255(a).

[808] 30 U.S.C. 1255(b).

[809] For a brief summary of the costs and benefits associated with these categories, *see* RIA at ES–1–ES–4.

of baseline conditions of any particular coal reserves. Therefore, our estimates do not include direct and indirect costs associated with stranded coal reserves.

B. Regulatory Flexibility Act (RFA)

The final Regulatory Flexibility Analysis, which appears in Appendix A of our final RIA, considers the extent to which the economic impacts resulting from this final rule could be borne by small businesses. Because of the complexity of corporate structures in the coal mining industry, it is difficult to calculate the exact number of small entities that could be affected by this rule. The coal mining industry is continually changing and it is common for large mining operators to merge with smaller operators, creating complicated business relationships between parent corporations and subsidiaries. For this analysis, we use information from the Mine Safety and Health Administration about mine controllers because information on parent companies is not readily available. We then used two methods for identifying small controllers:

Using the Small Business Administration (SBA) definition of small mines,[810] we estimate that there were 97 small underground coal mining entities, 199 small surface coal mining entities, and 43 small anthracite coal mining entities producing coal in 2015. This is a total of 339 small entities in the industry, representing approximately 98 percent of all entities. Using the Mine Safety and Health Administration definition of ''small mines'' (mines reporting less than 20 employees), we estimate that there were 167 small mines producing coal in 2015. Using either definition of small entities, nearly 90 percent of mines operated by small entities were in the Appalachian Basin. All of these entities are expected to be affected by this final rule.

In particular, we estimate that compliance costs for surface mines with fewer than 20 employees will total between 0.1 and 3.1 percent of annual revenues, depending on mining region. For surface mines reporting 1,250 or fewer employees, we estimate that compliance costs will total between 0.1 and 3.1 percent of revenues, depending on mining region. For underground mines reporting 1,500 or fewer employees, we estimate compliance costs will total between zero and 0.1 percent of revenues, depending on mining region. The annual cost of the final rule as a share of annual revenue for a mine operated by a small entity is 1.2 percent.

The largest affected group of small coal mining entities is small surface mines in Appalachia (311 mines). We anticipate that this final rule will increase costs to small mines in Appalachia with fewer than 20 employees by approximately 1.1 percent of annual revenues for surface mines and 0.1 percent of annual revenues for underground mines. Average compliance costs for small surface mines in Appalachia with 1,250 or fewer employees are estimated to be 1.1 percent of annual revenues. Average compliance costs for small underground mines in Appalachia with 1,500 or fewer employees are estimated to be 0.1 percent of annual revenues.

The estimated impacts of the stream protection rule on small business revenues have changed in the final RIA as compared to the draft RIA for several reasons. First, the estimated costs of the rule have been revised in the final RIA to reflect public comments as well as rule changes. Second, the SBA's small business thresholds for businesses in the coal industry have been revised since development of the draft RIA. Specifically, the SBA thresholds for surface and underground mining were 500 employees in the draft RIA, but the SBA now splits the industry into three parts with separate thresholds: Bituminous coal and lignite surface mining has a threshold of 1,250 employees, bituminous coal underground mining has a threshold of 1,500 employees, and anthracite mining has a threshold of 250 employees. While increasing the thresholds for these businesses results in more businesses being included as small entities, the impacts per business are smaller as a result. Third, as a consequence of changes we made in response to public comments, we revisited the distribution of administrative costs among entities. In the draft RIA, we assumed that administrative costs were evenly distributed across mining businesses, regardless of size. This resulted in the appearance of larger revenue impacts to smaller businesses associated with these costs. However, after reconsidering the various administrative cost components, we concluded that assuming a linear relationship between administrative costs and tons of coal produced is likely to more accurately estimate the administrative burden of the final rule. In section A.4 of the final RIA, the analysis recognizes that some administrative costs, such as increased monitoring requirements, may vary depending on the physical size of the mine. To the extent that small mines are physically smaller, they may need to collect fewer samples than assumed in the standard mine used to estimate costs. Additionally, in general, there are likely to be fewer permits required of smaller operations. Thus, the final RIA estimates revenue impacts per business by assuming a linear relationship exists between administrative costs and the tons of coal produced by an entity. The final RIA also recognizes that small coal producers may be disproportionately impacted by the final rule because they may be more likely to lease the land that they mine, operate with smaller budgets, and struggle to pay the minimum royalty payments, thus facing a greater risk of shutting down as coal production costs increase. Further, the final RIA recognizes that to the extent that administrative costs are independent of the scale of the affected operations, revenue impacts could be larger for small entities than are presented in this analysis. This aspect of the analysis is caveated in Exhibits A–9 through A–14 of the final RIA.

Description of Measures To Minimize Economic Impacts on Small Entities

Section 507(c) of SMCRA [811] establishes the small operator assistance program (SOAP). To the extent that funds are appropriated for that program, this provision of SMCRA authorizes us to provide small operators with training and financial assistance in preparing certain elements of permit applications. An operator is eligible to receive training and assistance if his or her probable total annual production at all locations will not exceed 300,000 tons.

Under section 507(c)(1) of SMCRA [812] and 30 CFR 795.9, the following permit application activities are eligible for financial assistance under SOAP:

- Preparation of the determination of the probable hydrologic consequences of mining, including collection and analysis of baseline data and any engineering analyses and designs needed for the determination.
- Collection and analysis of geological data.
- Development of cross-sections, maps, and plans.
- Collection of information on archaeological and historical resources and preparation of any related plans.
- Development of preblast surveys.

[810] The Regulatory Flexibility Analysis has been revised to reflect the recent changes to the Small Business size thresholds identified by the Small Business Administration for coal mining companies. The Small Business Administration thresholds for coal mining entities are as follows: Bituminous coal underground mining, 1,500 employees or less; bituminous coal and lignite surface mining, 1,250 employees or less; anthracite mining, 250 employees or less.

[811] 30 U.S.C. 1257(c).

[812] 30 U.S.C. 1257(c)(1).

• Collection of site-specific information on fish and wildlife resources and preparation of fish and wildlife protection and enhancement plans.

These activities include many of the new permit application requirements in this final rule; *e.g.,* the expanded baseline data requirements concerning hydrology, geology, and the biological condition of streams and the expanded requirements for site-specific fish and wildlife protection and enhancement plans. In addition, section 507(c)(2) of SMCRA [813] provides that, as part of SOAP, we must either provide training or assume the cost of training eligible small operators on the preparation of permit applications and compliance with the regulatory program. Although SOAP funding is available for activities associated with new permit application requirements and training, SMCRA does not authorize SOAP funding for compliance costs associated with the expanded requirements for monitoring groundwater, surface water, and the biological condition of streams.

SOAP funding is subject to annual appropriation from the federal expense portion of the Abandoned Mine Reclamation Fund established under section 401(a) of SMCRA.[814] Section 401(c)(9) of SMCRA [815] caps SOAP funding at $10 million per year. Subject to appropriations from Congress, we intend to provide financial assistance to small operators to develop permit applications up to the $10 million cap. We also intend to provide training to assist small operators in meeting the additional requirements of this final rule. SOAP assistance should substantially reduce compliance costs for small operators by offsetting the cost of most of the new permit application requirements.

C. Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act, unless the head of the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities.[816] These statutes are designed to ensure that government regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises. As discussed in Part IX.B., OSMRE reviewed the Small Business Administration (SBA) and Mine Safety and Health Administration size standards for small mines. OSMRE concludes that the vast majority of entities operating in the relevant sectors are small businesses as defined by the SBA.[817] As such, the rule will likely affect a substantial number of small entities. OSMRE finds, however, that the final rule will not have a significant economic impact on a substantial number of small entities. As explained more in the Final Regulatory Flexibility Analysis in the RIA, the annual cost of the final rule as a share of annual revenue for mines operated by a small entity is 1.2 percent.[818] This small change is not large enough to be considered significant.

Although it is not required, OSMRE nevertheless chose to prepare an Initial Regulatory Flexibility Analysis and Final Regulatory Flexibility Analysis for this rule. Even though this rule is not economically significant, OSMRE believes it is prudent, and potentially helpful to small entities, to provide an IRFA and FRFA for the rulemaking. This decision should not be viewed as a precedent for other rulemakings.

D. Unfunded Mandates Reform Act

As discussed in response to comments on the final RIA, Appendix I, this final rule will not impose an unfunded mandate on state, local, or tribal governments or the private sector of $100 million or more per year. As discussed in Chapter 9 of the final RIA, the total aggregate annual compliance and related costs for this rule are on the order of $81 million (when calculated at a seven percent real rate of discount), which includes the costs that state regulatory agencies are expected to bear.[819] More specifically, the increased compliance and related costs for regulatory authorities as a result of this rule is only expected to be approximately $0.72 million.[820] In addition, this final rule will not have a significant or unique effect on state, tribal, or local governments or the private sector. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1534, is not required.

E. Executive Order 12630—Takings

Under the criteria in Executive Order 12630, we have made a determination that this final rule does not have specific, identifiable takings implications. First, based upon the final RIA, we do not project that this final rule will prohibit mining in excess of baseline conditions of any particular coal reserves. In Chapter 5 of the final RIA we analyze the potential for coal reserves to be ''stranded'' or ''sterilized.'' We define stranded reserves as those that are technically and economically minable, but unavailable for production given the new requirements and restrictions included in the final rule. Our analysis indicates that there will be no increase in stranded reserves, that is, the engineering analyses determined that the same volume of coal could be mined under the final rule as under the baseline. Second, the question of whether this final rule might affect a compensable taking of a particular property interest necessarily involves ad hoc factual inquiries, including the economic impact of the final rule on a particular claimant; the extent to which this final rule might interfere with a claimant's reasonable, investment-backed expectations; and the character of the government action. None of these factual inquiries is possible for a national rule of this scope, which does not specifically bar the mining of any particular coal reserves. However, based upon the final RIA, we have no basis to believe that implementation of this final rule will result in compensable takings of any specific property interests.

F. Executive Order 13132—Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires that we develop a process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' Policies that have federalism implications are defined in the Executive Order to include regulations that have ''substantial direct effects on the States [in terms of compliance costs], on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' In addition, policies have federalism implications if they preempt State law. In terms of compliance costs, the Federal government must provide the necessary funds to pay the direct costs

[813] 30 U.S.C. 1257(c)(2).

[814] 30 U.S.C. 1231(a).

[815] 30 U.S.C. 1231(c)(9).

[816] 5 U.S.C. 601. The exception is found in 5 U.S.C. 605(b).

[817] RIA, at Appendix A, p. A–15–A–16.

[818] RIA, at Appendix A, p. A–27.

[819] RIA, at 9–2.

[820] RIA, at ES–31–ES–32.

incurred by State and local governments in complying with the regulation if the rule:

1. Results in direct expenditures to state and local governments in aggregate of $25 million in any one year; or

2. Results in expenditures to state and local governments greater than one percent of their annual revenues in any one year.

As explained in Chapter 4.4 of the final RIA, and in our Paperwork Reduction Act analysis in section J of the Procedural Matters and Required Determinations of this preamble, we do not anticipate that this rule will result in greater compliance costs for the States above thresholds listed above. As discussed in Part IV.C. of this preamble, we also do not expect this rule to impact the relationship between the Federal government and the States or on the distribution of power and responsibilities among the various levels of government, as specified in the Order.

G. Executive Order 12988—Civil Justice Reform

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (February 11, 1994), requires federal agencies to identify disproportionately large and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. Among other actions, agencies are directed to improve research and data collection regarding health and environmental effects in minority and low-income communities. We provide this analysis in the final EIS for the final rule in the Environmental Justice discussion at section 4.4.

H. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Where coal extraction occurs on Indian lands, we are the SMRCA regulatory authority. Therefore, the final rule has the potential to affect Indian tribes. Consistent with Executive Order 13175, the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), the Department of the Interior Policy on Consultation with Indian Tribes (Dec. 1, 2011), and 512 Departmental Manual 2, we evaluated possible effects of the rule on federally recognized Indian tribes and engaged in government-to-government consultations. On May 12, 2010, our Director met with the Chairmen of the Hopi and Crow Tribes and the President of the Navajo Nation to initiate consultation on the stream protection rulemaking and development of the DEIS. The Tribes in attendance requested that they be kept informed of the rulemaking process and EIS development.

Our Director again met with tribal leaders in Washington, DC on December 1, 2011. At that time, we provided additional information on the elements under consideration for the alternatives in the DEIS and discussed the expected impacts to the SMCRA regulatory program for Indian lands. From 2010–2016, the status of the stream protection rule was often included during our quarterly government-to-government meetings with the Crow Tribe, the Hopi Tribe, and the Navajo Nation. Our Western Regional Office conducts these quarterly consultation meetings with the Tribes to discuss topics of interest such as our rulemakings activities, coal mining operations on Tribal lands, and development of Tribal primacy.

On August 28, 2015, our Director sent letters to the Hopi and Crow Tribes and the Navajo Nation notifying them of the publication of our proposed stream protection rule, DEIS, and DRIA. The letters again included an offer to meet with the Tribes and further discuss the proposed rule and DEIS. On November 6, 2015, we requested government-to-government consultation with the Hopi Tribe, Crow Tribe, and Navajo Nation.

At the request of the Navajo Nation, OSMRE Director Joseph Pizarchik conducted government-to-government consultation with Navajo Nation Tribal leaders in Window Rock, Arizona on January 13, 2016. During the meeting the Navajo Tribal leaders were briefed on the proposed stream protection rule. On May 4, 2016, we offered to continue government-to-government consultation on an ongoing basis at the request of the Navajo Nation. A consultation meeting also occurred with the Navajo Nation on June 15, 2016, during which the Navajo Nation indicated its support for the letter sent by the western states and that it had no further comments on the proposed stream protection rule. We also consulted with the Hopi Tribe on June 28, 2016, at which time the Tribal representative indicated that the Hopi Tribe had no further comments on the proposed stream protection rule.

The Crow Tribe did not request additional consultation in response to our offer on November 6, 2015, or during subsequent government-to-government quarterly meetings held with the Tribe on January 13, 2016 and May 24, 2016, when the stream protection rule was discussed. On September 28, 2016, during an Executive Order 12866 meeting on the stream protection rule, a Crow tribal representative indicated that the Tribe wanted additional consultation on the stream protection rule. As a follow-up, we sent a letter to the Crow Tribe on September 29, 2016, explaining that we were in the late stages of rulemaking but offering to meet with the Tribe at the earliest opportunity. Having not received a response in over 30 days, we proceeded to finalize the rule and its supporting documents.

On November 15, 2016, the day the final environmental impact statement was released to the public, we received a letter from the Crow Tribe asking for consultation starting in January 2017. On November 17, 2016, the Chairman of the Crow Tribe requested a meeting with the Assistant Secretary for Land and Minerals Management to discuss the rule and consultation with the Crow Tribe. This meeting took place the following day on November 18, 2016, which was also attended by the Director and Deputy Director of OSMRE. The tribe did not raise any new issues at the meeting that had not already been considered. Additionally, we informed the Tribe that we did consider the comments of the Montana Department of Environmental Quality, Cloud Peak Energy, and Westmoreland Coal Company, which the Tribe indicated that they concurred with and adopted pending further review. We also committed to the Chairman that we would continue to work with and meet with the Tribe during implementation of the rule.

In addition, we sent letters to the Southern Ute Indian Tribe, Ute Mountain Ute Tribe, and Northern Cheyenne Tribe on March 7, 2016 requesting government-to-government consultation on the stream protection rule. The three Tribes did not respond to these requests.

We are committed to continuing working and meeting with the Tribes during implementation of the rule.

I. Executive Order 13211—Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use.

This final rule is not a significant energy action under Executive Order 13211. As discussed below and in the final RIA, the revisions contained in this final rule will not have a significant effect on the supply, distribution, or use of energy.

The Office of Management and Budget has identified nine outcomes that may constitute ''a significant adverse

effect.'' [821] The three outcomes that are relevant to this final rule are: (1) A reduction in coal production in excess of five million tons per year, (2) a reduction in electricity production in excess of one billion kilowatt-hours per year or in excess of 500 megawatts (MW) of installed capacity,[822] and (3) an increase in the cost of energy production in excess of one percent. This final rule may affect the cost of coal production, the amount of electricity produced, and the cost of energy production, but as explained below, the increases are anticipated to be less than what would constitute ''a significant adverse effect.''

In the final RIA, we analyzed the effects of the final rule on coal production and electricity production. Regarding coal production, this final rule is not expected to result in a reduction in national coal production in excess of five million tons per year. The greatest single-year reduction in domestic coal production is expected to occur in 2021, reaching 2.3 million tons. The change in production from baseline conditions over the period of this analysis is on average 0.7 million tons, significantly smaller than the 5 million tons that is considered a significant adverse effect.

This final rule may also affect levels of domestic electricity production by influencing the costs of production. By increasing the costs of coal production, the final rule may lead to subsequent increases in the price of coal paid by power plants. Because coal makes up a significant part of the domestic energy mix, a change in the price of coal is expected to be reflected in domestic electricity prices, reducing market demand for electricity. The final RIA uses the Energy Ventures Associates coal market model to predict the changes in electricity supply and demand resulting from the final rule. Electricity is an essential service in the United States industrial, commercial, and residential sectors. Typically a supply reduction of an essential good or service is followed by an immediate price spike. The extent and duration of the price spike depends on the economic viability of alternative inputs to substitute for the initial supply reduction over a period of time as alternative investments are made. In the case of the United States power generating sector and the increasingly diverse array of energy inputs, higher cost of one form of electricity generation, such as coal, will result in an increase in use of an alternative form of electricity generation, such as natural gas. Due to the substitution of alternative forms of generation for coal, in the long-term there is a negligible effect on the supply and demand for electricity as a result of the final rule.

There is some long-term cost involved in moving from one fuel source to another due to additional capital expenditures. This cost is ultimately reflected in the price of electricity. Thereby, the final rule will result in a slightly elevated electricity price that will translate to an expected decrease in electricity consumption by 78 million kilowatt hours. In the United States, reduced electricity consumption has typically been achieved by adoption of more energy efficient practices such as purchases of energy efficient appliances by households.

This final rule will introduce a number of new requirements that may increase the overall costs of energy produced by coal. Compliance costs are estimated to make up less than one percent of total coal production costs, nationally, in every year within the study period. On average, compliance costs are expected to account for 0.18 percent of total coal production costs, nationally. The final rule may result in an increase in the price of coal, which may increase the costs of electricity production nationwide. We do not expect that this final rule will result in an increase in electricity production costs exceeding one percent over the 21-year study period. Instead, as explained in the final RIA, on average, this final rule is expected to increase electricity costs nationwide by less than .01 percent.

J. Paperwork Reduction Act

Under 5 CFR part 1320, the rules implementing the information collection aspects of the Paperwork Reduction Act, a federal agency must estimate the burden imposed on the public by any proposed collection of information. This burden consists of ''the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.''

We estimated the aggregate burden (in hours) for information collection under the final rule by calculating the number of hours that industry and state governments would need to comply with each element of the rule.

In addition, we estimated the total annual non-hour cost burden to respondents. These non-wage costs include items such as equipment required for monitoring, sampling, drilling and testing, operation and maintenance, and purchase of services.

We calculated the total estimated burden for two respondent groups, mine operators and state regulatory authorities, on an annual basis averaged over a 3-year period.

We sought comments from the public on the information collection activities for our regulations that would be revised by the proposed stream protection rule. Although no comments were submitted to the information collection clearance officer during the public comment period a number of comments were submitted regarding burden (hours and non-wage costs) which we considered in preparing this final rule and associated information collection clearance packages.

Summary of Burden (Costs) Calculated by Part for the Stream Protection Rule

This final rule contains collections of information that we have submitted to the Office of Management and Budget (OMB) for review and were approved in accordance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* These collections are contained in 30 CFR parts 779, 780, 783, 784, 785, 800, 816, and 817. We also estimated programmatic changes where burden is being moved between parts.

Title: 30 CFR parts 779 and 783—Surface and Underground Mining Permit Applications—Minimum Requirements for Information on Environmental Resources and Conditions.

OMB Control Number: 1029–0035.

Summary: Applications for surface and underground coal mining permits are required to provide adequate descriptions of the environmental resources that may be affected by proposed surface mining activities. Without this information, OSMRE and state regulatory authorities could not approve permit applications for surface coal mines and related facilities.

Title: 30 CFR part 780—Surface Mining Permit Applications—Minimum Requirements for Operation and Reclamation Plans.

OMB Control Number: 1029–0036.

Summary: Sections 507 and 508 of the Act contain permit application requirements for surface coal mining activities, including a requirement that the application include an operation

[821] OMB 2001. Memorandum for Heads of Executive Department Agencies, and Independent Regulatory Agencies, Guidance For Implementing E.O. 13211, M–01–27. *http://www.whitehouse.gov/omb/memoranda/m01–27.html* (last accessed Nov. 1, 2016).

[822] Installed capacity is the ''total manufacturer-rated capacity for equipment such as turbines, generators, condensers, transformers, and other system components'' and represents the maximum flow of energy from the plant or the maximum output of the plant. Final Regulatory Impact Analysis—Chapter 9, page 3.

and reclamation plan. The regulatory authority uses this information to determine whether the proposed surface coal mining operation will achieve the environmental protection requirements of the Act and regulatory program. Without this information, OSMRE and state regulatory authorities could not approve permit applications for surface coal mines and related facilities.

Title: 30 CFR part 784—Underground Mining Permit Applications—Minimum Requirements for Operation and Reclamation Plans.

OMB Control Number: 1029–0039.

Summary: Sections 507(b), 508(a), and 516(b) and (d) of SMCRA require applicants for permits for underground coal mines to prepare and submit operation and reclamation plans for coal mining activities as part of the application. Regulatory authorities use this information to determine whether the plans will achieve the reclamation and environmental protection requirements of the Act and regulatory program. Without this information, OSMRE and state regulatory authorities could not approve permit applications for underground coal mines and related facilities.

Title: 30 CFR part 785—Requirements for Permits for Special Categories of Mining.

OMB Control Number: 1029–0040.

Summary: Sections 507, 508, 510, 515, 701, and 711 of SMCRA require applicants for special categories of mining activities to provide descriptions, maps, plans, and data relating to the proposed activity. Without this information, OSMRE and state regulatory authorities could not approve permit applications for special categories of mining activities.

Title: 30 CFR part 800—Performance Bond, Financial Assurance, and Insurance Requirements for Surface Coal Mining and Reclamation Operations.

OMB Control Number: 1029–0043.

Summary: OSMRE and state regulatory authorities use the information collected under 30 CFR part 800 to ensure that persons conducting or planning to conduct surface coal mining and reclamation operations post and maintain a performance bond or financial assurance in a form and amount adequate to guarantee fulfillment of all reclamation obligations.

Title: 30 CFR parts 816 and 817—Permanent Program Performance Standards—Surface and Underground Mining Activities.

OMB Control Number: 1029–0047.

Summary: Sections 515 and 516 of SMCRA provide that permittees conducting coal mining and reclamation operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to assist in evaluating compliance with this requirement.

The table below summarizes estimated information collection burdens for our regulations as revised by this final rule. We calculated the total estimated burden for two respondent groups, mine operators and state regulatory authorities, on an annual basis averaged over a 3-year period. The table does not include operational or other costs that do not involve a collection of information. For ease of understanding, the following table depicts burden increases as a result of the rule and total burden by 30 CFR part after implementation of the rule, but not programmatic changes where burden is moved between 30 CFR parts or between sections, which is less meaningful to respondents.

30 CFR part	Type of respondent	Estimated annual responses	Estimated burden hour changes due to SPR	Total estimated burden hours (all burden hours by 30 CFR part)	Estimated operator non-wage cost changes due to SPR	Total Estimated burden non-wage costs (all non-wage costs by 30 CFR part)
779 and 783	Operators	1,181	6,853	141,844	$41,590	$41,590
	SRA [823]	1,166	1,888	8,718	0	0
780	Operators	2,604	19,5340	58,559	6,444,960	7,474,551
	SRA	2,582	9,135	25,764	0	0
784	Operators	776	7,562	18,500	4,655,868	5,081,139
	SRA	798	2,757	6,533	0	0
785	Operators	187	400	12,240	0	0
	SRA	187	80	5,720	0	0
800	Operators	5,398	28,852	74,751	6,000	1,223,971
	SRA	13,859	4,818	104,473	10,817	291,158
816 and 817	Operators	469,455	136,578	1,742,515	10,513,667	33,364,075
	SRA	169	0	4,424	0	0
Subtotals	Operators	479,601	199,779	2,048,409	21,662,085	47,185,326
	SRA	18,761	18,678	155,632	$10,817	$291,158
Grand totals		498,362	218,457	2,204,041	21,672,902	47,476,484

Under the Paperwork Reduction Act, we must obtain OMB approval of all information and recordkeeping requirements. In accordance with 44 U.S.C. 3507(d), we submitted the information collection and recordkeeping requirements of 30 CFR parts 779, 780, 783, 784, 785, 800, 816, and 817 to OMB for review, and OMB approved them.

No person is required to respond to an information collection request unless the forms and regulations requesting the information have currently valid OMB control numbers. These control numbers appear in §§ 779.10, 780.10, 783.10, 784.10, 785.10, 800.10, 816.10, and 817.10.

You should direct any comments on the accuracy of our burden estimates; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of collection on respondents, to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203 SIB, Washington, DC 20240.

[823] State Regulatory Agency (SRA).

K. National Environmental Policy Act

The revisions to our regulations constitute a major Federal action affecting the quality of the natural and human environment under the National Environmental Policy Act of 1969 (NEPA). Therefore, we prepared a final Environmental Impact Statement (FEIS) pursuant to section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), the Council on Environmental Quality's (CEQ) implementing regulations (40 CFR part 1500 through 1508), and the Department's implementing regulations (43 CFR part 46). The FEIS, which is entitled ''Stream Protection Rule; Final Environmental Impact Statement,'' is available on the Internet at *www.regulations.gov*. The Docket ID number is OSM–2010–0021. A copy of the FEIS is also available for inspection as part of the administrative record for this rulemaking in the South Interior Building, Room 101, 1951 Constitution Avenue NW., Washington, DC 20240, and various other OSMRE offices, and it is available on our Web site at: *www.osmre.gov*.

We, along with the U.S. Environmental Protection Agency, published notices of availability of the FEIS on November 16, 2016, 81 FR 80592 and 81 FR 80664, respectively. In accordance with 40 CFR 1506.10(b)(2), a final decision on the proposed action was not made until at least thirty days after publication of the U.S. Environmental Protection Agency's notice.

The purpose of the proposed action is to update and revise our regulations to provide a better balance between the Nation's need for coal as an essential energy source with the need to prevent or mitigate adverse environmental effects of present and future surface coal mining operations. The proposed action will apply to both surface mines and underground mines and will protect, minimize, and mitigate adverse impacts on surface water, groundwater, and site productivity, with particular emphasis on protecting or restoring streams, aquatic ecosystems, riparian habitats and corridors, native vegetation, and the ability of mined land to support the uses that it was capable of supporting before mining.

Despite the enactment of SMCRA and the promulgation of federal regulations implementing the statute, scientific studies published since the adoption of our previous regulations indicate that surface coal mining operations continue to have significant negative impacts on streams, fish, and wildlife, which has created a need for us to update and revise the regulations to reflect the best available science in order to avoid or minimize these negative impacts, and provide regulatory certainty to industry. Further evidence is available through several decades of our observing the impacts of coal mining operations. In addition since our earlier rulemakings, there have been significant improvements in technologies and methods for prediction, prevention, mitigation, and reclamation of coal mining impacts on hydrology, streams, fish, wildlife, and related resources. (*See* Section II in this preamble and Chapter 1 in the FEIS).

Additional information about the alternatives considered and the Preferred Alternative selected may be reviewed in the FEIS. The evaluation of alternatives, including the No Action Alternative, and decision to implement the Preferred Alternative is documented in the Record of Decision, which is available on the Internet at *www.regulations.gov*. The Docket ID number is OSM–2010–0021. A copy of the Record of Decision is also available for inspection as part of the administrative record for this rulemaking in the South Interior Building, Room 101, 1951 Constitution Avenue NW., Washington, DC 20240, and it is available on our Web site at: *www.osmre.gov*.

L. Consultation Under the Endangered Species Act of 1973

We completed formal Section 7 consultations with the U.S. Fish and Wildlife Service on the continuation of existing permits and the approval and conduct of future surface coal mining and reclamation operations under both state and federal regulatory programs adopted pursuant to SMCRA, as modified by the final rule. OSMRE and the U.S. Fish and Wildlife Service agree that, due to the broad scope of this rulemaking and consultation, and because the action under consultation sufficiently modifies the OSMRE's regulations consulted on under the 1996 Biological Opinion, that this section 7 consultation supersedes the 1996 Biological Opinion for all future permitting actions. While the incidental take statement accompanying the 1996 Biological Opinion will remain valid for all existing surface coal mining and reclamation permits that complied with the terms and conditions of the 1996 Biological Opinion to obtain incidental take coverage prior to the effective date of the stream protection rule, any new permits, or revisions to previously approved permits where a revision would change the manner or extent of effects to species, would need to complete the technical assistance process identified in the new 2016 Biological Opinion and accompanying Memorandum of Understanding (MOU) or a habitat conservation plan under Section 10 of the ESA in order to demonstrate ESA compliance.

As noted elsewhere in this preamble, FEIS, and the 2016 Biological Opinion, significant new information has become available that reveals that surface coal mining operations affect listed and proposed species and proposed and designated critical habitats in a manner and to an extent not considered in the 1996 Biological Opinion, independently triggering reinitiation of ESA section 7 consultation on the 1996 Biological Opinion. Therefore, even without this rulemaking, OSMRE would have been required to reinitiate consultation on the continuation of existing permits and the approval and conduct of future surface coal mining and reclamation operations under both state and federal regulatory programs adopted pursuant to SMCRA. Further, any failure by OSMRE to ensure full implementation of this rulemaking in the Federal programs and all approved state regulatory programs would require OSMRE to reinitiate consultation on its surface coal mining program.

Because full implementation of the final rule could potentially take several years under SMCRA's cooperative federalism framework, OSMRE included in its ESA section 7 consultation an evaluation of the potential impacts to species resulting from the continuation of existing permits approved under the 1996 Biological Opinion and the approval and conduct of future surface coal mining and reclamation operations by states under the existing regulations between the effective date of the stream protection rule and the time when states update their programs to be consistent with OSMRE's stream protection rule and all program amendments are approved by OSMRE. Therefore, the scope of the consultation includes direct implementation and enforcement of the final rule in federal program states, oversight of state programs under the existing regulations until those states amend their approved programs to be consistent with the final stream protection rule, oversight of state programs as modified to be consistent with the final stream protection rule, including OSMRE's oversight of compliance with requirements related to the protection and enhancement of proposed or listed species and proposed or designated critical habitats.

Through the process of completing this section 7 consultation, OSMRE and the U.S. Fish and Wildlife Service entered into a MOU to improve

interagency coordination and cooperation to ensure that proposed, threatened, and endangered species and proposed and designated critical habitat are adequately protected for all surface coal mining and reclamation permitting actions, including exploration operations, initial permit issuance, renewals, and significant revisions. The MOU complements the U.S. Fish and Wildlife Service's 2016 programmatic Biological Opinion. The MOU specifically addresses the permit review and approval processes when proposed or listed species or proposed or designated critical habitats are involved, also referred to as the technical assistance process, and provides detailed dispute resolution procedures should there be disagreement between the SMCRA regulatory authority and the relevant U.S. Fish and Wildlife Service office under the final 2016 programmatic Biological Opinion for the rule.

The U.S. Fish and Wildlife Service issued a programmatic Biological Opinion finding that OSMRE's direct enforcement of the federal regulatory program, approval and conduct of surface coal mining and reclamation operations by primacy states, and oversight and enforcement of those state programs, as modified by the final rule and associated MOU, is not likely to jeopardize the continued existence of proposed and listed species and is not likely to destroy or adversely modify proposed or designated critical habitat. Compliance with the terms and conditions of the 2016 programmatic Biological Opinion and the MOU is only required where a proposed surface coal mining operation may affect proposed or federally-listed species or proposed or designated critical habitat and the proposed operation chooses to obtain incidental take coverage through compliance with the 2016 programmatic Biological Opinion. Alternatively, where a proposed operation may impact proposed or federally-listed species or proposed or designated critical habitat, the applicant may pursue ESA compliance through a process under section 10 or may modify its project so that it no longer has the potential to impact species or critical habitat.

Further details on this consultation can be found in the Biological Assessment and Biological Opinion for the final rule, available at *www.osmre.gov* and on regulations.gov under the stream protection rule docket. These documents contain the final species lists on which the consultations were based, terms and conditions that must be followed to obtain incidental take coverage, as well as the terms under which this consultation would be reinitiated.

We have determined that adoption of the final rule would have no effect on species under the jurisdiction of the National Marine Fisheries Service. As discussed below, no listed or proposed species under the National Marine Fisheries Service's jurisdiction occur in the study area or in such proximity to it that there would be any direct or indirect effects on them from this action.

One federal agency specifically asked if we gave consideration to the impact upon salmon near Tyonek, Alaska. We did, and there are no listed salmon species in Alaska that would be impacted by mining activity. Furthermore, in response to the proposed rule, another commenter stated that we must consult with the National Marine Fisheries Service on this rule. The commenter also stated that because of the potential impacts to species under the National Marine Fisheries Service's jurisdiction, regulatory authorities must include the National Marine Fisheries Service in consultations pursuant to section 7 of the Endangered Species Act.[824] Specifically, the commenter alleged that the shortnose sturgeon and the New York Bight distinct population segment of Atlantic sturgeon are potentially impacted by drainage from coal mining in the anthracite region of Pennsylvania that flows into the Delaware River. The only drainage from coal mining in the anthracite region of Pennsylvania that flows into the Delaware River originates in Luzerne County and Schuylkill County. We conducted a geographic information systems analysis of the distance this drainage must travel before reaching the Delaware River. Drainage from Luzerne County, after traveling through smaller tributaries, flows first into the Lehigh River. It then travels 63 miles down the river before reaching the Delaware River at Easton, Pennsylvania at approximately mile 183.5 of the Delaware River. Atlantic sturgeons are believed to spawn between the salt front of estuaries and the fall line of major rivers. The fall line of the Delaware River is at Trenton, New Jersey, at approximately Delaware River mile 136. Shortnose sturgeons are known to spawn in the Delaware River between miles 133 and 145 of that river. Thus, this drainage would have to travel over 100 miles before it reached a point where Atlantic sturgeon or shortnose sturgeon may be present. Drainage from Schuylkill County would flow approximately 118 miles down the Schuylkill River where it would enter the Delaware River at Philadelphia at mile 92.5 of the Delaware River. Given the dilution that would take place throughout these distances, we determined that there would be no effect on Atlantic sturgeon or shortnose sturgeon from mining in the anthracite region of Pennsylvania.

The commenter also stated there could be effects to the Carolina distinct population segment of the Atlantic sturgeon from potential mining in North Carolina. There has been no coal mining in North Carolina since 1953. North Carolina is not a part of the action area for this rulemaking and no mining is expected to occur there. Therefore, we have determined that this action will have no effect on the Carolina distinct population segment of Atlantic sturgeon.

The commenter also stated that this rulemaking may have effects on the lower Rio Grande River and the Gulf of Mexico. The National Marine Fisheries Service provided us with a list of species that may be potentially affected in the Gulf of Mexico. The list included the following sea turtle and whale species: North Atlantic distinct population segment of the green turtle, the leatherback sea turtle, the northwest Atlantic distinct population segment of the loggerhead sea turtle, the hawksbill sea turtle, the Kemp's ridley sea turtle, the humpback whale, the sei whale, the fin whale, and the blue whale. None of these species occur in the action area in Texas, nor do they occur in the lower Rio Grande River. These obligate marine species (sea turtles and whales) occur in saltwater in the Gulf of Mexico. They never enter freshwater and do not occur in the area that this rule will impact. Because coal mining occurs in inland areas in this region, drainage from mining would have to travel down tributaries, into streams, then into large rivers and finally out into the Gulf of Mexico before any of the marine species could potentially be encountered. We conducted a geographic information system analysis of the drainage distance from potentially mineable coal to the Gulf Coast. The minimum drainage distance from potentially mineable coal to the Gulf Coast is 80 river miles. We determined that the long distance, and the volume and chemistry of the receiving waters means that there would be no detectable residue of the drainage by the time the drainage encounters any threatened or endangered species. Therefore, there would be no effect on the marine species cited by the commenter.

In conclusion, we determined that this rulemaking will have no effect on

[824] 16 U.S.C. 1536.

species under the jurisdiction of the National Marine Fisheries Service. Therefore, it is not necessary to consult with the National Marine Fisheries Service under the Endangered Species Act.

M. Data Quality Act

In developing this final rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554).

List of Subjects

30 CFR Part 700

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining

30 CFR Part 701

Law enforcement, Surface mining, Underground mining

30 CFR Part 773

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining

30 CFR Part 774

Reporting and recordkeeping requirements, Surface mining, Underground mining

30 CFR Part 777

Reporting and recordkeeping requirements, Surface mining, Underground mining

30 CFR Part 779

Environmental protection, Reporting and recordkeeping requirements, Surface mining

30 CFR Part 780

Incorporation by reference, Reporting and recordkeeping requirements, Surface mining

30 CFR Part 783

Environmental protection, Reporting and recordkeeping requirements, Underground mining

30 CFR Part 784

Reporting and recordkeeping requirements, Underground mining

30 CFR Part 785

Reporting and recordkeeping requirements, Surface mining, Underground mining

30 CFR Part 800

Insurance, Reporting and recordkeeping requirements, Surety bonds, Surface mining, Underground mining

30 CFR Part 816

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements, Surface mining

30 CFR Part 817

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements, Underground mining

30 CFR Part 824

Environmental protection, Surface mining

30 CFR Part 827

Environmental protection, Surface mining, Underground mining.

Janice M. Schneider,

Assistant Secretary, Land and Minerals Management.

For the reasons set forth in the preamble, the Department amends 30 CFR parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827 as set forth below.

PART 700—GENERAL

■ 1. The authority citation for part 700 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. In § 700.11, revise the section heading and paragraph (d) to read as follows:

§ 700.11 What coal exploration and coal mining operations are subject to our rules?

* * * * *

(d) *Termination and reassertion of jurisdiction*—(1) *Termination of jurisdiction for initial regulatory program sites.* A regulatory authority may terminate its jurisdiction under the initial regulatory program over a completed surface coal mining and reclamation operation, or portion thereof, when the regulatory authority determines in writing that all requirements imposed under subchapter B of this chapter have been successfully completed.

(2) *Termination of jurisdiction for permanent regulatory program sites.* A regulatory authority may terminate its jurisdiction under the permanent regulatory program over a completed surface coal mining and reclamation operation, or portion thereof, when—

(i) The regulatory authority determines in writing that all requirements imposed under the applicable regulatory program have been successfully completed; or

(ii) Where a performance bond or financial assurance was required, the regulatory authority has made a final decision in accordance with the applicable regulatory program to release the performance bond or financial assurance fully.

(3) *Reassertion of jurisdiction.* Following a termination under paragraph (d)(1) or (2) of this section, the regulatory authority must reassert jurisdiction under the regulatory program over a site or operation whenever—

(i) Conditions develop after termination of jurisdiction that would constitute a violation of the reclamation requirements of the applicable regulatory program;

(ii) The conditions described in paragraph (d)(3)(i) of this section are the result of surface coal mining operations for which jurisdiction was terminated; and

(iii) The written determination or bond release referred to in paragraph (d)(1) or (2) of this section was based upon fraud, collusion, or the intentional or unintentional misrepresentation of a material fact. The intentional or unintentional misrepresentation of a material fact includes the discovery of a discharge requiring treatment after termination of jurisdiction, provided that the conditions creating the need for treatment are the result of the mining operation.

(4) *Exception for certain underground mining requirements.* The provisions of paragraphs (d)(1) and (2) of this section do not apply to the domestic water supply replacement requirements of § 817.40 of this chapter or to the structural damage repair or compensation requirements of § 817.121(d) of this chapter.

PART 701—PERMANENT REGULATORY PROGRAM

■ 3. The authority citation for part 701 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 4. Amend § 701.5 as follows:
■ a. Revise the definitions for ''Acid drainage'' and ''Adjacent area''.
■ b. Add in alphabetical order a definition for ''Angle of dewatering'';
■ c. Revise the definition for ''Approximate original contour'';
■ d. Add in alphabetical order definitions for ''Backfill'', ''Bankfull stage'', and ''Biological condition'';
■ e. Revise the definition for ''Cumulative impact area'';
■ f. Add in alphabetical order a definition for ''Ecological function'';
■ g. Revise the definitions for ''Ephemeral stream'' and ''Excess spoil'';
■ h. Add in alphabetical order definitions for ''Fill'' and ''Form'';

■ i. Remove the definitions for ''Fugitive dust'' and ''Ground water'';
■ j. Add in alphabetical order a definition for ''Groundwater'';
■ k. Remove the definition for ''Highwall remnant'';
■ l. Revise the definition for ''Hydrologic balance'';
■ m. Add in alphabetical order a definition for ''Hydrologic function'';
■ n. Revise the definition for ''Intermittent stream'';
■ o. Add in alphabetical order a definition for ''Invasive species'':
■ p. Revise the definitions for ''Land use'' and ''Material damage'';
■ q. Add in alphabetical order a definition for ''Material damage to the hydrologic balance outside the permit area'';
■ r. Revise the definition for ''Mountaintop removal mining'';
■ s. Add in alphabetical order a definition for ''Native species'';
■ t. Revise the definition for ''Occupied residential dwelling and structures related thereto'';
■ u. Add in alphabetical order definitions for ''Ordinary high water mark'' and ''Parameters of concern'';
■ v. Revise the definition for ''Perennial stream'';
■ w. Add in alphabetical order a definition for ''Premining'';
■ x. Revise the definition for ''Reclamation'';
■ y. Add in alphabetical order a definition for ''Reclamation plan''; and
■ z. Revise the definitions for ''Renewable resource lands'', ''Replacement of water supply'', and ''Temporary diversion''.

The revisions and additions read as follows:

§ 701.5 Definitions.

Acid drainage or *acid mine drainage* means water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity that is discharged from an active, inactive, or abandoned surface coal mining and reclamation operation or from an area affected by surface coal mining and reclamation operations.

* * * * *

Adjacent area means—

(1) *Basic definition for all operations and all resources.* (i) Except as provided in paragraph (1)(ii) of this definition, the adjacent area includes those areas outside the proposed or actual permit area within which there is a reasonable probability of adverse impacts from surface coal mining operations or underground mining activities, as determined by the regulatory authority. The area covered by this term will vary with the context in which a regulation uses this term; *i.e.,* the nature of the resource or resources addressed by a regulation in which the term ''adjacent area'' appears will determine the size and other dimensions of the adjacent area for purposes of that regulation.

(ii) In the context of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* the term *adjacent area* includes those areas outside the proposed or actual permit area where surface coal mining operations or underground mining activities may affect a species listed or proposed for listing as endangered or threatened under that Act or designated or proposed critical habitat under that Act.

(2) *Underground mines.* For underground mines, the adjacent area includes, at a minimum, the area overlying the underground workings plus the area within a reasonable angle of dewatering from the perimeter of the underground workings.

(3) *Underground mine pools.* For all operations, the adjacent area also includes the area that might be affected physically or hydrologically by the dewatering of existing mine pools as part of surface or underground mining operations, plus the area that might be affected physically or hydrologically by mine pools that develop after cessation of mining activities.

* * * * *

Angle of dewatering means the angle created from a vertical line drawn from the outer edge or boundary of high-extraction underground mining workings and an oblique line drawn from terminus of the vertical line at the mine floor to the farthest expected extent that the mining will cause dewatering of groundwater or surface water.

* * * * *

Approximate original contour means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area closely resembles the general surface configuration of the land within the permit area prior to any mining activities or related disturbances and blends into and complements the drainage pattern of the surrounding terrain. All highwalls and spoil piles must be eliminated to meet the terms of the definition, but that requirement does not prohibit the approval of terracing under § 816.102 or § 817.102 of this chapter, the retention of access roads in accordance with § 816.150 or § 817.151 of this chapter, or the approval of permanent water impoundments that comply with §§ 816.49, 816.55, and 780.24(b) or §§ 817.49, 817.55, and 784.24(b) of this chapter. For purposes of this definition, the term ''mined area'' does not include excess spoil fills and coal refuse piles.

* * * * *

Backfill, when used as a noun, means the spoil and waste materials used to fill the void resulting from an excavation created for the purpose of extracting coal from the earth. When used as a verb, the term refers to the process of filling that void. The term also includes all spoil and waste materials used to restore the approximate original contour.

Bankfull stage means the water level at which a stream, river, or lake begins to overflow its natural banks and enter the active floodplain, with the exception of an entrenched stream, river, or lake, in which case bankfull stage is the highest scour line, bench, or top of the point bar.

* * * * *

Biological condition refers to the type, diversity, distribution, and abundance of aquatic organisms and communities found in surface water bodies, including streams.

* * * * *

Cumulative impact area means an area that includes the—

(1) Actual or proposed permit area.

(2) HUC–12 (U.S. Geological Survey 12-digit Watershed Boundary Dataset) watershed or watersheds in which the actual or proposed permit area is located or a differently-sized watershed adequate for purposes of preparation of the cumulative hydrologic impact assessment, as determined by the regulatory authority.

(3) Any other area within which impacts resulting from an actual or proposed surface or underground coal mining operation may interact with the impacts of all existing and anticipated surface and underground coal mining on surface-water and groundwater systems, including the impacts that existing and anticipated mining will have during mining and reclamation until final bond release. At a minimum, existing and anticipated mining must include:

(i) The proposed operation;

(ii) All existing surface and underground coal mining operations;

(iii) Any proposed surface or underground coal mining operation for which a permit application has been submitted to the regulatory authority;

(iv) Any proposed surface or underground coal mining operation for which a request for an authorization, certification, or permit has been submitted under the Clean Water Act; and

(v) All existing and proposed coal mining operations that are required to

meet diligent development requirements for leased federal coal and for which a resource recovery and protection plan has been either approved or submitted to and reviewed by the authorized officer of the Bureau of Land Management under 43 CFR 3482.1(b).

* * * * *

Ecological function of a stream means the species richness, diversity, and extent of plants, insects, amphibians, reptiles, fish, birds, mammals, and other organisms for which the stream provides habitat, food, water, or shelter. The biological condition of a stream is one way to describe its ecological function.

* * * * *

Ephemeral stream means a stream or part of a stream that has flowing water only during, and for a short duration after, precipitation and snowmelt events in a typical year. Ephemeral streams include only those conveyances with channels that display both a bed-and-bank configuration and an ordinary high water mark, and that have streambeds located above the water table year-round. Groundwater is not a source of water for streamflow. Runoff from rainfall events and snowmelt is the primary source of water for streamflow.

* * * * *

Excess spoil means spoil material permanently disposed of within the permit area in a location other than the mined-out area. This term also includes all spoil material placed on the mined-out area in excess of the amount necessary to restore the approximate original contour when the spoil placement is part of an excess spoil fill with a toe located outside the mined-out area. This term does not include—

(1) Spoil used to restore the approximate original contour;

(2) Spoil used to blend the final configuration of the mined-out area with the surrounding terrain in non-steep slope areas in accordance with § 816.102(b)(3) or § 817.102(b)(2) of this chapter;

(3) Spoil placed outside the mined-out area as part of a remining operation under § 816.106 or § 817.106 of this chapter;

(4) Spoil placed within the mined-out area in accordance with the thick overburden provisions of § 816.105(b)(1) of this chapter, with the exception of spoil material placed on the mined-out area as part of an excess spoil fill with a toe located outside the mined-out area; or

(5) Any temporary stockpile of material that will be subsequently transported to another location.

* * * * *

Fill means a permanent, non-impounding structure constructed under §§ 816.71 through 816.83 or §§ 817.71 through 817.83 of this chapter for the purpose of disposing of excess spoil or coal mine waste generated by surface coal mining operations or underground mining activities.

* * * * *

Form, as used in §§ 780.28, 784.28, 800.42, 816.57, and 817.57 of this chapter, means the physical characteristics, pattern, profile, and dimensions of a stream channel. The term includes, but is not limited to, the ratio of the flood-prone area to the bankfull width (entrenchment), the ratio of the channel width to channel depth, channel slope, sinuosity, bankfull depth, dominant in-stream substrate particle size, and capacity for riffles and pools.

* * * * *

Groundwater means subsurface water located in soils and geologic formations that are fully saturated with water, including regional, local, and perched aquifers. This term does not include water in soil horizons that are temporarily saturated by precipitation events.

* * * * *

Hydrologic balance means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in storage of groundwater and surface water, as well as interactions that result in changes in the chemical composition or physical characteristics of groundwater and surface water.

Hydrologic function, as used in §§ 780.28, 784.28, 800.42, 816.57, and 817.57 of this chapter, means the role that streams play in the transport of water and the flow of water within the stream channel and floodplain. The term includes total flow volume, seasonal variations in streamflow and base flow, and provision of the water needed to maintain floodplains and wetlands associated with the stream.

* * * * *

Intermittent stream means a stream or part of a stream that has flowing water during certain times of the year when groundwater provides water for streamflow. The water table is located above the streambed for only part of the year, which means that intermittent streams may not have flowing water during dry periods. Runoff from rainfall events and snowmelt is a supplemental source of water for streamflow. Intermittent streams include only those conveyances with channels that display both a bed-and-bank configuration and an ordinary high water mark.

Invasive species means an alien species (a species that is not native to the region or area), the introduction of which has caused or is likely to cause economic or environmental harm or harm to human health.

* * * * *

Land use means specific uses or management-related activities, rather than the vegetation or cover of the land. Land uses may be identified in combination when joint or seasonal uses occur. Each land use category includes land used for facilities that support the land use. For purposes of this chapter, the following land use categories apply:

(1) *Cropland.* Land used for the production of crops for harvest, either alone or in rotation with grasses and legumes. Crops include row crops, small grains, hay, commercial nursery plantings, vegetables, fruits, nuts, crops, and other plants typically cultivated for commercial purposes in fields, orchards, vineyards, and similar settings.

(2) *Pastureland or land occasionally cut for hay.* Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed.

(3) *Grazing land.* Land used for grasslands and forest lands where the indigenous vegetation is actively managed for grazing, browsing, or occasional hay production.

(4) *Forestry.* Land used or managed for the long-term production of wood, wood fiber, or wood-derived products.

(5) *Residential.* Land used for single- and multiple-family housing, mobile home parks, or other residential lodgings.

(6) *Industrial/Commercial.* Land used for—

(i) Extraction or transformation of materials for fabrication of products, wholesaling of products, or long-term storage of products. This includes all heavy and light manufacturing facilities.

(ii) Retail or trade of goods or services, including hotels, motels, stores, restaurants, and other commercial establishments.

(7) *Recreation.* Land used for public or private leisure-time activities, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses.

(8) *Fish and wildlife habitat.* Land dedicated wholly or partially to the

production, protection, or management of species of fish or wildlife.

(9) *Developed water resources.* Land used for storing water for beneficial uses, such as stock ponds, irrigation, fire protection, flood control, and water supply.

(10) *Undeveloped land or no current use or land management.* Land that is undeveloped or, if previously developed, land that has been allowed to return naturally to an undeveloped state or has been allowed to return to forest through natural succession.

* * * * *

Material damage, in the context of §§ 784.30 and 817.121 of this chapter, which pertain to subsidence from underground mining operations, means:

(1) Any functional impairment of surface lands, surface features (including wetlands, streams, and bodies of water), structures, or facilities;

(2) Any physical change that—

(i) Has a significant adverse impact on the affected land's capability to support any current or reasonably foreseeable uses; or

(ii) Causes a significant loss in production or income; or

(3) Any significant change in the condition, appearance, or utility of any structure or facility from its pre-subsidence condition.

Material damage to the hydrologic balance outside the permit area means an adverse impact, as determined in accordance with the rest of this definition, resulting from surface coal mining and reclamation operations, underground mining activities, or subsidence associated with underground mining activities, on the quality or quantity of surface water or groundwater, or on the biological condition of a perennial or intermittent stream. The determination of whether an adverse impact constitutes material damage to the hydrologic balance outside the permit area will be based on consideration of the baseline data collected under § 780.19 or § 784.19 of this chapter and the following reasonably anticipated or actual effects of the operation:

(1) For a surface water located outside the permit area, effects that cause or contribute to a violation of applicable state or tribal water quality standards, including, but not limited to, state or tribal water quality standards established under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, for a surface water for which water quality standards have not been established, effects that cause or contribute to non-attainment of any premining use of that surface water outside the permit area;

(2) Effects that cause or contribute to a violation of applicable state or tribal water quality standards for groundwater located outside the permit area, or effects that preclude a premining use of groundwater located outside the permit area; or

(3) Effects that result in a violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

* * * * *

Mountaintop removal mining means surface mining activities in which the mining operation extracts an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill, except for outcrop barriers retained under § 824.11(b)(2) of this chapter, by removing substantially all overburden above the coal seam and using that overburden to create a level plateau or a gently rolling contour, with no highwalls remaining, that is capable of supporting one or more of the postmining land uses identified in § 785.14 of this chapter.

* * * * *

Native species means, with respect to a particular ecosystem, a species that historically occurred or currently occurs in that ecosystem. This term does not include alien species that occur in that ecosystem or species introduced to that ecosystem.

* * * * *

Occupied residential dwelling and structures related thereto means, for purposes of §§ 784.30 and 817.121 of this chapter, any building or other structure that, at the time the subsidence occurs, is used either temporarily, occasionally, seasonally, or permanently for human habitation. This term also includes any building, structure, or facility installed on, above, or below the land surface if that building, structure, or facility is adjunct to or used in connection with an occupied residential dwelling. Examples of such structures include, but are not limited to, garages; storage sheds and barns; greenhouses and related buildings; utilities and cables; fences and other enclosures; retaining walls; paved or improved patios, walks and driveways; septic sewage treatment facilities; and lot drainage and lawn and garden irrigation systems. This term does not include any structure used only for commercial agricultural, industrial, retail or other commercial purposes.

* * * * *

Ordinary high water mark means that line on the bank established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

* * * * *

Parameters of concern means those chemical or physical characteristics and properties of surface water or groundwater that could be altered by surface or underground mining activities, including discharges associated with those activities, in a manner that would adversely impact the quality of groundwater or surface water, including adverse impacts on aquatic life.

Perennial stream means a stream or part of a stream that has flowing water year-round during a typical year. The water table is located above the streambed for most of the year. Groundwater is the primary source of water for streamflow. Runoff from rainfall events and snowmelt is a supplemental source of water for streamflow. Perennial streams include only those conveyances with channels that display both a bed-and-bank configuration and an ordinary high water mark.

* * * * *

Premining refers to the conditions and features that exist on a site at the time of application for a permit to conduct surface coal mining operations.

* * * * *

Reclamation means those actions taken to restore mined land and associated disturbed areas to a condition in which the site is capable of supporting the uses it was capable of supporting prior to any mining or any higher or better uses approved by the regulatory authority. The site also must meet all other requirements of the permit and regulatory program that pertain to restoration of the site. For sites with discharges that require treatment, this term also includes those actions taken to eliminate, remediate, or treat those discharges, including both discharges from the mined area and all other discharges that are hydrologically connected to either the mined area or the operation, regardless of whether those discharges are located within the disturbed area.

Reclamation plan means the plan for reclamation of surface coal mining operations under parts 780, 784, and 785 of this chapter.

* * * * *

Renewable resource lands means aquifers, aquifer recharge areas, recharge areas for other subsurface water, watersheds for surface water bodies that

function as a water supply, areas for agricultural or silvicultural production of food and fiber, and grazing lands.

Replacement of water supply means, with respect to protected water supplies contaminated, diminished, or interrupted by coal mining operations, provision of water supply on both a temporary and permanent basis equivalent to premining quantity and quality. Replacement includes provision of an equivalent water-delivery system and payment of operation and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies.

* * * * *

Temporary diversion means a channel constructed to convey streamflow or overland flow away from the site of actual or proposed coal exploration or surface coal mining and reclamation operations or to convey those flows to a siltation structure or other treatment facility. The term includes only those channels not approved by the regulatory authority to remain after reclamation as part of the approved postmining land use.

* * * * *

■ 5. Add § 701.16 to read as follows:

§ 701.16 How will the stream protection rule apply to existing and future permits and permit applications?

(a) *General applicability.* The revisions to parts 701 through 827 of this chapter that became effective on January 19, 2017 (hereafter referred to as the stream protection rule) apply as provided therein or, if there is no specific applicability provision in the revisions, to—

(1) Any application for a new permit submitted to the regulatory authority after the effective date of the stream protection rule under the applicable regulatory program.

(2) Any application for a new permit pending a decision under § 773.7 of this chapter or its state program counterpart as of the effective date of the stream protection rule under the applicable regulatory program, unless the regulatory authority has determined the application to be administratively complete under § 777.15 of this chapter or its state program counterpart before the effective date of the stream protection rule under the applicable regulatory program.

(3) Any application for the addition of acreage to an existing permit submitted to the regulatory authority after the effective date of the stream protection rule under the applicable regulatory program, with the exception of applications for incidental boundary revisions that do not propose to add acreage for coal removal.

(4) Any application for the addition of acreage to an existing permit pending a decision under § 773.7 of this chapter or its state program counterpart as of the effective date of the stream protection rule under the applicable regulatory program, with two exceptions:

(i) Applications for incidental boundary revisions that do not propose to add acreage for coal removal; and

(ii) Applications that the regulatory authority has determined to be administratively complete before the effective date of the stream protection rule under the applicable regulatory program.

(5) Any application for a permit revision submitted on or after the effective date of the stream protection rule under the applicable regulatory program, or pending a decision as of that date, that proposes a new excess spoil fill, coal mine waste refuse pile, or coal mine waste slurry impoundment or that proposes to move or expand the location of an approved excess spoil fill or coal mine waste facility.

(b) [Reserved]

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

■ 6. The authority citation for part 773 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.,* 54 U.S.C. 300101 *et seq.,* 16 U.S.C. 661 *et seq.,* 16 U.S.C. 703 *et seq.,* 16 U.S.C. 668a *et seq.,* 16 U.S.C. 469 *et seq.,* and 16 U.S.C. 1531 *et seq.*

■ 7. Revise § 773.5 to read as follows:

§ 773.5 How must the regulatory authority coordinate the permitting process with requirements under other laws?

(a) To avoid duplication, each regulatory program must provide for the coordination of review of permit applications and issuance of permits for surface coal mining operations with the federal and state agencies responsible for permitting and related actions under the following laws and their implementing regulations:

(1) The Clean Water Act (33 U.S.C. 1251 *et seq.*).

(2) The Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(3) The Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*).

(4) The Migratory Bird Treaty Act of 1918 (16 U.S.C. 703 *et seq.*).

(5) The Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d).

(b) In addition to the requirements of paragraph (a) of this section, each federal regulatory program must provide for coordination of the review of permit applications and issuance of permits for surface coal mining operations with applicable requirements of the following laws and their implementing regulations:

(1) The National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*).

(2) The Archeological and Historic Preservation Act of 1974 (16 U.S.C. 469 *et seq.*).

(3) The Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa *et seq.*), where federal or Indian lands covered by that Act are involved.

(4) The National Environmental Policy Act of 1969 (42 U.S.C. 4371 *et seq.*).

■ 8. Revise § 773.7 to read as follows:

§ 773.7 How and when will the regulatory authority review and make a decision on an application for a permit, permit revision, or permit renewal?

(a) *General.* The regulatory authority will review an application for a permit, permit revision, or permit renewal; and issue a written decision granting, requiring modification of, or denying the application. Before making this decision, the regulatory authority must consider any written comments and objections submitted, as well as the records of any informal conference or hearing held on the application.

(b) *When will the regulatory authority make a decision on a permit application*? (1) If an informal conference is held under § 773.6(c) of this part, the regulatory authority will issue a decision on the application within 60 days of the close of the conference.

(2) If no informal conference is held under § 773.6(c) of this part, the regulatory authority must issue a decision on the application within a reasonable time established in the regulatory program. In determining what constitutes a reasonable time, the regulatory authority must consider the following five factors:

(i) The time needed for proper site investigations.

(ii) The complexity of the permit application.

(iii) Whether there are any written objections on file.

(iv) Whether the application previously has been approved or disapproved, in whole or in part.

(v) The time required for coordination of permitting activities with other agencies under § 773.5 of this part.

(c) *Who has the burden of proof*? You, the applicant for a permit, revision of a permit, or the transfer, assignment, or sale of permit rights, have the burden of establishing that your application is in compliance with all requirements of the regulatory program.

■ 9. Revise § 773.15 to read as follows:

§ 773.15 What findings must the regulatory authority make before approving a permit application?

The regulatory authority may not approve any application for a permit or a significant revision of a permit that you, the applicant, submit unless the application affirmatively demonstrates and the regulatory authority finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, that—

(a) The application is accurate and complete and you have complied with all applicable requirements of the Act and the regulatory program.

(b) You have demonstrated that reclamation as required by the Act and the regulatory program can be accomplished under the reclamation plan contained in the permit application.

(c) The proposed permit area is not within an area—

(1) Under study or administrative proceedings under a petition filed pursuant to part 764 or part 769 of this chapter to have an area designated as unsuitable for surface coal mining operations, unless you demonstrate that you made substantial legal and financial commitments before January 4, 1977, in relation to the operation covered by the permit application;

(2) Designated under parts 762 and 764 or 769 of this chapter as unsuitable for the type of surface coal mining operations that you propose to conduct; or

(3) Subject to the prohibitions of § 761.11 of this chapter, unless one or more of the exceptions provided under that section apply.

(d) For mining operations where the private mineral estate to be mined has been severed from the private surface estate, you have submitted to the regulatory authority the documentation required under § 778.15(b) of this chapter.

(e) The regulatory authority has—

(1) Made an assessment of the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area; and

(2) Determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(f) You have demonstrated that any existing structure will comply with § 701.11(d) of this chapter and the applicable performance standards of subchapter B or K of this chapter.

(g) You have paid all reclamation fees from previous and existing operations as required by subchapter R of this chapter.

(h) You have satisfied the applicable requirements of part 785 of this chapter.

(i) If applicable, you have satisfied the requirements for approval of a long-term, intensive agricultural postmining land use.

(j)(1) You have provided documentation that the proposed surface coal mining and reclamation operations would have no effect on species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or on designated or proposed critical habitat under that law; or

(2) You and the regulatory authority have documented compliance with a valid biological opinion that covers issuance of permits for surface coal mining operations and the conduct of those operations under the applicable regulatory program; or

(3) You have provided documentation that interagency consultation under section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536, has been completed for the proposed operation; or

(4) You have provided documentation that the proposed operation is covered under a permit issued pursuant to section 10 of the Endangered Species Act of 1973, 16 U.S.C. 1539.

(k) The regulatory authority has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources or a documented decision that the regulatory authority has determined that no additional protection measures are necessary.

(l) For a proposed remining operation where you intend to reclaim in accordance with the requirements of § 816.106 or § 817.106 of this chapter, the site of the operation is a previously mined area, as that term is defined in § 701.5 of this chapter.

(m) You are eligible to receive a permit, based on the reviews under §§ 773.7 through 773.14 of this part.

(n) You have demonstrated, and the regulatory authority concurs, that—

(1) The operation has been designed to prevent the formation of toxic mine drainage that would require long-term treatment after mining has been completed.

(2) A thorough analysis of all available evidence supports a conclusion that the design of the proposed operation will work as intended to prevent the formation of discharges that would require long-term treatment after mining has been completed. If a study or other evidence supports a contrary conclusion, you must explain why that study or other evidence is not credible or applicable to the proposed operation.

(o) To the extent possible using the best technology currently available, the proposed operation has been designed to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and to achieve enhancement of those resources where practicable, as required under § 780.16 or § 784.16 of this chapter.

■ 10. Revise § 773.17 to read as follows:

§ 773.17 What conditions must the regulatory authority place on each permit issued?

The regulatory authority must include the following conditions in each permit issued:

(a) You, the permittee, may conduct surface coal mining and reclamation operations only on those lands that are specifically designated as the permit area on the maps submitted with the application and authorized for the term of the permit and that are subject to the performance bond or other equivalent guarantee in effect pursuant to part 800 of this chapter.

(b) You must conduct all surface coal mining and reclamation operations only as described in the approved application, except to the extent that the regulatory authority otherwise directs in the permit.

(c) You must comply with the terms and conditions of the permit, all applicable requirements of the Act, and the requirements of the regulatory program.

(d) Without advance notice, delay, or a search warrant, upon presentation of appropriate credentials, you must allow authorized representatives of the Secretary and the regulatory authority to—

(1) Have the right of entry provided for in §§ 842.13 and 840.12 of this chapter; and

(2) Be accompanied by private persons for the purpose of conducting an inspection in accordance with parts 840 and 842 of this chapter, when the inspection is in response to an alleged violation reported to the regulatory authority by the private person.

(e) You must take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition of the permit, including, but not limited to—

(1) Any accelerated or additional monitoring necessary to determine the nature and extent of noncompliance and the results of the noncompliance.

(2) Immediate implementation of measures necessary to comply.

(3) Warning, as soon as possible after learning of such noncompliance, any person whose health and safety is in imminent danger due to the noncompliance.

(4) Notifying the regulatory authority and other appropriate state and federal regulatory agencies whenever conditions within the permit area result in an imminent danger to the health or safety of the public or cause or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, regardless of whether a noncompliance exists.

(f) As applicable, you must comply with § 701.11(d) and subchapter B or K of this chapter for compliance, modification, or abandonment of existing structures.

(g) You or the operator must pay all reclamation fees required by subchapter R of this chapter for coal produced under the permit for sale, transfer, or use, in the manner required by that subchapter.

(h) You must obtain all necessary authorizations, certifications, and permits in accordance with other applicable federal, state, and tribal laws before conducting any activities that require authorization, certification, or a permit under those laws.

(i) You must comply with all effluent limitations and conditions in any National Pollutant Discharge Elimination System permit issued for your operation by the appropriate authority under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 11. Add § 773.20 to read as follows:

§ 773.20 What actions must the regulatory authority take when a permit is issued on the basis of inaccurate information?

(a) We, the regulatory authority, will take the actions set forth in paragraphs (b) through (f) of this section if we issue a permit on the basis of what we later determine to be inaccurate baseline information, provided that the information is inaccurate to the extent that it would invalidate one or more of the findings required for permit application approval under § 773.15 or other provisions of this chapter.

(b) We will provide you, the permittee, with written notice that we have made a preliminary finding that your permit was issued on the basis of inaccurate information of the nature described in paragraph (a) of this section. The notice will set forth the reasons for that finding.

(c) Within 30 days of receiving a notice under paragraph (b) of this section, you may—

(1) Challenge the preliminary finding by providing us with an explanation of why the information either is not inaccurate or does not meet the standard established in paragraph (a) of this section; or

(2) Supply, or agree to supply, updated information and submit an application to revise the permit as needed to correct the deficiency in an expeditious manner.

(d)(1) We will evaluate any explanation that you submit under paragraph (c)(1) of this part.

(2)(i) If you do not take either of the actions identified under paragraph (c) of this section, or if the evaluation under paragraph (d)(1) of this section determines that the deficiency identified in our preliminary finding still exists, we will serve you with a written notice of proposed suspension or rescission of the permit, together with a statement of the reasons for the proposed suspension or rescission,

(ii) Any proposed suspension or rescission will take effect 60 days from the date that we provide notice under paragraph (d)(2)(i) of this section, unless you obtain temporary relief under § 775.11(b)(2) of this chapter.

(3) The proposed suspension or rescission under paragraph (d)(2) of this section is subject to administrative review under part 775 of this chapter.

(4) Section 843.14 of this chapter will govern service under paragraph (d)(2) of this section.

(e)(1) If we suspend your permit under paragraph (d)(2) of this section, you must cease all surface coal mining operations under the permit and complete all affirmative obligations specified in the suspension order within the time established in that order. We will rescind your permit in accordance with paragraph (d)(2) of this section if you do not complete those obligations within the time specified.

(2) If we rescind your permit under paragraph (d)(2) of this section, you must cease all surface coal mining operations under the permit and complete reclamation within the time specified in the order.

(f)(1) If we suspend or rescind your permit under paragraph (d)(2) of this section, the bond posted for the permit will remain in effect until you complete all reclamation obligations under the reclamation plan approved in the permit and obtain bond release under §§ 800.40 through 800.44 of this chapter.

(2) We will initiate bond forfeiture proceedings under § 800.50 of this chapter if you do not complete all reclamation obligations within the time specified in the order issued under paragraph (d)(2) of this section.

PART 774—REVISION; RENEWAL; TRANSFER, ASSIGNMENT, OR SALE OF PERMIT RIGHTS; POST-PERMIT ISSUANCE REQUIREMENTS

■ 12. The authority citation for part 774 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.

■ 13. Revise the part heading for part 774 to read as set forth above.

■ 14. Revise § 774.9 to read as follows:

§ 774.9 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–0116. The regulatory authority uses this information to determine if you, the applicant, meet the requirements for permit revision; permit renewal; or the transfer, assignment, or sale of permit rights. The regulatory authority also uses this information to update the Applicant/Violator System. You must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 203–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

■ 15. Revise § 774.10 to read as follows:

§ 774.10 When must the regulatory authority review a permit after issuance?

(a)(1) The regulatory authority must review each permit issued and outstanding under an approved regulatory program during the term of the permit.

(2) The review required by paragraph (a)(1) of this section must include, but is not limited to, an evaluation of the impacts of the operation on fish, wildlife, and related environmental values in the permit and adjacent areas. The regulatory authority must use that evaluation to determine whether it is necessary to order the permittee to modify the fish and wildlife enhancement plan approved in the

permit to ensure that the operation minimizes disturbances and adverse impacts on fish, wildlife, and related environmental values within the permit and adjacent areas to the extent possible using the best technology currently available.

(3) The review required by paragraph (a)(1) of this section must occur not later than the middle of each permit term except that permits with a term longer than 5 years must be reviewed no less frequently than the permit midterm or every 5 years, whichever is more frequent.

(4) Permits granted in accordance with § 785.14 of this chapter (mountaintop removal mining) and permits containing a variance from approximate original contour restoration requirements in accordance with § 785.16 of this chapter must be reviewed no later than 3 years from the date of issuance of the permit, unless the permittee affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the permit. This review may be combined with the first review conducted under paragraph (a)(3) of this section if the permit term does not exceed 5 years.

(5) Permits containing an experimental practice approved in accordance with § 785.13 of this chapter must be reviewed as set forth in the permit or at least every 2½ years from the date of issuance as required by the regulatory authority, in accordance with § 785.13(g) of this chapter.

(6) Permits granted in accordance with § 785.18 of this chapter (variance for delay in contemporaneous reclamation requirement in combined surface and underground mining operations) must be reviewed no later than 3 years from the date of issuance of the permit. This review may be combined with the first review conducted under paragraph (a)(3) of this section if the permit term does not exceed 5 years.

(b) After a review required by paragraph (a) of this section, or at any time, the regulatory authority may, by order, require reasonable revision of a permit in accordance with § 774.13 to ensure compliance with the Act and the regulatory program.

(c) Any order of the regulatory authority requiring revision of a permit must be based upon written findings and is subject to the provisions for administrative and judicial review in part 775 of this chapter. Copies of the order must be sent to the permittee.

(d) Permits may be suspended or revoked in accordance with subchapter L of this chapter.

■ 16. Revise § 774.15 to read as follows:

§ 774.15 How may I renew a permit?

(a) *Right of renewal.* A valid permit, issued pursuant to an approved regulatory program, carries with it the right of successive renewal, within the approved boundaries of the existing permit, upon expiration of the term of the permit.

(b) *Application requirements and procedures.* (1) You, the permittee, must file an application for renewal of a permit with the regulatory authority at least 120 days before expiration of the existing permit term.

(2) You must file the application for renewal in the form required by the regulatory authority. At a minimum, your application must include the following information—

(i) Your name and address.

(ii) The term of the renewal requested.

(iii) The permit number or other identifier.

(iv) Evidence that a liability insurance policy for the operation will continue in full force and effect during the proposed renewal term or that you will have adequate self-insurance under § 800.60 of this chapter for the proposed term of renewal.

(v) Evidence that the performance bond for the permit will continue in full force and effect for the proposed term of renewal.

(vi) A copy of the newspaper notice and proof of publication, as required by § 778.21 of this chapter.

(vii) Additional revised or updated information required by the regulatory authority.

(3) Applications for renewal are subject to the public notification and public participation requirements in §§ 773.6 and 773.19(b) of this chapter.

(4) If an application for renewal includes any proposed revisions to the permit, those revisions must be identified and processed in accordance with § 774.13 of this part.

(c) *Approval process*—(1) *Criteria for approval.* The regulatory authority must approve a complete and accurate application for permit renewal, unless it finds, in writing that—

(i) The terms and conditions of the existing permit are not being satisfactorily met.

(ii) The present surface coal mining and reclamation operations are not in compliance with the environmental protection standards of the Act and the regulatory program. The permit eligibility standards in §§ 773.12 through 773.14 of this chapter apply to this determination.

(iii) The requested renewal substantially jeopardizes your continuing ability to comply with the Act and the regulatory program on existing permit areas.

(iv) You have not provided evidence of having continuing liability insurance or self-insurance coverage as required under § 800.60 of this chapter.

(v) You have not provided evidence that any performance bond required to be in effect for the operation will continue in full force and effect for the proposed term of renewal.

(vi) You have not posted any additional bond required by the regulatory authority under part 800 of this chapter.

(vii) You have not provided any additional revised or updated information required by the regulatory authority.

(2) *Burden of proof.* In the determination of whether to approve or deny an application for renewal of a permit, the burden of proof is on the opponents of renewal.

(3) *Alluvial valley floor variance.* Areas previously identified in the reclamation plan for the original permit as exempt from the standards in paragraphs (A) and (B) of section 510(b)(5) of the Act and the requirements of paragraphs (c) through (e) of § 785.19 of this chapter will retain their exempt status for the term of the renewal.

(d) *Renewal term.* The term for any permit renewal must not exceed the original permit term under § 773.19(c) of this chapter.

(e) *Notice of decision.* The regulatory authority must send copies of its decision to the applicant, to each person who filed comments or objections on the renewal, to each party to any informal conference held on the permit renewal, and to OSMRE if OSMRE is not the regulatory authority.

(f) *Administrative and judicial review.* Any person having an interest which is or may be adversely affected by the decision of the regulatory authority has the right to administrative and judicial review under part 775 of this chapter.

PART 777—GENERAL CONTENT REQUIREMENTS FOR PERMIT APPLICATIONS

■ 17. Revise the authority citation for part 777 to read as follows:

Authority: 30 U.S.C. 1201 et seq.

■ 18. Revise § 777.1 to read as follows:

§ 777.1 What does this part cover?

This part provides minimum requirements concerning data collection and analysis and the format and general content of permit applications under a regulatory program.

■ 19. Revise § 777.11 to read as follows:

§ 777.11 What are the format and content requirements for permit applications?

(a) An application must—

(1) Contain current information, as required by this subchapter.

(2) Be clear and concise.

(3) Be filed in the format prescribed by the regulatory authority.

(b) If used in the application, referenced materials must either be provided to the regulatory authority by the applicant or be readily available to the regulatory authority. If provided, relevant portions of referenced published materials must be presented briefly and concisely in the application by photocopying or abstracting and with explicit citations.

(c) Applications for permits; revisions; renewals; or transfers, sales or assignments of permit rights must be verified under oath, by a responsible official of the applicant, that the information contained in the application is true and correct to the best of the official's information and belief.

■ 20. Revise § 777.13 to read as follows:

§ 777.13 What requirements apply to the collection, analysis, and reporting of technical data and to the use of models?

(a) *Technical data and analyses.* (1) All technical data submitted in the application must be accompanied by metadata, including, but not limited to, the names of persons or organizations that collected and analyzed the data, the dates that the data were collected and analyzed, descriptions of the methodology used to collect and analyze the data, the quality assurance and quality control procedures used by the laboratory and the results of those procedures, and the field sampling sheets for each surface-water sample collected and for each groundwater sample collected from wells, seeps, and springs. For electronic data, metadata must include identification of any data transformations.

(2) Technical analyses must be planned by or under the direction of a professional qualified in the subject to be analyzed.

(b) *Sampling and analyses of groundwater and surface water.* All sampling and analyses of groundwater and surface water performed to meet the requirements of this subchapter must be conducted according to—

(1) The methodology in 40 CFR parts 136 and 434, to the extent applicable; or

(2) A scientifically defensible methodology acceptable to the regulatory authority, in coordination with any agency responsible for administering or implementing a program under the Clean Water Act, 33 U.S.C. 1251 *et seq.,* that requires water sampling and analysis.

(c) *Geological sampling and analysis.* All geological sampling and analyses performed to meet the requirements of this subchapter must be conducted using a scientifically defensible methodology.

(d) *Use of models.* (1) Unless the regulatory authority specifies otherwise, you may use modeling techniques, interpolation, or statistical techniques to prepare the permit application.

(2) You must use actual site-specific data to calibrate each model. All models must be validated for the region and ecosystem in which they will be used.

(3) The regulatory authority may either disallow the use of models or require that you submit additional actual, site-specific data.

■ 21. Revise § 777.14 to read as follows:

§ 777.14 What general requirements apply to maps and plans?

(a)(1) Maps submitted with applications must be presented in a consolidated format, to the extent possible, and must include all the types of information that are set forth on topographic maps of the U.S. Geological Survey of the 1:24,000 scale series.

(2) Maps of the proposed permit area must be at a scale of 1:6,000 or larger.

(3) Maps of the adjacent area must clearly show the lands and waters within that area and must be at a scale determined by the regulatory authority, but in no event smaller than 1:24,000.

(b) When applicable, maps must clearly show those portions of the operation where surface coal mining operations occurred—

(1) Prior to August 3, 1977.

(2) After August 3, 1977, but prior to either—

(i) May 3, 1978; or

(ii) January 1, 1979, if an applicant or operator obtained a small operator's exemption in accordance with § 710.12 of this chapter.

(3) After May 3, 1978 (or January 1, 1979, for persons who received a small operator's exemption in accordance with § 710.12 of this chapter) and prior to the approval of the applicable regulatory program.

■ 22. Revise § 777.15 to read as follows:

§ 777.15 What information must my application include to be administratively complete?

An administratively complete application for a permit to conduct surface coal mining operations and must include at a minimum—

(a) For surface mining activities, the information required under parts 778, 779, and 780 of this chapter, and, as applicable to the operation, part 785 of this chapter.

(b) For underground mining activities, the information required under parts 778, 783, and 784 of this chapter, and, as applicable to the operation, part 785 of this chapter.

■ 23. Lift the suspension of § 779.21 and revise part 779 to read as follows:

PART 779—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES AND CONDITIONS

Sec.

Authority: 30 U.S.C. 1201 *et seq.* and 54 U.S.C. 300101 *et seq.*

§ 779.1 What does this part do?

This part establishes the minimum requirements for the descriptions of environmental resources and conditions that you must include in an application for a permit to conduct surface mining activities.

§ 779.2 What is the objective of this part?

The objective of this part is to ensure that you, the permit applicant, provide the regulatory authority with a complete and accurate description of the environmental resources that may be impacted or affected by proposed surface mining activities and the environmental conditions that exist within the proposed permit and adjacent areas.

§ 779.4 What responsibilities do I and government agencies have under this part?

(a) You, the permit applicant, must provide all information required by this

part in your application, except when this part specifically exempts you from doing so.

(b) State and federal government agencies are responsible for providing information for permit applications to the extent that this part specifically requires that they do so.

§ 779.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–0035. The information is being collected to meet the requirements of sections 507 and 508 of SMCRA, which require that each permit application include a description of the premining environmental resources within and around the proposed permit area. The regulatory authority uses this information as a baseline for evaluating the impacts of mining. You, the permit applicant, must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 203–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

§ 779.11 [Reserved]

§ 779.12 [Reserved]

§ 779.17 What information on cultural, historic, and archeological resources must I include in my permit application?

(a) Your permit application must describe the nature of cultural, historic, and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas. The description must be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historical, and cultural preservation agencies.

(b) The regulatory authority may require you, the applicant, to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places by—

(1) Collecting additional information;

(2) Conducting field investigations, or

(3) Completing other appropriate analyses.

§ 779.18 What information on climate must I include in my permit application?

The regulatory authority may require that your permit application contain a statement of the climatic factors that are representative of the proposed permit area, including:

(a) The average seasonal precipitation.

(b) The average direction and velocity of prevailing winds.

(c) Seasonal temperature ranges.

(d) Additional data that the regulatory authority deems necessary to ensure compliance with the requirements of this subchapter.

§ 779.19 What information on vegetation must I include in my permit application?

(a) You must identify, describe, and map existing vegetation types and plant communities within the proposed permit area. If you propose to use reference areas for purposes of determining revegetation success under § 816.116 of this chapter, you also must identify, describe, and map existing vegetation types and plant communities within any proposed reference areas.

(b) The description and map required under paragraph (a) of this section must—

(1) Be in sufficient detail to assist in preparation of the revegetation plan under § 780.12(g) of this chapter and provide a baseline for comparison with postmining vegetation;

(2) Be adequate to evaluate whether the vegetation provides important habitat for fish and wildlife and whether the proposed permit area contains native plant communities of local or regional significance;

(3) Identify areas with significant populations of non-native invasive or noxious species; and

(4) Delineate all wetlands and all areas bordering streams that either support or are capable of supporting hydrophytic or hydrophilic vegetation or vegetation typical of floodplains.

(c) If the vegetation on the proposed permit area has been altered by human activity, you must describe the native vegetation and plant communities typical of that area in the absence of human alterations.

§ 779.20 What information on fish and wildlife resources must I include in my permit application?

(a) *General requirements.* Your permit application must include information on fish and wildlife resources for the proposed permit and adjacent areas, including all species of fish, wildlife, plants, and other life forms listed or proposed for listing under the Endangered Species Act of 1973, 30 U.S.C. 1531 *et seq.* The adjacent area must include all lands and waters likely to be affected by the proposed operation.

(b) *Scope and level of detail.* The regulatory authority will determine the scope and level of detail for this information in coordination with state and federal agencies with responsibilities for fish and wildlife. The scope and level of detail must be sufficient to design the protection and enhancement plan required under § 780.16 of this chapter.

(c) *Site-specific resource information requirements.* Your application must include site-specific resource information if the proposed permit area or the adjacent area contains or is likely to contain one or more of the following—

(1) Species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or designated or proposed critical habitat under that law. When these circumstances exist, the site-specific resource information must include a description of the effects of future non-federal activities that are reasonably certain to occur within the proposed permit and adjacent areas.

(2) Species or habitat protected by state or tribal endangered species statutes and regulations.

(3) Habitat of unusually high value for fish and wildlife, which may include wetlands, riparian areas, cliffs that provide nesting sites for raptors, significant migration corridors, specialized reproduction or wintering areas, areas offering special shelter or protection, and areas that support populations of endemic species that are vulnerable because of restricted ranges, limited mobility, limited reproductive capacity, or specialized habitat requirements.

(4) Other species or habitat identified through interagency coordination as requiring special protection under state, tribal, or federal law, including species identified as sensitive by a state, tribal, or federal agency.

(5) Perennial or intermittent streams.

(6) Native plant communities of local or regional ecological significance.

§ 779.21 What information on soils must I include in my permit application?

Your permit application must include—

(a) The results of a reconnaissance inspection to determine whether the proposed permit area may contain prime farmland historically used for

cropland, as required by § 785.17(b)(1) of this chapter.

(b)(1) A map showing the soil mapping units located within the proposed permit area, if the National Cooperative Soil Survey has completed and published a soil survey of the area.

(2) The applicable soil survey information that the Natural Resources Conservation Service maintains for the soil mapping units identified in paragraph (b)(1) of this section. You may provide this information either in paper form or via a link to the appropriate element of the Natural Resources Conservation Service's soil survey Web site.

(c) A description of soil depths within the proposed permit area.

(d) Detailed information on soil quality, if you seek approval for the use of soil substitutes or supplements under § 780.12(e) of this chapter.

(e) The soil survey information required by § 785.17(b)(3) of this chapter if the reconnaissance inspection conducted under paragraph (a) of this section indicates that prime farmland historically used for cropland may be present.

(f) Any other information on soils that the regulatory authority finds necessary to determine land use capability.

§ 779.22 What information on land use and productivity must I include in my permit application?

Your permit application must contain a statement of the condition, capability, and productivity of the land within the proposed permit area, including—

(a)(1) A map and narrative identifying and describing the land use or uses in existence at the time of the filing of the application.

(2) A description of the historical uses of the land to the extent that this information is readily available or can be inferred from the uses of other lands in the vicinity.

(3) For any previously mined area within the proposed permit area, a description of the land uses in existence before any mining, to the extent that such information is available.

(b) A narrative analysis of—

(1) The capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover, and the hydrology of the proposed permit area; and

(2) The productivity of the proposed permit area before mining, expressed as average yield of food, fiber, forage, or wood products obtained under high levels of management, as determined by—

(i) Actual yield data; or

(ii) Yield estimates for similar sites based on current data from the U.S. Department of Agriculture, state agricultural universities, or appropriate state natural resources or agricultural agencies.

(c) Any additional information that the regulatory authority deems necessary to determine the condition, capability, and productivity of the land within the proposed permit area.

§ 779.24 What maps, plans, and cross-sections must I submit with my permit application?

(a) In addition to the maps, plans, and information required by other sections of this part, your permit application must include maps and, when appropriate, plans and cross-sections showing—

(1) All boundaries of lands and names of present owners of record of those lands, both surface and subsurface, included in or contiguous to the proposed permit area.

(2) The boundaries of land within the proposed permit area upon which you have the legal right to enter and begin surface mining activities.

(3) The boundaries of all areas that you anticipate affecting over the estimated total life of the surface mining activities, with a description of the size, sequence, and timing of the mining of subareas for which you anticipate seeking additional permits or expansion of an existing permit in the future.

(4) The location and current use of all buildings on the proposed permit area or within 1,000 feet of the proposed permit area.

(5) The location of surface and subsurface manmade features within, passing through, or passing over the proposed permit area, including, but not limited to, highways, electric transmission lines, pipelines, constructed drainageways, irrigation ditches, and agricultural drainage tile fields.

(6) The location and boundaries of any proposed reference areas for determining the success of revegetation.

(7) The location and ownership of existing wells, springs, and other groundwater resources within the proposed permit and adjacent areas. You may provide ownership information in a table cross-referenced to a map if approved by the regulatory authority.

(8) The location and depth (if available) of each water well within the proposed permit and adjacent areas. You may provide information concerning depth in a table cross-referenced to a map if approved by the regulatory authority.

(9) The name, location, ownership, and description of all surface-water bodies and features, such as perennial, intermittent, and ephemeral streams; ponds, lakes, and other impoundments; wetlands; and natural drainageways, within the proposed permit and adjacent areas. To the extent appropriate, you may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(10) The locations of water supply intakes for current users of surface water flowing into, from, and within a hydrologic area defined by the regulatory authority.

(11) The location of any public water supplies and the extent of any associated wellhead protection zones located within one-half mile, measured horizontally, of the proposed permit area. Both you and the regulatory authority must keep this information confidential when required by state law or when otherwise necessary for safety and security purposes and protection of the integrity of public water supplies.

(12) The location of all existing and proposed discharges to any surface-water body within the proposed permit and adjacent areas.

(13) The location of any discharge into or from an active, inactive, or abandoned surface or underground mine, including, but not limited to, a mine-water treatment or pumping facility, that is hydrologically connected to the site of the proposed operation or that is located within one-half mile, measured horizontally, of the proposed permit area.

(14) Each public road located in or within 100 feet of the proposed permit area.

(15) The boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas.

(16) Each cemetery that is located in or within 100 feet of the proposed permit area.

(17) Any land within the proposed permit area which is within the boundaries of any units of the National System of Trails or the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act.

(18) The elevations, locations, and geographic coordinates of test borings and core samplings. You may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(19) The location and extent of any subsurface water encountered within the proposed permit and adjacent areas. This information must include, but is not limited to, the elevation of the water table, the areal and vertical distribution of aquifers, and maximum and minimum variations in hydraulic head in different aquifers. You must provide this information on appropriately-scaled cross-sections or maps, in a narrative, or a combination of these methods, whichever format best displays this information to the satisfaction of the regulatory authority.

(20) The elevations, locations, and geographic coordinates of monitoring stations used to gather data on water quality and quantity and on fish and wildlife in preparation of the application. You may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(21) The nature, depth, thickness, and commonly used names of the coal seams to be mined.

(22) Any coal crop lines within the permit and adjacent areas and the strike and dip of the coal to be mined.

(23) The location and extent of known workings of active, inactive, or abandoned underground mines within or underlying the proposed permit and adjacent areas.

(24) Any underground mine openings to the surface within the proposed permit and adjacent areas.

(25) The location and extent of existing or previously surface-mined areas within the proposed permit area.

(26) The location and dimensions of existing areas of spoil, coal mine waste, noncoal mine waste disposal sites, dams, embankments, other impoundments, and water treatment facilities within the proposed permit area.

(27) The location and, if available, the depth of all gas and oil wells within the proposed permit and adjacent areas. You must identify the lateral extent of the well bores unless that information is confidential under state law. You may provide information concerning well depth in a table cross-referenced to a map if approved by the regulatory authority.

(28) Other relevant information required by the regulatory authority.

(b) Maps, plans, and cross-sections required by paragraph (a) of this section must be—

(1) Prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or in any state that authorizes land surveyors to prepare and certify such maps, plans, and cross-sections, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(2) Updated when required by the regulatory authority.

(c) The regulatory authority may require that you submit the materials required by this section in a digital format that includes all necessary metadata.

§ 779.25 [Reserved]

■ 24. Revise part 780 to read as follows:

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR OPERATION AND RECLAMATION PLANS

Sec.

Authority: 30 U.S.C. 1201 *et seq.* and 54 U.S.C. 300101 *et seq.*

§ 780.1 What does this part do?

This part establishes the minimum requirements for the operation and reclamation plan portions of applications for a permit to conduct surface mining activities, except to the extent that part 785 of this subchapter establishes different requirements.

§ 780.2 What is the objective of this part?

The objective of this part is to ensure that you, the permit applicant, provide the regulatory authority with comprehensive and reliable information on how you propose to conduct surface mining activities and reclaim the disturbed area in compliance with the Act, this chapter, and the regulatory program.

§ 780.4 What responsibilities do I and government agencies have under this part?

(a) You, the permit applicant, must provide to the regulatory authority all information required by this part, except where specifically exempted in this part.

(b) State and federal governmental agencies must provide information needed for permit applications to the extent that this part specifically requires that they do so.

§ 780.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–0036. Sections 507 and 508 of SMCRA contain permit application requirements for surface coal mining activities, including a requirement that the application include an operation and reclamation plan. The regulatory authority uses this information to determine whether the proposed surface coal mining operation will achieve the environmental protection requirements of the Act and regulatory program. You, the permit applicant, must respond to

obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 203–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

§ 780.11 What must I include in the description of my proposed operations?

Your application must contain a description of the mining operations that you propose to conduct during the life of the mine within the proposed permit area, including, at a minimum, the following:

(a) A narrative description of the—

(1) Type and method of coal mining procedures and proposed engineering techniques.

(2) Anticipated annual and total number of tons of coal to be produced.

(3) Major equipment to be used for all aspects of the proposed operations.

(b) A narrative explaining the construction, modification, use, maintenance, and removal (unless you can satisfactorily explain why retention is necessary or appropriate for the postmining land use specified in the application under § 780.24 of this part) of the following facilities:

(1) Dams, embankments, and other impoundments.

(2) Overburden and soil handling and storage areas and structures.

(3) Coal removal, handling, storage, cleaning, and transportation areas and structures.

(4) Spoil, coal processing waste, and noncoal mine waste removal, handling, storage, transportation, and disposal areas and structures.

(5) Mine facilities.

(6) Water pollution control facilities.

§ 780.12 What must the reclamation plan include?

(a) *General requirements.* Your application must contain a plan for the reclamation of the lands to be disturbed within the proposed permit area. The plan must show how you will comply with the operation and reclamation requirements of the applicable regulatory program. At a minimum, the plan must include all information required under this part and part 785 of this chapter.

(b) *Reclamation timetable.* The reclamation plan must contain a detailed timetable for the completion of each major step in the reclamation process including, but not limited to—

(1) Backfilling.

(2) Grading.

(3) Establishment of the surface drainage pattern and stream-channel configuration approved in the permit, including construction of appropriately-designed perennial, intermittent, and ephemeral stream channels to replace those removed by mining, to the extent and in the form required by §§ 780.27, 780.28, 816.56, and 816.57 of this chapter.

(4) Soil redistribution.

(5) Planting of all vegetation in accordance with the revegetation plan approved in the permit, including establishment of streamside vegetative corridors along the banks of perennial, intermittent, and ephemeral streams when required by §§ 816.56(c) and 816.57(d) of this chapter.

(6) Demonstration of revegetation success.

(7) Demonstration of restoration of the ecological function of all reconstructed perennial and intermittent stream segments.

(8) Application for each phase of bond release under § 800.42 of this chapter.

(c) *Reclamation cost estimate.* The reclamation plan must contain a detailed estimate of the cost of reclamation, including both direct and indirect costs, of those elements of the proposed operations that are required to be covered by a performance bond under part 800 of this chapter, with supporting calculations for the estimates. You must use current standardized construction cost estimation methods and equipment cost guides or up-to-date actual contracting costs incurred by the regulatory authority for similar activities to prepare this estimate.

(d) *Backfilling and grading plan.* (1) The reclamation plan must contain a plan for backfilling the mined area, compacting the backfill, and grading the disturbed area, with contour maps, models, or cross-sections that show in detail the anticipated final surface configuration of the proposed permit area, including drainage patterns, in accordance with §§ 816.102 through 816.107 of this chapter, using the best technology currently available.

(2) The backfilling and grading plan must describe in detail how you will conduct backfilling and related reclamation activities, including how you will—

(i) Compact spoil to reduce infiltration to minimize leaching and discharges of parameters of concern.

(ii) Limit compaction of topsoil and soil materials in the root zone to the minimum necessary to achieve stability. The plan also must identify measures that will be used to alleviate soil compaction if necessary.

(iii) Handle acid-forming and toxic-forming materials, if present, to prevent the formation of acid or toxic drainage from acid-forming and toxic-forming materials within the overburden. The plan must be consistent with paragraph (n) of this section and § 816.38 of this chapter.

(e) *Soil handling plan.*—(1) *General requirements.* (i) The reclamation plan must include a plan and schedule for removal, storage, and redistribution of topsoil, subsoil, and other material to be used as a final growing medium in accordance with § 816.22 of this chapter. It also must include a plan and schedule for removal, storage, and redistribution or other use of organic matter in accordance with § 816.22(f) of this chapter.

(ii) Except as provided in paragraphs (e)(1)(iii) and (iv) of this section, the plan submitted under paragraph (e)(1)(i) of this section must require that the B soil horizon, the C soil horizon, and other underlying strata, or portions of those soil horizons and strata, be removed separately, stockpiled if necessary, and redistributed to the extent and in the manner needed to achieve the optimal rooting depths required to restore premining land use capability and to comply with the revegetation requirements of §§ 816.111 and 816.116 of this chapter.

(iii) The plan submitted under paragraph (e)(1)(i) of this section need not require salvage of those soil horizons which you demonstrate, to the satisfaction of the regulatory authority, are inferior to other overburden materials as a plant growth medium, provided you comply with the soil substitute requirements of paragraph (e)(2) of this section.

(iv) The plan submitted under paragraph (e)(1)(i) of this section may allow blending of the B soil horizon, the C soil horizon, and underlying strata, or portions thereof, to the extent that research or prior experience under similar conditions has demonstrated that blending will not adversely affect soil productivity.

(v) The plan submitted under paragraph (e)(1)(i) of this section must explain how you will handle and, if necessary, store soil materials to avoid contamination by acid-forming or toxic-forming materials and to minimize deterioration of desirable soil characteristics.

(2) *Substitutes and supplements.* (i) You must identify each soil horizon for which you propose to use appropriate overburden materials as either a supplement to or a substitute for the existing topsoil or subsoil on the proposed permit area. For each of those horizons, you must demonstrate, and the regulatory authority must find in writing, that—

(A)(*1*) The quality of the existing topsoil and subsoil is inferior to that of the best overburden materials available; or

(*2*) The quantity of the existing topsoil and subsoil is insufficient to provide an optimal rooting depth. In this case, the plan must require that all available existing topsoil and favorable subsoil, regardless of the amount, be removed, stored, and redistributed as part of the final growing medium unless the conditions described in paragraph (e)(2)(i)(A)(*1*) of this section also apply.

(B) The use of the overburden materials that you have selected, in combination with or in place of the existing topsoil or subsoil, will result in a soil medium that is more suitable than the existing topsoil and subsoil to support and sustain vegetation consistent with the postmining land use and the revegetation plan under paragraph (g) of this section and that will provide a rooting depth that is superior to the existing topsoil and subsoil.

(C) The overburden materials that you select for use as a soil substitute or supplement are the best materials available to support and sustain vegetation consistent with the postmining land use and the revegetation plan under paragraph (g) of this section.

(ii) For purposes of paragraph (e)(2)(i) of this section, the regulatory authority will specify the—

(A) Suitability criteria for substitutes and supplements.

(B) Chemical and physical analyses, field trials, or greenhouse tests that you must conduct to make the demonstration required by paragraph (e)(2)(i) of this section.

(C) Sampling objectives and techniques and the analytical techniques that you must use for purposes of paragraph (e)(2)(ii)(B) of this section.

(iii) At a minimum, the demonstrations required by paragraph (e)(2)(i) of this section must include—

(A) The physical and chemical soil characteristics and root zones needed to support and sustain the type of vegetation to be established on the reclaimed area.

(B) A comparison and analysis of the thickness, total depth, texture, percent coarse fragments, pH, and areal extent of the different kinds of soil horizons and overburden materials available within the proposed permit area, based upon a statistically-valid sampling procedure.

(iv) You must include a plan for testing and evaluating overburden materials during both removal and redistribution to ensure that only materials approved for use as soil substitutes or supplements are removed and redistributed.

(f) *Surface stabilization plan.* The reclamation plan must contain a plan for stabilizing road surfaces, redistributed soil materials, and other exposed surface areas to effectively control erosion and air pollution attendant to erosion in accordance with §§ 816.95, 816.150, and 816.151 of this chapter.

(g) *Revegetation plan.* (1) The reclamation plan must contain a plan for revegetation consistent with §§ 816.111 through 816.116 of this chapter, including, but not limited to, descriptions of—

(i) The schedule for revegetation of the area to be disturbed.

(ii) The site preparation techniques that you plan to use, including the measures that you will take to avoid or, when avoidance is not possible, to minimize and alleviate compaction of the root zone during backfilling, grading, soil redistribution, and planting.

(iii) What soil tests you will perform, together with a statement as to whether you will apply lime, fertilizer, or other amendments in response to those tests before planting or seeding.

(iv) The species that you will plant to achieve temporary erosion control or, if you do not intend to establish a temporary vegetative cover, a description of other soil stabilization measures that you will implement in lieu of planting a temporary cover.

(v) The species that you will plant and the seeding and stocking rates and planting arrangements that you will use to achieve or complement the postmining land use, enhance fish and wildlife habitat, and achieve the streamside vegetative corridor requirements of §§ 816.56(c) and 816.57(d) of this chapter, when applicable.

(A) Revegetation plans that involve the establishment of trees and shrubs must include site-specific planting prescriptions for canopy trees, understory trees and shrubs, and herbaceous ground cover compatible with establishment of trees and shrubs.

(B) To the extent practicable and consistent with other revegetation and regulatory program requirements, the species mix must include native pollinator-friendly plants and the planting arrangements must promote the establishment of pollinator-friendly habitat.

(vi) The planting and seeding techniques that you will use.

(vii) Whether you will apply mulch and, if so, the type of mulch and the method of application.

(viii) Whether you plan to conduct irrigation or apply fertilizer after the first growing season and, if so, to what extent and for what length of time.

(ix) Any normal husbandry practices that you plan to use in accordance with § 816.115(d) of this chapter.

(x) The standards and evaluation techniques that you propose to use to determine the success of revegetation in accordance with § 816.116 of this chapter.

(xi) The measures that you will take to avoid the establishment of invasive species on reclaimed areas or to control those species if they do become established.

(2) Except as provided in paragraphs (g)(4) and (5) of this section, the species and planting rates and arrangements selected as part of the revegetation plan must be designed to create a diverse, effective, permanent vegetative cover that is consistent with the native plant communities and natural succession process described in the permit application in accordance with § 779.19 of this chapter.

(3) The species selected as part of the revegetation plan must—

(i) Be native to the area. The regulatory authority may approve the use of introduced species as part of the permanent vegetative cover for the site only if—

(A) The introduced species are both non-invasive and necessary to achieve the postmining land use;

(B) Planting of native species would be inconsistent with the approved postmining land use; and

(C) The approved postmining land use is implemented before the entire bond amount for the area has been fully released under §§ 800.40 through 800.43 of this chapter.

(ii) Be capable of stabilizing the soil surface from erosion to the extent that control of erosion with herbaceous ground cover is consistent with establishment of a permanent vegetative cover that resembles native plant communities in the area.

(iii) Be compatible with the approved postmining land use.

(iv) Have the same seasonal characteristics of growth, consistent with the appropriate stage of natural succession, as the native plant communities described in the permit application in accordance with § 779.19 of this chapter.

(v) Be capable of self-regeneration and natural succession.

(vi) Be compatible with the plant and animal species of the area.

(vii) Meet the requirements of applicable state and federal seed, noxious plant, and introduced species laws and regulations.

(4) The regulatory authority may grant an exception to the requirements of paragraphs (g)(3)(i), (iv), and (v) of this section when necessary to achieve a quick-growing, temporary, stabilizing cover on disturbed and regraded areas, and the species selected to achieve this purpose will not impede the establishment of permanent vegetation.

(5) The regulatory authority may grant an exception to the requirements of paragraphs (g)(2), (g)(3)(iv), and (g)(3)(v) of this section for those areas with a long-term, intensive, agricultural postmining land use.

(6) A qualified, experienced biologist, soil scientist, forester, or agronomist must prepare or approve all revegetation plans.

(h) *Stream protection and reconstruction plan.* The reclamation plan must describe how you will comply with the stream reconstruction requirements of §§ 780.27 and 816.56 of this chapter for ephemeral streams and the stream protection, stream reconstruction, and functional restoration requirements of §§ 780.28 and 816.57 of this chapter for perennial and intermittent streams.

(i) *Coal resource conservation plan.* The reclamation plan must describe the measures that you will employ to maximize the use and conservation of the coal resource while using the best technology currently available to maintain environmental integrity, as required by § 816.59 of this chapter.

(j) *Plan for disposal of noncoal waste materials.* The reclamation plan must describe—

(1) The type and quantity of noncoal waste materials that you anticipate disposing of within the proposed permit area.

(2) How you intend to dispose of noncoal waste materials in accordance with § 816.89 of this chapter.

(3) The locations of any proposed noncoal waste material disposal sites within the proposed permit area.

(4) The contingency plans that you have developed to preclude sustained combustion of combustible noncoal materials.

(k) *Management of mine openings, boreholes, and wells.* The reclamation plan must contain a description, including appropriate cross-sections and maps, of the measures that you will use to seal or manage mine openings, and to plug, case or manage exploration holes, boreholes, wells and other openings within the proposed permit area, in accordance with § 816.13 of this chapter.

(l) *Compliance with Clean Air Act and Clean Water Act.* The reclamation plan must describe the steps that you have taken or will take to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable air and water quality laws and regulations and health and safety standards.

(m) *Consistency with land use plans and surface owner plans.* The reclamation plan must describe how the proposed operation is consistent with—

(1) All applicable state and local land use plans and programs.

(2) The plans of the surface landowner, to the extent that those plans are practicable and consistent with this chapter and with other applicable laws and regulations.

(n) *Handling of acid-forming and toxic-forming materials.* (1) If the baseline geologic information collected under § 780.19(e)(3) of this part indicates the presence of acid-forming or toxic-forming materials in any stratum above the lowest coal seam to be mined, you must develop a plan to prevent any adverse hydrologic impacts that may result from exposure and fracturing of that stratum during the mining process and demonstrate how you will handle the materials to protect groundwater and surface water. At a minimum the plan must—

(i) Identify the anticipated postmining groundwater level for all locations within the mined-out area at which you propose to place acid-forming or toxic-forming materials within the backfill.

(ii) Explain how you will use one of the techniques in paragraphs (n)(1)(ii)(A) through (C) of this section when placing those materials in the backfill, as appropriate and as approved by the regulatory authority, to prevent the formation of acid or toxic mine drainage or other discharges that would require long-term treatment after mining has been completed:

(A) Treat or otherwise neutralize acid-forming and toxic-forming materials to prevent the formation of acid or toxic mine drainage. This technique may include the blending of acid-forming materials with spoil of sufficient alkalinity to prevent the development of acid drainage.

(B) Place acid-forming and toxic-forming materials in a location below the water table where they will remain fully saturated at all times, provided that you demonstrate, and the regulatory authority finds in writing in the permit, that complete saturation will prevent the formation of acid or toxic mine drainage.

(C) Isolate acid-forming and toxic-forming materials by completely surrounding them with compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent spoil.

(2) The plan developed under paragraph (n)(1) of this section may allow the placement of acid-forming and toxic-forming materials in an excess spoil fill or a coal mine waste refuse pile, using one or more of the techniques identified in paragraphs (n)(1)(ii)(A) through (C) of this section.

(3) If the baseline geologic information collected under § 780.19(e)(3) of this chapter indicates the presence of acid-forming or toxic-forming material in the stratum immediately below the lowest coal seam to be mined, you must identify the measures that you will take to prevent any adverse hydrologic impacts that might develop as a result of exposure of that stratum during the mining process.

§ 780.13 What additional maps and plans must I include in the reclamation plan?

(a) In addition to the maps and plans required under § 779.24 and other provisions of this subchapter, your application must include maps, plans, and cross-sections of the proposed permit area showing—

(1) The lands that you propose to affect throughout the life of the operation, including the sequence and timing of surface mining activities and the sequence and timing of backfilling, grading, and other reclamation activities on areas where the operation will disturb the land surface.

(2) Each area of land for which a performance bond or equivalent guarantee will be posted under part 800 of this chapter.

(3) Any change that the proposed operations will cause in a facility or feature identified under § 779.24 of this chapter.

(4) All buildings, utility corridors, and facilities to be used or constructed within the proposed permit area, with identification of those facilities that you propose to retain as part of the postmining land use.

(5) Each coal storage, cleaning, processing, and loading area and facility.

(6) Each temporary storage area for soil, spoil, coal mine waste, and noncoal mine waste.

(7) Each water diversion, collection, conveyance, treatment, storage and discharge facility to be used, including the location of each point at which water will be discharged from the proposed permit area to a surface-water body and the name of that water body.

(8) Each disposal facility for coal mine waste and noncoal mine waste materials.

(9) Each feature and facility to be constructed to protect or enhance fish, wildlife, and related environmental values.

(10) Each explosive storage and handling facility.

(11) The location of each siltation structure, sedimentation pond, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 780.25 of this part, and the location of each excess spoil fill for which plans are required under § 780.35 of this part.

(12) Each segment of a perennial or intermittent stream that you propose to mine through, bury, or divert.

(13) Each location in which you propose to restore a perennial or intermittent stream or construct a temporary or permanent diversion of a perennial or intermittent stream.

(14) Each streamside vegetative corridor that you propose to establish.

(15) Each segment of a perennial or intermittent stream that you propose to enhance under the plan submitted in accordance with § 780.16 of this part.

(16) The location and geographic coordinates of each monitoring point for groundwater and surface water.

(17) The location and geographic coordinates of each point at which you propose to monitor the biological condition of perennial and intermittent streams.

(b) Except as provided in §§ 780.25(a)(2), 780.25(a)(3), 780.35, 816.74(c), and 816.81(c) of this chapter, maps, plans, and cross-sections required under paragraphs (a)(5), (6), (7), (10), and (11) of this section must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify maps, plans, and cross-sections, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(c) The regulatory authority may require that you submit the materials required by paragraph (a) of this section in a digital format.

§ 780.14 What requirements apply to the use of existing structures?

(a) Each application must contain a description of every existing structure that you propose to use in connection with or to facilitate surface coal mining and reclamation operations. The description must include—

(1) The location of the structure.

(2) Plans of the structure.

(3) A description of the current condition of the structure.

(4) The approximate dates when the structure was originally built.

(5) A showing, including relevant monitoring data or other evidence, of whether the structure meets the permanent program performance standards of subchapter K of this chapter or, if the structure does not meet the performance standards of subchapter K of this chapter, a showing of whether the structure meets the initial program performance standards of subchapter B of this chapter.

(b) Each application must contain a compliance plan for every existing structure that you propose to modify or reconstruct for use in connection with or to facilitate surface coal mining and reclamation operations. The compliance plan must include—

(1) Design specifications for the modification or reconstruction of the structure to meet the design and performance standards of subchapter K of this chapter.

(2) A schedule for the initiation and completion of any modification or reconstruction under paragraph (b)(1) of this section.

(3) Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of subchapter K of this chapter are met.

(4) A demonstration that there is no significant risk of harm to the environment or to public health or safety during modification or reconstruction of the structure.

§ 780.15 What plans for the use of explosives must I include in my application?

(a) *Blasting plan.* Each application must contain a blasting plan for the proposed permit area, explaining how you will comply with the requirements of §§ 816.61 through 816.68 of this chapter. This plan must include, at a minimum, information setting forth the limitations on ground vibration and airblast, the bases for those limitations, and the methods to be applied in controlling the adverse effects of blasting operations.

(b) *Monitoring system.* Each application must contain a description of any system to be used to monitor compliance with the standards of § 816.67 including the type, capability, and sensitivity of any blast-monitoring equipment and proposed procedures and locations of monitoring.

(c) *Blasting near underground mines.* Blasting operations within 500 feet of active underground mines require approval of the state and federal regulatory authorities concerned with the health and safety of underground miners.

§ 780.16 What must I include in the fish and wildlife protection and enhancement plan?

(a) *General requirements.* Your application must include a fish and wildlife protection and enhancement plan that—

(1) Is consistent with the requirements of § 816.97 of this chapter.

(2) Is specific to the resources identified under § 779.20 of this chapter.

(3) Complies with the requirements of paragraphs (b) through (f) of this section.

(b) *Requirements related to the Endangered Species Act of 1973.* (1) Paragraphs (b)(2) and (3) of this section apply when the proposed operation may affect species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or designated or proposed critical habitat under that law.

(2) You must describe the steps that you have taken or will take to comply with the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* including any biological opinions developed under section 7 of that law and any species-specific habitat conservation plans developed in accordance with section 10 of that law.

(3) The regulatory authority may not approve the permit application before there is a demonstration of compliance with the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* through one of the mechanisms listed in § 773.15(j) of this chapter.

(c) *Protection of fish, wildlife, and related environmental values in general.* You must describe how, to the extent possible using the best technology currently available, you will minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. At a minimum, you must explain how you will—

(1) Retain forest cover and other native vegetation as long as possible and time the removal of that vegetation to minimize adverse impacts on aquatic and terrestrial species.

(2) Locate and design sedimentation ponds, utilities, support facilities, roads, rail spurs, and other transportation facilities to avoid or minimize adverse impacts on fish, wildlife, and related environmental values.

(3) Except as provided under § 780.12(g)(4) of this part, select non-invasive native species for revegetation that either promote or do not inhibit the long-term development of wildlife habitat.

(4)(i) Avoid mining through wetlands or perennial or intermittent streams or disturbing riparian habitat adjacent to those streams. When avoidance is not possible, minimize—

(A) The time during which mining and reclamation operations disrupt wetlands or streams or riparian habitat associated with streams;

(B) The length of stream mined through; and

(C) The amount of wetlands or riparian habitat disturbed by the operation.

(ii) If you propose to mine through or discharge dredged or fill material into wetlands or streams that are subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* your application must identify the authorizations, certifications, and permits that you anticipate will be needed under the Clean Water Act and describe the steps that you have taken or will take to procure those authorizations, certifications, and permits. The regulatory authority will process your application and may issue the permit before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.,* provided your application meets all applicable requirements of subchapter G of this chapter. Issuance of a permit under subchapter G of this chapter does not authorize you to conduct any surface mining activity in or affecting waters subject to the jurisdiction of the Clean Water Act before you obtain any required Clean Water Act authorization, certification, or permit. Information submitted and analyses conducted under subchapter G of this chapter may inform the agency responsible for authorizations, certifications, and permits under the Clean Water Act, but they are not a substitute for the reviews, authorizations, certifications, and permits required under the Clean Water Act.

(5) Implement other appropriate conservation practices such as, but not limited to, those identified in the technical guides published by the Natural Resources Conservation Service.

(d) *Enhancement measures.*—(1) *General requirements.* (i) You must describe how, to the extent possible, you will use the best technology currently available to enhance fish, wildlife, and related environmental values both within and outside the area to be disturbed by mining activities, where practicable. Your application must identify the enhancement measures that you propose to implement and the lands upon which you propose to implement those measures. Those measures may include some or all the potential enhancement measures listed in paragraph (d)(2) of this section, but they are not limited to the measures listed in paragraph (d)(2) of this section.

(ii) If your application includes no proposed enhancement measures under paragraph (d)(1)(i) of this section, you must explain, to the satisfaction of the regulatory authority, why implementation of enhancement measures is not practicable.

(2) *Potential enhancement measures.* Potential enhancement measures include, but are not limited to—

(i) Using the backfilling and grading process to create postmining surface features and configurations, such as functional wetlands, of high value to fish and wildlife.

(ii) Designing and constructing permanent impoundments in a manner that will maximize their value to fish and wildlife.

(iii) Creating rock piles and other permanent landscape features of value to raptors and other wildlife for nesting and shelter, to the extent that those features are consistent with features that existed on the site before any mining, the surrounding topography, and the approved postmining land use.

(iv) Reestablishing native forests or other native plant communities, both within and outside the permit area. This may include restoring the native plant communities that existed before any mining, establishing native plant communities consistent with the native plant communities that are a part of the natural succession process, establishing native plant communities designed to restore or expand native pollinator populations and habitats, or establishing native plant communities that will support wildlife species of local, state, tribal, or national concern, including, but not limited to, species listed or proposed for listing as threatened or endangered on a state, tribal, or national level.

(v) Establishing a vegetative corridor along the banks of streams where there is no such corridor before mining but where a vegetative corridor typically would exist under natural conditions. Species selected for planting within the corridor must be comprised of species native to the area, including native plants adapted to and suitable for planting in any floodplains or other riparian zones located within the corridor. Whenever possible, you should establish this corridor along both banks of the stream, preferably with a minimum corridor width of 100 feet along each bank.

(vi) Implementing conservation practices identified in publications, such as the technical guides published by the Natural Resources Conservation Service.

(vii) Permanently fencing livestock away from perennial and intermittent streams and wetlands.

(viii) Installing perches and nest boxes.

(ix) Establishing conservation easements or deed restrictions, with an emphasis on preserving riparian vegetation and forested corridors along perennial and intermittent streams.

(x) Providing funding to cover long-term operation and maintenance costs that watershed organizations incur in treating long-term postmining discharges from previous mining operations.

(xi) Reclaiming previously mined areas located outside the area that you propose to disturb for coal extraction.

(xii) Implementing measures to reduce or eliminate existing sources of surface-water or groundwater pollution.

(3) *Additional enhancement requirements for operations with anticipated long-term adverse impacts.* (i) The exception in paragraph (d)(1)(ii) of this section does not apply if your proposed surface mining activities would result in the—

(A) Temporary or permanent loss of mature native forest or other native plant communities that cannot be restored fully before final bond release under §§ 800.40 through 800.43 of this chapter or

(B) Permanent loss of wetlands or a segment of a perennial or intermittent stream.

(ii) Whenever the conditions described in paragraph (d)(3)(i) of this section apply, the scope of the enhancement measures that you propose under paragraph (d)(1)(i) of this section must be commensurate with the magnitude of the long-term adverse impacts of the proposed operation.

Whenever possible, the measures must be permanent.

(iii)(A) Enhancement measures proposed under paragraph (d)(3)(ii) of this section must be implemented within the watershed in which the proposed operation is located, unless opportunities for enhancement are not available within that watershed. In that case, you must propose to implement enhancement measures in the closest adjacent watershed in which enhancement opportunities exist, as approved by the regulatory authority.

(B) Each regulatory program must prescribe the size of the watershed for purposes of paragraph (d)(3)(iii)(A) of this section, using a generally-accepted watershed classification system.

(4) *Inclusion within permit area.* If the enhancement measures to be implemented under paragraphs (d)(1) through (d)(3) of this section would involve more than a de minimis disturbance of the surface of land outside the area to be mined, you must include the land to be disturbed by those measures within the proposed permit area.

(e) *Fish and Wildlife Service or National Marine Fisheries Service review.* (1)(i) The regulatory authority must provide the protection and enhancement plan developed under this section and the resource information submitted under § 779.20 of this chapter to the appropriate regional or field office of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as applicable, whenever the resource information submitted under § 779.20 of this chapter includes species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* designated or proposed critical habitat under that law, or species proposed for listing as threatened or endangered under that law. The regulatory authority must provide the resource information and the protection and enhancement plan to the appropriate Service(s) no later than the time that it provides written notice of the permit application to governmental agencies under § 773.6(a)(3)(ii) of this chapter.

(ii)(A) When the resource information obtained under § 779.20 of this chapter does not include species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* designated or proposed critical habitat under that law, or species proposed for listing as threatened or endangered under that law, the regulatory authority must provide the resource information and the protection and enhancement plan to the appropriate regional or field office of the U.S. Fish and Wildlife Service only if the Service requests an opportunity to review and comment on the resource information and the protection and enhancement plan.

(B) The regulatory authority must provide the resource information and the protection and enhancement plan to the Service under paragraph (e)(1)(ii)(A) of this section within 10 days of receipt of a request from the Service to review the resource information and the protection and enhancement plan.

(2) The regulatory authority must document the disposition of comments that it receives from the applicable Service(s) in response to the distribution made under paragraph (e)(1)(i) of this section to the extent that those comments pertain to species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* to designated or proposed critical habitat under that law, or to species proposed for listing as threatened or endangered under that law.

§ 780.17 [Reserved]

§ 780.18 [Reserved]

§ 780.19 What baseline information on hydrology, geology, and aquatic biology must I provide?

(a)(1) *General requirements.* Your permit application must include information on the hydrology, geology, and aquatic biology of the proposed permit area and the adjacent area in sufficient detail to assist in—

(i) Determining the probable hydrologic consequences of the operation upon the quality and quantity of surface water and groundwater in the proposed permit and adjacent areas, as required under § 780.20 of this part.

(ii) Determining the nature and extent of both the hydrologic reclamation plan required under § 780.22 of this part and the monitoring plans required under § 780.23 of this part.

(iii) Determining whether reclamation as required by this chapter can be accomplished.

(iv) Preparing the cumulative hydrologic impact assessment under § 780.21 of this part, including an evaluation of whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(2) *Core baseline water-quality data requirements for surface water and groundwater.* You must provide the following water-quality information for each groundwater and surface-water sample collected for baseline data purposes.

Parameter	Surface water	Groundwater
pH	Yes	Yes.
Specific conductance corrected to 25°C (conductivity)	Yes	Yes.
Total dissolved solids	Yes	Yes.
Total suspended solids	Yes	No.
Hot acidity	Yes	Yes.
Total alkalinity	Yes	Yes.
Major anions (dissolved), including, at a minimum, bicarbonate, sulfate, and chloride	Yes	Yes.
Major anions (total), including, at a minimum, bicarbonate, sulfate, and chloride	Yes	No.
Major cations (dissolved), including, at a minimum, calcium, magnesium, sodium, and potassium	Yes	Yes.
Major cations (total), including, at a minimum, calcium, magnesium, sodium, and potassium	Yes	No.
Cation-anion balance of dissolved major cations and dissolved major anions	Yes	Yes.
Any cation or anion that constitutes a significant percentage of the total ionic charge balance, but that was not included in the analyses of major anions and major cations.	Yes	Yes.
Iron (dissolved)	Yes	Yes.
Iron (total)	Yes	No.
Manganese (dissolved)	Yes	Yes.
Manganese (total)	Yes	No.
Selenium (dissolved)	Yes	Yes.
Selenium (total)	Yes	No.
Any other parameter identified in any applicable National Pollutant Discharge Elimination System permit, if known at the time of application for the SMCRA permit.	Yes	No.
Temperature	Yes	Yes.

(b) *Groundwater information*—(1) *General requirements.* Your permit application must include information sufficient to document seasonal variations in the quality, quantity, and usage of groundwater, including all surface discharges, within the proposed permit and adjacent areas.

(2) *Underground mine pools.* If an underground mine pool is present within the proposed permit or adjacent areas, you must prepare an assessment of the characteristics of the mine pool, including seasonal changes in quality, quantity, and flow patterns, unless you demonstrate, and the regulatory authority finds, that the mine pool is not hydrologically connected to the proposed permit area. The determination of the probable hydrologic consequences of mining required under § 780.20 of this part also must include a discussion of the effect of the proposed mining operation on any underground mine pools within the proposed permit and adjacent areas.

(3) *Monitoring wells.* The regulatory authority must require the installation of properly-screened monitoring wells to document seasonal variations in the quality, quantity, and usage of groundwater.

(4) *Groundwater quality descriptions.* Groundwater quality descriptions must include baseline information on the parameters identified in paragraph (a)(2) of this section and any additional parameters that the regulatory authority determines to be of local importance.

(5) *Groundwater quantity descriptions.* At a minimum, groundwater quantity descriptions must include baseline data documenting seasonal variations in—

(i) The areal extent and saturated thickness of all potentially-impacted aquifers; and

(ii) Approximate rates of groundwater discharge or usage and the elevation of the water table or potentiometric head in—

(A) Each water-bearing coal seam to be mined.

(B) Each aquifer above each coal seam to be mined.

(C) Each potentially-impacted aquifer below the lowest coal seam to be mined.

(6) *Groundwater sampling requirements.* (i) You must establish monitoring wells or equivalent monitoring points at a sufficient number of locations within the proposed permit and adjacent areas to determine groundwater quality, quantity, and movement in each aquifer above or immediately below the lowest coal seam to be mined. At a minimum, for each aquifer, you must locate monitoring points—

(A) Upgradient and downgradient of the proposed permit area; and

(B) Within the proposed permit area.

(ii)(A) To document seasonal variations in groundwater quality and quantity, you must collect samples and take the measurements identified in paragraph (b)(5) of this section from each location identified in paragraph (b)(6)(i) of this section at approximately equally-spaced monthly intervals for a minimum of 12 consecutive months.

(B) If approved by the regulatory authority, you may modify the interval or the 12-consecutive-month requirement specified in paragraph (b)(6)(ii)(A) of this section if adverse weather conditions make travel to a location specified in paragraph (b)(6)(i) of this section hazardous or if the water at that location is completely frozen.

(C) In lieu of the frequency specified in paragraph (b)(6)(ii)(A) of this section, the regulatory authority may allow you to collect data quarterly for 2 years. The regulatory authority may initiate review of the permit application after collection and analysis of the first four quarterly groundwater samples, but it may not approve the application until after receipt and analysis of the final four quarterly groundwater samples.

(D) You must analyze the samples collected in paragraph (b)(6)(ii)(A) of this section for the applicable water quality parameters identified in paragraph (a)(2) of this section and any other parameters specified by the regulatory authority.

(iii) You must provide the Palmer Drought Severity Index for the proposed permit and adjacent areas for the initial baseline data collection period under paragraph (b)(6)(ii) of this section. The regulatory authority may extend the minimum data collection period specified in paragraph (b)(6)(ii) of this section whenever data available from the National Oceanic and Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought or abnormally high precipitation during the initial baseline data collection period.

(c) *Surface-water information.*—(1) *General requirements.* Your permit application must include information sufficient to document seasonal variation in surface-water quality, quantity, and usage within the proposed permit and adjacent areas.

(2) *Surface-water quality descriptions.* Surface-water quality descriptions must include baseline information on the parameters identified in paragraph (a)(2) of this section and any additional parameters that the regulatory authority determines to be of local importance.

(3) *Surface-water quantity descriptions.* (i) At a minimum, surface-water quantity descriptions for perennial and intermittent streams within the proposed permit and adjacent areas must include baseline data documenting—

(A) Peak-flow magnitude and frequency.

(B) Actual and anticipated usage.

(C) Seasonal flow variations.

(ii) All flow measurements under paragraph (c)(3)(i) of this section must be made using generally-accepted professional techniques approved by the regulatory authority. All techniques must be repeatable and must produce consistent results on successive measurements. Visual observations are not acceptable.

(4) *Surface-water sampling requirements.* (i) You must establish monitoring points at a sufficient number of locations within the proposed permit and adjacent areas to determine the quality and quantity of water in perennial and intermittent streams within those areas. At a minimum, you must locate monitoring points upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas.

(ii)(A) To document seasonal variations in surface-water quality and quantity, you must collect samples and take the measurements identified in paragraph (c)(3) of this section from each location identified in paragraph (c)(4)(i) of this section at approximately equally-spaced monthly intervals for a minimum of 12 consecutive months.

(B) If approved by the regulatory authority, you may modify the interval or the 12-consecutive-month sampling requirement specified in paragraph (c)(4)(ii)(A) of this section if adverse weather conditions make travel to a location specified in paragraph (c)(4)(i) of this section hazardous or if the water at that location is completely frozen.

(C) You must analyze the samples collected under paragraph (c)(4)(ii)(A) of this section for the applicable parameters identified in paragraph (a)(2) of this section and any other parameters specified by the regulatory authority.(iii) You must provide the Palmer Drought Severity Index for the proposed permit and adjacent areas for the initial baseline data collection period under paragraph (c)(4)(ii) of this section. The regulatory authority may extend the minimum data collection period specified in paragraphs (c)(4)(ii) and (iii) of this section whenever data available from the National Oceanic and

Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought or abnormally high precipitation during the initial baseline data collection period.

(5) *Precipitation measurements.* (i) You must provide records of precipitation amounts for the proposed permit area, using on-site, self-recording devices.

(ii) Precipitation records must be adequate to generate and calibrate a hydrologic model of the site. The regulatory authority will determine whether you must create such a model.

(iii) At the discretion of the regulatory authority, you may use precipitation data from a single self-recording device to provide baseline data for multiple permits located close to each other.

(6) *Stream assessments.* (i)(A) You must map and separately identify all perennial, intermittent, and ephemeral streams within the proposed permit area and all perennial and intermittent streams within the adjacent area.

(B) The map must show the location of the channel head of each stream identified in paragraph (c)(6)(i)(A) of this section whenever the applicable area includes a terminal reach of the stream.

(C) The map must show the location of transition points from ephemeral to intermittent and from intermittent to perennial (and vice versa, when applicable) for each stream identified in paragraph (c)(6)(i)(A) of this section whenever the applicable area includes such a transition point. If the U.S. Army Corps of Engineers has determined the location of a transition point, your application must be consistent with that determination.

(ii)(A) For all perennial and intermittent streams within the proposed permit area, you must describe the baseline stream pattern, profile, and dimensions, with measurements of channel slope, sinuosity, water depth, alluvial groundwater depth, depth to bedrock, bankfull depth, bankfull width, width of the flood-prone area, and dominant in-stream substrate at a scale and frequency adequate to characterize the entire length of the stream within the proposed permit area.

(B) You must describe the general stream-channel configuration of ephemeral streams within the proposed permit area.

(iii) For all perennial, intermittent, and ephemeral streams within the proposed permit area, you must describe the vegetation growing along the banks of each stream, including—

(A) Identification of any hydrophytic vegetation located within or adjacent to the stream channel.

(B) The extent to which streamside vegetation consists of trees and shrubs.

(C) The percentage of channel canopy coverage.

(D) A scientific calculation of the species diversity of the vegetation.

(iv) You must identify all stream segments within the proposed permit and adjacent areas that appear on the list of impaired surface waters prepared under section 303(d) of the Clean Water Act, 33 U.S.C. 1313(d). You must identify the parameters responsible for the impaired condition and the total maximum daily loads associated with those parameters, when applicable.

(v) For all perennial, intermittent, and ephemeral streams within the proposed permit area and for all perennial and intermittent streams within the adjacent area, you must identify the extent of wetlands adjoining the stream and describe the quality of those wetlands.

(vi) Except as provided in paragraph (g) of this section, you must provide an assessment of the biological condition of—

(A) Each perennial stream within the proposed permit area.

(B) Each perennial stream within the adjacent area that could be affected by the proposed operation.

(C) Each intermittent stream within the proposed permit area, if a scientifically defensible protocol has been established for assessment of intermittent streams in the state or region in which the stream is located.

(D) Each intermittent stream within the adjacent area that could be affected by the proposed operation, if a scientifically defensible protocol has been established for assessment of intermittent streams in the state or region in which the stream is located.

(vii) When determining the biological condition of a stream under paragraph (c)(6)(vi) of this section, you must adhere to a bioassessment protocol approved by the state or tribal agency responsible for preparing the water quality inventory required under section 305(b) of the Clean Water Act, 33 U.S.C. 1315(b), or to other scientifically defensible bioassessment protocols accepted by agencies responsible for implementing the Clean Water Act, 33 U.S.C. 1251 *et seq.,* modified as necessary to meet the following requirements. The protocol must—

(A) Be based upon the measurement of an appropriate array of aquatic organisms, including, at a minimum, benthic macroinvertebrates, identified to the genus level where possible, otherwise to the lowest practical taxonomic level.

(B) Result in the calculation of index values for both stream habitat and aquatic biota based on the reference condition.

(C) Provide index values that correspond to the capability of the stream to support its designated aquatic life uses under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(D) Include a quantitative assessment of in-stream and riparian habitat condition.

(E) Describe the technical elements of the bioassessment protocol, including but not limited to sampling methods, sampling gear, index period, sample processing and analysis, and quality assessment/quality control procedures.

(viii) Except as provided in paragraph (g) of this section, you must describe the biology of each intermittent stream within the proposed permit area, and each intermittent stream within the adjacent area that could be affected by the proposed operation, whenever an assessment of the biological condition of those streams is not required under paragraph (c)(6)(vi) of this section. When obtaining the data needed to prepare this description, you must—

(A) Sample each stream using a scientifically defensible sampling method or protocol established or endorsed by an agency responsible for implementing the Clean Water Act, 33 U.S.C. 1251 *et seq.;*

(B) Identify benthic macroinvertebrates to the genus level where possible, otherwise to the lowest practical taxonomic level; and

(C) Describe the technical elements of the sampling protocol, including but not limited to sampling methods, sampling gear, index period, sample processing and analysis, and quality assessment/quality control procedures.

(d) *Additional information for discharges from previous coal mining operations.* If the proposed permit and adjacent areas contain any point-source discharges from previous surface or underground coal mining operations, you must sample those discharges during low-flow conditions of the receiving stream on a one-time basis. You must analyze the samples for the surface-water parameters identified in paragraph (a)(2) of this section and for both total and dissolved fractions of the following parameters—

(1) Aluminum.
(2) Arsenic.
(3) Barium.
(4) Beryllium.
(5) Cadmium.
(6) Copper.
(7) Lead.

(8) Mercury.
(9) Nickel.
(10) Silver.
(11) Thallium.
(12) Zinc.

(e) *Geologic information.* (1) Your application must include a description of the geology of the proposed permit and adjacent areas down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined that may be adversely impacted by mining. The description must include—

(i) The areal and structural geology of the proposed permit and adjacent areas.

(ii) Other parameters that may influence the required reclamation.

(iii) An explanation of how the areal and structural geology and other parameters affect the occurrence, availability, movement, quantity, and quality of potentially impacted surface water and groundwater.

(2) The description required by paragraph (e)(1) of this section must be based on all of the following—

(i) The cross-sections, maps, and plans required by § 779.24 of this chapter.

(ii) The information obtained under paragraphs (e)(3) and (4) of this section.

(iii) Geologic literature and practices.

(3) For any portion of the proposed permit area in which the strata down to the coal seam or seams to be mined will be removed or are already exposed, you must collect and analyze samples collected from test borings; drill cores; or fresh, unweathered, uncontaminated samples from rock outcrops, down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest seam to be mined that may be adversely impacted by mining. Your application must include the following data and analyses:

(i) Logs showing the lithologic characteristics, including physical properties and thickness of each stratum, and the location of any groundwater encountered.

(ii) Chemical analyses identifying those strata that may contain acid-forming materials, toxic-forming materials, or alkalinity-producing materials and the extent to which each stratum contains those materials.

(iii) Chemical analyses of all coal seams for acid-forming or toxic-forming materials, including, but not limited to, total sulfur and pyritic sulfur.

(4) You must provide any additional geologic information and analyses that the regulatory authority determines to be necessary to protect the hydrologic balance or to meet the performance standards of this chapter.

(5) You may request the regulatory authority to waive the requirements of paragraph (e)(3) of this section, in whole or in part. The regulatory authority may grant the waiver request only after finding in writing that the collection and analysis of such data is unnecessary because other representative information is available to the regulatory authority in a satisfactory form.

(f) *Cumulative impact area information.* (1) You must obtain the hydrologic, geologic, and biological information necessary to assess the impacts of both the proposed operation and all anticipated mining on surface-water and groundwater systems in the cumulative impact area, as required by § 780.21 of this part, from the appropriate federal or state agencies, to the extent that the information is available from those agencies.

(2) If the information identified as necessary in paragraph (f)(1) of this section is not available from other federal or state agencies, you may gather and submit this information to the regulatory authority as part of the permit application. As an alternative to collecting new information, you may submit data and analyses from nearby mining operations if the site of those operations is representative of the proposed operations in terms of topography, hydrology, geology, geochemistry, and method of mining.

(3) The regulatory authority may not approve the permit application until the information identified as necessary in paragraph (f)(1) of this section has been made available to the regulatory authority and the regulatory authority has used that information to prepare the cumulative hydrologic impact assessment required by § 780.21 of this part.

(g) *Exception for operations that avoid streams.* Upon your request, the regulatory authority may waive the biological information requirements of paragraphs (c)(6)(vi) through (viii) of this section if you demonstrate, and if the regulatory authority finds in writing, that your operation will not—

(1) Mine through or bury a perennial or intermittent stream;

(2) Create a point-source discharge to any perennial, intermittent, or ephemeral stream; or

(3) Modify the base flow of any perennial or intermittent stream.

(h) *Coordination with Clean Water Act agencies.* The regulatory authority will make best efforts to—

(1) Consult in a timely manner with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act;

(2) Minimize differences in baseline data collection points and parameters; and

(3) Share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations.

(i) *Corroboration of baseline data.* The regulatory authority must either corroborate a sample of the baseline information in your application or arrange for a third party to conduct the corroboration at your expense. Corroboration may include, but is not limited to, simultaneous sample collection and analysis, visual observation of sample collection, use of field measurements, or comparison of application data with application or monitoring data from adjacent operations.

§ 780.20 How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?

(a) *Content of PHC determination.* Your permit application must contain a determination of the probable hydrologic consequences of the proposed operation upon the quality and quantity of surface water and groundwater and, except as provided in § 780.19(g) of this part, upon the biology of perennial and intermittent streams under seasonal flow conditions for the proposed permit and adjacent areas. You must base the PHC determination on an analysis of the baseline hydrologic, geologic, biological, and other information required under § 780.19 of this part. It must include findings on:

(1) Whether the operation may cause material damage to the hydrologic balance outside the permit area.

(2) Whether acid-forming or toxic-forming materials are present that could result in the contamination of surface water or groundwater, including, but not limited to, a discharge of toxic mine drainage after the completion of land reclamation.

(3) Whether the proposed operation may result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas that is used for a domestic, agricultural, industrial, or other legitimate purpose.

(4) Whether the proposed operation will intercept aquifers in overburden strata or aquifers in underground mine voids (mine pools) or create aquifers in spoil placed in the backfilled area and, if so, what impacts the operation would

have on those aquifers, both during mining and after reclamation, and the effect of those impacts on the hydrologic balance.

(5) What impact the proposed operation will have on:

(i) Sediment yield and transport from the area to be disturbed.

(ii) The quality of groundwater and surface water within the proposed permit and adjacent areas. At a minimum, unless otherwise specified, the finding must address the impacts of the operation on both groundwater and surface water in terms of the parameters listed in § 780.19(a)(2) of this part and any additional water quality parameters that the regulatory authority determines to be of local importance.

(iii) Flooding and precipitation runoff patterns and characteristics.

(iv) Peak-flow magnitude and frequency for perennial and intermittent streams within the proposed permit and adjacent areas.

(v) Seasonal variations in streamflow.

(vi) The availability of groundwater and surface water, including the impact of any diversion of surface or subsurface flows to underground mine workings or any changes in watershed size as a result of the postmining surface configuration.

(vii) The biology of perennial and intermittent streams within the proposed permit and adjacent areas, except as provided in § 780.19(g) of this part.

(viii) Other characteristics as required by the regulatory authority.

(b) *Supplemental information.* You must provide any supplemental information that the regulatory authority determines is needed to fully evaluate the probable hydrologic consequences of the proposed operation and to plan remedial and reclamation activities. This information may include, but is not limited to, additional drilling, geochemical analyses of overburden materials, aquifer tests, hydrogeologic analyses of the water-bearing strata, analyses of flood flows, or analyses of other characteristics of water quality or quantity, including the stability of underground mine pools that might be affected by the proposed operation.

(c) *Subsequent reviews of PHC determinations.* (1) The regulatory authority must review each application for a permit revision to determine whether a new or updated PHC determination is needed.

(2) The regulatory authority must require that you prepare a new or updated PHC determination if the review under paragraph (c)(1) of this section finds that one is needed.

§ 780.21 What requirements apply to preparation, use, and review of the cumulative hydrologic impact assessment (CHIA)?

(a) *General requirements.* (1) The regulatory authority must prepare a written assessment of the probable cumulative hydrologic impacts of the proposed operation and all anticipated mining upon surface-water and groundwater systems in the cumulative impact area. This assessment, which is known as the CHIA, must be sufficient to determine, for purposes of permit application approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(2) In preparing the CHIA, the regulatory authority must consider relevant information on file for other mining operations located within the cumulative impact area or in similar watersheds.

(3) As provided in § 780.19(f) of this part, the regulatory authority may not approve a permit application until the hydrologic, geologic, and biological information needed to prepare the CHIA has been made available to the regulatory authority and the regulatory authority has used that information to prepare the CHIA.

(b) *Contents.* The CHIA must include—

(1) A map of the cumulative impact area. At a minimum, the map must identify and display—

(i) Any difference in the boundaries of the cumulative impact area for groundwater and surface water.

(ii) The locations of all previous, current, and anticipated surface and underground mining.

(iii) The locations of all baseline data collection sites within the proposed permit and adjacent areas under § 780.19 of this part.

(iv) Designated uses of surface water under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(2) A description of all previous, existing, and anticipated surface and underground coal mining within the cumulative impact area, including, at a minimum, the coal seam or seams mined or to be mined, the extent of mining, and the reclamation status of each operation.

(3) A quantitative and qualitative description of baseline hydrologic information for the proposed permit and adjacent areas under § 780.19 of this part, including—

(i) The quality and quantity of surface water and groundwater and seasonal variations therein.

(ii) The quality and quantity of water needed to support, maintain, or attain each—

(A) Designated use of surface water under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, if there are no designated uses, each premining use of surface water.

(B) Premining use of groundwater.

(iii) A description and/or maps of the local and regional groundwater systems.

(iv) To the extent required by § 780.19(c)(6)(vi) of this part, the biological condition of perennial and intermittent streams and, to the extent required by § 780.19(c)(6)(viii) of this part, the biology of intermittent streams not included within § 780.19(c)(6)(vi) of this part.

(4) A discussion of any potential concerns identified in the PHC determination required under § 780.20 of this part and how those concerns have been or will be resolved.

(5) A qualitative and quantitative assessment of how all anticipated surface and underground mining may impact the quality of surface water and groundwater in the cumulative impact area, expressed in terms of each baseline parameter identified under § 780.19 of this part.

(6) Site-specific numeric or narrative thresholds for material damage to the hydrologic balance outside the permit area. These thresholds must also be included as a condition of the permit. When identifying thresholds to define when material damage to the hydrologic balance outside the permit area would occur in connection with a particular permit, the regulatory authority will—

(i) In consultation with the Clean Water Act authority, as appropriate, undertake a comprehensive evaluation that considers the following factors—

(A) The baseline data collected under § 780.19 of this part;

(B) The PHC determination prepared under § 780.20 of this part;

(C) Applicable water quality standards adopted under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c);

(D) Applicable state or tribal standards for surface water or groundwater;

(E) Ambient water quality criteria developed under section 304(a) of the Clean Water Act, 33 U.S.C. 1314(a);

(F) The biological requirements of any species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* when those species; designated critical habitat for those species; habitat occupied by those species, such as nesting, resting, feeding, and breeding areas; and any areas in which those

species are present only for a short time, but that are important to their persistence, such as migration and dispersal corridors, are present within the cumulative impact area; and

(G) Other pertinent information and considerations to identify the parameters for which thresholds are necessary.

(ii) In consultation with the Clean Water Act authority, adopt numeric thresholds as appropriate, taking into consideration relevant contaminants for which there are water quality criteria under the Clean Water Act, 33 U.S.C. 1251 *et seq.* The regulatory authority may not adopt a narrative threshold for parameters for which numeric water quality criteria exist under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(iii) Identify the portion of the cumulative impact area to which each threshold applies. Parameters and thresholds may vary from subarea to subarea within the cumulative impact area when appropriate, based upon differences in watershed characteristics and variations in the geology, hydrology, and biology of the cumulative impact area.

(iv) Identify the points within the cumulative impact area at which the permittee will monitor the impacts of the operation on surface water and groundwater outside the permit area and explain how those locations will facilitate timely detection of the impacts of the operation on surface water and groundwater outside the permit area in a scientifically defensible manner. The permit applicant must incorporate those monitoring locations into the surface water and groundwater monitoring plans submitted under § 780.23 of this part.

(7) Evaluation thresholds for critical water quality and quantity parameters, as determined by the regulatory authority. After permit issuance, if monitoring results at the locations designated under paragraph (b)(6)(iv) of this section document exceedance of an evaluation threshold, the regulatory authority, in consultation with the Clean Water Act authority, as appropriate, must determine the cause of the exceedance. If the mining operation is responsible for the exceedance and if the adverse trend is likely to continue in the absence of corrective action, the regulatory authority must issue a permit revision order under § 774.10 of this chapter. The order must require that the permittee reassess the adequacy of the PHC determination prepared under § 780.20 of this part and the hydrologic reclamation plan approved under § 780.20 of this part and develop measures to prevent material damage to the hydrologic balance outside the permit area.

(8) An assessment of how all anticipated surface and underground mining may affect groundwater movement and availability within the cumulative impact area.

(9) After consultation with the Clean Water Act authority, as appropriate, an evaluation, with references to supporting data and analyses, of whether the CHIA will support a finding that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area. To support this finding, the CHIA must include the following determinations, with appropriate documentation, or an explanation of why the determination is not necessary or appropriate:

(i) Except as provided in §§ 780.22(b) and 816.40 of this chapter, the proposed operation will not—

(A) Cause or contribute to a violation of applicable water quality standards adopted under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or other applicable state or tribal water quality standards;

(B) Cause or contribute to a violation of applicable state or tribal groundwater quality standards;

(C) Preclude attainment of a premining use of a surface water located outside the permit area when no water quality standards have been established for that surface water; or

(D) Preclude attainment of any premining use of groundwater located outside the permit area.

(ii) The proposed operation has been designed to ensure that neither the mining operation nor the final configuration of the reclaimed area will result in changes in the size or frequency of peak flows from precipitation events or thaws that would cause an increase in flooding outside the permit area, when compared with premining conditions.

(iii) Perennial and intermittent streams located outside the permit area will continue to have sufficient base flow at all times during and after mining and reclamation to maintain their premining flow regime; *i.e.,* perennial streams located outside the permit area will retain perennial flows and intermittent streams located outside the permit area will retain intermittent flows both during and after mining and reclamation. Conversion of an intermittent stream to a perennial stream or conversion of an ephemeral stream to an intermittent or perennial stream outside the permit area may be acceptable, provided the conversion would be consistent with paragraph (b)(9)(i) of this section and would not result in a violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

(iv) The proposed operation has been designed to protect the quantity and quality of water in any aquifer that significantly ensures the prevailing hydrologic balance.

(c) *Subsequent reviews.* (1) The regulatory authority must review each application for a significant permit revision to determine whether a new or updated CHIA is needed. The regulatory authority must document the review, including the analysis and conclusions, together with the rationale for the conclusions, in writing.

(2) The regulatory authority must reevaluate the CHIA at intervals not to exceed 3 years to determine whether the CHIA remains accurate and whether the material damage and evaluation thresholds in the CHIA and the permit are adequate to ensure that material damage to the hydrologic balance outside the permit area will not occur. This evaluation must include a review of all biological and water monitoring data from both this operation and all other coal mining operations within the cumulative impact area.

(3) The regulatory authority must prepare a new or updated CHIA if the review conducted under paragraph (c)(1) or (2) of this section finds that one is needed.

§ 780.22 What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water sources?

(a) *Hydrologic reclamation plan.* Your permit application must include a plan, with maps and descriptions, that demonstrates how the proposed operation will comply with the applicable provisions of subchapter K of this chapter that relate to protection of the hydrologic balance. The plan must—

(1) Be specific to local hydrologic conditions.

(2) Include preventive or remedial measures for any potential adverse hydrologic consequences identified in the PHC determination prepared under § 780.20 of this part. These measures must describe the steps that you will take during mining and reclamation through final bond release under §§ 800.40 through 800.43 of this chapter to—

(i) Minimize disturbances to the hydrologic balance within the proposed permit and adjacent areas.

(ii) Prevent material damage to the hydrologic balance outside the proposed permit area.

(iii) Meet applicable water quality laws and regulations.

(iv) Protect the rights of existing water users in accordance with paragraph (b) of this section and § 816.40 of this chapter.

(v) Avoid acid or toxic discharges to surface water and avoid or, if avoidance is not possible, minimize degradation of groundwater.

(vi) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or to runoff outside the proposed permit area.

(vii) Provide water-treatment facilities when needed.

(viii) Control surface-water runoff in accordance with § 780.29 of this part.

(ix) Restore the approximate premining recharge capacity.

(3) Address the impacts of any transfers of water among active and abandoned mines within the proposed permit and adjacent areas.

(4) Describe the steps that you will take during mining and reclamation through final bond release under §§ 800.40 through 800.43 of this chapter to protect and enhance aquatic life and related environmental values to the extent possible using the best technology currently available.

(b) *Alternative water source information.* (1) If the PHC determination prepared under § 780.20 of this part indicates that the proposed mining operation may result in contamination, diminution, or interruption of an underground or surface source of water that is used for a domestic, agricultural, industrial, or other legitimate purpose, you must—

(i) Identify alternative water sources that are available, feasible to develop, and of suitable quality and sufficient in quantity to support the uses existing before mining and, when applicable, the approved postmining land uses.

(ii) Develop a water supply replacement plan that includes construction details, costs, and an implementation schedule.

(2) If you cannot identify an alternative water source that is both suitable and available, you must modify your application to prevent the proposed operation from contaminating, interrupting, or diminishing any water supply protected under § 816.40 of this chapter.

(3)(i) When a suitable alternative water source is available, your operation plan must require that the alternative water supply be developed and installed on a permanent basis before your operation advances to the point at which it could adversely affect an existing water supply protected under § 816.40 of this chapter.

(ii) Paragraph (b)(3)(i) of this section will not apply immediately if you demonstrate, and the regulatory authority finds, that the proposed operation also would adversely affect the replacement supply. In that case, your plan must require provision of a temporary replacement water supply until it is safe to install the permanent replacement water supply required under paragraph (b)(3)(i) of this section.

(4) Your application must describe how you will provide both temporary and permanent replacements for any unexpected losses of water supplies protected under § 816.40 of this chapter.

§ 780.23 What information must I include in plans for the monitoring of groundwater, surface water, and the biological condition of streams during and after mining?

(a) *Groundwater monitoring plan.*—(1) *General requirements.* Your permit application must include a groundwater monitoring plan adequate to evaluate the impacts of the mining operation on groundwater in the proposed permit and adjacent areas and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area. The plan must—

(i) Identify the locations to be monitored, the measurements to be taken at each location, and the parameters to be analyzed in samples collected at each location.

(ii) Specify the sampling frequency.

(iii) Establish a sufficient number of appropriate monitoring locations to evaluate the accuracy of the findings in the PHC determination, to identify adverse trends, and to determine, in a timely fashion, whether corrective action is needed to prevent material damage to the hydrologic balance outside the permit area. At a minimum, the plan must include—

(A) For each aquifer above or immediately below the lowest coal seam to be mined, monitoring wells or equivalent monitoring points located upgradient and downgradient of the proposed operation.

(B) Monitoring wells placed in backfilled portions of the permit area after backfilling and grading of all or a portion of the permit area is completed, unless you demonstrate, and the regulatory authority finds in writing, that wells in the backfilled area are not necessary to determine or predict the future impact of the mining operation on groundwater quality.

(C) Monitoring wells in any existing underground mine workings that would have a direct hydrologic connection to the proposed operation.

(D) Monitoring wells or equivalent monitoring points at the locations specified in the CHIA under § 780.21(b)(6)(iv) of this part.

(iv) Describe how the monitoring data will be used to—

(A) Determine the impacts of the operation upon the hydrologic balance.

(B) Determine the impacts of the operation upon the biology of surface waters within the permit and adjacent areas.

(C) Prevent material damage to the hydrologic balance outside the permit area.

(v) Describe how the water samples will be collected, preserved, stored, transmitted for analysis, and analyzed in accordance with the sampling, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter.

(2) *Parameters.*—(i) *General criteria for selection of parameters.* The plan must provide for the monitoring of parameters for which an evaluation threshold under § 780.21(b)(7) of this part exists. It also must provide for the monitoring of other parameters that could be affected by the proposed operation to the extent needed to assess the—

(A) Accuracy of the findings and predictions in the PHC determination prepared under § 780.20 of this part.

(B) Suitability of the quality and quantity of groundwater for premining uses of the groundwater within the permit and adjacent areas, subject to § 816.40 of this chapter.

(C) Suitability of the quality and quantity of groundwater to support the premining land uses within the permit and adjacent areas.

(ii) *Minimum sampling and analysis requirements.* At a minimum, the plan must require collection and analysis of a sample from each monitoring point every 3 months, with data submitted to the regulatory authority at the same frequency. The data must include—

(A) Analysis of each sample for the groundwater parameters listed in § 780.19(a)(2) of this part.

(B) Water levels in each well used for monitoring purposes and discharge rates from each spring or underground opening used for monitoring purposes.

(C) Analysis of each sample for parameters detected by the baseline sampling and analysis conducted under § 780.19(d) of this part.

(D) Analysis of each sample for all parameters for which there is an evaluation threshold under § 780.21(b)(7) of this part.

(E) Analysis of each sample for other parameters of concern, as determined by

the regulatory authority, based upon the information and analyses required under §§ 780.19 through 780.21 of this part.

(3) *Regulatory authority review and action.* (i) Upon completing the technical review of the application, the regulatory authority may require that you revise the plan to increase the frequency of monitoring, to require monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 780.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes.

(4) *Exception.* If you can demonstrate, on the basis of the PHC determination prepared under § 780.20 of this part or other available information that a particular aquifer in the proposed permit and adjacent areas has no existing or foreseeable use for agricultural or other human purposes or for fish and wildlife purposes and does not serve as an aquifer that significantly ensures the hydrologic balance within the cumulative impact area, the regulatory authority may waive monitoring of that aquifer.

(b) *Surface-water monitoring plan.*—(1) *General requirements.* Your permit application must include a surface-water monitoring plan adequate to evaluate the impacts of the mining operation on surface water in the proposed permit and adjacent areas and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area. The plan must—

(i) Identify the locations to be monitored, the measurements to be taken at each location, and the parameters to be analyzed in samples collected at each location.

(ii)(A) Require on-site measurement of precipitation amounts at specified locations within the permit area, using self-recording devices.

(B) Measurement of precipitation amounts must continue through Phase II bond release under § 800.42(c) of this chapter or for any longer period specified by the regulatory authority.

(C) At the discretion of the regulatory authority, you may use precipitation data from a single self-recording device to provide monitoring data for multiple permits that are contiguous or nearly contiguous if a single station would provide adequate and accurate coverage of precipitation events occurring in that area.

(iii) Specify the sampling frequency.

(iv) Establish a sufficient number of appropriate monitoring locations to evaluate the accuracy of the findings in the PHC determination, to identify adverse trends, and to determine, in a timely fashion, whether corrective action is needed to prevent material damage to the hydrologic balance outside the permit area. At a minimum, the plan must include—

(A) Monitoring of point-source discharges from the proposed operation.

(B) Monitoring locations upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas, with the exception that no upgradient monitoring location is needed for a stream when the operation will mine through the headwaters of that stream.

(C) Monitoring locations specified in the CHIA under § 780.21(b)(6)(vi) of this part.

(v) Describe how the monitoring data will be used to—

(A) Determine the impacts of the operation upon the hydrologic balance.

(B) Determine the impacts of the operation upon the biology of surface waters within the permit and adjacent areas.

(C) Prevent material damage to the hydrologic balance outside the permit area.

(vi) Describe how the water samples will be collected, preserved, stored, transmitted for analysis, and analyzed in accordance with the sampling, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter.

(2) *Parameters.*—(i) *General criteria for selection of parameters.* The plan must provide for the monitoring of parameters—

(A) For which there are applicable effluent limitation guidelines under 40 CFR part 434.

(B) Needed to assess the accuracy of the findings and predictions in the PHC determination prepared under § 780.20 of this part.

(C) Needed to assess the adequacy of the surface-water runoff control plan prepared under § 780.29 of this part.

(D) Needed to assess the suitability of the quality and quantity of surface water in the permit and adjacent areas for all designated uses under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, if there are no designated uses, all premining uses of surface water in the permit and adjacent areas, subject to § 816.40 of this chapter; and

(E) Needed to assess the suitability of the quality and quantity of surface water in the permit and adjacent areas to support the premining land uses.

(F) For which there is an evaluation threshold under § 780.21(b)(7) of this part.

(ii) *Minimum sampling and analysis requirements for monitoring locations other than point-source discharges.* For all monitoring locations other than point-source discharges, the plan must require collection and analysis of a sample from each monitoring point at least every 3 months, with data submitted to the regulatory authority at the same frequency. The data must include—

(A) Analysis of each sample for the surface-water parameters listed in § 780.19(a)(2) of this part.

(B) Flow rates at each sampling location. The plan must require use of generally-accepted professional flow measurement techniques. Visual observations are not acceptable.

(C) Analysis of each sample for parameters detected by the baseline sampling and analysis conducted under § 780.19(d) of this part.

(D) Analysis of each sample for all parameters for which there is an evaluation threshold under § 780.21(b)(7) of this part.

(E) Analysis of each sample for other parameters of concern, as determined by the regulatory authority, based upon the information and analyses required under §§ 780.19 through 780.21 of this part.

(iii) *Minimum requirements for point-source discharges.* For point-source discharges, the plan must—

(A) Provide for monitoring in accordance with 40 CFR parts 122, 123, and 434 and as required by the National Pollutant Discharge Elimination System permitting authority.

(B) Require measurement of flow rates, using generally-accepted professional flow measurement techniques. Visual observations are not acceptable.

(iv) *Requirements related to the Clean Water Act.* You must revise the plan to incorporate any site-specific monitoring requirements imposed by the National Pollutant Discharge Elimination System permitting authority or the agency responsible for administration of section 404 of the Clean Water Act, 33 U.S.C. 1344, subsequent to submission of the SMCRA permit application.

(3) *Regulatory authority review and action.* (i) Upon completing the technical review of your application, the regulatory authority may require that you revise the plan to increase the frequency of monitoring, to require

monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 780.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes.

(c) *Biological condition monitoring plan.*—(1) *General requirements.* Except as provided in paragraph (d) of this section, your permit application must include a plan for monitoring the biological condition of each perennial and intermittent stream within the proposed permit and adjacent areas for which baseline biological condition data was collected under § 780.19(c)(6)(vi) of this part. The plan must be adequate to evaluate the impacts of the mining operation on the biological condition of those streams and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area.

(2) *Monitoring techniques.* The plan must—

(i) Require use of a bioassessment protocol that meets the requirements of § 780.19(c)(6)(vii) of this part.

(ii) Identify monitoring locations in each perennial and intermittent stream within the proposed permit and adjacent areas for which baseline biological condition data was collected under § 780.19(c)(6)(vi) of this part.

(iii) Establish a sampling frequency that must be no less than annual, but not so frequent as to unnecessarily deplete the populations of the species being monitored.

(iv) Require submission of monitoring data to the regulatory authority on an annual basis.

(3) *Regulatory authority review and action.* (i) Upon completing review of your application, the regulatory authority may require that you revise the plan to adjust monitoring locations, the frequency of monitoring, and the species to be monitored.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 780.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes.

(d) *Exceptions.*—(1) *Lands eligible for remining.* (i) If the proposed permit area includes only lands eligible for remining, you may request that the regulatory authority modify the groundwater and surface water monitoring plan requirements of paragraphs (a) and (b) of this section and modify or waive the biological condition monitoring plan requirements of paragraph (c) of this section.

(ii) The regulatory authority may approve your request if it determines that a less extensive monitoring plan will be adequate to monitor the impacts of the proposed operation on groundwater and surface water, based upon an evaluation of the quality of groundwater and surface water and the biological condition of the receiving stream at the time of application.

(2) *Operations that avoid streams.* (i) Upon your request, the regulatory authority may waive the biological condition monitoring plan requirements of paragraph (c) of this section if you demonstrate, and if the regulatory authority finds in writing, that your operation will not—

(A) Mine through or bury any perennial or intermittent stream;

(B) Create a point-source discharge to any perennial, intermittent, or ephemeral stream; or

(C) Modify the base flow of any perennial or intermittent stream.

(ii) If you meet all the criteria of paragraph (d)(2)(i) of this section with the exception of paragraph (d)(2)(i)(B) of this section, you may request, and the regulatory authority may approve, limiting the biological condition monitoring plan requirements of paragraph (c) of this section to only the stream that will receive the point-source discharge.

(e) *Coordination with Clean Water Act agencies.* The regulatory authority will make best efforts to—

(1) Consult in a timely manner with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act;

(2) Minimize differences in monitoring locations and reporting requirements; and

(3) Share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations.

§ 780.24 What requirements apply to the postmining land use?

(a) *What postmining land use information must my application contain*? (1) You must describe and map the proposed use or uses of the land within the proposed permit area following reclamation, based on the categories of land uses listed in the definition of land use in § 701.5 of this chapter.

(2) Except for prime farmland historically used for cropland, you must discuss the utility and capability of the reclaimed land to support the proposed postmining land use and the variety of uses that the land was capable of supporting before any mining, as identified under § 779.22 of this chapter, regardless of the proposed postmining land use.

(3) You must explain how the proposed postmining land use is consistent with existing state and local land use policies and plans.

(4) You must include a copy of the comments concerning the proposed postmining use that you receive from the—

(i) Legal or equitable owner of record of the surface of the proposed permit area; and

(ii) State and local government agencies that would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

(5) You must explain how the proposed postmining land use will be achieved and identify any support activities or facilities needed to achieve that use.

(6) If you propose to restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses rather than to a condition capable of supporting the uses that the land could support before any mining, you must provide the demonstration required under paragraph (b)(1) of this section.

(b) *What requirements apply to the approval of alternative postmining land uses*?—(1) *Application requirements.* If you propose to restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses, rather than to a condition capable of supporting the uses that the land could support before any mining, you must demonstrate that the proposed higher or better use or uses meet the following criteria:

(i) There is a reasonable likelihood that the proposed use or uses will be achieved after mining and reclamation, as documented by, for example, real estate and construction contracts, plans for installation of any necessary infrastructure, procurement of any necessary zoning approvals, landowner commitments, economic forecasts, and studies by land use planning agencies.

(ii) The proposed use or uses do not present any actual or probable hazard to public health or safety or any threat of water diminution or pollution.

(iii) The proposed use or uses will not—

(A) Be impractical or unreasonable.

(B) Be inconsistent with applicable land use policies or plans.

(C) Involve unreasonable delay in implementation.

(D) Cause or contribute to a violation of federal, state, tribal or local law.

(E) Result in changes in the size or frequency of peak flows from the reclaimed area that would cause an increase in flooding when compared with the conditions that would exist if the land were restored to a condition capable of supporting the uses that it was capable of supporting before any mining.

(F) Cause the total volume of flow from the reclaimed area, during every season of the year, to vary in a way that would preclude attainment of any designated use of a surface water located outside the permit area under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, if there are no designated uses, any premining use of a surface water located outside the permit area.

(G) Cause a change in the temperature or chemical composition of the water that would preclude attainment of any designated use of a surface water under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, if there are no designated uses, any premining use of a surface water located outside the permit area.

(2) *Regulatory authority decision requirements.* The regulatory authority may approve your request if it—

(i) Consults with the landowner or the land management agency having jurisdiction over the lands to which the use would apply; and

(ii) Finds in writing that you have made the demonstration required under paragraph (b)(1) of this section. Landowner consent alone is an insufficient basis for this finding.

(c) *What requirements apply to permit revision applications that propose to change the postmining land use*? (1) You may propose to change the postmining land use for all or a portion of the permit area at any time through the permit revision process under § 774.13 of this chapter.

(2) If you propose a higher or better postmining land use, the requirements of paragraphs (b)(1) and (2) of this section will apply and the application must be considered a significant permit revision for purposes of § 774.13(b)(2) of this chapter.

(d) *What restrictions apply to the retention of mining-related structures*? (1) If you propose to retain mining-related structures other than roads and impoundments for potential future use as part of the postmining land use, you must demonstrate, and the regulatory authority must find in writing, that the size and characteristics of the structures are consistent with and proportional to the needs of the postmining land use.

(2) The amount of bond required for the permit under part 800 of this chapter must include the cost of removing the structure and reclaiming the land upon which it was located to a condition capable of supporting the premining uses. The bond must include the cost of restoring the site to its approximate original contour in accordance with § 816.102 of this chapter and revegetating the site in accordance with the revegetation plan approved under § 780.12(g) of this part for the permit area surrounding the site upon which the structure was previously located.

(3) The reclamation plan submitted under § 780.12 of this part must specify that if a structure is not in use as part of the approved postmining land use by the end of the revegetation responsibility period specified in § 816.115 of this chapter, you must remove the structure and reclaim the land upon which it was located by restoring the approximate original contour in accordance with § 816.102 of this chapter and revegetating the site in accordance with the revegetation plan approved under § 780.12(g) of this part for the permit area surrounding the site upon which the structure was previously located.

(e) *What special provisions apply to previously mined areas*? If land that was previously mined cannot be reclaimed to the land use that existed before any mining because of the previously mined condition, you may propose, and the regulatory authority may approve, any appropriate postmining land use for that land that is both achievable and compatible with land uses in the surrounding area, provided that restoration of the land to that capability does not require disturbance of land previously unaffected by mining.

§ 780.25 What information must I provide for siltation structures, impoundments, and refuse piles?

(a) *How do I determine the hazard potential of a proposed impoundment*? You must use the following table to identify the hazard potential classification of each proposed impoundment that includes a dam:

Hazard potential classification	Loss of human life in event of failure	Economic, environmental, or lifeline losses [1] in event of failure
Low	None expected	Low potential; generally limited to property owned by the permittee.
Significant	None expected	Yes.
High	Loss of one or more lives probable	Yes, but not necessary for this classification.

[1] Lifeline losses refer to disruption of lifeline facilities, which include, but are not limited to, important public utilities, highways, and railroads.

(b) *How must I prepare the general plan for proposed siltation structures, impoundments, and refuse piles*? If you propose to construct a siltation structure, impoundment, or refuse pile, your application must include a general plan that meets the following requirements:

(1) The plan must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify such plans, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(2) The plan must contain a description, map, and cross-sections of the structure and its location.

(3) The plan must contain the hydrologic and geologic information required to assess the hydrologic impact of the structure.

(4)(i) The plan must contain a report describing the results of a geotechnical investigation of the potential effect on the structure if subsurface strata subside as a result of past, current, or future underground mining operations beneath or within the proposed permit and adjacent areas. When necessary, the investigation report also must identify design and construction measures that would prevent adverse subsidence-related impacts on the structure.

(ii) Except for structures that would meet the criteria in § 77.216(a) of this title or that would have a significant or high hazard potential under paragraph (a) of this section, the requirements of paragraph (b)(4)(i) of this section do not apply—

(A) In areas with 26.0 inches or less of average annual precipitation; or

(B) To siltation structures.

(5)(i) The plan must contain an analysis of the potential for each impoundment to drain into subjacent underground mine workings, together with an analysis of the impacts of such drainage.

(ii) Except for structures that would meet the criteria in § 77.216(a) of this title or that would have a significant or high hazard potential under paragraph (a) of this section, the requirements of paragraph (b)(5)(i) of this section do not apply—

(A) In areas with 26.0 inches or less of average annual precipitation; or

(B) To siltation structures.

(6) The plan must include a schedule setting forth the dates when any detailed design plans for structures that are not submitted with the general plan will be submitted to the regulatory authority.

(c) *How must I prepare the detailed design plan for proposed siltation structures, impoundments, and refuse piles*?—(1) *Detailed design plan requirements for high hazard dams, significant hazard dams, and impounding structures that meet MSHA criteria.* If you propose to construct an impounding structure that would meet the criteria in § 77.216(a) of this title or that would have a significant or high hazard potential under paragraph (a) of this section, you must prepare and submit a detailed design plan that meets the following requirements:

(i) The plan must be prepared by, or under the direction of, a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture. The engineer must certify that the impoundment design meets the requirements of this part, current prudent engineering practices, and any design criteria established by the regulatory authority. The qualified registered professional engineer must be experienced in the design and construction of impoundments.

(ii) The plan must incorporate any design and construction measures identified in the geotechnical investigation report prepared under paragraph (b)(4) of this section as necessary to protect against potential adverse impacts from subsidence resulting from underground mine workings underlying or adjacent to the structure.

(iii) The plan must describe the operation and maintenance requirements for each structure.

(iv) The plan must describe the timetable and plans to remove each structure, if appropriate.

(2) *Detailed design plan requirements for other structures.* If you propose to construct an impounding structure that would not meet the criteria in § 77.216(a) of this title and that would not have a significant or high hazard potential under paragraph (a) of this section, you must prepare and submit a detailed design plan that meets the following requirements:

(i)(A) Except as provided in paragraph (c)(2)(i)(B) of this section, the plan must be prepared by, or under the direction of, a qualified, registered, professional engineer, or, in any state that authorizes land surveyors to prepare and certify such plans, a qualified, registered, professional, land surveyor. The engineer or land surveyor must certify that the impoundment design meets the requirements of this part, current prudent engineering practices, and any design criteria established by the regulatory authority. The qualified registered professional engineer or qualified registered professional land surveyor must be experienced in the design and construction of impoundments.

(B) All coal mine waste structures to which §§ 816.81 through 816.84 of this chapter apply must be certified by a qualified, registered, professional engineer.

(ii) The plan must reflect any design and construction requirements for the structure, including any measures identified as necessary in the geotechnical investigation report prepared under paragraph (b)(4) of this section.

(iii) The plan must describe the operation and maintenance requirements for each structure.

(iv) The plan must describe the timetable and plans to remove each structure, if appropriate.

(3) *Timing of submittal of detailed design plans.* You must submit the detailed design plans to the regulatory authority either as part of the permit application or in accordance with the schedule submitted under paragraph (b)(6) of this section. The regulatory authority must approve, in writing, the detailed design plan for a structure before you may begin construction of the structure.

(d) *What additional design requirements apply to siltation structures?* You must design siltation structures in compliance with the requirements of § 816.46 of this chapter.

(e) *What additional design requirements apply to permanent and temporary impoundments?* (1) You must design permanent and temporary impoundments to comply with the requirements of § 816.49 of this chapter.

(2) The regulatory authority may establish, through the regulatory program approval process, engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of conducting engineering tests to establish compliance with the minimum static safety factor of 1.3 required in § 816.49(a)(2)(ii) of this chapter.

(3) Each plan must include stability analyses of the proposed impoundment if the structure would meet the criteria in § 77.216(a) of this title or would have a significant or high hazard potential under paragraph (a) of this section. The stability analyses must address static, seismic, and post-earthquake (liquefaction) conditions. They must include, but are not limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific analysis and design parameters and construction methods.

(f) *What additional design requirements apply to coal mine waste impoundments, refuse piles, and impounding structures constructed of coal mine waste?* If you propose to place coal mine waste in a refuse pile or impoundment, or if you plan to use coal mine waste to construct an impounding structure, you must comply with the applicable design requirements in paragraphs (f)(1) and (2) of this section.

(1) *Design requirements for refuse piles.* You must design refuse piles to comply with the requirements of §§ 780.28, 816.81, and 816.83 of this chapter.

(2) *Design requirements for impounding structures that will impound coal mine waste or that will be constructed of coal mine waste.* (i) You must design impounding structures constructed of or intended to impound coal mine waste to comply with the coal mine waste disposal requirements of §§ 780.28, 816.81, and 816.84 of this chapter and with the impoundment requirements of paragraphs (a) and (c) of § 816.49 of this chapter.

(ii) The plan for each impounding structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title.

(iii) Each plan for an impounding structure that will impound coal mine waste or that will be constructed of coal mine waste must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the

impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the impounding structure.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impounding structure on each plan.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impounding structure, impoundment, or impounded material.

(iv) The design must ensure that at least 90 percent of the water stored in the impoundment during the design precipitation event will be removed within a 10-day period.

§ 780.26 What special requirements apply to surface mining near underground mining?

Your application must describe the measures that you will use to comply with § 816.79 of this chapter if you intend to conduct surface mining activities within 500 feet of an underground mine.

§ 780.27 What additional permitting requirements apply to proposed activities in or through ephemeral streams?

(a) *Clean Water Act requirements.* If the proposed permit area includes waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* the regulatory authority must condition the permit to prohibit initiation of surface mining activities in or affecting those waters before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(b) *Postmining surface drainage pattern and stream-channel configuration.* (1) If you propose to mine through an ephemeral stream, your application must include a plan to construct—

(i) A postmining surface drainage pattern that is similar to the premining surface drainage pattern, relatively stable, and in dynamic near-equilibrium; and

(ii) Postmining stream-channel configurations that are relatively stable and similar to the premining configuration of ephemeral stream channels.

(2) The regulatory authority may approve or require a postmining surface drainage pattern or stream-channel configuration that differs from the pattern or configuration otherwise required under paragraph (b)(1) of this section when the regulatory authority finds that a different pattern or configuration is necessary or appropriate to—

(i) Ensure stability;

(ii) Prevent or minimize downcutting or widening of reconstructed stream channels and control meander migration;

(iii) Promote enhancement of fish and wildlife habitat;

(iv) Accommodate any anticipated temporary or permanent increase in surface runoff as a result of mining and reclamation;

(v) Accommodate the construction of excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures;

(vi) Replace a stream that was channelized or otherwise severely altered prior to submittal of the permit application with a more natural, relatively stable, and ecologically sound drainage pattern or stream-channel configuration; or

(vii) Reclaim a previously mined area.

(c) *Streamside vegetative corridors.* (1) If you propose to mine through an ephemeral stream, your application must include a plan to establish a vegetative corridor at least 100 feet wide along each bank of the reconstructed stream channel, consistent with natural vegetation patterns.

(2) The plan submitted under paragraph (c)(1) of this section must be consistent with the requirements of § 816.56(c) of this chapter for vegetative corridors along ephemeral streams.

(3) Paragraphs (c)(1) and (2) of this section do not apply to prime farmland historically used for cropland.

§ 780.28 What additional permitting requirements apply to proposed activities in, through, or adjacent to a perennial or intermittent stream?

(a) *Clean Water Act requirements.* If the proposed permit area includes waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* the regulatory authority must condition the permit to prohibit initiation of surface mining activities in or affecting those waters before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(b) *To what activities does this section apply*? You, the permit applicant, must provide the information and demonstrations required by paragraphs (c) through (g) of this section, as applicable, whenever you propose to conduct surface mining activities—

(1) In or through a perennial or intermittent stream; or

(2) On the surface of lands within 100 feet of a perennial or intermittent stream. You must measure this distance horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(c) *Postmining surface drainage pattern and stream-channel configuration.* (1) If you propose to mine through a perennial or intermittent stream, your application must include a plan to construct—

(i) A postmining surface drainage pattern that is similar to the premining surface drainage pattern, relatively stable, and in dynamic near-equilibrium; and

(ii) Postmining stream-channel configurations that are relatively stable and similar to the premining configuration of perennial and intermittent stream channels.

(2) The regulatory authority may approve or require a postmining surface drainage pattern or stream-channel configuration that differs from the pattern or configuration otherwise required under paragraph (c)(1) of this section when the regulatory authority finds that a different pattern or configuration is necessary or appropriate to—

(i) Ensure stability;

(ii) Prevent or minimize downcutting or widening of reconstructed stream channels and control meander migration;

(iii) Promote enhancement of fish and wildlife habitat;

(iv) Accommodate any anticipated temporary or permanent increase in surface runoff as a result of mining and reclamation;

(v) Accommodate the construction of excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures;

(vi) Replace a stream that was channelized or otherwise severely altered prior to submittal of the permit application with a more natural, relatively stable, and ecologically sound drainage pattern or stream-channel configuration; or

(vii) Reclaim a previously mined area.

(d) *Streamside vegetative corridors.* (1) If you propose to conduct any surface mining activities identified in paragraph (b) of this section, your application must include a plan to

establish a vegetated streamside corridor at least 100 feet wide along each bank of the stream as part of the reclamation process following the completion of surface mining activities within that area.

(2) The plan submitted under paragraph (d)(1) of this section must be consistent with natural vegetation patterns.

(3) The plan submitted under paragraph (d)(1) of this section must be consistent with the streamside vegetative corridor requirements of § 816.57(d) of this chapter.

(4) The corridor width must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(5) Paragraphs (d)(1) through (2) of this section do not apply to prime farmland historically used for cropland.

(e) *What demonstrations must I include in my application if I propose to conduct activities in or within 100 feet of a perennial or intermittent stream?* (1) Except as provided in paragraphs (e)(4), (e)(5), and (i) of this section and § 816.57(i) of this chapter, your application must contain the applicable demonstrations set forth in the table if you propose to conduct surface mining activities in or through a perennial or intermittent stream or on the surface of land within 100 feet of a perennial or intermittent stream, as specified in paragraph (b) of this section.

Demonstration	Activity		
	Any activity other than mining through or permanently diverting a stream or construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream	Mining through or permanently diverting a stream	Construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream
(i) The proposed activity would not cause or contribute to a violation of applicable state or tribal water quality standards, including, but not limited to, standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).	Yes	Yes	Yes.
(ii) The proposed activity would not cause material damage to the hydrologic balance outside the permit area or upset the dynamic near-equilibrium of streams outside the permit area.	Yes	Yes	Yes.
(iii) The proposed activity would not result in conversion of the affected stream segment from perennial to ephemeral.	Yes	Yes	Not applicable.
(iv) The proposed activity would not result in conversion of the affected stream segment from intermittent to ephemeral or from perennial to intermittent.	Yes	Yes, except as provided in paragraphs (e)(2) and (5) of this section.	Not applicable.
(v) There is no practicable alternative that would avoid mining through or diverting a perennial or intermittent stream.	Not applicable	Yes, except as provided in paragraph (e)(3) of this section.	Yes.
(vi) After evaluating all potential upland locations in the vicinity of the proposed operation, including abandoned mine lands and unreclaimed bond forfeiture sites, there is no practicable alternative that would avoid placement of excess spoil or coal mine waste in a perennial or intermittent stream.	Not applicable	Not applicable	Yes.
(vii) The proposed operation has been designed to minimize the extent to which perennial or intermittent streams will be mined through, diverted, or covered by an excess spoil fill, a coal mine waste refuse pile, or a coal mine waste impounding structure.	Not applicable	Yes, except as provided in paragraphs (e)(3) and (5) of this section.	Yes.
(viii) The stream restoration techniques in the proposed reclamation plan are adequate to ensure restoration or improvement of the form, hydrologic function (including flow regime), dynamic near-equilibrium, streamside vegetation, and ecological function of the stream after you have mined through it, as required by § 816.57 of this chapter.	Not applicable	Yes, except as provided in paragraph (e)(5) of this section.	Not applicable.
(ix) The proposed operation has been designed to minimize the amount of excess spoil or coal mine waste that the proposed operation will generate.	§ 780.35(b) of this part requires minimization of excess spoil.	§ 780.35(b) of this part requires minimization of excess spoil.	Yes.

Demonstration	Activity		
	Any activity other than mining through or permanently diverting a stream or construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream	Mining through or permanently diverting a stream	Construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream
(x) To the extent possible using the best technology currently available, the proposed operation has been designed to minimize adverse impacts on fish, wildlife, and related environmental values.	Yes	Yes	Yes.
(xi) The fish and wildlife enhancement plan prepared under § 780.16 of this part includes measures that would fully and permanently offset any long-term adverse impacts on fish, wildlife, and related environmental values within the footprint of each excess spoil fill, coal mine waste refuse pile, and coal mine waste impounding structure.	Not applicable	Not applicable	Yes.
(xii) Each excess spoil fill, coal mine waste refuse pile, and coal mine waste impounding structure has been designed in a manner that will not result in the formation of toxic mine drainage.	Not applicable	Not applicable	Yes.
(xiii) The revegetation plan prepared under § 780.12(g) of this part requires reforestation of each completed excess spoil fill if the land is forested at the time of application or if the land would revert to forest under conditions of natural succession.	Not applicable	Not applicable	Yes.

(2)(i) As part of a proposal to mine through an intermittent stream, you may propose to convert a minimal portion of the mined-through segment of an intermittent stream to an ephemeral stream. The regulatory authority may approve the proposed conversion only if you demonstrate, and the regulatory authority finds, that the conversion would not degrade the hydrologic function, dynamic near-equilibrium, or the ecological function of the stream as a whole within the mined area, as determined by comparison with the stream assessment conducted under § 780.19(c)(6) of this part.

(ii) Paragraph (e)(2)(i) of this section does not apply to the circumstances described in paragraph (e)(5) of this section.

(3)(i) Paragraphs (e)(1)(v) and (vii) of this section do not apply to a proposal to mine through a segment of an intermittent stream when that segment meets the criteria of paragraph (e)(3)(ii) of this section, provided you demonstrate, and the regulatory authority finds, that implementation of the proposed mining and reclamation plan—

(A) Will improve the form of the stream segment;

(B) Will improve the hydrologic function of the stream;

(C) Is likely to result in improvement of the biological condition or ecological function of the stream;

(D) Will not further degrade the hydrologic function, dynamic near-equilibrium, biological condition, or ecological function of the stream; and

(E) Will result in establishment of a streamside vegetative corridor for the stream segment in accordance with § 816.57(d) of this chapter.

(ii) To qualify for purposes of paragraph (e)(3)(i) of this section, a stream segment must display both of the following characteristics:

(A) Prior anthropogenic activity has resulted in substantial degradation of the profile or dimensions of the stream channel; and

(B) Degradation of the stream channel has resulted in a substantial adverse impact on the ecological function of the stream.

(4) Paragraph (e)(1) of this section does not apply to a stream segment that will be part of a permanent impoundment approved and constructed under § 816.49(b) of this chapter.

(5) Paragraphs (e)(1)(iv) and (vii) of this section and the requirement for restoration of the hydrologic and ecological functions and the dynamic near-equilibrium of a stream in paragraph (e)(1)(viii) of this section do not apply to an intermittent stream segment if—

(i) The intermittent segment is a minor interval in what is otherwise a predominantly ephemeral stream;

(ii) You demonstrate, and the regulatory authority finds, that the intermittent segment has no significant fish, wildlife, or related environmental values, as documented by the baseline data collected under § 780.19(c)(6) of this part; and

(iii) You demonstrate, and the regulatory authority finds, that conversion of the intermittent stream segment will not adversely affect water uses.

(f) *What design requirements apply to the diversion, restoration, and reconstruction of perennial and intermittent stream channels?* (1)(i) You must design permanent stream-channel diversions, temporary stream-channel diversions that will remain in use for 3 or more years, and stream channels to be reconstructed after the completion of mining to restore, approximate, or improve the premining characteristics of the original stream channel, to promote the recovery and enhancement of aquatic habitat and the ecological and hydrologic functions of the stream, and to minimize adverse alteration of stream

channels on and off the site, including channel deepening or enlargement.

(ii) Pertinent stream-channel characteristics include, but are not limited to, the baseline stream pattern, profile, dimensions, substrate, habitat, and natural vegetation growing in the riparian zone and along the banks of the stream.

(iii) For temporary stream-channel diversions that will remain in use for 3 or more years, the vegetation proposed for planting along the banks of the diversion need not include species that would not reach maturity until after the diversion is removed.

(2) You must design the hydraulic capacity of all temporary and permanent stream-channel diversions to be at least equal to the hydraulic capacity of the unmodified stream channel immediately upstream of the diversion, but no greater than the hydraulic capacity of the unmodified stream channel immediately downstream from the diversion.

(3) You must design all temporary and permanent stream-channel diversions in a manner that ensures that the combination of channel, bank, and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

(4) You must submit a certification from a qualified registered professional engineer that the designs for all stream-channel diversions and all stream channels to be reconstructed after the completion of mining meet the design requirements of this section and any additional design criteria established by the regulatory authority. This certification may be limited to the location, dimensions, and physical characteristics of the stream channel.

(g) *What requirements apply to establishment of standards for restoration of the ecological function of a stream?* (1) If you propose to mine through a perennial or intermittent stream, the regulatory authority must establish standards for determining when the ecological function of the reconstructed stream has been restored. Your application must incorporate those standards and explain how you will meet them.

(2) In establishing standards under paragraph (g)(1) of this section, the regulatory authority must coordinate with the appropriate agencies responsible for administering the Clean Water Act, 33 U.S.C. 1251 *et seq.,* to ensure compliance with all Clean Water Act requirements.

(3)(i) The biological component of the standards established under paragraph (g)(1) of this section must employ the best technology currently available, as specified in paragraphs (g)(3)(ii) through (iv) of this section.

(ii) For perennial streams, the best technology currently available includes an assessment of the biological condition of the stream, as determined by an index of biological condition or other scientifically-defensible bioassessment protocols consistent with § 780.19(c)(6)(vii) of this part. Standards established under paragraph (g)(1) of this section for perennial streams—

(A) Need not require that a reconstructed stream or stream-channel diversion have precisely the same biological condition or biota as the stream segment did before mining.

(B) Must prohibit substantial replacement of pollution-sensitive species with pollution-tolerant species.

(C) Must require that populations of organisms used to determine the biological condition of the reconstructed stream or stream-channel diversion be self-sustaining within that stream segment.

(iii) Paragraph (g)(3)(ii) of this section also applies to intermittent streams whenever a scientifically defensible biological index and bioassessment protocol have been established for assessment of intermittent streams in the state or region in which the stream is located.

(iv)(A) Except as provided in paragraph (g)(3)(iii) of this section, the best technology currently available for intermittent streams consists of the establishment of standards that rely upon restoration of the form, hydrologic function, and water quality of the stream and reestablishment of streamside vegetation as a surrogate for the biological condition of the stream.

(B) The regulatory authority must reevaluate the best technology currently available for intermittent streams under paragraph (g)(3)(iv)(A) of this section at 5-year intervals. Upon conclusion of that evaluation, the regulatory authority must make any appropriate adjustments before processing permit applications submitted after the conclusion of that evaluation.

(4) Standards established under paragraph (g)(1) of this section must ensure that the reconstructed stream or stream-channel diversion will not—

(i) Preclude attainment of the designated uses of that stream segment under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), before mining, or, if there are no designated uses, the premining uses of that stream segment; or

(ii) Result in that stream segment not meeting the applicable anti-degradation requirements under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), as adopted by a state or authorized tribe or as promulgated in a federal rulemaking under the Clean Water Act.

(h) *What finding must the regulatory authority make before approving a permit application under this section?* The regulatory authority may not approve an application that includes a proposal to conduct surface mining activities in or within 100 feet of a perennial or intermittent stream unless it first makes a specific written finding that you have fully satisfied all applicable requirements of paragraphs (c) through (f) of this section. The finding must be accompanied by a detailed explanation of the rationale for the finding.

(i) *Programmatic alternative.* Paragraphs (c) through (h) of this section will not apply to a state program approved under subchapter T of this chapter if that program is amended to expressly prohibit all surface mining activities, including the construction of stream-channel diversions, that would result in more than a de minimis disturbance of perennial or intermittent streams or the surface of land within 100 feet of a perennial or intermittent stream.

§ 780.29 What information must I include in the surface-water runoff control plan?

Your application must contain a surface-water runoff control plan that includes the following—

(a)(1) An explanation of how you will handle surface-water runoff in a manner that will prevent peak flows from the proposed permit area, both during and after mining and reclamation, from exceeding the premining peak flow from the same area for the same-size precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution or another scientifically defensible method approved by the regulatory authority that takes into account the time of concentration to estimate peak flows.

(2) The explanation in paragraph (a)(1) of this section must consider the findings in the determination of the probable hydrologic consequences of mining prepared under § 780.20 of this part.

(b) A surface-water runoff monitoring and inspection program that will provide sufficient precipitation and stormwater discharge data for the proposed permit area to evaluate the effectiveness of the surface-water runoff control practices under paragraph (a) of

this section. The surface-water runoff monitoring and inspection program must specify criteria for monitoring, inspection, and reporting consistent with § 816.34(d) of this chapter. The program must contain a monitoring-point density that adequately represents the drainage pattern across the entire proposed permit area, with a minimum of one monitoring point per watershed discharge point.

(c) Descriptions maps, and cross-sections of runoff-control structures. A runoff-control structure is any man-made structure designed to control or convey storm water runoff on or across a minesite. This term encompasses the entire surface water control system and includes diversion ditches, drainage benches or terraces, drop structures or check dams, all types of conveyance channels, downdrains, and sedimentation and detention ponds and associated outlets. It does not include swales or reconstructed perennial, intermittent, or ephemeral stream channels.

(d) An explanation of how diversions will be constructed in compliance with § 816.43 of this chapter.

§ 780.31 What information must I provide concerning the protection of publicly owned parks and historic places?

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be adversely affected by the proposed operation, you must describe the measures to be used—

(1) To prevent adverse impacts, or

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

(b) The regulatory authority may require the applicant to protect historic or archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance, provided that the required measures are completed before the properties are affected by any mining operation.

§ 780.33 What information must I provide concerning the relocation or use of public roads?

Your application must describe, with appropriate maps and cross-sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under § 761.14 of this chapter, you seek to have the regulatory authority approve—

(a) Conducting the proposed surface mining activities within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(b) Relocating a public road.

§ 780.35 What information must I provide concerning the minimization and disposal of excess spoil?

(a) *Applicability.* This section applies to you, the permit applicant, if you propose to generate excess spoil as part of your operation.

(b) *Demonstration of minimization of excess spoil.* (1) You must submit a demonstration, with supporting calculations and other documentation, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate.

(2) The demonstration under paragraph (b)(1) of this section must explain, in quantitative terms, how the maximum amount of overburden will be returned to the mined-out area after considering—

(i) Applicable regulations concerning backfilling, compaction, grading, and restoration of the approximate original contour.

(ii) Safety and stability needs and requirements.

(iii) The need for access and haul roads with their attendant drainage structures and safety berms during mining and reclamation. You may construct roads and their attendant drainage structures and safety berms on the perimeter of the backfilled area as necessary to conduct surface coal mining and reclamation operations, but, when the roads are no longer needed to support heavy equipment traffic, you must reduce the total width of roads and their attendant drainage structures and berms to be retained as part of the postmining land use to no more than 20 feet unless you demonstrate an essential need for a greater width for the postmining land use.

(iv) Needs and requirements associated with revegetation and the proposed postmining land use.

(v) Any other relevant regulatory requirements, including those pertaining to protection of water quality and fish, wildlife, and related environmental values.

(3) When necessary to avoid or minimize construction of excess spoil fills on undisturbed land, paragraph (b)(2)(i) of this section does not prohibit the placement of what would otherwise be excess spoil on the mined-out area to heights in excess of the premining elevation, provided that the final surface configuration is compatible with the surrounding terrain and generally resembles landforms found in the surrounding area.

(4) You may not create a permanent impoundment under § 816.49(b) of this chapter or place coal combustion residues or noncoal materials in the mine excavation if doing so would result in the creation of excess spoil.

(c) *Preferential use of preexisting benches for excess spoil disposal.* To the extent that your proposed operation will generate excess spoil, you must maximize the placement of excess spoil on preexisting benches in the vicinity of the proposed permit area in accordance with § 816.74 of this chapter rather than constructing excess spoil fills on previously undisturbed land.

(d) *Fill capacity demonstration.* You must submit a demonstration, with supporting calculations and other documentation, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as calculated under paragraph (b) of this section.

(e) *Requirements related to perennial and intermittent streams.* You must comply with the requirements of § 780.28 of this part concerning activities in or near perennial or intermittent streams if you propose to construct an excess spoil fill in or within 100 feet of a perennial or intermittent stream. The 100-foot distance must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(f) *Location and profile.* (1) You must submit maps and cross-section drawings or models showing the location and profile of all proposed excess spoil fills.

(2) You must locate fills on the most moderately sloping and naturally stable areas available. The regulatory authority will determine which areas are available, based upon the requirements of the Act and this chapter.

(3) Whenever possible, you must place fills on or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(g) *Design plans.* You must submit detailed design plans, including appropriate maps and cross-section drawings, for each proposed fill, prepared in accordance with the requirements of this section and §§ 816.71 through 816.74 of this chapter. You must design the fill and

appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(h) *Geotechnical investigation.* You must submit the results of a geotechnical investigation, with supporting calculations and analyses, of the site of each proposed fill, with the exception of those sites at which excess spoil will be placed only on a preexisting bench under § 816.74 of this chapter. The information submitted must include—

(1) Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site.

(2) A description of the character of the bedrock and any adverse geologic conditions in the area of the proposed fill.

(3) The geographic coordinates and a narrative description of all springs, seepage, mine discharges, and groundwater flow observed or anticipated during wet periods in the area of the proposed fill.

(4) An analysis of the potential effects of any underground mine workings within the proposed permit and adjacent areas, including the effects of any subsidence that may occur as a result of previous, existing, and future underground mining operations.

(5) A technical description of the rock materials to be used in the construction of fills underlain by a rock drainage blanket.

(6) Stability analyses that address static and seismic conditions. The analyses must include, but are not limited to, strength parameters, pore pressures and long-term seepage conditions. The analyses must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the specific design specifications and methods.

(i) *Operation and reclamation plans.* You must submit plans for the construction, operation, maintenance, and reclamation of all excess spoil fills in accordance with the requirements of §§ 816.71 through 816.74 of this chapter.

(j) *Additional requirements for bench cuts or rock-toe buttresses.* If bench cuts or rock-toe buttresses are required under § 816.71(b)(2) of this chapter, you must provide the—

(1) Number, location, and depth of borings or test pits, which must be determined according to the size of the fill and subsurface conditions.

(2) Engineering specifications used to design the bench cuts or rock-toe buttresses. Those specifications must be based upon the stability analyses required under paragraph (h)(6) of this section.

(k) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of each proposed fill and appurtenant structures meets the requirements of this section.

§ 780.37 What information must I provide concerning access and haul roads?

(a) *Design and other application requirements.* (1) You, the applicant, must submit a map showing the location of all roads that you intend to construct or use within the proposed permit area, together with plans and drawings for each road to be constructed, used, or maintained within the proposed permit area.

(2) You must include appropriate cross-sections, design drawings, and specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, drainage structures, and fords and low-water crossings of perennial and intermittent streams.

(3) You must demonstrate how all proposed roads will comply with the applicable requirements of §§ 780.28, 816.150, and 816.151 of this chapter.

(4) You must identify—

(i) Each road that you propose to locate in or within 100 feet, measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark, of a perennial or intermittent stream.

(ii) Each proposed ford of a perennial or intermittent stream that you plan to use as a temporary route during road construction.

(iii) Any plans to alter or relocate a natural stream channel.

(iv) Each proposed low-water crossing of a perennial or intermittent stream channel.

(5) You must explain why the roads, fords, and stream crossings identified in paragraph (a)(4) of this section are necessary and how they comply with the applicable requirements of § 780.28 of this part and §§ 816.150 and 816.151 of this chapter.

(6) You must describe the plans to remove and reclaim each road that would not be retained as part of the postmining land use, and provide a schedule for removal and reclamation.

(b) *Primary road certification.* The plans and drawings for each primary road must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, or in any state that authorizes land surveyors to certify the design of primary roads, a qualified registered professional land surveyor, with experience in the design and construction of roads, as meeting the requirements of this chapter; current, prudent engineering practices; and any design criteria established by the regulatory authority.

(c) *Standard design plans.* The regulatory authority may establish engineering design standards for primary roads through the regulatory program approval process, in lieu of engineering tests, to establish compliance with the minimum static safety factor of 1.3 for all embankments specified in § 816.151(c) of this chapter.

§ 780.38 What information must I provide concerning support facilities?

You must submit a description, plans, and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings must include a map, appropriate cross-sections, design drawings, and specifications sufficient to demonstrate compliance with § 816.181 of this chapter for each facility.

■ 25. Lift the suspensions of §§ 783.21, 783.25(a)(3), 783.25(a)(8), and 783.25(a)(9) and revise part 783 to read as follows:

Part 783—Underground Mining Permit Applications—Minimum Requirements for Information on Environmental Resources and Conditions

Sec.

Authority: 30 U.S.C. 1201 *et seq.* and 54 U.S.C. 300101 *et seq.*

§ 783.1 What does this part do?

This part establishes the minimum requirements for the descriptions of environmental resources and conditions that you must include in an application for a permit to conduct underground mining activities.

§ 783.2 What is the objective of this part?

The objective of this part is to ensure that you, the permit applicant, provide the regulatory authority with a complete and accurate description of the environmental resources that may be impacted or affected by proposed underground mining activities and the environmental conditions that exist within the proposed permit and adjacent areas.

§ 783.4 What responsibilities do I and government agencies have under this part?

(a) You, the permit applicant, must provide all information required by this part in your application, except when this part specifically exempts you from doing so.

(b) State and federal government agencies are responsible for providing information for permit applications to the extent that this part specifically requires that they do so.

§ 783.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–0035. The information is being collected to meet the requirements of sections 507 and 508 of SMCRA, which require that each permit application include a description of the premining environmental resources within and around the proposed permit area. The regulatory authority uses this information as a baseline for evaluating the impacts of mining. You, the permit applicant, must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 203–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

§ 783.11 [Reserved]

§ 783.12 [Reserved]

§ 783.17 What information on cultural, historic, and archeological resources must I include in my permit application?

(a) Your permit application must describe the nature of cultural, historic, and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas. The description must be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historical, and cultural preservation agencies.

(b) The regulatory authority may require you, the applicant, to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places by—

(1) Collecting additional information,

(2) Conducting field investigations, or

(3) Completing other appropriate analyses.

§ 783.18 What information on climate must I include in my permit application?

The regulatory authority may require that your permit application contain a statement of the climatic factors that are representative of the proposed permit area, including—

(a) The average seasonal precipitation.

(b) The average direction and velocity of prevailing winds.

(c) Seasonal temperature ranges.

(d) Additional data that the regulatory authority deems necessary to ensure compliance with the requirements of this subchapter.

§ 783.19 What information on vegetation must I include in my permit application?

(a) You must identify, describe, and map existing vegetation types and plant communities within the proposed permit area. If you propose to use reference areas for purposes of determining revegetation success under § 817.116 of this chapter, you also must identify, describe, and map existing vegetation types and plant communities within any proposed reference areas.

(b) The description and map required under paragraph (a) of this section must—

(1) Be in sufficient detail to assist in preparation of the revegetation plan under § 784.12(g) of this chapter and provide a baseline for comparison with postmining vegetation;

(2) Be adequate to evaluate whether the vegetation provides important habitat for fish and wildlife and whether the proposed permit area contains native plant communities of local or regional significance;

(3) Identify areas with significant populations of non-native invasive or noxious species; and

(4) Delineate all wetlands and all areas bordering streams that either support or are capable of supporting hydrophytic or hydrophilic vegetation or vegetation typical of floodplains.

(c) If the vegetation on the proposed permit area has been altered by human activity, you must describe the native vegetation and plant communities typical of that area in the absence of human alterations.

§ 783.20 What information on fish and wildlife resources must I include in my permit application?

(a) *General requirements.* Your permit application must include information on fish and wildlife resources for the proposed permit and adjacent areas, including all species of fish, wildlife, plants, and other life forms listed or proposed for listing under the Endangered Species Act of 1973, 30 U.S.C. 1531 *et seq.* The adjacent area must include all lands and waters likely to be affected by the proposed operation.

(b) *Scope and level of detail.* The regulatory authority will determine the scope and level of detail for this information in coordination with state and federal agencies with responsibilities for fish and wildlife. The scope and level of detail must be sufficient to design the protection and enhancement plan required under § 784.16 of this chapter.

(c) *Site-specific resource information requirements.* Your application must include site-specific resource information if the proposed permit area or the adjacent area contains or is likely to contain one or more of the following—

(1) Species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or designated or proposed critical habitat under that law. When these circumstances exist, the site-specific resource information must include a description of the effects of future non-federal activities that are reasonably certain to occur within the proposed permit and adjacent areas.

(2) Species or habitat protected by state or tribal endangered species statutes and regulations.

(3) Habitat of unusually high value for fish and wildlife, which may include wetlands, riparian areas, cliffs that provide nesting sites for raptors,

significant migration corridors, specialized reproduction or wintering areas, areas offering special shelter or protection, and areas that support populations of endemic species that are vulnerable because of restricted ranges, limited mobility, limited reproductive capacity, or specialized habitat requirements.

(4) Other species or habitat identified through interagency coordination as requiring special protection under state, tribal, or federal law, including species identified as sensitive by a state, tribal, or federal agency.

(5) Perennial or intermittent streams.

(6) Native plant communities of local or regional ecological significance.

§ 783.21 What information on soils must I include in my permit application?

Your permit application must include—

(a) The results of a reconnaissance inspection to determine whether the proposed permit area may contain prime farmland historically used for cropland, as required by § 785.17(b)(1) of this chapter.

(b)(1) A map showing the soil mapping units located within the proposed permit area, if the National Cooperative Soil Survey has completed and published a soil survey of the area.

(2) The applicable soil survey information that the Natural Resources Conservation Service maintains for the soil mapping units identified in paragraph (b)(1) of this section. You may provide this information either in paper form or via a link to the appropriate element of the Natural Resources Conservation Service's soil survey Web site.

(c) A description of soil depths within the proposed permit area.

(d) Detailed information on soil quality, if you seek approval for the use of soil substitutes or supplements under § 784.12(e) of this chapter.

(e) The soil survey information required by § 785.17(b)(3) of this chapter if the reconnaissance inspection conducted under paragraph (a) of this section indicates that prime farmland historically used for cropland may be present.

(f) Any other information on soils that the regulatory authority finds necessary to determine land capability.

§ 783.22 What information on land use and productivity must I include in my permit application?

Your permit application must contain a statement of the condition, capability, and productivity of the land within the proposed permit area, including—

(a)(1) A map and narrative identifying and describing the land use or uses in existence at the time of the filing of the application.

(2) A description of the historical uses of the land to the extent that this information is readily available or can be inferred from the uses of other lands in the vicinity.

(3) For any previously mined area within the proposed permit area, a description of the land uses in existence before any mining, to the extent that such information is available.

(b) A narrative analysis of—

(1) The capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover, and the hydrology of the proposed permit area; and

(2) The productivity of the proposed permit area before mining, expressed as average yield of food, fiber, forage, or wood products obtained under high levels of management, as determined by—

(i) Actual yield data; or

(ii) Yield estimates for similar sites based on current data from the U.S. Department of Agriculture, state agricultural universities, or appropriate state natural resources or agricultural agencies.

(c) Any additional information that the regulatory authority deems necessary to determine the condition, capability, and productivity of the land within the proposed permit area.

§ 783.24 What maps, plans, and cross-sections must I submit with my permit application?

(a) In addition to the maps, plans, and information required by other sections of this part, your permit application must include maps and, when appropriate, plans and cross-sections showing—

(1) All boundaries of lands and names of present owners of record of those lands, both surface and subsurface, included in or contiguous to the proposed permit area.

(2) The boundaries of land within the proposed permit area upon which you have the legal right to enter and begin underground mining activities.

(3) The boundaries of all areas that you anticipate affecting over the estimated total life of the underground mining activities, with a description of the size, sequence, and timing of the mining of subareas for which you anticipate seeking additional permits or expansion of an existing permit in the future.

(4) The location and current use of all buildings within the proposed permit area or within 1,000 feet of the proposed permit area.

(5) The location of surface and subsurface manmade features within, passing through, or passing over the proposed permit and adjacent areas, including, but not limited to, highways, electric transmission lines, pipelines, constructed drainageways, irrigation ditches, and agricultural drainage tile fields.

(6) The location and boundaries of any proposed reference areas for determining the success of revegetation.

(7) The location and ownership of existing wells, springs, and other groundwater resources within the proposed permit and adjacent areas. You may provide ownership information in a table cross-referenced to a map if approved by the regulatory authority.

(8) The location and depth (if available) of each water well within the proposed permit and adjacent areas. You may provide information concerning depth in a table cross-referenced to a map if approved by the regulatory authority.

(9) The name, location, ownership, and description of all surface-water bodies and features, such as perennial, intermittent, and ephemeral streams; ponds, lakes, and other impoundments; wetlands; and natural drainageways, within the proposed permit and adjacent areas. To the extent appropriate, you may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(10) The locations of water supply intakes for current users of surface water flowing into, from, and within a hydrologic area defined by the regulatory authority.

(11) The location of any public water supplies and the extent of any associated wellhead protection zones located within one-half mile, measured horizontally, of the proposed permit area or the area overlying the proposed underground workings. Both you and the regulatory authority must keep this information confidential when required by state law or when otherwise necessary for safety and security purposes and protection of the integrity of public water supplies.

(12) The location of all existing and proposed discharges to any surface-water body within the proposed permit and adjacent areas.

(13) The location of any discharge into or from an active, inactive, or abandoned surface or underground mine, including, but not limited to, a mine-water treatment or pumping facility, that is hydrologically connected to the site of the proposed operation or that is located within one-half mile,

measured horizontally, of either the proposed permit area or the area overlying the proposed underground workings.

(14) Each public road located in or within 100 feet of the proposed permit area.

(15) The boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas.

(16) Each cemetery that is located in or within 100 feet of the proposed permit area.

(17) Any land within the proposed permit area which is within the boundaries of any units of the National System of Trails or the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act.

(18) The elevations, locations, and geographic coordinates of test borings and core samplings. You may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(19) The location and extent of subsurface water, if encountered, within the proposed permit and adjacent areas. This information must include, but is not limited to, the elevation of the water table, the areal and vertical distribution of aquifers, and maximum and minimum variations in hydraulic head in different aquifers. You must provide this information on appropriately-scaled cross-sections or maps, in a narrative, or a combination of these methods, whichever format best displays this information to the satisfaction of the regulatory authority.

(20) The elevations, locations, and geographic coordinates of monitoring stations used to gather data on water quality and quantity and on fish and wildlife in preparation of the application. You may provide this information in a table cross-referenced to a map if approved by the regulatory authority.

(21) The nature, depth, thickness, and commonly used names of the coal seams to be mined.

(22) Any coal crop lines within the permit and adjacent areas and the strike and dip of the coal to be mined.

(23) The location and extent of known workings of active, inactive, or abandoned underground mines within or underlying the proposed permit and adjacent areas.

(24) Any underground mine openings to the surface within the proposed permit and adjacent areas.

(25) The location and extent of existing or previously surface-mined areas within the proposed permit area.

(26) The location and dimensions of existing areas of spoil, coal mine waste, noncoal mine waste disposal sites, dams, embankments, other impoundments, and water treatment facilities within the proposed permit area.

(27) The location and, if available, the depth of all gas and oil wells within the proposed permit and adjacent areas. You must identify the lateral extent of the well bores unless that information is confidential under state law. You may provide information concerning well depth in a table cross-referenced to a map if approved by the regulatory authority.

(28) Other relevant information required by the regulatory authority.

(b) Maps, plans, and cross-sections required by paragraph (a) of this section must be—

(1) Prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or in any state that authorizes land surveyors to prepare and certify such maps, plans, and cross-sections, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(2) Updated when required by the regulatory authority.

(c) The regulatory authority may require that you submit the materials required by this section in a digital format that includes all necessary metadata.

§ 783.25 [Reserved]

§ 783.26 May I submit permit application information in increments as mining progresses?

(a) You may request that the regulatory authority approve a schedule for incremental submission of the information required by this part, based on the anticipated progress and impact of underground mining activities.

(b) At its discretion, the regulatory authority may approve the proposed schedule, provided that—

(1) Each increment is clearly defined and includes at least 5 years of anticipated mining.

(2) The schedule includes a map showing the limits of underground mining activity under each increment. You must establish those limits in a manner that will prevent any impact on the succeeding increment before the regulatory authority approves mining within that increment.

(3) The schedule requires that you submit all required data under this part for each successive increment at least one year in advance of any anticipated impact of underground mining upon that increment.

(4) The regulatory authority conditions the permit to—

(i) Require that you reevaluate the adequacy of the PHC determination under § 784.20 of this chapter and the hydrologic reclamation plan under § 784.22 of this chapter as part of each submission under paragraph (b)(3) of this section.

(ii) Prohibit the conduct of any underground mining activity that might impact an increment before the regulatory authority reviews the information submitted for that increment, updates the CHIA prepared under § 784.21 of this chapter to incorporate that information, and determines that the findings made under § 773.15 of this chapter remain accurate.

■ 26. Revise part 784 to read as follows:

Part 784—Underground Mining Permit Applications—Minimum Requirements for Operation and Reclamation Plans

Sec.

Authority: 30 U.S.C. 1201 *et seq.* and 54 U.S.C. 300101 *et seq.*

§ 784.1 What does this part do?

This part establishes the minimum requirements for the operation and reclamation plan portions of applications for a permit to conduct underground mining activities, except to the extent that part 785 of this subchapter establishes different requirements.

§ 784.2 What is the objective of this part?

The objective of this part is to ensure that you, the permit applicant, provide the regulatory authority with comprehensive and reliable information on how you propose to conduct underground mining activities and reclaim the disturbed area in compliance with the Act, this chapter, and the regulatory program.

§ 784.4 What responsibilities do I and government agencies have under this part?

(a) You, the permit applicant, must provide to the regulatory authority all information required by this part, except where specifically exempted in this part.

(b) State and federal governmental agencies must provide information needed for permit applications to the extent that this part specifically requires that they do so.

§ 784.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–0039. Collection of this information is required under section 516(d) of SMCRA, which in effect requires applicants for permits for underground coal mines to prepare and submit an operation and reclamation plan for coal mining activities as part of the application. The regulatory authority uses this information to determine whether the plan will achieve the reclamation and environmental protection requirements of the Act and regulatory program. You, the permit applicant, must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 203–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

§ 784.11 What must I include in the general description of my proposed operations?

Your application must contain a description of the mining operations that you propose to conduct during the life of the mine, including, at a minimum, the following—

(a) A narrative description of the—

(1) Type and method of coal mining procedures and proposed engineering techniques.

(2) Anticipated annual and total number of tons of coal to be produced.

(3) Major equipment to be used for all aspects of the proposed operations.

(b) A narrative explaining the construction, modification, use, maintenance, and removal (unless you can satisfactorily explain why retention is necessary or appropriate for the postmining land use specified in the application under § 784.24 of this part) of the following facilities:

(1) Dams, embankments, and other impoundments.

(2) Overburden and soil handling and storage areas and structures.

(3) Coal removal, handling, storage, cleaning, and transportation areas and structures.

(4) Spoil, coal processing waste, underground development waste, and noncoal mine waste removal, handling, storage, transportation, and disposal areas and structures.

(5) Mine facilities, including ventilation boreholes, fans, and access roads.

(6) Water pollution control facilities.

§ 784.12 What must the reclamation plan include?

(a) *General requirements.* Your application must contain a plan for the reclamation of the lands to be disturbed within the proposed permit area. The plan must show how you will comply with the reclamation requirements of the applicable regulatory program. At a minimum, the plan must include all information required under this part and part 785 of this chapter.

(b) *Reclamation timetable.* The reclamation plan must contain a detailed timetable for the completion of each major step in the reclamation process including, but not limited to—

(1) Backfilling.

(2) Grading.

(3) Establishment of the surface drainage pattern and stream-channel configuration approved in the permit, including construction of appropriately-designed perennial, intermittent, and ephemeral stream channels to replace those removed by mining, to the extent and in the form required by §§ 784.27, 784.28, 817.56, and 817.57 of this chapter.

(4) Soil redistribution.

(5) Planting of all vegetation in accordance with the revegetation plan approved in the permit, including establishment of streamside vegetative corridors along the banks of perennial, intermittent, and ephemeral streams when required by §§ 817.56(c) and 817.57(d) of this chapter.

(6) Demonstration of revegetation success.

(7) Demonstration of restoration of the ecological function of all reconstructed perennial and intermittent stream segments.

(8) Application for each phase of bond release under § 800.42 of this chapter.

(c) *Reclamation cost estimate.* The reclamation plan must contain a detailed estimate of the cost of reclamation, including both direct and indirect costs, of those elements of the proposed operations that are required to be covered by a performance bond under part 800 of this chapter, with supporting calculations for the estimates. You must use current standardized construction cost estimation methods and equipment cost guides or up-to-date actual contracting costs incurred by the regulatory authority for similar activities to prepare this estimate.

(d) *Backfilling and grading plan.* (1) The reclamation plan must contain a plan for backfilling surface excavations, compacting the backfill, and grading the disturbed area, with contour maps, models, or cross-sections that show the anticipated final surface configuration of the proposed permit area, including drainage patterns, in accordance with §§ 817.102 through 817.107 of this chapter, using the best technology currently available.

(2) The backfilling and grading plan must describe in detail how you will conduct backfilling and related reclamation activities, including how you will—

(i) Compact spoil to reduce infiltration to minimize leaching and discharges of parameters of concern.

(ii) Limit compaction of topsoil and soil materials in the root zone to the minimum necessary to achieve stability. The plan also must identify measures that will be used to alleviate soil compaction if necessary.

(iii) Handle acid-forming and toxic-forming materials, if present, to prevent the formation of acid or toxic drainage from acid-forming and toxic-forming materials within the overburden. The plan must be consistent with paragraph (n) of this section and § 817.38 of this chapter.

(e) *Soil handling plan.*—(1) *General requirements.* (i) The reclamation plan must include a plan and schedule for removal, storage, and redistribution of topsoil, subsoil, and other material to be used as a final growing medium in accordance with § 817.22 of this chapter. It also must include a plan and schedule for removal, storage, and redistribution or other use of organic matter in accordance with § 817.22(f) of this chapter.

(ii) Except as provided in paragraphs (e)(1)(iii) and (iv) of this section, the plan submitted under paragraph (e)(1)(i) of this section must require that the B soil horizon, the C soil horizon, and other underlying strata, or portions of those soil horizons and strata, be removed separately, stockpiled if necessary, and redistributed to the extent and in the manner needed to achieve the optimal rooting depths required to restore premining land use capability and to comply with the revegetation requirements of §§ 817.111 and 817.116 of this chapter.

(iii) The plan submitted under paragraph (e)(1)(i) of this section need not require salvage of those soil horizons which you demonstrate, to the satisfaction of the regulatory authority, are inferior to other overburden materials as a plant growth medium, provided you comply with the soil substitute requirements of paragraph (e)(2) of this section.

(iv) The plan submitted under paragraph (e)(1)(i) of this section may allow blending of the B soil horizon, the C soil horizon, and underlying strata, or portions thereof, to the extent that research or prior experience under similar conditions has demonstrated that blending will not adversely affect soil productivity.

(v) The plan submitted under paragraph (e)(1)(i) of this section must explain how you will handle and, if necessary, store soil materials to avoid contamination by acid-forming or toxic-forming materials and to minimize deterioration of desirable soil characteristics.

(2) *Substitutes and supplements.* (i) You must identify each soil horizon for which you propose to use appropriate overburden materials as either a supplement to or a substitute for the existing topsoil or subsoil on the proposed permit area. For each of those horizons, you must demonstrate, and the regulatory authority must find in writing, that—

(A)(*1*) The quality of the existing topsoil and subsoil is inferior to that of the best overburden materials available; or

(*2*) The quantity of the existing topsoil and subsoil on the proposed permit area is insufficient to provide an optimal rooting depth. In this case, the plan must require that all available existing topsoil and favorable subsoil, regardless of the amount, be removed, stored, and redistributed as part of the final growing medium unless the conditions described in paragraph (e)(2)(i)(A)(*1*) of this section also apply.

(B) The use of the overburden materials that you have selected, in combination with or in place of the topsoil or subsoil, will result in a soil medium that is more suitable than the existing topsoil and subsoil to support and sustain vegetation consistent with the postmining land use and the revegetation plan under paragraph (g) of this section and that will provide a rooting depth that is superior to the existing topsoil and subsoil.

(C) The overburden materials that you select for use as a soil substitute or supplement are the best materials available to support and sustain vegetation consistent with the postmining land use and the revegetation plan under paragraph (g) of this section.

(ii) For purposes of paragraph (e)(2)(i) of this section, the regulatory authority will specify the—

(A) Suitability criteria for substitutes and supplements.

(B) Chemical and physical analyses, field trials, or greenhouse tests that you must conduct to make the demonstration required by paragraph (e)(2)(ii) of this section.

(C) Sampling objectives and techniques and the analytical techniques that you must use for purposes of paragraph (e)(2)(iii)(B) of this section.

(iii) At a minimum, the demonstrations required by paragraph (e)(2)(ii) of this section must include—

(A) The physical and chemical soil characteristics and root zones needed to support and sustain the type of vegetation to be established on the reclaimed area.

(B) A comparison and analysis of the thickness, total depth, texture, percent coarse fragments, pH, and areal extent of the different kinds of soil horizons and overburden materials available within the proposed permit area, based upon a statistically valid sampling procedure.

(v) You must include a plan for testing and evaluating overburden materials during both removal and redistribution to ensure that only materials approved for use as soil substitutes or supplements are removed and redistributed.

(f) *Surface stabilization plan.* The reclamation plan must contain a plan for stabilizing road surfaces, redistributed soil materials, and other exposed surface areas to effectively control erosion and air pollution attendant to erosion in accordance with §§ 817.95, 817.150, and 817.151 of this chapter.

(g) *Revegetation plan.* (1) The reclamation plan must contain a plan for revegetation consistent with §§ 817.111 through 817.116 of this chapter, including, but not limited to, descriptions of—

(i) The schedule for revegetation of the area to be disturbed.

(ii) The site preparation techniques that you plan to use, including the measures that you will take to avoid or, when avoidance is not possible, to minimize and alleviate compaction of the root zone during backfilling, grading, soil redistribution, and planting.

(iii) What soil tests you will perform, together with a statement as to whether you will apply lime, fertilizer, or other amendments in response to those tests before planting or seeding.

(iv) The species that you will plant to achieve temporary erosion control or, if you do not intend to establish a temporary vegetative cover, a description of other soil stabilization measures that you will implement in lieu of planting a temporary cover.

(v) The species that you will plant and the seeding and stocking rates and planting arrangements that you will use to achieve or complement the postmining land use, enhance fish and wildlife habitat, and achieve the streamside vegetative corridor requirements of §§ 817.56(c) and 817.57(d) of this chapter, when applicable.

(A) Revegetation plans that involve the establishment of trees and shrubs must include site-specific planting prescriptions for canopy trees, understory trees and shrubs, and herbaceous ground cover compatible with establishment of trees and shrubs.

(B) To the extent practicable and consistent with other revegetation and regulatory program requirements, the species mix must include native pollinator-friendly plants and the planting arrangements must promote the establishment of pollinator-friendly habitat.

(vi) The planting and seeding techniques that you will use.

(vii) Whether you will apply mulch and, if so, the type of mulch and the method of application.

(viii) Whether you plan to conduct irrigation or apply fertilizer after the first growing season and, if so, to what extent and for what length of time.

(ix) Any normal husbandry practices that you plan to use in accordance with § 817.115(d) of this chapter.

(x) The standards and evaluation techniques that you propose to use to determine the success of revegetation in accordance with § 817.116 of this chapter.

(xi) The measures that you will take to avoid the establishment of invasive species on reclaimed areas or to control those species if they do become established.

(2) Except as provided in paragraphs (g)(4) and (5) of this section, the species and planting rates and arrangements selected as part of the revegetation plan must be designed to create a diverse, effective, permanent vegetative cover that is consistent with the native plant communities and natural succession process described in the permit application in accordance with § 783.19 of this chapter.

(3) The species selected as part of the revegetation plan must—

(i) Be native to the area. The regulatory authority may approve the use of introduced species as part of the permanent vegetative cover for the site only if—

(A) The introduced species are both non-invasive and necessary to achieve the postmining land use;

(B) Planting of native species would be inconsistent with the approved postmining land use; and

(C) The approved postmining land use is implemented before the entire bond amount for the area has been fully released under §§ 800.40 through 800.43 of this chapter.

(ii) Be capable of stabilizing the soil surface from erosion to the extent that control of erosion with herbaceous ground cover is consistent with establishment of a permanent vegetative cover that resembles native plant communities in the area.

(iii) Be compatible with the approved postmining land use.

(iv) Have the same seasonal characteristics of growth, consistent with the appropriate stage of natural succession, as the native plant communities described in the permit application in accordance with § 783.19 of this chapter.

(v) Be capable of self-regeneration and natural succession.

(vi) Be compatible with the plant and animal species of the area.

(vii) Meet the requirements of applicable state and federal seed, noxious plant, and introduced species laws and regulations.

(4) The regulatory authority may grant an exception to the requirements of paragraphs (g)(3)(i), (iv), and (v) of this section when necessary to achieve a quick-growing, temporary, stabilizing cover on disturbed and regraded areas, and the species selected to achieve this purpose will not impede the establishment of permanent vegetation.

(5) The regulatory authority may grant an exception to the requirements of paragraphs (g)(2), (g)(3)(iv), and (g)(3)(v) of this section for those areas with a long-term, intensive, agricultural postmining land use.

(6) A qualified, experienced biologist, soil scientist, forester, or agronomist must prepare or approve all revegetation plans.

(h) *Stream protection and reconstruction plan.* The reclamation plan must describe how you will comply with the stream reconstruction requirements of §§ 784.27 and 817.56 of this chapter for ephemeral streams and the stream protection, stream reconstruction, and functional restoration requirements of §§ 784.28 and 817.57 of this chapter for perennial and intermittent streams.

(i) *Coal resource conservation plan.* The reclamation plan must describe the measures that you will employ to maximize the use and conservation of the coal resource while using the best technology currently available to maintain environmental integrity, as required by § 817.59 of this chapter.

(j) *Plan for disposal of noncoal waste materials.* The reclamation plan must describe—

(1) The type and quantity of noncoal waste materials that you anticipate disposing of within the proposed permit area.

(2) How you intend to dispose of noncoal waste materials in accordance with § 817.89 of this chapter.

(3) The locations of any proposed noncoal waste material disposal sites within the proposed permit area.

(4) The contingency plans that you have developed to preclude sustained combustion of combustible noncoal materials.

(k) *Management of mine openings, boreholes, and wells.* The reclamation plan must contain a description, including appropriate cross-sections and maps, of the measures that you will use to seal or manage mine openings, and to plug, case or manage exploration holes, boreholes, wells and other openings within the proposed permit area, in accordance with § 817.13 of this chapter.

(l) *Compliance with Clean Air Act and Clean Water Act.* The reclamation plan must describe the steps that you have taken or will take to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable air and water quality laws and regulations and health and safety standards.

(m) *Consistency with land use plans and surface owner plans.* The reclamation plan must describe how the proposed operation is consistent with—

(1) All applicable state and local land use plans and programs.

(2) The plans of the surface landowner, to the extent that those plans are practicable and consistent with this chapter and with other applicable laws and regulations.

(n) *Handling of acid-forming and toxic-forming materials.* (1) If the baseline geologic information collected under § 784.19(e)(3) and (4) of this part indicates the presence of acid-forming or toxic-forming materials, you must develop a plan to prevent any adverse hydrologic impacts that may result from exposure of those materials during either the face-up process or disposal of underground development waste. At a minimum the plan must—

(i) Identify the anticipated postmining groundwater level for all locations at which you propose to place acid-forming or toxic-forming materials.

(ii) When approved in the permit, place acid-forming and toxic-forming

materials in an excess spoil fill or a coal mine waste refuse pile, using one or both of the following techniques, as appropriate:

(A) Completely surround acid-forming and toxic-forming materials with compacted material with a hydraulic conductivity at least two orders of magnitude lower than the hydraulic conductivity of the adjacent spoil or coal mine waste.

(B) Treat or otherwise neutralize acid-forming and toxic-forming materials to prevent the formation of acid or toxic mine drainage. This technique may include the blending of acid-forming materials with spoil of sufficient alkalinity to prevent the development of acid drainage.

§ 784.13 What additional maps and plans must I include in the reclamation plan?

(a) In addition to the maps and plans required under § 783.24 and other provisions of this subchapter, your application must include maps, plans, and cross-sections of the proposed permit area showing—

(1) The lands that you propose to affect throughout the life of the operation, including the sequence and timing of underground mining activities and the sequence and timing of backfilling, grading, and other reclamation activities to be conducted on areas where the operation will disturb the land surface.

(2) Each area of land for which a performance bond or other equivalent guarantee will be posted under part 800 of this chapter.

(3) Any change that the proposed operations will cause in a facility or feature identified under § 783.24 of this chapter.

(4) All buildings, utility corridors, and facilities to be used or constructed within the proposed permit area, with identification of those facilities that you propose to retain as part of the postmining land use.

(5) Each coal storage, cleaning, processing, and loading area and facility.

(6) Each temporary storage area for soil, spoil, coal mine waste, and noncoal mine waste.

(7) Each water diversion, collection, conveyance, treatment, storage and discharge facility to be used, including the location of each point at which water will be discharged from the proposed permit area to a surface-water body and the name of that water body.

(8) Each disposal facility for coal mine waste and noncoal mine waste materials.

(9) Each feature and facility to be constructed to protect or enhance fish, wildlife, and related environmental values.

(10) Each explosive storage and handling facility.

(11) The location of each siltation structure, sedimentation pond, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 784.25 of this part, and the location of each excess spoil fill for which plans are required under § 784.35 of this part.

(12) Each segment of a perennial or intermittent stream that you propose to mine through, bury, or divert.

(13) Each location in which you propose to restore a perennial or intermittent stream or construct a temporary or permanent diversion of a perennial or intermittent stream.

(14) Each streamside vegetative corridor that you propose to establish.

(15) Each segment of a perennial or intermittent stream that you propose to enhance under the plan submitted in accordance with § 784.16 of this part.

(16) The location and geographic coordinates of each monitoring point for groundwater, surface water, and subsidence.

(17) The location and geographic coordinates of each point at which you propose to monitor the biological condition of perennial and intermittent streams.

(b) Except as provided in §§ 784.25(a)(2), 784.25(a)(3), 784.35, 817.74(c), and 817.81(c) of this chapter, maps, plans, and cross-sections required under paragraphs (a)(5), (6), (7), (10), and (11) of this section must be prepared by, or under the direction of, and certified by a qualified, registered, professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify such maps, plans, and cross-sections, a qualified, registered, professional, land surveyor, with assistance from experts in related fields such as landscape architecture.

(c) The regulatory authority may require that you submit the materials required by paragraph (a) of this section in a digital format.

§ 784.14 What requirements apply to the use of existing structures?

(a) Each application must contain a description of every existing structure that you propose to use in connection with or to facilitate surface coal mining and reclamation operations. The description must include—

(1) The location of the structure.

(2) Plans of the structure.

(3) A description of the current condition of the structure.

(4) The approximate dates when the structure was originally built.

(5) A showing, including relevant monitoring data or other evidence, of whether the structure meets the permanent program performance standards of subchapter K of this chapter or, if the structure does not meet the performance standards of subchapter K of this chapter, a showing of whether the structure meets the initial program performance standards of subchapter B of this chapter.

(b) Each application must contain a compliance plan for every existing structure that you propose to modify or reconstruct for use in connection with or to facilitate surface coal mining and reclamation operations. The compliance plan must include—

(1) Design specifications for the modification or reconstruction of the structure to meet the design and performance standards of subchapter K of this chapter.

(2) A schedule for the initiation and completion of any modification or reconstruction under paragraph (b)(1) of this section.

(3) Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of subchapter K of this chapter are met.

(4) A demonstration that there is no significant risk of harm to the environment or to public health or safety during modification or reconstruction of the structure.

§ 784.15 [Reserved]

§ 784.16 What must I include in the fish and wildlife protection and enhancement plan?

(a) *General requirements.* Your application must include a fish and wildlife protection and enhancement plan that—

(1) Is consistent with the requirements of § 817.97 of this chapter.

(2) Is specific to the resources identified under § 783.20 of this chapter.

(3) Complies with the requirements of paragraphs (b) through (e) of this section.

(b) *Requirements related to the Endangered Species Act of 1973.* (1) Paragraphs (b)(2) and (3) of this section apply when the proposed operation may affect species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or designated or proposed critical habitat under that law.

(2) You must describe the steps that you have taken or will take to comply with the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* including

any biological opinions developed under section 7 of that law and any species-specific habitat conservation plans developed in accordance with section 10 of that law.

(3) The regulatory authority may not approve the permit application before there is a demonstration of compliance with the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* through one of the mechanisms listed in § 773.15(j) of this chapter.

(c) *Protection of fish, wildlife, and related environmental values in general.* You must describe how, to the extent possible using the best technology currently available, you will minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. At a minimum, you must explain how you will—

(1) Retain forest cover and other native vegetation as long as possible and time the removal of that vegetation to minimize adverse impacts on aquatic and terrestrial species.

(2) Locate and design sedimentation ponds, utilities, support facilities, roads, rail spurs, and other transportation facilities to avoid or minimize adverse impacts on fish, wildlife, and related environmental values.

(3) Except as provided under § 784.12(g)(4) of this part, select non-invasive native species for revegetation that either promote or do not inhibit the long-term development of wildlife habitat.

(4)(i) Avoid mining through wetlands or perennial or intermittent streams or disturbing riparian habitat adjacent to those streams. When avoidance is not possible, minimize—

(A) The time during which mining and reclamation operations disrupt wetlands or streams or riparian habitat associated with streams;

(B) The length of stream mined through; and

(C) The amount of wetlands or riparian habitat disturbed by the operation.

(ii) If you propose to mine through or discharge dredged or fill material into wetlands or streams that are subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* your application must identify the authorizations, certifications, and permits that you anticipate will be needed under the Clean Water Act and describe the steps that you have taken or will take to procure those authorizations, certifications, and permits. The regulatory authority will process your application and may issue the permit before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.,* provided your application meets all applicable requirements of subchapter G of this chapter. Issuance of a permit under subchapter G of this chapter does not authorize you to conduct any mining-related activity in or affecting waters subject to the jurisdiction of the Clean Water Act before you obtain any required Clean Water Act authorization, certification, or permit. Information submitted and analyses conducted under subchapter G of this chapter may inform the agency responsible for authorizations, certifications, and permits under the Clean Water Act, but they are not a substitute for the reviews, authorizations, certifications, and permits required under the Clean Water Act.

(5) Implement other appropriate conservation practices such as, but not limited to, those identified in the technical guides published by the Natural Resources Conservation Service.

(d) *Enhancement measures.*—(1) *General requirements.* (i) You must describe how, to the extent possible, you will use the best technology currently available to enhance fish, wildlife, and related environmental values both within and outside the area to be disturbed by mining activities, where practicable. Your application must identify the enhancement measures that you propose to implement and the lands upon which you propose to implement those measures. Those measures may include some or all the potential enhancement measures listed in paragraph (d)(2) of this section, but they are not limited to the measures listed in paragraph (d)(2) of this section.

(ii) If your application includes no proposed enhancement measures under paragraph (d)(1)(i) of this section, you must explain, to the satisfaction of the regulatory authority, why implementation of enhancement measures is not practicable.

(2) *Potential enhancement measures.* Potential enhancement measures include, but are not limited to—

(i) Using the backfilling and grading process to create postmining surface features and configurations, such as functional wetlands, of high value to fish and wildlife.

(ii) Designing and constructing permanent impoundments in a manner that will maximize their value to fish and wildlife.

(iii) Creating rock piles and other permanent landscape features of value to raptors and other wildlife for nesting and shelter, to the extent that those features are consistent with features that existed on the site before any mining, the surrounding topography, and the approved postmining land use.

(iv) Reestablishing native forests or other native plant communities, both within and outside the permit area. This may include restoring the native plant communities that existed before any mining, establishing native plant communities consistent with the native plant communities that are a part of the natural succession process, establishing native plant communities designed to restore or expand native pollinator populations and habitats, or establishing native plant communities that will support wildlife species of local, state, tribal, or national concern, including, but not limited to, species listed or proposed for listing as threatened or endangered on a state, tribal, or national level.

(v) Establishing a vegetative corridor along the banks of streams where there is no such corridor before mining but where a vegetative corridor typically would exist under natural conditions. Species selected for planting within the corridor must be comprised of species native to the area, including native plants adapted to and suitable for planting in any floodplains or other riparian zones located within the corridor. Whenever possible, you should establish this corridor along both banks of the stream, preferably with a minimum corridor width of 100 feet along each bank.

(vi) Implementing conservation practices identified in publications, such as the technical guides published by the Natural Resources Conservation Service.

(vii) Permanently fencing livestock away from perennial and intermittent streams and wetlands.

(viii) Installing perches and nest boxes.

(ix) Establishing conservation easements or deed restrictions, with an emphasis on preserving riparian vegetation and forested corridors along perennial and intermittent streams.

(x) Providing funding to cover long-term operation and maintenance costs that watershed organizations incur in treating long-term postmining discharges from previous mining operations.

(xi) Reclaiming previously mined areas located outside the area that you propose to disturb for coal extraction.

(xii) Implementing measures to reduce or eliminate existing sources of surface-water or groundwater pollution.

(3) *Additional enhancement requirements for operations with anticipated long-term adverse impacts.* (i) The exception in paragraph (d)(1)(ii) of this section does not apply if you

propose to conduct activities on the land surface that would result in the—

(A) Temporary or permanent loss of mature native forest or other native plant communities that cannot be restored fully before final bond release under §§ 800.40 through 800.43 of this chapter or

(B) Permanent loss of wetlands or a segment of a perennial or intermittent stream.

(ii) Whenever the conditions described in paragraph (d)(3)(i) of this section apply, the scope of the enhancement measures that you propose under paragraph (d)(1)(i) of this section must be commensurate with the magnitude of the long-term adverse impacts of the proposed operation. Whenever possible, the measures must be permanent.

(iii)(A) Enhancement measures proposed under paragraph (d)(3)(ii) of this section must be implemented within the watershed in which the proposed operation is located, unless opportunities for enhancement are not available within that watershed. In that case, you must propose to implement enhancement measures in the closest adjacent watershed in which enhancement opportunities exist, as approved by the regulatory authority.

(B) Each regulatory program must prescribe the size of the watershed for purposes of paragraph (d)(3)(iii)(A) of this section, using a generally-accepted watershed classification system.

(4) *Inclusion within permit area.* If the enhancement measures to be implemented under paragraphs (d)(1) through (d)(3) of this section would involve more than a de minimis disturbance of the surface of land outside the area to be mined, you must include the land to be disturbed by those measures within the proposed permit area.

(e) *Fish and Wildlife Service or National Marine Fisheries Service review.* (1)(i) The regulatory authority must provide the protection and enhancement plan developed under this section and the resource information submitted under § 779.20 of this chapter to the appropriate regional or field office of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as applicable, whenever the resource information submitted under § 783.20 of this chapter includes species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* designated or proposed critical habitat under that law, or species proposed for listing as threatened or endangered under that law. The regulatory authority must provide the resource information and the protection and enhancement plan to the appropriate Service(s) no later than the time that it provides written notice of the permit application to governmental agencies under § 773.6(a)(3)(ii) of this chapter.

(ii)(A) When the resource information obtained under § 783.20 of this chapter does not include species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* designated or proposed critical habitat under that law, or species proposed for listing as threatened or endangered under that law, the regulatory authority must provide the resource information and the protection and enhancement plan to the appropriate regional or field office of the U.S. Fish and Wildlife Service only if the Service requests an opportunity to review and comment on the resource information or the protection and enhancement plan.

(B) The regulatory authority must provide the resource information and the protection and enhancement plan to the Service under paragraph (e)(1)(ii)(A) of this section within 10 days of receipt of a request from the Service to review the resource information and the protection and enhancement plan.

(2) The regulatory authority must document the disposition of comments that it receives from the applicable Service(s) in response to the distribution made under paragraph (e)(1)(i) of this section to the extent that those comments pertain to species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* to designated or proposed critical habitat under that law, or to species proposed for listing as threatened or endangered under that law.

§ 784.17 [Reserved]

§ 784.18 [Reserved]

§ 784.19 What baseline information on hydrology, geology, and aquatic biology must I provide?

(a)(1) *General requirements.* Your permit application must include information on the hydrology, geology, and aquatic biology of the proposed permit area and the adjacent area in sufficient detail to assist in—

(i) Determining the probable hydrologic consequences of the proposed operation upon the quality and quantity of surface water and groundwater in the proposed permit and adjacent areas, as required under § 784.20 of this part.

(ii) Determining the nature and extent of both the hydrologic reclamation plan required under § 784.22 of this part and the monitoring plans required under § 784.23 of this part.

(iii) Determining whether reclamation as required by this chapter can be accomplished.

(iv) Preparing the cumulative hydrologic impact assessment under § 784.21 of this part, including an evaluation of whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(v) Preparing the subsidence control plan under § 784.30 of this part.

(2) *Core baseline water-quality data requirements for surface water and groundwater.* You must provide the following water-quality information for each groundwater and surface-water sample collected for baseline data purposes.

Parameter	Surface water	Groundwater
pH	Yes	Yes.
Specific conductance corrected to 25°C (conductivity)	Yes	Yes.
Total dissolved solids	Yes	Yes.
Total suspended solids	Yes	No.
Hot acidity	Yes	Yes.
Total alkalinity	Yes	Yes.
Major anions (dissolved), including, at a minimum, bicarbonate, sulfate, and chloride	Yes	Yes.
Major anions (total), including, at a minimum, bicarbonate, sulfate, and chloride	Yes	No.
Major cations (dissolved), including, at a minimum, calcium, magnesium, sodium, and potassium	Yes	Yes.
Major cations (total), including, at a minimum, calcium, magnesium, sodium, and potassium	Yes	No.
Cation-anion balance of dissolved major cations and dissolved major anions	Yes	Yes.
Any cation or anion that constitutes a significant percentage of the total ionic charge balance, but that was not included in the analyses of major anions and major cations.	Yes	Yes.

Parameter	Surface water	Groundwater
Iron (dissolved)	Yes	Yes.
Iron (total)	Yes	No.
Manganese (dissolved)	Yes	Yes.
Manganese (total)	Yes	No.
Selenium (dissolved)	Yes	Yes.
Selenium (total)	Yes	No.
Any other parameter identified in any applicable National Pollutant Discharge Elimination System permit, if known at the time of application for the SMCRA permit.	Yes	No.
Temperature	Yes	Yes.

(b) *Groundwater information*—(1) *General requirements.* Your permit application must include information sufficient to document seasonal variations in the quality, quantity, and usage of groundwater, including all surface discharges, within the proposed permit and adjacent areas.

(2) *Underground mine pools.* If an underground mine pool is present within the proposed permit or adjacent areas, you must prepare an assessment of the characteristics of the mine pool, including seasonal changes in quality, quantity, and flow patterns, unless you demonstrate, and the regulatory authority finds, that the mine pool would not be hydrologically connected to the proposed operation. The determination of the probable hydrologic consequences of mining required under § 784.20 of this part also must include a discussion of the effect of the proposed mining operation on any underground mine pools within the proposed permit and adjacent areas.

(3) *Monitoring wells.* The regulatory authority must require the installation of properly-screened monitoring wells to document seasonal variations in the quality, quantity, and usage of groundwater.

(4) *Groundwater quality descriptions.* Groundwater quality descriptions must include baseline information on the parameters identified in paragraph (a)(2) of this section and any additional parameters that the regulatory authority determines to be of local importance.

(5) *Groundwater quantity descriptions.* At a minimum, groundwater quantity descriptions must include baseline data documenting seasonal variations in—

(i) The areal extent and saturated thickness of all potentially-impacted aquifers; and

(ii) Approximate rates of groundwater discharge or usage and the elevation of the water table or potentiometric head in—

(A) Each water-bearing coal seam to be mined.

(B) Each aquifer above each coal seam to be mined.

(C) Each potentially-impacted aquifer below the lowest coal seam to be mined.

(6) *Groundwater sampling requirements.* (i) You must establish monitoring wells or equivalent monitoring points at a sufficient number of locations within the proposed permit and adjacent areas to determine groundwater quality, quantity, and movement in each aquifer above or immediately below the lowest coal seam to be mined. At a minimum, for each aquifer, you must locate monitoring points—

(A) Upgradient and downgradient of the proposed permit area;

(B) Upgradient and downgradient of the area encompassed by the angle of dewatering; and

(C) Within the proposed permit area and the area overlying the proposed underground workings.

(ii)(A) To document seasonal variations in groundwater quality and quantity, you must collect samples and take the measurements identified in paragraph (b)(5) of this section from each location identified in paragraph (b)(6)(i) of this section at approximately equally-spaced monthly intervals for a minimum of 12 consecutive months.

(B) If approved by the regulatory authority, you may modify the interval or the 12-consecutive-month requirement specified in paragraph (b)(6)(ii)(A) of this section if adverse weather conditions make travel to a location specified in paragraph (b)(6)(i) of this section hazardous or if the water at that location is completely frozen.

(C) In lieu of the frequency specified in paragraph (b)(6)(ii)(A) of this section, the regulatory authority may allow you to collect data quarterly for 2 years. The regulatory authority may initiate review of the permit application after collection and analysis of the first four quarterly groundwater samples, but it may not approve the application until after receipt and analysis of the final four quarterly groundwater samples.

(D) You must analyze the samples collected in paragraph (b)(6)(ii)(A) of this section for the applicable water quality parameters identified in paragraph (a)(2) of this section and any other parameters specified by the regulatory authority.

(iii) You must provide the Palmer Drought Severity Index for the proposed permit and adjacent areas for the initial baseline data collection period under paragraph (b)(6)(ii) of this section. The regulatory authority may extend the minimum data collection period specified in paragraph (b)(6)(ii) of this section whenever data available from the National Oceanic and Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought or abnormally high precipitation during the initial baseline data collection period.

(c) *Surface-water information.*—(1) *General requirements.* Your permit application must include information sufficient to document seasonal variation in surface-water quality, quantity, and usage within the proposed permit and adjacent areas.

(2) *Surface-water quality descriptions.* Surface-water quality descriptions must include baseline information on the parameters identified in paragraph (a)(2) of this section and any additional parameters that the regulatory authority determines to be of local importance.

(3) *Surface-water quantity descriptions.* (i) At a minimum, surface-water quantity descriptions for perennial and intermittent streams within the proposed permit and adjacent areas must include baseline data documenting—

(A) Peak-flow magnitude and frequency.

(B) Actual and anticipated usage.

(C) Seasonal flow variations.

(D) Seepage-run sampling determinations, if you propose to deploy a longwall panel beneath a perennial or intermittent stream or employ other types of full-extraction mining methods beneath a perennial or intermittent stream. You must take the seepage-run measurement during both low-flow and high-flow conditions. The seepage-run measurement must extend to the full length of the stream that

would be affected by the mining operation.

(ii) All flow measurements under paragraph (c)(3)(i) of this section must be made using generally-accepted professional techniques approved by the regulatory authority. All techniques must be repeatable and must produce consistent results on successive measurements. Visual observations are not acceptable.

(4) *Surface-water sampling requirements.* (i) You must establish monitoring points at a sufficient number of locations within the proposed permit and adjacent areas to determine the quality and quantity of water in perennial and intermittent streams within those areas. At a minimum, you must locate monitoring points—

(A) Upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas; and

(B) Upgradient and downgradient of the area encompassed by the angle of dewatering in all potentially affected perennial and intermittent streams.

(ii)(A) To document seasonal variations in surface-water quality and quantity, you must collect samples and take the measurements identified in paragraph (c)(3) of this section from each location identified in paragraph (c)(4)(i) of this section at approximately equally-spaced monthly intervals for a minimum of 12 consecutive months.

(B) If approved by the regulatory authority, you may modify the interval or the 12-consecutive-month sampling requirement specified in paragraph (c)(4)(ii)(A) of this section if adverse weather conditions make travel to a location specified in paragraph (c)(4)(i) of this section hazardous or if the water at that location is completely frozen.

(C) You must analyze the samples collected under paragraph (c)(4)(ii)(A) of this section for the applicable parameters identified in paragraph (a)(2) of this section and any other parameters specified by the regulatory authority.

(iii) You must provide the Palmer Drought Severity Index for the proposed permit and adjacent areas for the initial baseline data collection period under paragraph (c)(4)(ii) of this section. The regulatory authority may extend the minimum data collection period specified in paragraphs (c)(4)(ii) and (iii) of this section whenever data available from the National Oceanic and Atmospheric Administration or similar databases indicate that the region in which the proposed operation is located experienced severe drought or abnormally high precipitation during the initial baseline data collection period.

(5) *Precipitation measurements.* (i) You must provide records of precipitation amounts for the proposed permit area, using on-site, self-recording devices.

(ii) Precipitation records must be adequate to generate and calibrate a hydrologic model of the site. The regulatory authority will determine whether you must create such a model.

(iii) At the discretion of the regulatory authority, you may use precipitation data from a single self-recording device to provide baseline data for multiple permits located close to each other.

(6) *Stream assessments.* (i)(A) You must map and separately identify all perennial, intermittent, and ephemeral streams within the proposed permit area and all perennial and intermittent streams within the adjacent area.

(B) The map must show the location of the channel head of each stream identified in paragraph (c)(6)(i)(A) of this section whenever the applicable area includes a terminal reach of the stream.

(C) The map must show the location of transition points from ephemeral to intermittent and from intermittent to perennial (and vice versa, when applicable) for each stream identified in paragraph (c)(6)(i)(A) of this section whenever the applicable area includes such a transition point. If the U.S. Army Corps of Engineers has determined the location of a transition point, your application must be consistent with that determination.

(ii)(A) For all perennial and intermittent streams within the proposed permit area, you must describe the baseline stream pattern, profile, and dimensions, with measurements of channel slope, sinuosity, water depth, alluvial groundwater depth, depth to bedrock, bankfull depth, bankfull width, width of the flood-prone area, and dominant in-stream substrate at a scale and frequency adequate to characterize the entire length of the stream within the proposed permit area.

(B) You must describe the general stream-channel configuration of ephemeral streams within the proposed permit area.

(iii) For all perennial, intermittent, and ephemeral streams within the proposed permit area, you must describe the vegetation growing along the banks of each stream, including—

(A) Identification of any hydrophytic vegetation located within or adjacent to the stream channel.

(B) The extent to which streamside vegetation consists of trees and shrubs.

(C) The percentage of channel canopy coverage.

(D) A scientific calculation of the species diversity of the vegetation.

(iv) You must identify all stream segments within the proposed permit and adjacent areas that appear on the list of impaired surface waters prepared under section 303(d) of the Clean Water Act, 33 U.S.C. 1313(d). You must identify the parameters responsible for the impaired condition and the total maximum daily loads associated with those parameters, when applicable.

(v) For all perennial, intermittent, and ephemeral streams within the proposed permit area and for all perennial and intermittent streams within the adjacent area, you must identify the extent of wetlands adjoining the stream and describe the quality of those wetlands.

(vi) Except as provided in paragraph (g) of this section, you must provide an assessment of the biological condition of—

(A) Each perennial stream within the proposed permit area.

(B) Each perennial stream within the adjacent area that could be affected by the proposed operation.

(C) Each intermittent stream within the proposed permit area, if a scientifically defensible protocol has been established for assessment of intermittent streams in the state or region in which the stream is located.

(D) Each intermittent stream within the adjacent area that could be affected by the proposed operation, if a scientifically defensible protocol has been established for assessment of intermittent streams in the state or region in which the stream is located.

(vii) When determining the biological condition of a stream under paragraph (c)(6)(vi) of this section, you must adhere to a bioassessment protocol approved by the state or tribal agency responsible for preparing the water quality inventory required under section 305(b) of the Clean Water Act, 33 U.S.C. 1315(b), or to other scientifically defensible bioassessment protocols accepted by agencies responsible for implementing the Clean Water Act, 33 U.S.C. 1251 *et seq.,* modified as necessary to meet the following requirements. The protocol must—

(A) Be based upon the measurement of an appropriate array of aquatic organisms, including, at a minimum, benthic macroinvertebrates, identified to the genus level where possible, otherwise to the lowest practical taxonomic level.

(B) Result in the calculation of index values for both stream habitat and aquatic biota based on the reference condition.

(C) Provide index values that correspond to the capability of the stream to support its designated aquatic life uses under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(D) Include a quantitative assessment of in-stream and riparian habitat condition.

(E) Describe the technical elements of the bioassessment protocol, including but not limited to sampling methods, sampling gear, index period, sample processing and analysis, and quality assessment/quality control procedures.

(viii) Except as provided in paragraph (g) of this section, you must describe the biology of each intermittent stream within the proposed permit area, and each intermittent stream within the adjacent area that could be affected by the proposed operation, whenever an assessment of the biological condition of those streams is not required under paragraph (c)(6)(vi) of this section. When obtaining the data needed to prepare this description, you must—

(A) Sample each stream using a scientifically defensible sampling method or protocol established or endorsed by an agency responsible for implementing the Clean Water Act, 33 U.S.C. 1251 *et seq.;*

(B) Identify benthic macroinvertebrates to the genus level where possible, otherwise to the lowest practical taxonomic level; and

(C) Describe the technical elements of the sampling protocol, including but not limited to sampling methods, sampling gear, index period, sample processing and analysis, and quality assessment/quality control procedures.

(d) *Additional information for discharges from previous coal mining operations.* If the proposed permit and adjacent areas contain any point-source discharges from previous surface or underground coal mining operations, you must sample those discharges during low-flow conditions of the receiving stream on a one-time basis. You must analyze the samples for the surface-water parameters identified in paragraph (a)(2) of this section and for both total and dissolved fractions of the following parameters—

(1) Aluminum.
(2) Arsenic.
(3) Barium.
(4) Beryllium.
(5) Cadmium.
(6) Copper.
(7) Lead.
(8) Mercury.
(9) Nickel.
(10) Silver.
(11) Thallium.
(12) Zinc.

(e) *Geologic information.* (1) Your application must include a description of the geology of the proposed permit and adjacent areas down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined that may be adversely impacted by mining. The description must include—

(i) The areal and structural geology of the proposed permit and adjacent areas.

(ii) Other parameters that influence the required reclamation.

(iii) An explanation of how the areal and structural geology may affect the occurrence, availability, movement, quantity, and quality of potentially impacted surface water and groundwater.

(iv) The composition of the bed of each perennial and intermittent stream within the proposed permit and adjacent areas, together with a prediction of how that bed would respond to subsidence of strata overlying the proposed underground mine workings and how subsidence would impact streamflow.

(2) The description required by paragraph (f)(1) of this section must be based on all of the following—

(i) The cross-sections, maps, and plans required by § 783.24 of this chapter.

(ii) The information obtained under paragraphs (e)(3) through (5) of this section.

(iii) Geologic literature and practices.

(3) For any portion of the proposed permit area in which the strata down to the coal seam to be mined will be removed or are already exposed, you must collect and analyze samples from test borings; drill cores; or fresh, unweathered, uncontaminated samples from rock outcrops, down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest seam to be mined that may be adversely impacted by mining. Your application must include the following data and analyses:

(i) Logs showing the lithologic characteristics, including physical properties and thickness, of each stratum, and the location of any groundwater encountered.

(ii) Chemical analyses identifying those strata that may contain acid-forming materials, toxic-forming materials, or alkalinity-producing materials and the extent to which each stratum contains those materials.

(iii) Chemical analyses of all coal seams for acid-forming or toxic-forming materials, including, but not limited to, total sulfur and pyritic sulfur.

(4) For lands within the permit and adjacent areas where the strata above the coal seam to be mined will not be removed, you must collect and analyze samples from test borings or drill cores. Your application must include the following data and analyses:

(i) Logs showing the lithologic characteristics, including physical properties and thickness, of each stratum that may be impacted, and the location of any groundwater encountered.

(ii) Chemical analyses of those strata immediately above and below the coal seam to be mined to identify whether and to what extent each stratum contains acid-forming materials, toxic-forming materials, or alkalinity-producing materials.

(iii) Chemical analyses of the coal seam for acid-forming or toxic-forming materials, including, but not limited to, total sulfur and pyritic sulfur.

(iv) For standard room-and-pillar mining operations, the thickness and engineering properties of clays or soft rock such as clay shale, if any, in the strata immediately above and below each coal seam to be mined.

(5) You must provide any additional geologic information and analyses that the regulatory authority determines to be necessary to protect the hydrologic balance, to minimize or prevent subsidence, or to meet the performance standards of this chapter.

(6) You may request the regulatory authority to waive the requirements of paragraphs (e)(3) and (4) of this section, in whole or in part. The regulatory authority may grant the waiver request only after finding in writing that the collection and analysis of that data is unnecessary because other representative information is available to the regulatory authority in a satisfactory form.

(f) *Cumulative impact area information.* (1) You must obtain the hydrologic, geologic, and biological information necessary to assess the impacts of both the proposed operation and all anticipated mining on surface-water and groundwater systems in the cumulative impact area, as required by § 784.21 of this part, from the appropriate federal or state agencies, to the extent that the information is available from those agencies.

(2) If the information identified as necessary in paragraph (f)(1) of this section is not available from other federal or state agencies, you may gather and submit this information to the regulatory authority as part of the permit application. As an alternative to collecting new information, you may submit data and analyses from nearby mining operations if the site of those operations is representative of the

proposed operations in terms of topography, hydrology, geology, geochemistry, and method of mining.

(3) The regulatory authority may not approve the permit application until the information identified as necessary in paragraph (f)(1) of this section has been made available to the regulatory authority and the regulatory authority has used that information to prepare the cumulative hydrologic impact assessment required by § 784.21 of this part.

(g) *Exception for operations that avoid streams.* Upon your request, the regulatory authority may waive the biological information requirements of paragraphs (c)(6)(vi) through (viii) of this section if you demonstrate, and if the regulatory authority finds in writing, that your operation will not—

(1) Mine through or bury a perennial or intermittent stream;

(2) Create a point-source discharge to any perennial, intermittent, or ephemeral stream; or

(3) Modify the base flow of any perennial or intermittent stream.

(h) *Coordination with Clean Water Act agencies.* The regulatory authority will make best efforts to—

(1) Consult in a timely manner with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act;

(2) Minimize differences in baseline data collection points and parameters; and

(3) Share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations.

(i) *Corroboration of baseline data.* The regulatory authority must either corroborate a sample of the baseline information in your application or arrange for a third party to conduct the corroboration at your expense. Corroboration may include, but is not limited to, simultaneous sample collection and analysis, visual observation of sample collection, use of field measurements, or comparison of application data with application or monitoring data from adjacent operations.

§ 784.20 How must I prepare the determination of the probable hydrologic consequences of my proposed operation (PHC determination)?

(a) *Content of PHC determination.* Your permit application must contain a determination of the probable hydrologic consequences of the proposed operation upon the quality and quantity of surface water and groundwater and, except as provided in § 784.19(g) of this part, upon the biology of perennial and intermittent streams under seasonal flow conditions for the proposed permit and adjacent areas. You must base the PHC determination on an analysis of the baseline hydrologic, geologic, biological, and other information required under § 784.19 of this part. It must include findings on:

(1) Whether the operation may cause material damage to the hydrologic balance outside the permit area.

(2) Whether acid-forming or toxic-forming materials are present that could result in the contamination of surface water or groundwater, including, but not limited to, a discharge of toxic mine drainage after the completion of land reclamation.

(3) Whether underground mining activities conducted after October 24, 1992, may result in contamination, diminution or interruption of a well or spring within the permit or adjacent areas that was in existence when the permit application was submitted and that is used for domestic, drinking, or residential purposes.

(4) Whether the proposed operation will intercept aquifers in overburden strata or aquifers in underground mine voids (mine pools) or create aquifers in spoil placed in the backfilled area and, if so, what impacts the operation would have on those aquifers, both during mining and after reclamation, and the effect of those impacts on the hydrologic balance.

(5) What impact the proposed operation will have on:

(i) Sediment yield and transport from the area to be disturbed.

(ii) The quality of groundwater and surface water within the proposed permit and adjacent areas. At a minimum, unless otherwise specified, the finding must address the impacts of the operation on both groundwater and surface water in terms of the parameters listed in § 784.19(a)(2) of this part and any additional water quality parameters that the regulatory authority determines to be of local importance.

(iii) Flooding and precipitation runoff patterns and characteristics.

(iv) Peak-flow magnitude and frequency for perennial and intermittent streams within the proposed permit and adjacent areas.

(v) Seasonal variations in streamflow.

(vi) The availability of groundwater and surface water, including the impact of any diversion of surface or subsurface flows to underground mine workings or any changes in watershed size as a result of the postmining surface configuration.

(vii) The biology of perennial and intermittent streams within the proposed permit and adjacent areas, except as provided in § 784.19(g) of this part.

(viii) Other characteristics as required by the regulatory authority.

(6) What impact subsidence resulting from the proposed underground mining activities may have on perennial and intermittent streams.

(7) Whether the underground mine workings will flood after mine closure and, if so, a statement and explanation of—

(i) The highest potentiometric surface of the mine pool after closure.

(ii) Whether, where, and when the mine pool is likely to result in a surface discharge, either via gravity or as a result of hydrostatic pressure.

(iii) The predicted quality of any discharge from the mine pool.

(iv) The predicted impact of the mine pool on the hydrologic balance of the proposed permit and adjacent areas after the mine pool reaches equilibrium.

(v) The potential for a mine pool blowout or other hydrologic disturbances.

(vi) The potential for the mine pool to destabilize surface features.

(vii) The potential impact of roof collapses on mine pool behavior and equilibrium.

(b) *Supplemental information.* You must provide any supplemental information that the regulatory authority determines is needed to fully evaluate the probable hydrologic consequences of the proposed operation and to plan remedial and reclamation activities. This information may include, but is not limited to, additional drilling, geochemical analyses of overburden materials, aquifer tests, hydrogeologic analyses of the water-bearing strata, analyses of flood flows, or analyses of other characteristics of water quality or quantity, including the stability of underground mine pools that might be affected by the proposed operation.

(c) *Subsequent reviews of PHC determinations.* (1) The regulatory authority must review each application for a permit revision to determine whether a new or updated PHC determination is needed.

(2) The regulatory authority must require that you prepare a new or updated PHC determination if the review under paragraph (c)(1) of this section finds that one is needed.

§ 784.21 What requirements apply to preparation, use, and review of the cumulative hydrologic impact assessment (CHIA)?

(a) *General requirements.* (1) The regulatory authority must prepare a

written assessment of the probable cumulative hydrologic impacts of the proposed operation and all anticipated mining upon surface-water and groundwater systems in the cumulative impact area. This assessment, which is known as the CHIA, must be sufficient to determine, for purposes of permit application approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(2) In preparing the CHIA, the regulatory authority must consider relevant information on file for other mining operations located within the cumulative impact area or in similar watersheds.

(3) As provided in § 784.19(f) of this part, the regulatory authority may not approve a permit application until the hydrologic, geologic, and biological information needed to prepare the CHIA has been made available to the regulatory authority and the regulatory authority has used that information to prepare the CHIA.

(b) *Contents.* The CHIA must include—

(1) A map of the cumulative impact area. At a minimum, the map must identify and display—

(i) Any difference in the boundaries of the cumulative impact area for groundwater and surface water.

(ii) The locations of all previous, current, and anticipated surface and underground mining.

(iii) The locations of all baseline data collection sites within the proposed permit and adjacent areas under § 784.19 of this part.

(iv) Designated uses of surface water under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(2) A description of all previous, existing, and anticipated surface and underground coal mining within the cumulative impact area, including, at a minimum, the coal seam or seams mined or to be mined, the extent of mining, and the reclamation status of each operation.

(3) A quantitative and qualitative description of baseline hydrologic information for the proposed permit and adjacent areas under § 784.19 of this part, including—

(i) The quality and quantity of surface water and groundwater and seasonal variations therein.

(ii) The quality and quantity of water needed to support, maintain, or attain each—

(A) Designated use of surface water under section 303(c) of the Clean Water Act, 33 U.S.C. or 1313(c), or, if there are no designated uses, each premining use of surface water.

(B) Premining use of groundwater.

(iii) A description and/or maps of the local and regional groundwater systems.

(iv) To the extent required by § 784.19(c)(6)(vi) of this part, the biological condition of perennial and intermittent streams and, to the extent required by § 784.19(c)(6)(viii) of this part, the biology of intermittent streams not included within § 784.19(c)(6)(vi) of this part.

(4) A discussion of any potential concerns identified in the PHC determination required under § 784.20 of this part and how those concerns have been or will be resolved.

(5) A qualitative and quantitative assessment of how all anticipated surface and underground mining may impact the quality of surface water and groundwater in the cumulative impact area, expressed in terms of each baseline parameter identified under § 784.19 of this part.

(6) Site-specific numeric or narrative thresholds for material damage to the hydrologic balance outside the permit area. These thresholds must also be included as a condition of the permit. When identifying thresholds to define when material damage to the hydrologic balance outside the permit area would occur in connection with a particular permit, the regulatory authority will—

(i) In consultation with the Clean Water Act authority, as appropriate, undertake a comprehensive evaluation that considers the following factors—

(A) The baseline data collected under § 784.19 of this part;

(B) The PHC determination prepared under § 784.20 of this part;

(C) Applicable water quality standards adopted under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c);

(D) Applicable state or tribal standards for surface water or groundwater;

(E) Ambient water quality criteria developed under section 304(a) of the Clean Water Act, 33 U.S.C. 1314(a);

(F) The biological requirements of any species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* when those species; designated critical habitat for those species; habitat occupied by those species, such as nesting, resting, feeding, and breeding areas; and any areas in which those species are present only for a short time, but that are important to their persistence, such as migration and dispersal corridors, are present within the cumulative impact area; and

(G) Other pertinent information and considerations to identify the parameters for which thresholds are necessary.

(ii) In consultation with the Clean Water Act authority, adopt numeric thresholds as appropriate, taking into consideration relevant contaminants for which there are water quality criteria under the Clean Water Act, 33 U.S.C. 1251 *et seq.* The regulatory authority may not adopt a narrative threshold for parameters for which numeric water quality criteria exist under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(iii) Identify the portion of the cumulative impact area to which each threshold applies. Parameters and thresholds may vary from subarea to subarea within the cumulative impact area when appropriate, based upon differences in watershed characteristics and variations in the geology, hydrology, and biology of the cumulative impact area.

(iv) Identify the points within the cumulative impact area at which the permittee will monitor the impacts of the operation on surface water and groundwater outside the permit area and explain how those locations will facilitate timely detection of the impacts of the operation on surface water and groundwater outside the permit area in a scientifically defensible manner. The permit applicant must incorporate those monitoring locations into the surface water and groundwater monitoring plans submitted under § 784.23 of this part.

(7) Evaluation thresholds for critical water quality and quantity parameters, as determined by the regulatory authority. After permit issuance, if monitoring results at the locations designated under paragraph (b)(6)(iv) of this section document exceedance of an evaluation threshold, the regulatory authority, in consultation with the Clean Water Act authority, as appropriate, must determine the cause of the exceedance. If the mining operation is responsible for the exceedance and if the adverse trend is likely to continue in the absence of corrective action, the regulatory authority must issue a permit revision order under § 774.10 of this chapter. The order must require that the permittee reassess the adequacy of the PHC determination prepared under § 784.20 of this part and the hydrologic reclamation plan approved under § 784.20 of this part and develop measures to prevent material damage to the hydrologic balance outside the permit area.

(8) An assessment of how all anticipated surface and underground

mining may affect groundwater movement and availability within the cumulative impact area.

(9) After consultation with the Clean Water Act authority, as appropriate, an evaluation, with references to supporting data and analyses, of whether the CHIA will support a finding that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area. To support this finding, the CHIA must include the following determinations, with appropriate documentation, or an explanation of why the determination is not necessary or appropriate:

(i) Except as provided in §§ 784.22(b) and 817.40 of this chapter, the proposed operation will not—

(A) Cause or contribute to a violation of applicable water quality standards adopted under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or other applicable state or tribal water quality standards;

(B) Cause or contribute to a violation of applicable state or tribal groundwater quality standards;

(C) Preclude attainment of a premining use of a surface water located outside the permit area when no water quality standards have been established for that surface water; or

(D) Preclude attainment of any premining use of groundwater located outside the permit area.

(ii) The proposed operation has been designed to ensure that neither the mining operation nor the final configuration of the reclaimed area will result in changes in the size or frequency of peak flows from precipitation events or thaws that would cause an increase in flooding outside the permit area, when compared with premining conditions.

(iii) Perennial and intermittent streams located outside the permit area will continue to have sufficient base flow at all times during and after mining and reclamation to maintain their premining flow regime; *i.e.,* perennial streams located outside the permit area will retain perennial flows and intermittent streams located outside the permit area will retain intermittent flows both during and after mining and reclamation. Conversion of an intermittent stream to a perennial stream or conversion of an ephemeral stream to an intermittent or perennial stream outside the permit area may be acceptable, provided the conversion would be consistent with paragraph (b)(9)(i) of this section and would not result in a violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

(iv) The proposed operation has been designed to protect the quantity and quality of water in any aquifer that significantly ensures the prevailing hydrologic balance.

(c) *Subsequent reviews.* (1) The regulatory authority must review each application for a significant permit revision to determine whether a new or updated CHIA is needed. The regulatory authority must document the review, including the analysis and conclusions, together with the rationale for the conclusions, in writing.

(2) The regulatory authority must reevaluate the CHIA at intervals not to exceed 3 years to determine whether the CHIA remains accurate and whether the material damage and evaluation thresholds in the CHIA and the permit are adequate to ensure that material damage to the hydrologic balance outside the permit area will not occur. This evaluation must include a review of all biological and water monitoring data from both this operation and all other coal mining operations within the cumulative impact area.

(3) The regulatory authority must prepare a new or updated CHIA if the review conducted under paragraph (c)(1) or (2) of this section finds that one is needed.

§ 784.22 What information must I include in the hydrologic reclamation plan and what information must I provide on alternative water sources?

(a) *Hydrologic reclamation plan.* Your permit application must include a plan, with maps and descriptions, that demonstrates how the proposed operation will comply with the applicable provisions of this subchapter and subchapter K of this chapter that relate to protection of the hydrologic balance. The plan must—

(1) Be specific to local hydrologic conditions.

(2) Include preventive or remedial measures for any potential adverse hydrologic consequences identified in the PHC determination prepared under § 784.20 of this part. These measures must describe the steps that you will take during mining and reclamation through final bond release under §§ 800.40 through 800.43 of this chapter to—

(i) Minimize disturbances to the hydrologic balance within the proposed permit and adjacent areas. .

(ii) Prevent material damage to the hydrologic balance outside the proposed permit area. The plan must include remedial measures for any predicted diminution of streamflow or loss of wetlands as a result of subsidence. The application must discuss the results of past use of the proposed remedial measures in the vicinity of the proposed mining operation and under similar conditions elsewhere.

(iii) Meet applicable water quality laws and regulations.

(iv) Protect existing water users in accordance with paragraph (b) of this section and § 817.40 of this chapter.

(v) Avoid acid or toxic discharges to surface water and avoid or, if avoidance is not possible, minimize degradation of groundwater.

(vi) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or to runoff outside the proposed permit area.

(vii) Provide water-treatment facilities when needed.

(viii) Control surface-water runoff in accordance with § 784.29 of this part.

(3) Address the impacts of any transfers of water among active and abandoned mines within the proposed permit and adjacent areas.

(4) Describe the steps that you will take during mining and reclamation through final bond release under §§ 800.40 through 800.43 of this chapter to protect and enhance aquatic life and related environmental values to the extent possible using the best technology currently available.

(b) *Alternative water source information.* (1)(i) If the PHC determination prepared under § 784.20 of this part indicates that underground mining activities conducted after October 24, 1992, may result in contamination, diminution, or interruption of a well or spring that is in existence at the time the permit application is submitted and that is used for domestic, drinking, or residential purposes, you must demonstrate that alternative water sources are both available and feasible to develop. The alternative water sources must be of suitable quality and sufficient in quantity to support all uses protected under § 817.40 of this chapter.

(ii) You must develop a water supply replacement plan for all uses protected under § 817.40 of this chapter that includes construction details, costs, and an implementation schedule.

(2) If you cannot identify an alternative water source that is both suitable and available, you must modify your application to prevent the proposed operation from contaminating, interrupting, or diminishing any water supply protected under § 817.40 of this chapter.

(3)(i) When a suitable alternative water source is available, your operation plan must require that the alternative water supply be developed and installed

on a permanent basis before your operation advances to the point at which it could adversely affect an existing water supply protected under § 817.40 of this chapter. This requirement applies only to those water supplies for which adverse impacts are probable.

(ii) Paragraph (b)(3)(i) of this section will not apply immediately if you demonstrate, and the regulatory authority finds, that the proposed operation also would adversely affect the replacement supply. In that case, your plan must require provision of a temporary replacement water supply until it is safe to install the permanent replacement water supply required under paragraph (b)(3)(i) of this section.

(4) Your application must describe how you will provide both temporary and permanent replacements for any unexpected losses of water supplies protected under § 817.40 of this chapter.

§ 784.23 What information must I include in plans for the monitoring of groundwater, surface water, and the biological condition of streams during and after mining?

(a) *Groundwater monitoring plan.*—(1) *General requirements.* Your permit application must include a groundwater monitoring plan adequate to evaluate the impacts of the mining operation on groundwater in the proposed permit and adjacent areas and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area. The plan must—

(i) Identify the locations to be monitored, the measurements to be taken at each location, and the parameters to be analyzed in samples collected at each location.

(ii) Specify the sampling frequency.

(iii) Establish a sufficient number of appropriate monitoring locations to evaluate the accuracy of the findings in the PHC determination, to identify adverse trends, and to determine, in a timely fashion, whether corrective action is needed to prevent material damage to the hydrologic balance outside the permit area. At a minimum, the plan must include—

(A) For each aquifer above or immediately below the coal seam to be mined, monitoring sites located upgradient and downgradient of the proposed operation at a distance sufficiently close to the underground mine workings to detect changes as the mining operation progresses. The plan must include a schedule and map for moving these sites as the underground workings advance.

(B) Monitoring wells in any existing underground mine workings that would have a direct hydrological connection to the proposed operation.

(C) At least one monitoring well to be located in the mine pool after mine closure.

(D) Monitoring wells or equivalent monitoring points at the locations specified in the CHIA under § 784.21(b)(6)(vi) of this part.

(iv) Describe how the monitoring data will be used to—

(A) Determine the impacts of the operation upon the hydrologic balance.

(B) Determine the impacts of the operation upon the biology of surface waters within the permit and adjacent areas.

(C) Prevent material damage to the hydrologic balance outside the permit area.

(v) Describe how the water samples will be collected, preserved, stored, transmitted for analysis, and analyzed in accordance with the sampling, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter.

(2) *Parameters.*—(i) *General criteria for selection of parameters.* The plan must provide for the monitoring of parameters for which an evaluation threshold under § 784.21(b)(7) of this part exists. It also must provide for the monitoring of other parameters that could be affected by the proposed operation to the extent needed to assess the—

(A) Accuracy of the findings and predictions in the PHC determination prepared under § 784.20 of this part.

(B) Suitability of the quality and quantity of groundwater for protected premining uses of groundwater within the permit and adjacent areas, subject to § 817.40 of this chapter.

(C) Suitability of the quality and quantity of groundwater to support the premining land uses within the permit and adjacent areas.

(ii) *Minimum sampling and analysis requirements.* At a minimum, the plan must require collection and analysis of a sample from each monitoring point every 3 months, with data submitted to the regulatory authority at the same frequency. The data must include—

(A) Analysis of each sample for the groundwater parameters listed in § 784.19(a)(2) of this part.

(B) Water levels in each well used for monitoring purposes and discharge rates from each spring or underground opening used for monitoring purposes.

(C) Analysis of each sample for parameters detected by the baseline sampling and analysis conducted under § 784.19(d) of this part.

(D) Analysis of each sample for all parameters for which there is an evaluation threshold under § 784.21(b)(7) of this part.

(E) Analysis of each sample for other parameters of concern, as determined by the regulatory authority, based upon the information and analyses required under §§ 784.19 through 784.21 of this part.

(3) *Regulatory authority review and action.* (i) Upon completing the technical review of the application, the regulatory authority may require that you revise the plan to increase the frequency of monitoring, to require monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 784.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes.

(4) *Exception.* If you can demonstrate, on the basis of the PHC determination prepared under § 784.20 of this part or other available information that a particular aquifer in the proposed permit and adjacent areas has no existing or foreseeable use for agricultural or other human purposes or for fish and wildlife purposes and does not serve as an aquifer that significantly ensures the hydrologic balance within the cumulative impact area, the regulatory authority may waive monitoring of that aquifer.

(b) *Surface-water monitoring plan.*—(1) *General requirements.* Your permit application must include a surface-water monitoring plan adequate to evaluate the impacts of the mining operation on surface water in the proposed permit and adjacent areas and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area. The plan must—

(i) Identify the locations to be monitored, the measurements to be taken at each location, and the parameters to be analyzed in samples collected at each location.

(ii)(A) Require on-site measurement of precipitation amounts at specified locations within the permit area, using self-recording devices.

(B) Measurement of precipitation amounts must continue through Phase II bond release under § 800.42(c) of this chapter or for any longer period specified by the regulatory authority.

(C) At the discretion of the regulatory authority, you may use precipitation data from a single self-recording device to provide monitoring data for multiple permits that are contiguous or nearly contiguous if a single station would provide adequate and accurate coverage of precipitation events occurring in that area.

(iii) Specify the sampling frequency.

(iv) Establish a sufficient number of appropriate monitoring locations to evaluate the accuracy of the findings in the PHC determination, to identify adverse trends, and to determine, in a timely fashion, whether corrective action is needed to prevent material damage to the hydrologic balance outside the permit area. At a minimum, the plan must include—

(A) Monitoring of point-source discharges from the proposed operation.

(B) Monitoring locations upgradient and downgradient of the proposed permit area in each perennial and intermittent stream within the proposed permit and adjacent areas, with the exception that no upgradient monitoring location is needed for a stream when the operation will mine through the headwaters of that stream.

(C) Monitoring locations upgradient and downgradient of the proposed operation at a distance sufficiently close to the underground mine workings to detect changes as the mining operation progresses. The plan must include a schedule and map for moving these sites as the underground workings advance.

(D) Monitoring locations specified in the CHIA under § 784.21(b)(6)(vi) of this part.

(v) Describe how the monitoring data will be used to—

(A) Determine the impacts of the operation upon the hydrologic balance.

(B) Determine the impacts of the operation upon the biology of surface waters within the permit and adjacent areas.

(C) Prevent material damage to the hydrologic balance outside the permit area.

(vi) Describe how the water samples will be collected, preserved, stored, transmitted for analysis, and analyzed in accordance with the sampling, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter.

(2) *Parameters.*—(i) *General criteria for selection of parameters.* The plan must provide for the monitoring of parameters—

(A) For which there are applicable effluent limitation guidelines under 40 CFR part 434.

(B) Needed to assess the accuracy of the findings and predictions in the PHC determination prepared under § 784.20 of this part.

(C) Needed to assess the adequacy of the surface-water runoff control plan prepared under § 784.29 of this part.

(D) Needed to assess the suitability of the quality and quantity of surface water in the permit and adjacent areas for all designated uses under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, if there are no designated uses, all premining uses of surface water in the permit and adjacent areas, subject to § 817.40 of this chapter; and

(E) Needed to assess the suitability of the quality and quantity of surface water in the permit and adjacent areas to support the premining land uses.

(F) For which there is an evaluation threshold under § 784.21(b)(7) of this part.

(ii) *Minimum sampling and analysis requirements for monitoring locations other than point-source discharges.* For all monitoring locations other than point-source discharges, the plan must require collection and analysis of a sample from each monitoring point at least every 3 months, with data submitted to the regulatory authority at the same frequency. The data must include—

(A) Analysis of each sample for the surface-water parameters listed in § 784.19(a)(2) of this part.

(B) Flow rates at each sampling location. The plan must require use of generally-accepted professional flow measurement techniques. Visual observations are not acceptable.

(C) Analysis of each sample for parameters detected by the baseline sampling and analysis conducted under § 784.19(d) of this part.

(D) Analysis of each sample for all parameters for which there is an evaluation threshold under § 784.21(b)(7) of this part.

(E) Analysis of each sample for other parameters of concern, as determined by the regulatory authority, based upon the information and analyses required under §§ 784.19 through 784.21 of this part.

(iii) *Minimum requirements for point-source discharges.* For point-source discharges, the plan must—

(A) Provide for monitoring in accordance with 40 CFR parts 122, 123, and 434 and as required by the National Pollutant Discharge Elimination System permitting authority.

(B) Require measurement of flow rates, using generally-accepted professional flow measurement techniques. Visual observations are not acceptable.

(iv) *Requirements related to the Clean Water Act.* You must revise the plan to incorporate any site-specific monitoring requirements imposed by the National Pollutant Discharge Elimination System permitting authority or the agency responsible for administration of section 404 of the Clean Water Act, 33 U.S.C. 1344, subsequent to submission of the SMCRA permit application.

(3) *Regulatory authority review and action.* (i) Upon completing the technical review of your application, the regulatory authority may require that you revise the plan to increase the frequency of monitoring, to require monitoring of additional parameters, or to require monitoring at additional locations, if the additional requirements would contribute to protection of the hydrologic balance.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 784.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes.

(c) *Biological condition monitoring plan.*—(1) *General requirements.* Except as provided in paragraph (d) of this section, your permit application must include a plan for monitoring the biological condition of each perennial and intermittent stream within the proposed permit and adjacent areas for which baseline biological condition data was collected under § 784.19(c)(6)(vi) of this part. The plan must be adequate to evaluate the impacts of the mining operation on the biological condition of those streams and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance outside the permit area.

(2) *Monitoring techniques.* The plan must—

(i) Require use of a bioassessment protocol that meets the requirements of § 784.19(c)(6)(vii) of this part.

(ii) Identify monitoring locations in each perennial and intermittent stream within the proposed permit and adjacent areas for which baseline biological condition data was collected under § 784.19(c)(6)(vi) of this part.

(iii) Establish a sampling frequency that must be no less than annual, but not so frequent as to unnecessarily deplete the populations of the species being monitored.

(iv) Require submission of monitoring data to the regulatory authority on an annual basis.

(3) *Regulatory authority review and action.* (i) Upon completing review of your application, the regulatory authority may require that you revise the plan to adjust monitoring locations,

the frequency of monitoring, and the species to be monitored.

(ii) After completing preparation of the cumulative hydrologic impact assessment required under § 784.21 of this part, the regulatory authority must reconsider the adequacy of the monitoring plan and require that you make any necessary changes.

(d) *Exception for operations that avoid streams.* (1) Upon your request, the regulatory authority may waive the biological condition monitoring plan requirements of paragraph (c) of this section if you demonstrate, and if the regulatory authority finds in writing, that your operation will not—

(i) Mine through or bury any perennial or intermittent stream;

(ii) Create a point-source discharge to any perennial, intermittent, or ephemeral stream; or

(iii) Modify the base flow of any perennial or intermittent stream or cause the stream to pool, either as a result of subsidence or as a result of any other mining-related activity.

(2) If you meet all the criteria of paragraph (d)(1) of this section with the exception of paragraph (d)(1)(ii) of this section, you may request, and the regulatory authority may approve, limiting the biological condition monitoring requirements of paragraph (c) of this section to only the stream that will receive the point-source discharge.

(e) *Coordination with Clean Water Act agencies.* The regulatory authority will make best efforts to—

(1) Consult in a timely manner with the agencies responsible for issuing permits, authorizations, and certifications under the Clean Water Act;

(2) Minimize differences in monitoring locations and reporting requirements; and

(3) Share data to the extent practicable and consistent with each agency's mission, statutory requirements, and implementing regulations.

§ 784.24 What requirements apply to the postmining land use?

(a) *What postmining land use information must my application contain*? (1) You must describe and map the proposed use or uses of the land within the proposed permit area following reclamation, based on the categories of land uses listed in the definition of land use in § 701.5 of this chapter.

(2) Except for prime farmland historically used as cropland, you must discuss the utility and capability of the reclaimed land to support the proposed postmining land use and the variety of uses that the land was capable of supporting before any mining, as identified under § 783.22 of this chapter, regardless of the proposed postmining land use.

(3) You must explain how the proposed postmining land use is consistent with existing state and local land use policies and plans.

(4) You must include a copy of the comments concerning the proposed postmining use that you receive from the—

(i) Legal or equitable owner of record of the surface of the proposed permit area; and

(ii) State and local government agencies that would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

(5) You must explain how the proposed postmining land use will be achieved and identify any support activities or facilities needed to achieve that use.

(6) If you propose to restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses rather than to a condition capable of supporting the uses that the land could support before any mining, you must provide the demonstration required under paragraph (b)(1) of this section.

(b) *What requirements apply to the approval of alternative postmining land uses*?—(1) *Application requirements.* If you propose to restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses, rather than to a condition capable of supporting the uses that the land could support before any mining, you must demonstrate that the proposed higher or better use or uses meet the following criteria:

(i) There is a reasonable likelihood that the proposed use or uses will be achieved after mining and reclamation, as documented by, for example, real estate and construction contracts, plans for installation of any necessary infrastructure, procurement of any necessary zoning approvals, landowner commitments, economic forecasts, and studies by land use planning agencies.

(ii) The proposed use or uses do not present any actual or probable hazard to public health or safety or any threat of water diminution or pollution.

(iii) The proposed use or uses will not—

(A) Be impractical or unreasonable.

(B) Be inconsistent with applicable land use policies or plans.

(C) Involve unreasonable delay in implementation.

(D) Cause or contribute to a violation of federal, state, tribal or local law.

(E) Result in changes in the size or frequency of peak flows from the reclaimed area that would cause an increase in flooding when compared with the conditions that would exist if the land were restored to a condition capable of supporting the uses that it was capable of supporting before any mining.

(F) Cause the total volume of flow from the reclaimed area, during every season of the year, to vary in a way that would preclude attainment of any designated use of a surface water located outside the permit area under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, if there are no designated uses, any premining use of a surface water located outside the permit area.

(G) Cause a change in the temperature or chemical composition of the water that would preclude attainment of any designated use of a surface water under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, if there are no designated uses, any premining use of a surface water located outside the permit area.

(2) *Regulatory authority decision requirements.* The regulatory authority may approve your request if it—

(i) Consults with the landowner or the land management agency having jurisdiction over the lands to which the use would apply; and

(ii) Finds in writing that you have made the demonstration required under paragraph (b)(1) of this section. Landowner consent alone is an insufficient basis for this finding.

(c) *What requirements apply to permit revision applications that propose to change the postmining land use*? (1) You may propose to change the postmining land use for all or a portion of the permit area at any time through the permit revision process under § 774.13 of this chapter.

(2) If you propose a higher or better postmining land use, the requirements of paragraphs (b)(1) and (2) of this section will apply and the application must be considered a significant permit revision for purposes of § 774.13(b)(2) of this chapter.

(d) *What restrictions apply to the retention of mining-related structures*? (1) If you propose to retain mining-related structures other than roads and impoundments for potential future use as part of the postmining land use, you must demonstrate, and the regulatory authority must find in writing, that the size and characteristics of the structures are consistent with and proportional to the needs of the postmining land use.

(2) The amount of bond required for the permit under part 800 of this

chapter must include the cost of removing the structure and reclaiming the land upon which it was located to a condition capable of supporting the premining uses. The bond must include the cost of restoring the site to its approximate original contour in accordance with § 817.102 of this chapter and revegetating the site in accordance with the revegetation plan approved under § 784.12(g) of this part for the permit area surrounding the site upon which the structure was previously located.

(3) The reclamation plan submitted under § 784.12 of this part must specify that if a structure is not in use as part of the approved postmining land use by the end of the revegetation responsibility period specified in § 817.115 of this chapter, you must remove the structure and reclaim the land upon which it was located by restoring the approximate original contour in accordance with § 817.102 of this chapter and revegetating the site in accordance with the revegetation plan approved under § 784.12(g) of this part for the permit area surrounding the site upon which the structure was previously located.

(e) *What special provisions apply to previously mined areas*? If land that was previously mined cannot be reclaimed to the land use that existed before any mining because of the previously mined condition, you may propose, and the regulatory authority may approve, any appropriate postmining land use for that land that is both achievable and compatible with land uses in the surrounding area, provided that restoration of the land to that capability does not require disturbance of land previously unaffected by mining.

§ 784.25 What information must I provide for siltation structures, impoundments, and refuse piles?

(a) *How do I determine the hazard potential of a proposed impoundment*? You must use the following table to identify the hazard potential classification of each proposed impoundment that includes a dam:

Hazard potential classification	Loss of human life in event of failure	Economic, environmental, or lifeline losses [1] in event of failure
Low	None expected	Low potential; generally limited to property owned by the permittee.
Significant	None expected	Yes.
High	Loss of one or more lives probable	Yes, but not necessary for this classification.

[1] Lifeline losses refer to disruption of lifeline facilities, which include, but are not limited to, important public utilities, highways, and railroads.

(b) *How must I prepare the general plan for proposed siltation structures, impoundments, and refuse piles*? If you propose to construct a siltation structure, impoundment, or refuse pile, your application must include a general plan that meets the following requirements:

(1) The plan must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify such plans, a qualified registered professional land surveyor, with assistance from experts in related fields such as landscape architecture.

(2) The plan must contain a description, map, and cross-sections of the structure and its location.

(3) The plan must contain the hydrologic and geologic information required to assess the hydrologic impact of the structure.

(4)(i) The plan must contain a report describing the results of a geotechnical investigation of the potential effect on the structure if subsurface strata subside as a result of past, current, or future underground mining operations beneath or within the proposed permit and adjacent areas. When necessary, the investigation report also must identify design and construction measures that would prevent adverse subsidence-related impacts on the structure.

(ii) Except for structures that would meet the criteria in § 77.216(a) of this title or that would have a significant or high hazard potential under paragraph (a) of this section, the requirements of paragraph (b)(4)(i) of this section do not apply—

(A) In areas with 26.0 inches or less of average annual precipitation; or

(B) To siltation structures.

(5)(i) The plan must contain an analysis of the potential for each impoundment to drain into subjacent underground mine workings, together with an analysis of the impacts of such drainage.

(ii) Except for structures that would meet the criteria in § 77.216(a) of this title or that would have a significant or high hazard potential under paragraph (a) of this section, the requirements of paragraph (b)(5)(i) of this section do not apply—

(A) In areas with 26.0 inches or less of average annual precipitation; or

(B) To siltation structures.

(6) The plan must include a schedule setting forth the dates when any detailed design plans for structures that are not submitted with the general plan will be submitted to the regulatory authority.

(c) *How must I prepare the detailed design plan for proposed siltation structures, impoundments, and refuse piles*?—(1) *Detailed design plan requirements for high hazard dams, significant hazard dams, and impounding structures that meet MSHA criteria.* If you propose to construct an impounding structure that would meet the criteria in § 77.216(a) of this title or that would have a significant or high hazard potential under paragraph (a) of this section, you must prepare and submit a detailed design plan that meets the following requirements:

(i) The plan must be prepared by, or under the direction of, a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture. The engineer must certify that the impoundment design meets the requirements of this part, current prudent engineering practices, and any design criteria established by the regulatory authority. The qualified registered professional engineer must be experienced in the design and construction of impoundments.

(ii) The plan must incorporate any design and construction measures identified in the geotechnical investigation report prepared under paragraph (b)(4) of this section as necessary to protect against potential adverse impacts from subsidence resulting from underground mine workings underlying or adjacent to the structure.

(iii) The plan must describe the operation and maintenance requirements for each structure.

(iv) The plan must describe the timetable and plans to remove each structure, if appropriate.

(2) *Detailed design plan requirements for other structures.* If you propose to construct an impounding structure that would not meet the criteria in § 77.216(a) of this title and that would not have a significant or high hazard

potential under paragraph (a) of this section, you must prepare and submit a detailed design plan that meets the following requirements:

(i)(A) Except as provided in paragraph (c)(2)(i)(B) of this section, the plan must be prepared by, or under the direction of, a qualified, registered, professional engineer, or, in any state that authorizes land surveyors to prepare and certify such plans, a qualified, registered, professional, land surveyor. The engineer or land surveyor must certify that the impoundment design meets the requirements of this part, current prudent engineering practices, and any design criteria established by the regulatory authority. The qualified registered professional engineer or qualified registered professional land surveyor must be experienced in the design and construction of impoundments.

(B) All coal mine waste structures to which §§ 817.81 through 817.84 of this chapter apply must be certified by a qualified, registered, professional engineer.

(ii) The plan must reflect any design and construction requirements for the structure, including any measures identified as necessary in the geotechnical investigation report prepared under paragraph (b)(4) of this section.

(iii) The plan must describe the operation and maintenance requirements for each structure.

(iv) The plan must describe the timetable and plans to remove each structure, if appropriate.

(3) *Timing of submittal of detailed design plans.* You must submit the detailed design plans to the regulatory authority either as part of the permit application or in accordance with the schedule submitted under paragraph (b)(6) of this section. The regulatory authority must approve, in writing, the detailed design plan for a structure before you may begin construction of the structure.

(d) *What additional design requirements apply to siltation structures?* You must design siltation structures in compliance with the requirements of § 817.46 of this chapter.

(e) *What additional design requirements apply to permanent and temporary impoundments?* (1) You must design permanent and temporary impoundments to comply with the requirements of § 817.49 of this chapter.

(2) The regulatory authority may establish, through the regulatory program approval process, engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of conducting engineering tests to establish compliance with the minimum static safety factor of 1.3 required in § 816.49(a)(2)(ii) of this chapter.

(3) Each plan must include stability analyses of the proposed impoundment if the structure would meet the criteria in § 77.216(a) of this title or would have a significant or high hazard potential under paragraph (a) of this section. The stability analyses must address static, seismic, and post-earthquake (liquefaction) conditions. They must include, but are not limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific analysis and design parameters and construction methods.

(f) *What additional design requirements apply to coal mine waste impoundments, refuse piles, and impounding structures constructed of coal mine waste?* If you propose to place coal mine waste in a refuse pile or impoundment, or if you plan to use coal mine waste to construct an impounding structure, you must comply with the applicable design requirements in paragraphs (f)(1) and (2) of this section.

(1) *Design requirements for refuse piles.* You must design refuse piles to comply with the requirements of §§ 784.28, 817.81, and 817.83 of this chapter.

(2) *Design requirements for impounding structures that will impound coal mine waste or that will be constructed of coal mine waste.* (i) You must design impounding structures constructed of or intended to impound coal mine waste to comply with the coal mine waste disposal requirements of §§ 784.28, 817.81, and 817.84 of this chapter and with the impoundment requirements of paragraphs (a) and (c) of § 817.49 of this chapter.

(ii) The plan for each impounding structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title.

(iii) Each plan for an impounding structure that will impound coal mine waste or that will be constructed of coal mine waste must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the impounding structure.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impounding structure on each plan.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impounding structure, impoundment, or impounded material.

(iv) The design must ensure that at least 90 percent of the water stored in the impoundment during the design precipitation event will be removed within a 10-day period.

§ 784.26 What information must I provide if I plan to return coal processing waste to abandoned underground mine workings?

(a) As provided in §§ 816.81(h) and 817.81(h) of this chapter, you may return coal processing waste from either surface-mined coal or underground-mined coal to abandoned underground mine workings for disposal only if the regulatory authority and the Mine Safety and Health Administration first approve the disposal plan.

(b) Each plan for the return of coal processing waste to abandoned underground mine workings must describe the—

(1) Source and quality of coal processing waste to be stowed in the abandoned underground workings.

(2) All chemicals used to process the coal, the quantity of those chemicals remaining in the coal processing waste, and the likely impact of those chemicals on groundwater and any persons, aquatic life, or wildlife using that groundwater.

(3) Area of the abandoned underground workings in which the waste is to be placed.

(4) Percent of the abandoned underground mine void to be filled.

(5) Method of constructing underground retaining walls.

(6) Influence of the backstowing operation on active underground mine operations.

(7) Surface area to be supported by the backstowed waste.

(8) Anticipated occurrence of surface effects following backstowing.

(9) Source and operation of the hydraulic transport mediums.

(10) Method of dewatering the coal processing waste after placement.

(11) Extent to which water will be retained underground.

(12) Method of treatment of water if released to surface streams.

(13) Plans for monitoring for chemicals contained in the coal processing waste.

(14) Effect on the hydrologic regime and biological communities.

(15) Measures to be taken to comply with the requirements of § 816.41 or § 817.41 of this chapter for discharges to underground mines.

(c) The plan submitted under paragraph (b) of this section must include a monitoring plan that complies with § 784.23 of this part, as applicable. It must describe the objective of each permanent monitoring well to be located in the area in which coal processing waste is placed, the stratum underlying the mined coal, and the gradient from the area in which the waste is placed.

(d) Paragraphs (a) through (c) of this section also apply to pneumatic backstowing operations, except that the regulatory authority may exempt a proposed pneumatic backstowing operation from compliance with the monitoring requirements of paragraph (c) of this section after finding in writing that you have demonstrated that the proposed operation will not adversely impact surface water, groundwater, or water supplies.

§ 784.27 What additional permitting requirements apply to proposed activities in or through ephemeral streams?

(a) *Clean Water Act requirements.* If the proposed permit area includes waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* the regulatory authority must condition the permit to prohibit initiation of mining-related activities in or affecting those waters before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(b) *Postmining surface drainage pattern and stream-channel configuration.* (1) If you propose to mine through an ephemeral stream, your application must include a plan to construct—

(i) A postmining surface drainage pattern that is similar to the premining surface drainage pattern, relatively stable, and in dynamic near-equilibrium; and

(ii) Postmining stream-channel configurations that are relatively stable and similar to the premining configuration of ephemeral stream channels.

(2) The regulatory authority may approve or require a postmining surface drainage pattern or stream-channel configuration that differs from the pattern or configuration otherwise required under paragraph (b)(1) of this section when the regulatory authority finds that a different pattern or configuration is necessary or appropriate to—

(i) Ensure stability;

(ii) Prevent or minimize downcutting or widening of reconstructed stream channels and control meander migration;

(iii) Promote enhancement of fish and wildlife habitat;

(iv) Accommodate any anticipated temporary or permanent increase in surface runoff as a result of mining and reclamation; or

(v) Accommodate the construction of excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures;

(vi) Replace a stream that was channelized or otherwise severely altered prior to submittal of the permit application with a more natural, relatively stable, and ecologically sound drainage pattern or stream-channel configuration; or

(vii) Reclaim a previously mined area.

(c) *Streamside vegetative corridors.* (1) If you propose to mine through an ephemeral stream, your application must include a plan to establish a vegetative corridor at least 100 feet wide along each bank of the reconstructed stream channel, consistent with natural vegetation patterns.

(2) The plan submitted under paragraph (c)(1) of this section must be consistent with the requirements of § 817.56(c) of this chapter for vegetative corridors along ephemeral streams.

(3) Paragraphs (c)(1) and (2) of this section do not apply to prime farmland historically used for cropland.

§ 784.28 What additional permitting requirements apply to proposed surface activities in, through, or adjacent to perennial or intermittent streams?

(a) *Clean Water Act requirements.* If the proposed permit area includes waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* the regulatory authority must condition the permit to prohibit initiation of mining-related activities in or affecting those waters before you obtain all necessary authorizations, certifications, and permits under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(b) *To what activities does this section apply*? You, the permit applicant, must provide the information and demonstrations required by paragraphs (c) through (g) of this section, as applicable, whenever you propose to conduct mining activities—

(1) In or through a perennial or intermittent stream; or

(2) On the surface of lands within 100 feet of a perennial or intermittent stream. You must measure this distance horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(c) *Postmining surface drainage pattern and stream-channel configuration.* (1) If you propose to mine through a perennial or intermittent stream, your application must include a plan to construct—

(i) A postmining surface drainage pattern that is similar to the premining surface drainage pattern, relatively stable, and in dynamic near-equilibrium; and

(ii) Postmining stream-channel configurations that are relatively stable and similar to the premining configuration of perennial and intermittent stream channels.

(2) The regulatory authority may approve or require a postmining surface drainage pattern or stream-channel configuration that differs from the pattern or configuration otherwise required under paragraph (c)(1) of this section when the regulatory authority finds that a different pattern or configuration is necessary or appropriate to—

(i) Ensure stability;

(ii) Prevent or minimize downcutting or widening of reconstructed stream channels and control meander migration;

(iii) Promote enhancement of fish and wildlife habitat;

(iv) Accommodate any anticipated temporary or permanent increase in surface runoff as a result of mining and reclamation;

(v) Accommodate the construction of excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures;

(vi) Replace a stream that was channelized or otherwise severely altered prior to submittal of the permit application with a more natural, relatively stable, and ecologically sound drainage pattern or stream-channel configuration; or

(vii) Reclaim a previously mined area.

(d) *Streamside vegetative corridors.* (1) If you propose to conduct any mining activities identified in paragraph (b) of this section, your application must include a plan to establish a vegetated streamside corridor at least 100 feet wide on each side of the stream as part

of the reclamation process following the completion of mining activities on the surface of land within that area.

(2) The plan submitted under paragraph (d)(1) of this section must be consistent with natural vegetation patterns.

(3) The plan submitted under paragraph (d)(1) of this section must be consistent with the streamside vegetative corridor requirements of § 817.57(d) of this chapter.

(4) The corridor width must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(5) Paragraphs (d)(1) through (2) of this section do not apply to prime farmland historically used for cropland.

(e) *What demonstrations must I include in my application if I propose to conduct activities in or within 100 feet of a perennial or intermittent stream?* (1) Except as provided in paragraphs (e)(5), (e)(6), and (i) of this section and § 817.57(i) of this chapter, your application must contain the applicable demonstrations set forth in the table if you propose to conduct mining activities in or through a perennial or intermittent stream or on the surface of land within 100 feet of a perennial or intermittent stream, as specified in paragraph (b) of this section.

Demonstration	Activity		
	Any activity other than mining through or permanently diverting a stream or construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream	Mining through or permanently diverting a stream	Construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream
(i) The proposed activity would not cause or contribute to a violation of applicable state or tribal water quality standards, including, but not limited to, standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).	Yes	Yes	Yes.
(ii) The proposed activity would not cause material damage to the hydrologic balance outside the permit area or upset the dynamic near-equilibrium of streams outside the permit area.	Yes	Yes	Yes.
(iii) The proposed activity would not result in conversion of the affected stream segment from perennial to ephemeral.	Yes	Yes	Not applicable.
(iv) The proposed activity would not result in conversion of the affected stream segment from intermittent to ephemeral or from perennial to intermittent.	Yes	Yes, except as provided in paragraphs (e)(2) and (5) of this section.	Not applicable.
(v) There is no practicable alternative that would avoid mining through or diverting a perennial or intermittent stream.	Not applicable	Yes, except as provided in paragraph (e)(3) of this section.	Yes.
(vi) After evaluating all potential upland locations in the vicinity of the proposed operation, including abandoned mine lands and unreclaimed bond forfeiture sites, there is no practicable alternative that would avoid placement of excess spoil or coal mine waste in a perennial or intermittent stream.	Not applicable	Not applicable	Yes.
(vii) The proposed operation has been designed to minimize the extent to which perennial or intermittent streams will be mined through, diverted, or covered by an excess spoil fill, a coal mine waste refuse pile, or a coal mine waste impounding structure.	Not applicable	Yes, except as provided in paragraphs (e)(3) and (5) of this section.	Yes.
(viii) The stream restoration techniques in the proposed reclamation plan are adequate to ensure restoration or improvement of the form, hydrologic function (including flow regime), dynamic near-equilibrium, streamside vegetation, and ecological function of the stream after you have mined through it, as required by § 817.57 of this chapter.	Not applicable	Yes, except as provided in paragraph (e)(5) of this section.	Not applicable.
(ix) The proposed operation has been designed to minimize the amount of excess spoil or coal mine waste that the proposed operation will generate.	§ 784.35(b) of this part requires minimization of excess spoil.	§ 784.35(b) of this part requires minimization of excess spoil.	Yes.
(x) To the extent possible using the best technology currently available, the proposed operation has been designed to minimize adverse impacts on fish, wildlife, and related environmental values.	Yes	Yes	Yes.
(xi) The fish and wildlife enhancement plan prepared under § 784.16 of this part includes measures that would fully and permanently offset any long-term adverse impacts on fish, wildlife, and related environmental values within the footprint of each excess spoil fill, coal mine waste refuse pile, and coal mine waste impounding structure.	Not applicable	Not applicable	Yes.

Demonstration	Activity		
	Any activity other than mining through or permanently diverting a stream or construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream	Mining through or permanently diverting a stream	Construction of an excess spoil fill, coal mine waste refuse pile, or impounding structure that encroaches upon any part of a stream
(xii) Each excess spoil fill, coal mine waste refuse pile, and coal mine waste impounding structure has been designed in a manner that will not result in the formation of toxic mine drainage.	Not applicable	Not applicable	Yes.
(xiii) The revegetation plan prepared under § 784.12(g) of this part requires reforestation of each completed excess spoil fill if the land is forested at the time of application or if the land would revert to forest under conditions of natural succession.	Not applicable	Not applicable	Yes.

(2)(i) As part of a proposal to mine through an intermittent stream, you may propose to convert a minimal portion of the mined-through segment of an intermittent stream to an ephemeral stream. The regulatory authority may approve the proposed conversion only if you demonstrate, and the regulatory authority finds, that the conversion would not degrade the hydrologic function, dynamic near-equilibrium, or the ecological function of the stream as a whole within the mined area, as determined by comparison with the stream assessment conducted under § 784.19(c)(6) of this part.

(ii) Paragraph (e)(2)(i) of this section does not apply to the circumstances described in paragraph (e)(5) of this section.

(3)(i) Paragraphs (e)(1)(v) and (vii) of this section do not apply to a proposal to mine through a segment of an intermittent stream when that segment meets the criteria of paragraph (e)(3)(ii) of this section, provided you demonstrate, and the regulatory authority finds, that implementation of the proposed mining and reclamation plan—

(A) Will improve the form of the stream segment;

(B) Will improve the hydrologic function of the stream;

(C) Is likely to result in improvement of the biological condition or ecological function of the stream;

(D) Will not further degrade the hydrologic function, dynamic near-equilibrium, biological condition, or ecological function of the stream; and

(E) Will result in establishment of a streamside vegetative corridor for the stream segment in accordance with § 817.57(d) of this chapter.

(ii) To qualify for purposes of paragraph (e)(3)(i) of this section, a stream segment must display both of the following characteristics:

(A) Prior anthropogenic activity has resulted in substantial degradation of the profile or dimensions of the stream channel; and

(B) Degradation of the stream channel has resulted in a substantial adverse impact on the ecological function of the stream.

(4) Paragraph (e)(1) of this section does not apply to a stream segment that will be part of a permanent impoundment approved and constructed under § 817.49(b) of this chapter.

(5) Paragraphs (e)(1)(iv) and (vii) of this section and the requirement for restoration of the hydrologic and ecological functions and the dynamic near-equilibrium of a stream in paragraph (e)(1)(viii) of this section do not apply to an intermittent stream segment if—

(i) The intermittent segment is a minor interval in what is otherwise a predominantly ephemeral stream;

(ii) You demonstrate, and the regulatory authority finds, that the intermittent segment has no significant fish, wildlife, or related environmental values, as documented by the baseline data collected under § 784.19(c)(6) of this part; and

(iii) You demonstrate, and the regulatory authority finds, that conversion of the intermittent stream segment will not adversely affect water uses.

(f) *What design requirements apply to the diversion, restoration, and reconstruction of perennial and intermittent stream channels?* (1)(i) You must design permanent stream-channel diversions, temporary stream-channel diversions that will remain in use for 3 or more years, and stream channels to be reconstructed after the completion of mining to restore, approximate, or improve the premining characteristics of the original stream channel, to promote the recovery and enhancement of aquatic habitat and the ecological and hydrologic functions of the stream, and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement.

(ii) Pertinent stream-channel characteristics include, but are not limited to, the baseline stream pattern, profile, dimensions, substrate, habitat, and natural vegetation growing in the riparian zone and along the banks of the stream.

(iii) For temporary stream-channel diversions that will remain in use for 3 or more years, the vegetation proposed for planting along the banks of the diversion need not include species that would not reach maturity until after the diversion is removed.

(2) You must design the hydraulic capacity of all temporary and permanent stream-channel diversions to be at least equal to the hydraulic capacity of the unmodified stream channel immediately upstream of the diversion, but no greater than the hydraulic capacity of the unmodified stream channel immediately downstream from the diversion.

(3) You must design all temporary and permanent stream-channel diversions in a manner that ensures that the combination of channel, bank, and flood-plain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

(4) You must submit a certification from a qualified registered professional engineer that the designs for all stream-

channel diversions and all stream channels to be reconstructed after the completion of mining meet the design requirements of this section and any additional design criteria established by the regulatory authority. This certification may be limited to the location, dimensions, and physical characteristics of the stream channel.

(g) *What requirements apply to establishment of standards for restoration of the ecological function of a stream?* (1) If you propose to mine through a perennial or intermittent stream, the regulatory authority must establish standards for determining when the ecological function of the reconstructed stream has been restored. Your application must incorporate those standards and explain how you will meet them.

(2) In establishing standards under paragraph (g)(1) of this section, the regulatory authority must coordinate with the appropriate agencies responsible for administering the Clean Water Act, 33 U.S.C. 1251 *et seq.,* to ensure compliance with all Clean Water Act requirements.

(3)(i) The biological component of the standards established under paragraph (g)(1) of this section must employ the best technology currently available, as specified in paragraphs (g)(3)(ii) through (iv) of this section.

(ii) For perennial streams, the best technology currently available includes an assessment of the biological condition of the stream, as determined by an index of biological condition or other scientifically-defensible bioassessment protocols consistent with § 784.19(c)(6)(vii) of this part. Standards established under paragraph (g)(1) of this section for perennial streams—

(A) Need not require that a reconstructed stream or stream-channel diversion have precisely the same biological condition or biota as the stream segment did before mining.

(B) Must prohibit substantial replacement of pollution-sensitive species with pollution-tolerant species.

(C) Must require that populations of organisms used to determine the biological condition of the reconstructed stream or stream-channel diversion be self-sustaining within that stream segment.

(iii) Paragraph (g)(3)(ii) of this section also applies to intermittent streams whenever a scientifically defensible biological index and bioassessment protocol have been established for assessment of intermittent streams in the state or region in which the stream is located.

(iv)(A) Except as provided in paragraph (g)(3)(iii) of this section, the best technology currently available for intermittent streams consists of the establishment of standards that rely upon restoration of the form, hydrologic function, and water quality of the stream and reestablishment of streamside vegetation as a surrogate for the biological condition of the stream.

(B) The regulatory authority must reevaluate the best technology currently available for intermittent streams under paragraph (g)(3)(iv)(A) of this section at 5-year intervals. Upon conclusion of that evaluation, the regulatory authority must make any appropriate adjustments before processing permit applications submitted after the conclusion of that evaluation.

(4) Standards established under paragraph (g)(1) of this section must ensure that the reconstructed stream or stream-channel diversion will not—

(i) Preclude attainment of the designated uses of that stream segment under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), before mining, or, if there are no designated uses, the premining uses of that stream segment; or

(ii) Result in that stream segment not meeting the applicable anti-degradation requirements under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), as adopted by a state or authorized tribe or as promulgated in a federal rulemaking under the Clean Water Act.

(h) *What finding must the regulatory authority make before approving a permit application under this section?* The regulatory authority may not approve an application that includes a proposal to conduct mining activities in a perennial or intermittent stream or on the surface of land within 100 feet of a perennial or intermittent stream unless it first makes a specific written finding that you have fully satisfied all applicable requirements of paragraphs (c) through (f) of this section. The finding must be accompanied by a detailed explanation of the rationale for the finding.

(i) *Programmatic alternative.* Paragraphs (c) through (h) of this section will not apply to a state program approved under subchapter T of this chapter if that program is amended to expressly prohibit all mining activities, including the construction of stream-channel diversions, that would result in more than a de minimis disturbance of perennial or intermittent streams or the surface of land within 100 feet of a perennial or intermittent stream.

§ 784.29 What information must I include in the surface-water runoff control plan?

Your application must contain a surface-water runoff control plan that includes the following—

(a)(1) An explanation of how you will handle surface-water runoff in a manner that will prevent peak discharges from the proposed permit area, both during and after mining and reclamation, from exceeding the premining peak discharge from the same area for the same-size precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution or another scientifically defensible method approved by the regulatory authority that takes into account the time of concentration to estimate peak discharges.

(2) The explanation in paragraph (a)(1) of this section must consider the findings in the determination of the probable hydrologic consequences of mining prepared under § 784.20 of this part.

(b) A surface-water runoff monitoring and inspection program that will provide sufficient precipitation and stormwater discharge data for the proposed permit area to evaluate the effectiveness of the surface-water runoff control practices under paragraph (a) of this section. The surface-water runoff monitoring and inspection program must specify criteria for monitoring, inspection, and reporting consistent with § 817.34(d) of this chapter. The program must contain a monitoring-point density that adequately represents the drainage pattern across the entire proposed permit area, with a minimum of one monitoring point per watershed discharge point.

(c) Descriptions maps, and cross-sections of runoff-control structures. A runoff-control structure is any man-made structure designed to control or convey storm water runoff on or across a minesite. This term encompasses the entire surface water control system and includes diversion ditches, drainage benches or terraces, drop structures or check dams, all types of conveyance channels, downdrains, and sedimentation and detention ponds and associated outlets. It does not include swales or reconstructed perennial, intermittent, or ephemeral stream channels.

(d) An explanation of how diversions will be constructed in compliance with § 817.43 of this chapter.

§ 784.30 When must I prepare a subsidence control plan and what information must that plan include?

(a) *Pre-subsidence survey.* Each application must include—

(1) A map of the proposed permit and adjacent areas at a scale no smaller than 1:12,000. The regulatory authority may require a larger-scale or more detailed map. The map must show the location and type of—

(i) Structures, renewable resource lands, wetlands, streams, and water bodies that subsidence may materially damage or for which the value or reasonably foreseeable use may be diminished by subsidence; and

(ii) Drinking, domestic, and residential water supplies that could be contaminated, diminished, or interrupted by subsidence.

(2) A narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures, renewable resource lands, wetlands, streams, or water bodies or could contaminate, diminish, or interrupt drinking, domestic, or residential water supplies.

(3)(i) A survey of the quantity and quality of all drinking, domestic, and residential water supplies within the permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence.

(ii) You, the applicant, must pay for any technical assessment or engineering evaluation used to determine the premining quantity and quality of drinking, domestic, or residential water supplies. You may use publicly available assessments conducted for research purposes by a university or government agency, provided those assessments are updated to reflect any changes that have occurred since completion of the study.

(iii) You must provide copies of the survey and any technical assessment or engineering evaluation to the property owner and to the regulatory authority.

(b) *Conditions under which no subsidence control plan is needed.* You do not need to submit a subsidence control plan if the survey conducted and information provided under paragraph (a) of this section show that—

(1) No structures, drinking, domestic, or residential water supplies, renewable resource lands, wetlands, streams, or water bodies exist within the proposed permit and adjacent areas; or

(2) There would be no material damage or diminution in value or reasonably foreseeable use of structures, lands, or features protected under § 817.121(c) through (e) of this chapter, and no contamination, diminution, or interruption of water supplies protected under § 817.40 of this chapter would occur as a result of mine subsidence, provided that the regulatory authority agrees with this conclusion.

(c) *Subsidence control plan.* (1) Your application must include a subsidence control plan unless the conditions specified in paragraph (b) of this section exist.

(2) The subsidence control plan must contain the following information:

(i) A description of the method of coal removal, such as longwall mining, room-and-pillar removal or hydraulic mining, including the size, sequence and timing of the development of underground workings.

(ii) A map of the underground workings that describes the location and extent of the areas in which planned-subsidence mining methods will be used and that identifies all areas where the measures described in paragraphs (c)(2)(iv), (v), and (vii) of this section will be taken to prevent or minimize subsidence and subsidence-related damage; and, when applicable, to correct subsidence-related material damage.

(iii) A description of the physical conditions, such as depth of cover, seam thickness and lithology of overlying strata, that affect the likelihood or extent of subsidence and subsidence-related damage.

(iv) A description of the monitoring, if any, needed to determine the commencement and degree of subsidence so that, when appropriate, other measures can be taken to prevent, reduce or correct material damage in accordance with § 817.121(c) of this chapter.

(v) Except for those areas where planned subsidence is projected to be used, a detailed description of the subsidence control measures that will be taken to prevent or minimize subsidence and subsidence-related damage to the extent technologically and economically feasible. Those measures may include, but are not limited to:

(A) Backstowing of voids;

(B) Leaving support pillars of coal;

(C) Leaving areas in which no coal is removed, including a description of the overlying area to be protected by leaving coal in place; and

(D) Taking measures on the surface to prevent or minimize material damage or diminution in value of the surface.

(vi) A description of the anticipated effects of planned subsidence, if any, including impacts to wetlands, streams, and water bodies that support the value and reasonably foreseeable uses of surface lands.

(vii) For those areas where planned subsidence is projected to be used, a description of methods to be employed to minimize damage from planned subsidence to non-commercial buildings and occupied residential dwellings and structures related thereto; or the written consent of the owner of the structure or facility that minimization measures not be taken; or, unless the anticipated damage would constitute a threat to health or safety, a demonstration that the costs of minimizing damage exceed the anticipated costs of repair.

(viii) A description of the measures to be taken in accordance with §§ 817.40 and 817.121(c) of this chapter to replace adversely affected protected water supplies or to mitigate or remedy any subsidence-related material damage to land, wetlands, streams, water bodies, and protected structures.

(ix) Other information specified by the regulatory authority as necessary to demonstrate that the operation will be conducted in accordance with § 817.121 of this chapter.

§ 784.31 What information must I provide concerning the protection of publicly owned parks and historic places?

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be adversely affected by the proposed operation, you must describe the measures to be used—

(1) To prevent adverse impacts, or

(2) If a person has valid existing rights, as determined under § 761.16 of this chapter, or if joint agency approval is to be obtained under § 761.17(d) of this chapter, to minimize adverse impacts.

(b) The regulatory authority may require the applicant to protect historic or archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance, provided that the required measures are completed before the properties are affected by any mining operation.

§ 784.33 What information must I provide concerning the relocation or use of public roads?

Your application must describe, with appropriate maps and cross-sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under § 761.14 of this chapter, you seek to have the regulatory authority approve—

(a) Conducting the proposed surface mining activities within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(b) Relocating a public road.

§ 784.35 What information must I provide concerning the minimization and disposal of excess spoil?

(a) *Applicability.* This section applies to you, the permit applicant, if you propose to generate excess spoil as part of your operation.

(b) *Demonstration of minimization of excess spoil.* (1) You must submit a demonstration, with supporting calculations and other documentation, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate.

(2) The demonstration under paragraph (b)(1) of this section must explain, in quantitative terms, how the maximum amount of overburden will be returned to the mined-out area after considering—

(i) Applicable regulations concerning backfilling, compaction, grading, and restoration of the approximate original contour.

(ii) Safety and stability needs and requirements.

(iii) The need for access and haul roads with their attendant drainage structures and safety berms during mining and reclamation. You may construct roads and their attendant drainage structures and safety berms on the perimeter of the backfilled area as necessary to conduct surface coal mining and reclamation operations, but, when the roads are no longer needed to support heavy equipment traffic, you must reduce the total width of roads and their attendant drainage structures and berms to be retained as part of the postmining land use to no more than 20 feet unless you demonstrate an essential need for a greater width for the postmining land use.

(iv) Needs and requirements associated with revegetation and the proposed postmining land use.

(v) Any other relevant regulatory requirements, including those pertaining to water quality and protection of fish, wildlife, and related environmental values.

(3) When necessary to avoid or minimize construction of excess spoil fills on undisturbed land, paragraph (b)(2)(i) of this section does not prohibit the placement of what would otherwise be excess spoil on the mined-out area to heights in excess of the premining elevation, provided that the final surface configuration is compatible with the surrounding terrain and generally resembles landforms found in the surrounding area.

(4) You may not create a permanent impoundment under § 817.49(b) of this chapter or place coal combustion residues or noncoal materials in the surface excavation if doing so would result in the creation of excess spoil.

(c) *Preferential use of preexisting benches for excess spoil disposal.* To the extent that your proposed operation will generate excess spoil, you must maximize the placement of excess spoil on preexisting benches in the vicinity of the proposed permit area in accordance with § 817.74 of this chapter rather than constructing excess spoil fills on previously undisturbed land.

(d) *Fill capacity demonstration.* You must submit a demonstration, with supporting calculations and other documentation, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as calculated under paragraph (b) of this section.

(e) *Requirements related to perennial and intermittent streams.* You must comply with the requirements of § 784.28 of this part concerning activities in or near perennial or intermittent streams if you propose to construct an excess spoil fill in or within 100 feet of a perennial or intermittent stream. The 100-foot distance must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(f) *Location and profile.* (1) You must submit maps and cross-section drawings or models showing the location and profile of all proposed excess spoil fills.

(2) You must locate fills on the most moderately sloping and naturally stable areas available. The regulatory authority will determine which areas area available, based upon the alternatives analysis under § 784.28 of this part and other requirements of the Act and this chapter.

(3) Whenever possible and consistent with the alternatives analysis and alternative selection requirements of § 784.28 of this part, you must place fills on or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(g) *Design plans.* You must submit detailed design plans, including appropriate maps and cross-section drawings, for each proposed fill, prepared in accordance with the requirements of this section and §§ 817.71 through 817.74 of this chapter. You must design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(h) *Geotechnical investigation.* You must submit the results of a geotechnical investigation, with supporting calculations and analyses, of the site of each proposed fill, with the exception of those sites at which excess spoil will be placed only on a preexisting bench under § 817.74 of this chapter. The information submitted must include—

(1) Sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site.

(2) A description of the character of the bedrock and any adverse geologic conditions in the area of the proposed fill.

(3) The geographic coordinates and a narrative description of all springs, seepage, mine discharges, and groundwater flow observed or anticipated during wet periods in the area of the proposed fill.

(4) An analysis of the potential effects of any underground mine workings within the proposed permit and adjacent areas, including the effects of any subsidence that may occur as a result of previous, existing, and future underground mining operations.

(5) A technical description of the rock materials to be used in the construction of fills underlain by a rock drainage blanket.

(6) Stability analyses that address static and seismic conditions. The analyses must include, but are not limited to, strength parameters, pore pressures, and long-term seepage conditions. The analyses must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the design specifications and methods.

(i) *Operation and reclamation plans.* You must submit plans for the construction, operation, maintenance, and reclamation of all excess spoil fills in accordance with the requirements of §§ 817.71 through 817.74 of this chapter.

(j) *Additional requirements for bench cuts or rock-toe buttresses.* If bench cuts or rock-toe buttresses are required under § 817.71(b)(2) of this chapter, you must provide the—

(1) Number, location, and depth of borings or test pits, which must be determined according to the size of the fill and subsurface conditions.

(2) Engineering specifications used to design the bench cuts or rock-toe buttresses. Those specifications must be based upon the stability analyses

required under paragraph (h)(6) of this section.

(k) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of each proposed fill and appurtenant structures meets the requirements of this section.

§ 784.37 What information must I provide concerning access and haul roads?

(a) *Design and other application requirements.* (1) You, the applicant, must submit a map showing the location of all roads that you intend to construct or use within the proposed permit area, together with plans and drawings for each road to be constructed, used, or maintained within the proposed permit area.

(2) You must include appropriate cross-sections, design drawings, and specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, drainage structures, and fords and low-water crossings of perennial and intermittent streams.

(3) You must demonstrate how all proposed roads will comply with the applicable requirements of §§ 784.28, 817.150, and 817.151 of this chapter.

(4) You must identify—

(i) Each road that you propose to locate in or within 100 feet, measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark of a perennial or intermittent stream.

(ii) Each proposed ford of a perennial or intermittent stream that you plan to use as a temporary route during road construction.

(iii) Any plans to alter or relocate a natural stream channel.

(iv) Each proposed low-water crossing of a perennial or intermittent stream channel.

(5) You must explain why the roads, fords, and stream crossings identified in paragraph (a)(4) of this section are necessary and how they comply with the applicable requirements of § 784.28 of this part and §§ 817.150 and 817.151 of this chapter.

(6) You must describe the plans to remove and reclaim each road that would not be retained as part of the postmining land use, and provide a schedule for removal and reclamation.

(b) *Primary road certification.* The plans and drawings for each primary road must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, or in any state that authorizes land surveyors to certify the design of primary roads, a qualified registered professional land surveyor, with experience in the design and construction of roads, as meeting the requirements of this chapter; current, prudent engineering practices; and any design criteria established by the regulatory authority.

(c) *Standard design plans.* The regulatory authority may establish engineering design standards for primary roads through the regulatory program approval process, in lieu of engineering tests, to establish compliance with the minimum static safety factor of 1.3 for all embankments specified in § 817.151(c) of this chapter.

§ 784.38 What information must I provide concerning support facilities?

You must submit a description, plans, and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings must include a map, appropriate cross-sections, design drawings, and specifications sufficient to demonstrate compliance with § 817.181 of this chapter for each facility.

§ 784.40 May I submit permit application information in increments as mining progresses?

(a) You may request that the regulatory authority approve a schedule for incremental submission of the information required by this part, based on the anticipated progress and impact of underground mining activities.

(b) Section 783.26(b) of this chapter applies to a request submitted under paragraph (a) of this section.

(c) The monitoring plans submitted under § 784.23 of this part may be structured and implemented in a manner consistent with the schedule approved under paragraph (b) of this section.

§ 784.200 [Reserved]

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

■ 27. The authority citation for part 785 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 28. Revise § 785.10 to read as follows:

§ 785.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of part 785 and assigned it control number 1029–0040. Collection of this information is required by sections510, 515, 701 and 711 of SMCRA, which requires applicants for special types of mining activities to provide pertinent descriptions, maps, plans, and data. The regulatory authority will use this information to determine whether you, the applicant, can meet the applicable performance standards for the special type of mining activity. You must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 203–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

■ 29. Revise § 785.14 to read as follows:

§ 785.14 What special provisions apply to mountaintop removal mining operations?

(a) *Applicability.* This section applies to you if you conduct or intend to conduct mountaintop removal mining, as that term is defined in § 701.5 of this chapter.

(b) *Application and approval requirements.* The regulatory authority may approve an application for a permit to conduct mountaintop removal mining operations, without regard to the approximate original contour restoration requirements of §§ 816.102 and 816.105 of this chapter, if it first finds, in writing, on the basis of a complete application, that you have met the following requirements:

(1) The proposed postmining land use of the lands to be disturbed is an industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use.

(2) After consultation with the appropriate land-use planning agencies, if any, the regulatory authority deems that the proposed postmining land use constitutes an equal or better economic or public use of the land compared with the premining use.

(3) You have demonstrated compliance with the requirements for alternative postmining land uses in § 780.24(b) of this chapter.

(4) You have presented specific plans for the proposed postmining land use and appropriate assurances that the use will be—

(i) Compatible with adjacent land uses.

(ii) Obtainable according to data regarding expected need and market.

(iii) Assured of investment in necessary public facilities.

(iv) Supported by commitments from public agencies where appropriate.

(v) Practicable with respect to private financial capability for completion of the proposed use.

(vi) Planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use.

(5) The proposed operation has been designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

(6) The proposed use is consistent with adjacent land uses and with existing state and local land use plans and programs.

(7) The regulatory authority has provided, in writing, an opportunity of not more than 60 days to review and comment on the proposed use to—

(i) The governing body of the unit of general-purpose government in whose jurisdiction the land is located; and

(ii) Any state or federal agency that the regulatory authority, in its discretion, determines to have an interest in the proposed use.

(8) You have demonstrated that the proposed operation has been designed to comply with the requirements of part 824 of this chapter.

(9) You have demonstrated that the operation will not damage natural watercourses within the proposed permit and adjacent areas. You may meet this requirement by demonstrating that the proposed operation will comply with all of the following requirements:

(i) The proposed operation will not increase the amount or concentration of parameters of concern in discharges to groundwater and surface water from the proposed permit area, when compared to the discharges that would occur if the operation were designed to adhere to approximate original contour restoration requirements.

(ii) The proposed operation will not result in any greater adverse impact to the aquatic and terrestrial ecology of the proposed permit and adjacent area than would occur if the area to be mined was restored to its approximate original contour.

(iii) The proposed operation will not result in changes in the size or frequency of peak flows from the proposed permit area that would cause an increase in flooding, when compared to the impacts that would occur if the operation were designed to adhere to approximate original contour restoration requirements.

(iv) The total volume of flow from the proposed permit area, during every season of the year, will not vary in a way that would adversely affect any—

(A) Designated use of a surface water located outside the proposed permit area under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, if there are no designated uses, any premining use of a surface water located outside the proposed permit area.

(B) Premining use of groundwater located outside the proposed permit area.

(v) Any other demonstrations that the regulatory authority finds necessary to determine that no damage will occur to natural watercourses within the proposed permit and adjacent areas.

(10) The revegetation plan proposed under § 780.12(g) of this chapter requires that those portions of the proposed permit area that are forested at the time of application or that would revert to forest under conditions of natural succession be revegetated using native tree and understory species to the extent that this requirement is not inconsistent with attainment of the proposed postmining land use.

(11) The proposed operation complies with all other requirements of the regulatory program.

(c) *Additional requirements for permit issuance.* (1) The permit must specifically identify the acreage and location of the lands on which mountaintop removal mining operations will occur within the permit area.

(2) The permit must include a condition prohibiting the release of any part of the bond posted for the permit under part 800 of this chapter until substantial implementation of the approved postmining land use is underway. The condition must provide that the prohibition does not apply to any portion of the bond that is in excess of an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented.

(3) The regulatory authority must clearly mark the permit issued under this part as including mountaintop removal mining operations.

(d) *Subsequent permit reviews.* (1) The regulatory authority must review each permit issued under this section in accordance with § 774.10(a)(2) of this chapter.

(2) The regulatory authority may modify the terms and conditions of a permit for mountaintop removal mining at any time if it determines that more stringent measures are necessary to insure that the operation is conducted in compliance with the requirements of the regulatory program.

■ 30. Revise § 785.16 to read as follows:

§ 785.16 What special provisions apply to proposed variances from approximate original contour restoration requirements for steep-slope mining?

(a) *Application and approval requirements.* The regulatory authority may issue a permit for non-mountaintop removal steep-slope surface coal mining operations that includes a variance from the approximate original contour restoration requirements in §§ 816.102 and 816.105 of this chapter, as referenced in § 816.107 of this chapter, or § 817.102 of this chapter, as referenced in § 817.107 of this chapter, for all or a portion of the permit area. The permit may contain this variance only if the regulatory authority finds, in writing, that you, the applicant, have demonstrated compliance with the following requirements on the basis of a complete application:

(1) After reclamation, the lands within the proposed permit area to which the variance would apply will be suitable for an industrial, commercial, residential, or public (including recreational facilities) postmining land use.

(2) The alternative postmining land use requirements of § 780.24(b) or § 784.24(b) of this chapter have been met.

(3) After consultation with the appropriate land use planning agencies, if any, the proposed use is shown to constitute an equal or better economic or public use.

(4) Federal, state, and local government agencies with an interest in the proposed land use have an adequate period in which to review and comment on the proposed use.

(5) A qualified registered professional engineer has certified that the operation has been designed in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

(6) The highwall will be completely backfilled with spoil material in a manner that results in a static factor of safety of at least 1.3, using standard geotechnical analysis methods.

(7) Only the amount of spoil that is necessary to achieve the postmining land use, ensure the stability of spoil retained on the bench, and meet all other requirements of this chapter will be placed off the mine bench. All spoil not retained on the bench will be placed in accordance with §§ 816.71 and 816.74 or §§ 817.71 and 817.74 of this chapter.

(8) The variance will not result in the construction of a fill in a perennial or intermittent stream.

(9) The proposed operation will improve the condition of the watershed of lands within the proposed permit and adjacent areas when compared either with the condition of the watershed before the proposed operation or with the condition that would exist if the site were mined and restored to the approximate original contour. The condition of the watershed will be deemed improved only if you demonstrate that the following criteria will be met, relative to one of the situations described in the preceding sentence:

(i) The amount or concentration of total suspended solids or other parameters of concern in discharges to groundwater or surface water from the proposed permit area will be reduced.

(ii) Flood hazards within the watershed containing the proposed permit area will be diminished by reduction of the size or frequency of peak-flow discharges from precipitation events or thaws.

(iii) The total volume of flow from the proposed permit area, during every season of the year, will not vary in a way that would adversely affect any—

(A) Designated use of a surface water located outside the proposed permit area under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or, if there are no designated uses, any premining use of a surface water located outside the proposed permit area;

(B) Premining use of groundwater located outside the proposed permit area.

(iv) The proposed operation will result in a lesser adverse impact on the aquatic ecology of the cumulative impact area than would occur if the area to be mined was restored to its approximate original contour.

(v) The impact on perennial and intermittent streams within the proposed permit and adjacent areas will be less than the impact that would occur if the area to be mined was restored to its approximate original contour. The fish and wildlife enhancement measures proposed and approved under § 780.16 or § 784.16 of this chapter may be considered in making this determination.

(vi) The appropriate state environmental agency has approved the plan.

(10)(i) The owner of the surface of the lands within the proposed permit area has knowingly requested, in writing, as part of the application, that a variance be granted.

(ii) The request to which paragraph (a)(10)(i) of this section refers must be made separately from any surface owner consent given for the operations under § 778.15 of this chapter and it must show an understanding that the variance could not be granted without the surface owner's request.

(iii) The permit application must include a copy of the request to which paragraph (a)(10)(i) of this section refers.

(11) The proposed deviations from the premining surface configuration are necessary and appropriate to achieve the approved postmining land use.

(12) The revegetation plan proposed under § 780.12(g) or § 784.12(g) of this chapter requires the use of native tree and understory species to revegetate all portions of the permit area that are forested at the time of application or that would revert to forest under conditions of natural succession. This requirement does not apply to—

(i) Permanent impoundments, roads, and other impervious surfaces to be retained following the completion of mining and reclamation.

(ii) Those portions of the permit area covered by the variance, but only to the extent that compliance with this requirement would be inconsistent with attainment of the postmining land use.

(b) *Additional requirements for permit issuance.* (1) The regulatory authority must specifically mark any permit issued under this section as containing an approved variance from approximate original contour restoration requirements.

(2) The permit must include a condition prohibiting the release of any part of the bond posted for the permit under part 800 of this chapter until substantial implementation of the approved postmining land use is underway. The condition must provide that the prohibition does not apply to any portion of the bond that is in excess of an amount equal to the cost of regrading the site to its approximate original contour and revegetating the regraded land in the event that the approved postmining land use is not implemented.

(c) *Subsequent permit reviews.* (1) The regulatory authority must review each permit incorporating a variance under this section in accordance with § 774.10(a)(2) of this chapter.

(2) The regulatory authority may modify the terms and conditions of a permit incorporating a variance under this section at any time if it determines that more stringent measures are necessary to ensure that the operations are conducted in compliance with the requirements of the regulatory program.

(d) *Miscellaneous provision.* The regulatory authority may grant variances in accordance with this section only if it has promulgated specific rules to govern the granting of variances in accordance with the provisions of this section and any necessary more stringent requirements.

■ 31. Revise § 785.25 to read as follows:

§ 785.25 What special provisions apply to proposed operations on lands eligible for remining?

(a) This section applies to you if you intend to apply for a permit to conduct surface coal mining operations on lands eligible for remining, as that term is defined in § 701.5 of this chapter.

(b)(1) Your application must comply with all applicable requirements of this subchapter.

(2) In addition, to be eligible under the provisions of § 773.13 of this chapter concerning unanticipated events or conditions at remining sites, the application must—

(i) To the extent possible, if not otherwise addressed in the permit application, identify potential environmental and safety problems that could reasonably be anticipated to occur as a result of prior mining activities within the proposed permit area. This identification must be based on a due diligence investigation that includes visual observations, a record review of past mining operations at or near the site, environmental sampling, and any other relevant available information, including data from prior mining activities and remining operations on similar sites.

(ii) With regard to potential environmental and safety problems referred to in paragraph (b)(1)(i) of this section, describe the measures that will be taken to ensure that the applicable reclamation requirements of the regulatory program can and will be met.

SUBCHAPTER J—PERFORMANCE BOND, FINANCIAL ASSURANCE, AND INSURANCE REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS

■ 32. Under the authority of 30 U.S.C. 1211(c)(2) and 1251(b), revise the heading for subchapter J to read as set forth above.

■ 33. Revise part 800 to read as follows:

PART 800—PERFORMANCE BOND, FINANCIAL ASSURANCE, AND INSURANCE REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS

Sec.

Authority: 30 U.S.C. 1201 *et seq.*

§ 800.1 Scope and purpose.

This part sets forth the minimum requirements for filing and maintaining bonds, financial assurances, and liability insurance policies for surface coal mining and reclamation operations under regulatory programs in accordance with the Act.

§ 800.4 Regulatory authority responsibilities.

(a) The regulatory authority must prescribe and furnish forms for filing performance bonds and financial assurances.

(b) The regulatory authority must prescribe by regulation terms and conditions for performance bonds, financial assurances, and liability insurance policies.

(c) The regulatory authority must determine the amount of the bond for each area to be bonded, in accordance with § 800.14 of this part. The regulatory authority also must adjust the bond amount as acreage in the permit area is revised or when other relevant conditions change, in accordance with § 800.15 of this part. In addition, the regulatory authority must determine the amount of financial assurance required to ensure long-term treatment of discharges under § 800.18 of this part, monitor trust performance, and require adjustments of the financial assurance as necessary.

(d) The regulatory authority may accept a self-bond if the requirements of § 800.23 of this part and any additional requirements in the regulatory program are met. However, a state or tribal regulatory program need not authorize the use of self-bonds.

(e) The regulatory authority must release liability under a bond or financial assurance instrument in accordance with §§ 800.40 through 800.44 of this part.

(f) If the conditions specified in § 800.50 of this part occur, the regulatory authority must take appropriate action to cause all or part of a bond or financial assurance to be forfeited in accordance with procedures of that section.

(g) The regulatory authority must require in the permit that adequate bond and financial assurance coverage be in effect at all times. Except as provided in § 800.30(b) of this part, operating without adequate bond or financial assurance is a violation of these rules and the terms and conditions of the permit.

§ 800.5 Definitions.

Collateral bond means an indemnity agreement in a sum certain, executed by the permittee as principal, which is supported by the deposit with the regulatory authority of one or more of the following:

(1) A cash account, which must be the deposit of cash—

(i) In one or more federally-insured or equivalently protected accounts, payable only to the regulatory authority upon demand; or

(ii) Directly with the regulatory authority.

(2) Negotiable bonds of the United States, a state, or a municipality, endorsed to the order of, and placed in the possession of, the regulatory authority.

(3) Negotiable certificates of deposit, made payable or assigned to the regulatory authority and placed in its possession or held by a federally-insured bank.

(4) An irrevocable letter of credit of any bank organized or authorized to transact business in the United States, payable only to the regulatory authority upon presentation.

(5) A perfected, first-lien security interest in real property in favor of the regulatory authority.

(6) Other securities with a rating of ''A'' or higher from either Moody's Investors Service or Standard and Poor's or an equivalent rating issued by any other nationally recognized statistical rating organization registered with the Securities and Exchange Commission, endorsed to the order of, and placed in the possession of, the regulatory authority.

Financial assurance is a type of alternative bonding system that consists of a trust, an annuity, or a combination thereof.

Self-bond means an indemnity agreement in a sum certain executed by the applicant or by the applicant and any corporate guarantor and made payable to the regulatory authority, with or without separate surety.

Surety bond means an indemnity agreement in a sum certain payable to the regulatory authority, executed by the permittee as principal, which is supported by the performance guarantee of a corporation licensed to do business as a surety in the state where the operation is located.

§ 800.9 What requirements apply to alternative bonding systems?

(a) *Criteria for approval.* OSMRE may approve an alternative bonding system as part of a state or federal regulatory program if the system will achieve the following objectives and purposes of the bonding program:

(1) The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time, except as provided in paragraphs (c) and (d) of this section.

(2) The alternative must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.

(b) *Relationship to other bonding regulations.* (1) The alternative bonding system will apply in lieu of the requirements of §§ 800.12 through 800.23 of this part, with the exception of those provisions of § 800.18 of this part that apply to financial assurances established to guarantee long-term treatment of discharges, to the extent specified in the regulatory program provisions establishing the alternative bonding system and the terms of approval under part 732 of this chapter.

(2) The alternative bonding system must include appropriate conforming modifications to the bond release

provisions of §§ 800.40 through 800.44 of this part and the bond forfeiture provisions of § 800.50 of this part.

(c) *Partial alternative bonding systems.* An alternative bonding system may be structured to include only certain phases of mining and reclamation under § 800.42 of this part, provided that the other phases of mining and reclamation are covered by one of the types of bond listed in § 800.12 of this part.

(d) *Discharges that require long-term treatment.* (1) Except as provided in paragraphs (d)(2) and (3) of this section, a discharge requiring long-term treatment is not eligible for coverage under an alternative bonding system, other than a financial assurance under § 800.18 of this part, unless the permittee contributes cash in an amount equal to the present value of all costs that the regulatory authority estimates that the alternative bonding system will incur to treat the discharge for as long as the discharge requires active or passive treatment, taking into account the expenses listed in § 800.18(c)(2)(i) through (v) of this part. If the alternative bonding system will receive interest or other earnings on the cash contribution, the regulatory authority may deduct the present value of those estimated earnings from the present value of all estimated expenses when calculating the amount of the required cash contribution.

(2)(i) The regulatory authority must amend an alternative bonding system, other than a financial assurance under § 800.18 of this part, that we approved as part of a regulatory program under subchapter T of this chapter before January 19, 2017 to specify that any permittee responsible for a discharge requiring long-term treatment must make the cash contribution required under paragraph (d)(1) of this section if the permittee elects to retain coverage of discharge treatment under the alternative bonding system.

(ii) An alternative bonding system, other than a financial assurance under § 800.18 of this part, that we approved as part of a regulatory program under subchapter T of this chapter before January 19, 2017 must continue to provide coverage for long-term treatment of discharges from operations included within the system until we approve the program amendment to which paragraph (d)(2)(i) of this section refers and the permittee makes the cash contribution required by the state program counterpart to paragraph (d)(1) of this section, unless the permittee posts a separate financial assurance, collateral bond, or surety bond to cover that liability.

(iii) An alternative bonding system, other than a financial assurance under § 800.18 of this part, that we approved as part of a regulatory program under subchapter T of this chapter before January 19, 2017 must continue to provide coverage for long-term treatment of discharges from operations included within the system if the permittee does not make the cash contribution required by the state program counterpart to paragraph (d)(1) of this section, unless the permittee posts a separate financial assurance, collateral bond, or surety bond to cover that liability.

(iv) Paragraphs (d)(2)(i) through (iii) of this section do not apply to an alternative bonding system that we approved as part of a regulatory program under subchapter T of this chapter if the system that we approved includes an exclusion for coverage of discharges that require long-term treatment.

(3) An alternative bonding system to which paragraphs (d)(1) and (2) of this section apply may elect to provide secondary coverage for long-term treatment of discharges when the permittee posts a financial assurance, collateral bond, or surety bond to cover anticipated treatment costs in lieu of making the cash contribution required by paragraph (d)(1) of this section to retain or obtain primary coverage under the alternative bonding system. The regulatory authority must establish terms and conditions for the secondary coverage.

§ 800.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–0043. The regulatory authority uses information collected under this part to ensure that bond, insurance, and financial assurance instruments are valid and meet all requirements of section 509 of SMCRA, which requires that persons planning to conduct surface coal mining operations first post a performance bond to guarantee fulfillment of all reclamation obligations under the approved permit. The regulatory authority also uses information collected under this part to ensure compliance with the bond release requirements and procedures of section 519 of SMCRA, the liability insurance requirements of section 507(f) of SMCRA, and bond forfeiture requirements and procedures. Persons planning to conduct surface coal mining operations must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 203–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

§ 800.11 When and how must I file a performance bond?

(a) After approving a permit application submitted under subchapter G of this chapter, the regulatory authority may not issue the permit until you, the permit applicant, file one of the following:

(1) A performance bond or bonds for the entire permit area;

(2) A cumulative bond schedule and the performance bond required for full reclamation of the initial area to be disturbed; or

(3) An incremental bond schedule and the performance bond required for the first increment in the schedule.

(b) The bond or bonds that you file under paragraph (a) of this section must be—

(1) In an amount determined under § 800.14 of this part.

(2) On a form prescribed and furnished by the regulatory authority.

(3) Made payable to the regulatory authority.

(4) Conditioned upon the faithful performance of all the requirements of the regulatory program and the permit, including the reclamation plan.

(c) If the bond or bonds filed under paragraph (a) of this section cover only an identified increment of land within the permit area upon which you will initiate and conduct surface coal mining operations during the initial term of the permit, you must—

(1) Identify the initial and successive areas or increments for bonding on the permit application map submitted under part 780 or part 784 of this chapter and specify the bond amount to be provided for each area or increment.

(2) Ensure that independent increments are of sufficient size and configuration to provide for efficient reclamation operations should reclamation by the regulatory authority become necessary pursuant to § 800.50 of this part.

(3) File additional bond or bonds with the regulatory authority to cover each succeeding increment before you initiate and conduct surface coal mining operations on that increment. The bond

or bonds must comply with paragraph (b) of this section.

(d) You may not disturb any surface area or extend any vertical underground mine shaft or other vertical underground mine opening for which a performance bond is required before the regulatory authority accepts the performance bond required for that area or extension.

§ 800.12 What types of performance bond are acceptable?

(a) Except as provided in paragraphs (b) through (d) of this section, the regulatory authority may allow you to post any of the following types of performance bond:

(1) A surety bond;

(2) A collateral bond;

(3) A self-bond; or

(4) A combination of any of these types of performance bond.

(b) An alternative bonding system approved under § 800.9 of this part may accept either more or fewer types of performance bond than those listed in paragraph (a) of this section.

(c) To guarantee long-term treatment of a discharge under § 800.18 of this part, the regulatory authority may accept a—

(1) Financial assurance;

(2) Collateral bond; or

(3) Surety bond.

(d) The regulatory authority may accept any type of performance bond listed in paragraph (a) of this section, other than a self-bond, to guarantee restoration of the ecological function of a perennial or intermittent stream under §§ 780.28(e) and (g), 784.28(e) and (g), 816.57(g), and 817.57(g) of this chapter.

§ 800.13 What is the liability period for a performance bond?

(a)(1) Liability under the performance bond will be for the duration of the surface coal mining and reclamation operation and for a period coincident with the period of extended responsibility for successful revegetation under § 816.115 or § 817.115 of this chapter or until achievement of the reclamation requirements of the regulatory program and the permit, whichever is later.

(2) With the approval of the regulatory authority, you may post a performance bond to guarantee specific phases of reclamation within the permit area, provided that the sum of the phase bonds posted equals or exceeds the total performance bond amount required under §§ 800.14 and 800.15 of this part. The scope of work to be guaranteed and the liability assumed under each phase bond must be specified in detail.

(b) Isolated and clearly defined portions of the permit area requiring extended liability may be separated from the original area and bonded separately with the approval of the regulatory authority, with the following provisos:

(1) These areas must be limited in extent and not constitute a scattered, intermittent, or checkerboard pattern of failure.

(2) The regulatory authority must include any necessary access roads or routes in the area under extended liability.

(c) If the regulatory authority approves a long-term, intensive agricultural postmining land use, the revegetation responsibility period specified under § 816.115 or § 817.115 of this chapter will start on the date of initial planting for the long-term agricultural use.

(d)(1) The bond liability of the permittee includes only those actions that the permittee is required to perform under the permit and regulatory program to complete the reclamation plan for the area covered by the bond.

(2) The performance bond does not cover implementation of the approved postmining land use or uses. The permittee is responsible only for restoring the site to conditions capable of supporting the uses specified in § 816.133 or § 817.133 of this chapter.

(3) Performance bond liability for prime farmland historically used for cropland includes meeting the productivity requirement specified in § 800.42(c) of this part.

(4) Section 800.18 of this part specifies the liability for long-term treatment of discharges.

§ 800.14 How will the regulatory authority determine the amount of performance bond required?

(a) The regulatory authority must determine the amount of the performance bond required for the permit or permit increment based upon, but not limited to—

(1) The requirements of the permit, including the reclamation plan.

(2) The probable difficulty of reclamation, giving consideration to the topography, geology, hydrology, and revegetation potential of the permit area.

(3) The estimated reclamation costs submitted by the permit applicant.

(b) The amount of the performance bond must be sufficient to assure the completion of the reclamation plan if the work has to be performed by a third party under contract with the regulatory authority in the event of forfeiture.

(c) The amount of financial assurance, collateral bond, or surety bond required to guarantee long-term treatment of discharges must be determined in accordance with § 800.18 of this part.

(d) The total performance bond initially posted for the entire area under one permit may not be less than $10,000.

(e) The permittee's financial responsibility under § 817.121(c) of this chapter for repairing or compensating for material damage resulting from subsidence may be satisfied by the liability insurance policy required under § 800.60 of this part.

§ 800.15 When must the regulatory authority adjust the performance bond amount and when may I request adjustment of the bond amount?

(a) The regulatory authority must adjust the amount of performance bond required and, if needed, the terms of the acceptance when—

(1) The area requiring bond coverage increases or decreases.

(2) The unit cost or scope of future reclamation changes as a result of technological advances, revisions to the operation or reclamation plans in the permit, or external factors. The regulatory authority may specify periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement.

(b) The permittee may request at any time that the regulatory authority reduce the amount of the performance bond based upon submission of evidence that the permittee's method of operation or other circumstances will reduce the estimated unit costs for the regulatory authority to reclaim the bonded area.

(c) Bond reductions under paragraphs (a) and (b) of this section are not subject to the bond release requirements and procedures of §§ 800.40 through 800.44 of this part.

(d) The regulatory authority may not use the provisions of this section to reduce the amount of the performance bond to reflect changes in the cost of reclamation resulting from completion of activities required under the reclamation plan. Bond reduction for completed reclamation activities must comply with the bond release requirements and procedures of §§ 800.40 through 800.44 of this part.

(e) Before making a bond adjustment, the regulatory authority must—

(1) Notify the permittee, the surety, and any person with a property interest in collateral who has requested notification under § 800.21(f) of this part of any proposed adjustment to the bond amount; and

(2) Provide the permittee an opportunity for an informal conference on the adjustment.

(f) In the event that an approved permit is revised in accordance with subchapter G of this chapter, the

regulatory authority must review the bond amount for adequacy and, if necessary, require adjustment of the bond amount to conform to the permit as revised. This provision may not be used to reduce bond amounts on the basis of completion of reclamation activities, in whole or in part.

(g) The regulatory authority must require that the permittee post a financial assurance, collateral bond, or surety bond in accordance with § 800.18 of this part whenever it identifies a discharge that will require long-term treatment.

(h) The regulatory authority may not reduce the bond amount when the permittee does not restore the approximate original contour as required or when the reclamation plan does not reflect the level of reclamation required under the regulatory program.

§ 800.16 What are the general terms and conditions of a performance bond?

(a) The performance bond must be in an amount determined by the regulatory authority as provided in § 800.14 of this part.

(b) The performance bond must be payable to the regulatory authority.

(c) The performance bond must be conditioned upon faithful performance of all the requirements of the regulatory program and the approved permit, including completion of the reclamation plan.

(d) The duration of the bond must be for the time provided in § 800.13 of this part.

(e) The bond must provide a mechanism for a bank, surety, or other responsible financial entity to give prompt notice to the regulatory authority and the permittee of any action filed alleging the insolvency or bankruptcy of the surety, the bank, or other responsible financial entity, or alleging any violations that would result in suspension or revocation of the firm's charter or license to do business.

§ 800.17 [Reserved]

§ 800.18 What special provisions apply to financial guarantees for long-term treatment of discharges?

(a) *Applicability.* (1) This section applies to any discharge resulting from surface coal mining operations, underground mining activities, or other activities or facilities regulated under this title whenever both the discharge and the need to treat the discharge continue or may reasonably be expected to continue after the completion of mining, backfilling, grading, and the establishment of revegetation. For purposes of this section, the term *discharge* includes both discharges to surface water and discharges to groundwater.

(2) This section also applies whenever information available to the regulatory authority documents that a discharge of the nature described in paragraph (a)(1) of this section will develop in the future, provided that the quantity and quality of the future discharge can be determined with reasonable probability.

(3) Paragraphs (a)(1) and (2) of this section apply only to discharges that are not anticipated at the time of permit application approval. Those paragraphs do not authorize approval of a permit application for a proposed operation that anticipates creating a discharge for which long-term treatment would be required.

(4) As provided in § 800.18(g) of this part, the regulatory authority must require adjustment of the bond amount whenever it becomes aware of a situation described in paragraph (a)(1) or (2) of this section.

(b) *Acceptable bonding mechanisms.* (1) Except as provided in paragraph (b)(2) of this section, you, the permittee, must post a financial assurance, a collateral bond, or a surety bond to guarantee treatment or abatement of discharges requiring long-term treatment.

(2) Operations with discharges in states with an alternative bonding system (other than a financial assurance) approved under subchapter T of this chapter must comply with the requirements of the applicable alternative bonding system.

(c) *Calculation of amount of financial assurance or performance bond.* (1) If you elect to post a financial assurance under paragraph (b)(1) of this section, the regulatory authority must calculate the amount of financial assurance required in the manner provided in paragraph (d) of this section.

(2) If you elect to post a collateral bond or surety bond under paragraph (b)(1) of this section, the bond amount must be no less than the present value of the funds needed to pay for—

(i) Treatment of the discharge in perpetuity, unless you demonstrate, and the regulatory authority finds, based upon available evidence, that treatment will be needed for a lesser time, either because the discharge will attenuate or because its quality will improve;

(ii) Treatment of the discharge during the time required to forfeit and collect the bond;

(iii) Maintenance, renovation, and replacement of treatment and support facilities as needed;

(iv) Final reclamation of sites upon which treatment facilities are located and areas used in support of those facilities; and

(v) Administrative costs borne by the regulatory authority.

(d) *Requirements for financial assurances.* (1) The trust or annuity must be established in a manner that guarantees that sufficient moneys will be available when needed to pay for—

(i) Treatment of discharges in perpetuity, unless the permittee demonstrates, and the regulatory authority finds, based upon available evidence, that treatment will be needed for a lesser time, either because the discharge will attenuate or because its quality will improve. The regulatory authority may accept arrangements that allow the permittee to build the amount of the trust or annuity over time, provided—

(A) The permittee continues to treat the discharge during that time; and

(B) The regulatory authority retains all performance bonds posted for the permit or permit increment until the trust or annuity reaches a self-sustaining level as determined by the regulatory authority.

(ii) Maintenance, renovation, and replacement of treatment and support facilities as needed.

(iii) Final reclamation of the sites upon which treatment facilities are located and areas used in support of those facilities.

(iv) Administrative costs borne by the regulatory authority or trustee to implement paragraphs (d)(1)(i) through (iii) of this section.

(2) The regulatory authority must require that the investment portfolio held by the trust or annuity prudently account for:

(i) The expected duration of the treatment obligation;

(ii) The need to provide a guarantee of uninterrupted treatment; and

(iii) Whether any other financial guarantee covers a portion of the treatment obligation. If the financial assurance will provide the only financial guarantee of treatment, the regulatory authority must require that the trust or annuity hold a low-risk investment portfolio.

(3) In determining the required amount of the trust or annuity, the regulatory authority must base present value calculations on a conservative anticipated real rate of return on the proposed investments. The rate of return must be net of management or trustee fees.

(4)(i) The trust or annuity must be in a form approved by the regulatory authority and contain all terms and conditions required by the regulatory authority.

(ii) When appropriate, the terms and conditions must include a mechanism whereby the regulatory authority may require the permittee to grant the trustee the real and personal property rights necessary to continue treatment in the event that the permittee ceases treatment. These rights include, but are not limited to, access to and use of the treatment site and ownership of treatment facilities and equipment.

(5) The trust or annuity must irrevocably establish the regulatory authority as the beneficiary of the trust or of the proceeds from the annuity for the purpose of treating mine drainage or other mining-related discharges to protect the environment and users of surface water.

(6) The trust or annuity must provide that disbursement of money from the trust or annuity may be made only upon written authorization of the regulatory authority or according to a schedule established in the agreement accompanying the trust or annuity.

(7) A financial institution or company serving as a trustee or issuing an annuity must be one of the following:

(i) A national bank chartered by the Office of the Comptroller of the Currency.

(ii) An operating subsidiary of a national bank chartered by the Office of the Comptroller of the Currency.

(iii) A bank or trust company chartered by the state in which the operation is located.

(iv) An insurance company licensed or authorized to do business in the state in which the operation is located or designated by the pertinent regulatory body of that state as an eligible surplus lines insurer.

(v) Any other financial institution or company authorized to do business in the state in which the operation is located, provided that—

(A) The institution's or company's activities are examined or regulated by a state or federal agency; and

(B) The institution or company has trust powers satisfactory to the regulatory authority.

(8) The regulatory authority may allow a not-for-profit organization under section 501(c)(3) of the Internal Revenue Code to serve as a trustee if—

(i) The organization maintains appropriate professional liability insurance coverage; and

(ii) The regulatory authority determines that the organization has demonstrated the financial and technical capability to manage trusts and assume day-to-day operation of the trust and treatment facility in the event of a default.

(9) The permittee or the regulatory authority must procure a new trustee when the trustee's administration of the trust or annuity is unsatisfactory to the regulatory authority.

(e) *Termination of a financial assurance instrument.* Termination of a trust or annuity may occur only as specified by the regulatory authority upon a determination that one of the following situations exists—

(1) No further treatment or other reclamation measures are necessary, in which case paragraph (h) of this section will apply.

(2) A satisfactory replacement financial assurance or bond has been posted in accordance with paragraph (g) of this section.

(3) The terms of the trust or annuity establish conditions for termination and those conditions have been met.

(f) *Regulatory authority review and adjustment of amount of financial assurance.* (1) The regulatory authority must establish a schedule for reviewing the performance of the trustee, the adequacy of the trust or annuity, and the accuracy of the assumptions upon which the trust or annuity is based. This review must occur on at least an annual basis.

(2) The regulatory authority must require that the permittee provide additional resources to the trust or annuity whenever the review conducted under paragraph (f)(1) of this section or any other information available to the regulatory authority at any time demonstrates that the financial assurance is no longer adequate to meet the purpose for which it was established.

(g) *Replacement of financial assurance.* With the approval of the regulatory authority, a financial assurance may be replaced in accordance with the provisions of § 800.30(a) of this part.

(h) *Release of liability.* Release of reclamation liabilities and obligations under a financial assurance is subject to the applicable bond release provisions of §§ 800.40 through 800.44 of this part.

(i) *Effect of financial assurance on release of bond.* The permittee may apply for, and the regulatory authority may approve, release of any bonds posted for the permit or, if the permittee uses incremental bonding, the permit increment for which the regulatory authority has approved a financial assurance under this section, provided that the permittee and the regulatory authority comply with the bond release requirements and procedures in §§ 800.40 through 800.44 of this part. This provision applies only if the following conditions exist—

(1) The financial assurance is both in place and fully funded.

(2) The permit or permit increment fully meets all applicable reclamation requirements, with the exception of the discharge and the presence of associated treatment and support facilities.

(3) The financial assurance will serve as the bond for reclamation of the portion of the permit area required for postmining water treatment facilities and access to those facilities.

§ 800.20 What additional requirements apply to surety bonds?

(a) A surety bond must be executed by the permittee and a corporate surety licensed to do business in the state where the operation is located.

(b) Surety bonds must be noncancellable during their terms, except that surety bond coverage for undisturbed lands may be cancelled with the prior consent of the regulatory authority. Within 30 days after receipt of a notice to cancel bond, the regulatory authority will advise the surety whether the bond may be cancelled on an undisturbed area.

(c) The regulatory authority may decline to accept a surety bond if, in the judgment of the regulatory authority, the surety does not have resources sufficient to cover the default of one or more mining companies for which the surety has provided bond coverage.

§ 800.21 What additional requirements apply to collateral bonds?

(a) Collateral bonds, except for letters of credit, cash accounts, and real property, are subject to the following conditions:

(1) The regulatory authority must keep custody of collateral deposited by the applicant or permittee until authorized for release or replacement as provided in this part.

(2) The regulatory authority must value collateral at its current market value, not at face value.

(3) The regulatory authority must require that certificates of deposit be made payable to or assigned to the regulatory authority, both in writing and upon the records of the bank or other financial institution issuing the certificates. If assigned, the regulatory authority must require the bank or other financial institution issuing the certificate to waive all rights of setoff or liens against the certificate.

(4) The regulatory authority may not accept an individual certificate of deposit in an amount in excess of the maximum amount insured by the Federal Deposit Insurance Corporation.

(b) Letters of credit are subject to the following conditions:

(1) The letter may be issued only by a bank organized or authorized to do business in the United States;

(2) Letters of credit must be irrevocable during their terms.

(3) The letter of credit must be payable to the regulatory authority upon demand, in part or in full, upon receipt from the regulatory authority of a notice of forfeiture issued in accordance with § 800.50 of this part.

(4) If the permittee has not replaced a letter of credit with another letter of credit or other suitable bond at least 30 days before the letter's expiration date, the regulatory authority must draw upon the letter of credit and use the cash received as a replacement bond.

(c) Real property posted as a collateral bond must meet the following conditions:

(1) The applicant or permittee must grant the regulatory authority a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell or otherwise dispose of the property in the event of forfeiture under § 800.50 of this part.

(2) In order for the regulatory authority to evaluate the adequacy of the real property offered to satisfy collateral requirements, the applicant or permittee must submit a schedule of the real property to be mortgaged or pledged to secure the obligations under the indemnity agreement. The schedule must include—

(i) A description of the property;

(ii) The fair market value as determined by an independent appraisal conducted by a certified appraiser; and

(iii) Proof of possession and title to the real property.

(3) The property may include land that is part of the permit area. However, land pledged as collateral for a bond under this section may not be disturbed under any permit while it is serving as security under this section.

(4) The appraised fair market value determined under paragraph (c)(2)(ii) of this section is not the bond value of the real estate. In calculating the bond value of real estate, the regulatory authority must discount the appraised fair market value to account for the administrative costs of liquidating real estate, the probability of a forced sale in the event of forfeiture, and a contingency reserve for unanticipated costs including, but not limited to, unpaid real estate taxes, liens, property maintenance expenses, and insurance premiums.

(d) Cash accounts are subject to the following conditions:

(1) The regulatory authority may authorize the permittee to supplement the bond through the establishment of a cash account in one or more federally insured or equivalently protected accounts made payable upon demand to, or deposited directly with, the regulatory authority. The total bond, including the cash account, may not be less than the amount determined under § 800.14 of this part, as modified by any adjustments under § 800.15 of this part, less any amounts released under §§ 800.40 through 800.44 of this part.

(2) Any interest paid on a cash account will be retained in the account and applied to the bond value of the account unless the regulatory authority has approved the payment of interest to the permittee.

(3) Certificates of deposit may be substituted for a cash account with the approval of the regulatory authority.

(4) The regulatory authority may not accept an individual cash account in an amount in excess of the maximum amount insured by the Federal Deposit Insurance Corporation.

(e)(1) The regulatory authority must determine the bond value of all collateral posted as assurance under this section. The bond value must reflect legal and liquidation fees, as well as value depreciation, marketability, and fluctuations that might affect the net cash available to the regulatory authority to complete reclamation.

(2)(i) The regulatory authority may evaluate the bond value of collateral at any time.

(ii) The regulatory authority must evaluate the bond value of collateral as part of the permit renewal process.

(iii) The regulatory authority must increase or decrease the performance bond amount required if an evaluation conducted under paragraph (e)(2)(i) or (ii) of this section determines that the bond value of collateral has increased or decreased.

(iv) In no case may the bond value of collateral exceed the market value of the collateral.

(f) Persons who have an interest in collateral posted as a bond, and who desire notification of actions pursuant to the bond, must request such notification in writing to the regulatory authority at the time that the collateral is offered.

§ 800.23 What additional requirements apply to self-bonds?

(a) *Definitions.* For the purposes of this section only:

Current assets means cash or other assets or resources that are reasonably expected to be converted to cash or sold or consumed within one year or within the normal operating cycle of the business.

Current liabilities means obligations that are reasonably expected to be paid or liquidated within one year or within the normal operating cycle of the business.

Fixed assets means plants and equipment, but does not include land or coal in place.

Liabilities means obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

Net worth means total assets minus total liabilities and is equivalent to owners' equity.

Parent corporation means a corporation which owns or controls the applicant.

Tangible net worth means net worth minus intangibles such as goodwill and rights to patents or royalties.

(b) The regulatory authority may accept a self-bond from an applicant for a permit if all of the following conditions are met by the applicant or its parent corporation guarantor:

(1) The applicant designates a suitable agent to receive service of process in the state where the proposed surface coal mining operation is to be conducted.

(2) The applicant has been in continuous operation as a business entity for a period of not less than 5 years. Continuous operation means that business was conducted over the 5 years immediately preceding the date of application.

(i) The regulatory authority may allow a joint venture or syndicate with less than 5 years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least 5 years immediately preceding the date of application.

(ii) When calculating the period of continuous operation, the regulatory authority may exclude past periods of interruption to the operation of the business entity that were beyond the applicant's control and that do not affect the applicant's likelihood of remaining in business during the proposed surface coal mining and reclamation operations.

(3) The applicant submits financial information in sufficient detail to show that the applicant meets one of the following criteria:

(i) The applicant has a current rating for its most recent bond issuance of ''A'' or higher as issued by either Moody's Investors Service or Standard and Poor's or an equivalent rating from any other nationally recognized statistical rating organization registered with the Securities and Exchange Commission.

(ii) The applicant has a tangible net worth of at least $10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(iii) The applicant's fixed assets in the United States total at least $20 million, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(4) The applicant submits—

(i) Financial statements for the most recently completed fiscal year accompanied by a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles and containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion;

(ii) Unaudited financial statements for completed quarters in the current fiscal year; and

(iii) Additional unaudited information as requested by the regulatory authority.

(c)(1) The regulatory authority may accept a written guarantee for an applicant's self-bond from a parent corporation guarantor, if the guarantor meets the conditions of paragraphs (b)(1) through (4) of this section as if it were the applicant. This written guarantee will be referred to as a ''corporate guarantee.'' The terms of the corporate guarantee must provide for the following:

(i) If the applicant fails to complete the reclamation plan, the guarantor must do so or the guarantor will be liable under the indemnity agreement to provide funds to the regulatory authority sufficient to complete the reclamation plan, but not to exceed the bond amount.

(ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the regulatory authority at least 90 days in advance of the cancellation date, and the regulatory authority accepts the cancellation.

(iii) The cancellation may be accepted by the regulatory authority if the applicant obtains suitable replacement bond before the cancellation date or if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed.

(2) The regulatory authority may accept a written guarantee for an applicant's self-bond from any corporate guarantor, whenever the applicant meets the conditions of paragraphs (b)(1), (2), and (4) of this section, and the guarantor meets the conditions of paragraphs (b)(1) through (4) of this section. This written guarantee will be referred to as a ''non-parent corporate guarantee.'' The terms of this guarantee must provide for compliance with the conditions of paragraphs (c)(1)(i) through (iii) of this section. The regulatory authority may require the applicant to submit any information specified in paragraph (b)(3) of this section in order to determine the financial capabilities of the applicant.

(d)(1) For the regulatory authority to accept an applicant's self-bond, the total amount of the outstanding and proposed self-bonds of the applicant for surface coal mining and reclamation operations may not exceed 25 percent of the applicant's tangible net worth in the United States.

(2) For the regulatory authority to accept a corporate guarantee, the total amount of the parent corporation guarantor's present and proposed self-bonds and guaranteed self-bonds for surface coal mining and reclamation operations may not exceed 25 percent of the guarantor's tangible net worth in the United States.

(3) For the regulatory authority to accept a non-parent corporate guarantee, the total amount of the non-parent corporate guarantor's present and proposed self-bonds and guaranteed self-bonds may not exceed 25 percent of the guarantor's tangible net worth in the United States.

(e) If the regulatory authority accepts an applicant's self-bond, the applicant must submit an indemnity agreement subject to the following requirements:

(1) The indemnity agreement must be executed by all persons and parties who are to be bound by it, including the parent corporation guarantor. It must bind each party jointly and severally.

(2) Corporations applying for a self-bond, and parent and non-parent corporations guaranteeing an applicant's self-bond, must submit an indemnity agreement signed by two corporate officers who are authorized to bind their corporations. A copy of the authorization must be provided to the regulatory authority along with an affidavit certifying that the agreement is valid under all applicable federal and state laws. In addition, the guarantor must provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement.

(3) If the applicant is a partnership, joint venture or syndicate, the agreement must bind each partner or party who has a beneficial interest, directly or indirectly, in the applicant.

(4) Pursuant to § 800.50 of this part, the applicant and the parent or non-parent corporate guarantor will be required to complete the approved reclamation plan for the lands in default or to pay to the regulatory authority an amount necessary to complete the approved reclamation plan, not to exceed the bond amount. If permitted under state law, the indemnity agreement, when under forfeiture, will operate as a judgment against those parties liable under the indemnity agreement.

(f) A regulatory authority may require self-bonded applicants and parent and non-parent corporate guarantors to submit an update of the information required under paragraphs (b)(3) and (4) of this section within 90 days after the close of each fiscal year following the issuance of the self-bond or corporate guarantee.

(g) If at any time during the period when a self-bond is posted, the financial conditions of the applicant or the parent or non-parent corporate guarantor change so that the criteria of paragraphs (b)(3) and (d) of this section are not satisfied, the permittee must notify the regulatory authority immediately and post an alternate form of bond in the same amount as the self-bond within 90 days. Should the permittee fail to post an adequate substitute bond, the provisions of § 800.30(b) of this part will apply.

§ 800.30 When may I replace a performance bond or financial assurance and when must I do so?

(a) *Replacement upon request of permittee.* (1) The regulatory authority may allow you, the permittee, to replace existing performance bonds and financial assurances with other performance bonds and financial assurances that provide equivalent coverage.

(2) The regulatory authority may not release any existing performance bond or financial assurance until you have submitted, and the regulatory authority has approved, an acceptable replacement.

(b) *Replacement by order of the regulatory authority.* (1) Upon the incapacity of a bank, surety, or other responsible financial entity by reason of bankruptcy, insolvency, or suspension or revocation of a charter or license, you will be deemed to be without bond coverage and you must promptly notify the regulatory authority.

(2) Upon receipt of notification from a bank, surety, or other responsible financial entity under § 800.16(e) of this part or from you under paragraph (b)(1) of this section, the regulatory authority must issue an order requiring that you submit replacement bond or financial assurance coverage within a reasonable time, not to exceed 90 days.

(3) If you do not post adequate bond or financial assurance by the end of the time allowed under paragraph (b)(2) of this section, the regulatory authority must issue a notice of violation

requiring that you cease surface coal mining operations immediately. The notice of violation also must require that you either—

(i) Post adequate bond or financial assurance coverage before you may resume surface coal mining operations; or

(ii) Reclaim the site in accordance with the provisions of § 816.132 or § 817.132 of this chapter.

§ 800.40 How do I apply for release of all or part of a performance bond?

(a) *When may I file an application for bond release*? You, the permittee, may file an application with the regulatory authority for the release of all or part of a performance bond only at times or during seasons authorized by the regulatory authority. The times or seasons appropriate for the evaluation of certain types of reclamation will be established in either the regulatory program or your permit.

(b) *What must I include in my application for bond release*? Each application for bond release must include—

(1) An application on a form prescribed by the regulatory authority.

(2) All other information required by the regulatory authority, which must include a detailed description of the results that you have achieved under the approved reclamation plan and an analysis of the results of the monitoring conducted under §§ 816.35 through 816.37 or §§ 817.35 through 817.37 of this chapter.

(3) A certified copy of an advertisement that you have placed at least once a week for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining and reclamation operation. You must submit the copy within 30 days after you file the application form under paragraph (b)(1) of this section. The advertisement must contain—

(i) Your name.

(ii) The permit number and approval date.

(iii) The number of acres and the precise location of the land for which you are requesting bond release.

(iv) The amount of the performance bond filed and the portion for which you seek release.

(v) The type and dates of reclamation work performed.

(vi) A brief description of the results that you have achieved under the approved reclamation plan.

(vii) The name and address of the regulatory authority to which written comments, objections, or requests for public hearings and informal conferences on the bond release application may be submitted pursuant to § 800.44 of this section and the location at which the application may be reviewed.

(4) Copies of letters that you have sent to adjoining property owners, local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality of the surface coal mining and reclamation operation, notifying them of your intention to seek release of the bond.

(5) A notarized statement certifying that all applicable reclamation activities have been accomplished in accordance with the requirements of the regulatory program and the approved reclamation plan. You must submit a separate certification for each application and each phase of bond release.

§ 800.41 How will the regulatory authority process my application for bond release?

(a)(1) Upon receipt of a complete application for bond release, the regulatory authority will, within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection of the site and an evaluation of the reclamation work performed and the reclamation work remaining. A complete application for bond release is one that includes all items required under § 800.40 of this part.

(2) The evaluation will consider, among other factors, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of future occurrence of such pollution, and the estimated cost of abating such pollution.

(b)(1) The regulatory authority will notify the surface owner, agent, or lessee before conducting the inspection and will offer that person an opportunity to participate with the regulatory authority in making the inspection.

(2) The regulatory authority may arrange with you to allow access to the permit area, upon request by any person with an interest in bond release, for the purpose of gathering information relevant to the proceeding.

§ 800.42 What are the criteria for bond release?

(a) *General requirements.* (1) Except as provided in paragraphs (a)(2) through (5) of this section, the regulatory authority may release all or part of the performance bond for the permit area or an increment thereof if the regulatory authority is satisfied that you have accomplished the required reclamation for the permit area or increment in accordance with paragraphs (b) through (d) of this section.

(2)(i) The regulatory authority must conduct a scientifically defensible trend analysis of the monitoring data submitted under §§ 816.35 through 816.37 or §§ 817.35 through 817.37 of this chapter before releasing any bond amount.

(ii) The regulatory authority may not approve a bond release application if the analysis conducted under paragraph (a)(2)(i) of this section and other relevant information indicate that the operation is causing material damage to the hydrologic balance outside the permit area or is likely to do so in the future.

(3) If you are responsible for a discharge requiring long-term treatment, regardless of whether the discharge emerges either on the permit area or at a point that is hydrologically connected to the permit area, you must post a separate financial assurance, collateral bond, or surety bond under § 800.18 of this part to guarantee treatment of the discharge before any portion of the existing performance bond for the permit area may be released, unless the type and amount of bond remaining after the release would be adequate to meet the requirements of § 800.18 of this part as well as any remaining land reclamation obligations.

(4) If the permit area or increment includes mountaintop removal mining operations under § 785.14 of this chapter or a variance from restoration of the approximate original contour under § 785.16 of this chapter, the amount of bond that may be released is subject to the limitation specified in § 785.14(c)(2) of this chapter for mountaintop removal mining operations or the limitation specified in § 785.16(b)(2) of this chapter for a variance from restoration of the approximate original contour.

(5) The bond amount described in § 780.24(d)(2) or § 784.24(d)(2) of this chapter may not be released either until the structure is in use as part of the postmining land use or until the structure is removed and the site upon which it was located is reclaimed in accordance with part 816 or part 817 of this chapter.

(6) The regulatory authority must consider the results of the evaluation conducted under § 800.41(a)(2) of this part when determining the amount of performance bond to release.

(b) *Phase I reclamation.* (1) The regulatory authority may release a maximum of 60 percent of the performance bond for a bonded area after you complete Phase I reclamation for that area in accordance with the approved reclamation plan. Phase I reclamation consists of backfilling, grading, and establishment of drainage control. It includes construction of the postmining drainage pattern and stream-

channel configuration required by §§ 816.56(b), 816.57(c)(1), 817.56(b), and 817.57(c)(1) of this chapter and restoration of the form of perennial and intermittent streams under §§ 816.57(e) and 817.57(e) of this chapter. Soil replacement is optional for this phase.

(2) The amount of performance bond that the regulatory authority retains after Phase I release must be adequate to ensure that the regulatory authority will have sufficient funds for a third party to complete the remaining portion of the reclamation plan, including restoration of the hydrologic function and ecological function of perennial and intermittent streams under § 816.57(f) and (g) or § 817.57(f) and (g) of this chapter and completion of any fish and wildlife enhancement measures required in the permit in accordance with § 780.16 or § 784.16 of this chapter, in the event of forfeiture.

(c) *Phase II reclamation.* (1) The regulatory authority may release an additional amount of performance bond after you complete Phase II reclamation, which consists of—

(i) Soil replacement and redistribution of organic materials (if not accomplished as part of Phase I reclamation);

(ii) Restoration of the hydrologic function of perennial and intermittent streams under § 816.57(f) or § 817.57(f) of this chapter; and

(iii) Successfully establishing revegetation on the area in accordance with the approved reclamation plan, including any streamside vegetative corridors required by §§ 816.56(c), 816.57(d), 817.56(c), and 817.57(d) of this chapter. The regulatory authority must establish standards defining successful establishment of vegetation for Phase II reclamation.

(2) The amount of performance bond that the regulatory authority retains after Phase II release must be sufficient to cover the cost of having a third party reestablish revegetation for the revegetation responsibility period under § 816.115 or § 817.115 of this chapter. In addition, it must be adequate to ensure that the regulatory authority will have sufficient funds for a third party to complete the remaining portion of the reclamation plan, including restoration of the ecological function of perennial and intermittent streams under § 816.57(g) or § 817.57(g) of this chapter and completion of any fish and wildlife enhancement measures required in the permit in accordance with § 780.16 or § 784.16 of this chapter, in the event of forfeiture.

(3) The regulatory authority may not release any part of the performance bond under paragraph (c)(1) of this section if the lands to which the release would apply are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by subchapter K of this chapter.

(4) The regulatory authority may not release any part of the performance bond under paragraph (c)(1) of this section until soil productivity for all prime farmland historically used for cropland on the area to which the release would apply has returned to levels of yield equivalent to yields from nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed under part 823 of this chapter.

(5) When the regulatory authority has approved retention of a silt dam as a permanent impoundment under § 816.49(b) or § 817.49(b) of this chapter, the regulatory authority may approve Phase II bond release for the area of the impoundment if the requirements of § 816.55 or § 817.55 of this chapter have been met and provisions for sound future maintenance by the operator or the landowner have been made with the regulatory authority.

(d) *Phase III reclamation.* (1) The regulatory authority must release the remaining portion of the performance bond upon the completion of Phase III reclamation, which consists of successful completion of all surface coal mining and reclamation activities and expiration of the revegetation responsibility period under § 816.115 or § 817.115 of this chapter.

(2) The regulatory authority may not fully release any performance bond under provisions of this section until all applicable reclamation requirements of the regulatory program and the permit are fully met. Among other things, those requirements include restoration of the ecological function of perennial and intermittent streams under § 816.57(g) or § 817.57(g) of this chapter and completion of any fish and wildlife enhancement measures required in the permit in accordance with § 780.16 or § 784.16 of this chapter.

§ 800.43 When and how must the regulatory authority provide notification of its decision on a bond release application?

(a) The regulatory authority will provide written notification of its decision on your bond release application to—

(1) You;

(2) The surety (if applicable);

(3) All other persons with an interest in bond collateral who have requested notification under § 800.21(f) of this part;

(4) Any person who filed objections in writing; and

(5) Objectors who were a party to the hearing proceedings, if any.

(b) The regulatory authority will provide notification under paragraph (a) of this section—

(1) Within 60 days after you file the application, if there is no public hearing under § 800.44 of this part, or

(2) Within 30 days after a public hearing has been held under § 800.44 of this part.

(c) If the regulatory authority disapproves your application for release of the bond or portion thereof, the regulatory authority must notify you, the surety, and any person with an interest in collateral as provided in § 800.21(f) of this part, in writing, stating the reasons for disapproval and recommending corrective actions necessary to secure the release and allowing an opportunity for a public hearing.

(d) When any application for total or partial bond release is filed with the regulatory authority, the regulatory authority must notify the municipality in which the surface coal mining operation is located by certified mail at least 30 days prior to the release of all or a portion of the bond.

§ 800.44 Who may file an objection to a bond release application and how must the regulatory authority respond to an objection?

(a)(1) Any person with a valid legal interest that might be adversely affected by release of the bond, or the responsible officer or head of any federal, state, tribal, or local governmental agency with jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or which is authorized to develop and enforce environmental standards with respect to those operations, has the right to file written objections to the proposed bond release with the regulatory authority within 30 days after the last publication of the notice required by § 800.40(b)(2) of this part.

(2) If written objections are filed and a hearing is requested, the regulatory authority must inform all interested parties of the time and place of the hearing, and hold a public hearing within 30 days after receipt of the request for the hearing. The regulatory authority must advertise the date, time, and location of the public hearing in a newspaper of general circulation in the locality for two consecutive weeks.

(3) The public hearing must be held in the locality of the surface coal mining

operation for which bond release is sought, at the location of the regulatory authority office, or at the state capital, at the option of the objector.

(b)(1) For the purpose of the hearing under paragraph (a) of this section, the regulatory authority has the authority to administer oaths, subpoena witnesses or written or printed material, compel the attendance of witnesses or the production of materials, and take evidence including, but not limited to, inspection of the land affected and other surface coal mining operations carried on by the applicant in the general vicinity.

(2) A verbatim record of each public hearing must be made, and a transcript must be made available on the motion of any party or by order of the regulatory authority.

(c) Without prejudice to the right of an objector or the applicant for bond release, the regulatory authority may hold an informal conference as provided in section 513(b) of the Act, 30 U.S.C. 1263(b), to resolve written objections. The regulatory authority must make a record of the informal conference unless waived by all parties, which must be accessible to all parties. The regulatory authority also must furnish all parties to the informal conference with a written finding based on the informal conference, and the reasons for the finding.

§ 800.50 When and how will a bond be forfeited?

(a) If a permittee or operator refuses or is unable to conduct reclamation of an unabated violation, if the terms of the permit are not met, or if the permittee or operator defaults on the conditions under which the bond was accepted, the regulatory authority must take the following action to forfeit all or part of a bond or bonds for any permit area or an increment of a permit area:

(1)(i) Send written notification by certified mail, return receipt requested, to the permittee and the surety on the bond, if any, informing them of the determination to forfeit all or part of the bond, including the reasons for the forfeiture and the amount to be forfeited.

(ii) If the amount to be forfeited under paragraph (a)(1)(i) of this section is less than the total amount of bond posted, the amount forfeited must be no less than the estimated total cost of achieving the reclamation plan requirements. For a discharge that requires long-term treatment, the regulatory authority must calculate the estimated total cost of achieving the reclamation plan requirements for that discharge in a manner consistent with § 800.18(c) of this part.

(2) Advise the permittee and surety, if applicable, of the conditions under which forfeiture may be avoided. Those conditions may include, but are not limited to—

(i) Agreement by the permittee or another party to perform reclamation operations in accordance with a compliance schedule that meets the conditions of the permit, the reclamation plan, and the regulatory program and a demonstration that the party has the ability to satisfy the conditions; or

(ii) The regulatory authority may allow a surety to complete the reclamation plan, or the portion of the reclamation plan applicable to the bonded phase or increment if the surety can demonstrate an ability to complete the reclamation in accordance with the approved reclamation plan. Except where the reclamation work performed meets the criteria for partial bond release under § 800.42 of this part, no surety liability may be released until successful completion of all reclamation under the terms of the permit, including applicable liability periods of § 800.13 of this part.

(b) In the event forfeiture of the bond is required by this section, the regulatory authority shall—

(1) Proceed to collect the forfeited amount as provided by applicable laws for the collection of defaulted bonds or other debts if actions to avoid forfeiture have not been taken, or if rights of appeal, if any, have not been exercised within a time established by the regulatory authority, or if such appeal, if taken, is unsuccessful.

(2) Use funds collected from bond forfeiture to complete the reclamation plan, or the portion thereof covered by the bond, on the permit area or increment to which the bond applies.

(c) Upon default, the regulatory authority may cause the forfeiture of any and all bonds deposited to complete reclamation for which the bonds were posted. Unless specifically limited, as provided in § 800.11(c) of this part, bond liability will extend to the entire permit area under conditions of forfeiture.

(d)(1) In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the permittee or operator is liable for remaining costs. The regulatory authority may complete, or authorize completion of, reclamation of the bonded area and may recover from the permittee or operator all costs of reclamation in excess of the amount forfeited.

(2) In the event the amount of performance bond forfeited is more than the amount necessary to complete reclamation, the regulatory authority must return the unused funds to the party from whom they were collected.

§ 800.60 What liability insurance must I carry?

(a) The regulatory authority must require the applicant to submit as part of its permit application a certificate issued by an insurance company authorized to do business in the United States certifying that the applicant has a public liability insurance policy in force for the surface coal mining and reclamation operations for which the permit is sought. The policy must provide for personal-injury and property-damage protection in an amount adequate to compensate any persons injured or property damaged as a result of the surface coal mining and reclamation operations, including the use of explosives, and who are entitled to compensation under the applicable provisions of state law. Minimum insurance coverage for bodily injury and property damage is $300,000 for each occurrence and $500,000 aggregate.

(b) The policy must be maintained in full force during the life of the permit or any renewal thereof and the liability period necessary to complete all reclamation operations under this chapter.

(c) The policy must include a rider requiring that the insurer notify the regulatory authority whenever substantive changes are made in the policy, including any termination or failure to renew.

(d) The regulatory authority may accept from the applicant, in lieu of a certificate for a public liability insurance policy, satisfactory evidence from the applicant that it satisfies applicable state self-insurance requirements approved as part of the regulatory program and the requirements of this section.

§ 800.70 What special bonding provisions apply to anthracite operations in Pennsylvania?

(a) All provisions of this subchapter apply to bonding and insuring anthracite surface coal mining and reclamation operations in Pennsylvania except that—

(1) The regulatory authority must determine specified bond limits in accordance with applicable provisions of Pennsylvania statutes, rules and regulations adopted thereunder, and implementing policies of the Pennsylvania regulatory authority.

(2) The period of liability for responsibility under each bond must be

established for those operations in accordance with applicable laws of the Commonwealth of Pennsylvania, rules and regulations adopted thereunder, and implementing policies of the Pennsylvania regulatory authority.

(b) Upon amendment of the Pennsylvania permanent regulatory program with respect to specified bond limits and the period of revegetation responsibility for anthracite surface coal mining and reclamation operations, any person engaging in or seeking to engage in those operations must comply with additional regulations the Secretary may issue as are necessary to meet the purposes of the Act.

■ 34. Lift the suspension of § 816.101, and revise part 816 to read as follows:

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

Sec.

Authority: 30 U.S.C. 1201 *et seq.*

§ 816.1 *What does this part do?*

This part sets forth the minimum environmental protection performance standards for surface mining activities under the Act.

§ 816.2 What is the objective of this part?

This part is intended to ensure that all surface mining activities are conducted in an environmentally sound manner in accordance with the Act.

§ 816.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–0047. Collection of this information is required under section 515 of SMCRA, which provides that permittees conducting surface coal mining and reclamation operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that surface mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending to conduct such operations must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 203–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

§ 816.11 What signs and markers must I post?

(a) *General specifications.* Signs and markers required under this part must—

(1) Be posted and maintained by the person who conducts the surface mining activities;

(2) Be of a uniform design throughout the operation;

(3) Be easily seen and read;

(4) Be made of durable material; and

(5) Conform to local ordinances and codes.

(b) *Duration of maintenance.* You must maintain signs and markers during the conduct of all activities to which they pertain.

(c) *Mine and permit identification signs.* (1) You must display identification signs at each point of access to the permit area from public roads.

(2) The signs must show the name, business address, and telephone number of the person who conducts the surface mining activities and the identification number of the current SMCRA permit authorizing surface mining activities.

(3) You must retain and maintain the signs until the release of all bonds for the permit area.

(d) *Perimeter markers.* You must clearly mark the perimeter of the permit area before beginning surface mining activities.

(e) *Stream buffer zone markers.* You must clearly mark the boundaries of any buffer to be maintained between surface mining activities and a perennial or intermittent stream in accordance with §§ 780.28 and 816.57 of this chapter to avoid disturbance by surface mining activities.

(f) *Topsoil markers.* You must clearly mark stockpiles of topsoil, subsoil, or other plant growth media segregated and stored as required in the permit in accordance with § 816.22 of this part.

§ 816.13 What special requirements apply to drilled holes, wells, and exposed underground openings?

(a) Except as provided in paragraph (f) of this section, you must case, line, otherwise manage each exploration hole, drilled hole, borehole, shaft, well, or other exposed underground opening in a manner approved by the regulatory authority to—

(1) Prevent acid or other toxic drainage from entering groundwater and surface water.

(2) Minimize disturbance to the prevailing hydrologic balance.

(3) Ensure the safety of people, livestock, fish and wildlife, and machinery in the permit area and the adjacent area.

(b) If the approved permit identifies an exploration hole, drilled hole, borehole, well, or other exposed underground opening for use to monitor groundwater or to return coal processing waste or water to underground workings, you must temporarily seal the hole or opening before use and protect it during use by installing barricades, fences, or other protective devices approved by the regulatory authority. You must periodically inspect these devices and maintain them in good operating condition.

(c) You may retain and transfer a drilled hole or groundwater monitoring well for use as a water well under the conditions established in § 816.39 of this part.

(d) Except as provided in paragraph (c) of this section, you must permanently close each exploration hole, drilled hole, borehole, well, or underground opening that mining activities uncover or expose within the permit area, unless the regulatory authority—

(1) Approves use of the hole, well, or opening for water monitoring purposes; or

(2) Authorizes other management of the hole or well.

(e)(1) Except as provided in paragraph (c) of this section, you must cap, seal, backfill, or otherwise properly manage each shaft, drift, adit, tunnel, exploratory hole, entryway or other opening to the surface from underground when no longer needed for monitoring or any other use that the regulatory authority approves after finding that the use will not adversely affect the environment or public health and safety.

(2) Permanent closure measures taken under paragraph (e)(1) of this section must be—

(i) Consistent with § 75.1771 of this title;

(ii) Designed to prevent access to the mine workings by people, livestock, fish and wildlife, and machinery; and

(iii) Designed to keep acid or toxic mine drainage from entering groundwater or surface water.

(f) The requirements of this section do not apply to holes drilled and used for blasting for surface mining purposes.

§ 816.14 [Reserved]

§ 816.15 [Reserved]

§ 816.22 How must I handle topsoil, subsoil, and other plant growth media?

(a) *Removal and salvage.* (1)(i) You, the permittee, must remove and salvage all topsoil and other soil materials identified for salvage and use as postmining plant growth media in the soil handling plan approved in the permit under § 780.12(e) of this chapter.

(ii) The soil handling plan approved in the permit under § 780.12(e) of this chapter will specify which soil horizons and underlying strata, or portions thereof, you must separately remove and salvage. The plan also will specify whether some or all of those soil horizons and soil substitute materials may or must be blended to achieve an improved plant growth medium.

(iii) Except as provided in the soil handling plan approved in the permit under § 780.12(e) of this chapter, you must complete removal and salvage of topsoil, subsoil, and organic matter in advance of any mining-related surface disturbance other than the minor disturbances identified in paragraph (a)(2) of this section.

(2) Unless otherwise specified by the regulatory authority, you need not remove and salvage topsoil and other soil materials for minor disturbances that—

(i) Occur at the site of small structures, such as power poles, signs, monitoring wells, or fence lines; or

(ii) Will not destroy the existing vegetation and will not cause erosion.

(b) *Handling and storage.* (1) You must segregate and separately handle the materials removed under paragraph (a) of this section to the extent required in the soil handling plan approved in the permit pursuant to § 780.12(e). You must redistribute those materials promptly on regraded areas or stockpile them when prompt redistribution is impractical.

(2) Stockpiled materials must—

(i) Be selectively placed on a stable site within the permit area;

(ii) Be protected from contaminants and unnecessary compaction that would interfere with revegetation;

(iii) Be protected from wind and water erosion through prompt establishment and maintenance of an effective, quick-growing, non-invasive vegetative cover or through other measures approved by the regulatory authority; and

(iv) Not be moved until required for redistribution unless approved by the regulatory authority.

(3) When stockpiling of organic matter and soil materials removed under paragraphs (a) and (f) of this section would be detrimental to the quality or quantity of those materials, you may temporarily redistribute those soil materials on an approved site within the permit area to enhance the current use of that site until the materials are needed for later reclamation, provided that—

(i) Temporary redistribution will not permanently diminish the capability of the topsoil of the host site; and

(ii) The redistributed material will be preserved in a condition more suitable for redistribution than if it were stockpiled.

(c) *Soil substitutes and supplements.* When the soil handling plan approved in the permit in accordance with

§ 780.12(e) of this chapter provides for the use of substitutes for or supplements to the existing topsoil or subsoil, you must salvage, store, and redistribute the overburden materials selected and approved for that purpose in a manner consistent with paragraphs (a), (b), and (e) of this section.

(d) *Site preparation.* If necessary to reduce potential slippage of the redistributed material or to promote root penetration, you must rip, chisel-plow, deep-till, or otherwise mechanically treat backfilled and graded areas either before or after redistribution of soil materials, whichever time is agronomically appropriate.

(e) *Redistribution.* (1) You must redistribute the materials removed, salvaged, and, if necessary, stored under paragraphs (a) through (c) of this section in a manner that—

(i) Complies with the soil handling plan developed under § 780.12(e) of this chapter and approved as part of the permit.

(ii) Is consistent with the approved postmining land use, the final surface configuration, and surface water drainage systems.

(iii) Minimizes compaction of the topsoil and soil materials in the root zone to the extent possible and alleviates any excess compaction that may occur. You must limit your use of measures that result in increased compaction to those situations in which added compaction is necessary to ensure stability.

(iv) Protects the materials from wind and water erosion before and after seeding and planting to the extent necessary to ensure establishment of a successful vegetative cover and to avoid causing or contributing to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in any National Pollutant Discharge Elimination System permit issued for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart.

(v) Achieves an approximately uniform, stable thickness across the regraded area. The thickness may vary when consistent with the approved postmining land use, the final surface configuration, surface water drainage systems, and the requirement in § 816.133 of this part for restoration of all disturbed areas to conditions that are capable of supporting the uses they were capable of supporting before any mining or higher or better uses approved under § 780.24(b) of this chapter. The thickness also may vary when variations are necessary or desirable to achieve specific revegetation goals and ecological diversity, as set forth in the revegetation plan developed under § 780.12(g) of this chapter and approved as part of the permit.

(2) You must use a statistically valid sampling technique to document that soil materials have been redistributed in the locations and depths required by the soil handling plan developed under § 780.12(e) of this chapter and approved as part of the permit.

(3) The regulatory authority may choose not to require the redistribution of topsoil on the embankments of permanent impoundments or on the embankments of roads to be retained as part of the postmining land use if it determines that—

(i) Placement of topsoil on those embankments is inconsistent with the requirement to use the best technology currently available to prevent sedimentation, and

(ii) The embankments will be otherwise stabilized.

(f) *Organic matter.* (1)(i) You must salvage duff, other organic litter, and vegetative materials such as tree tops and branches, small logs, and root balls. When practicable and consistent with the approved postmining land use, you may salvage organic matter and topsoil in a single operation that blends those materials.

(ii) Paragraph (f)(1)(i) of this section does not apply to organic matter from areas identified under § 779.19(b) of this chapter as containing significant populations of invasive or noxious non-native species. You must bury organic matter from those areas in the backfill at a sufficient depth to prevent regeneration or proliferation of undesirable species.

(2)(i) Except as otherwise provided in paragraphs (f)(2)(ii) and (iii) and (3) of this section, you must redistribute the organic matter salvaged under paragraph (f)(1) of this section across the regraded surface or incorporate it into the soil to control erosion, promote growth of vegetation, serve as a source of native plant seeds and soil inoculants to speed restoration of the soil's ecological community, and increase the moisture retention capability of the soil.

(ii) You may use vegetative debris to construct stream improvement or fish and wildlife habitat enhancement features consistent with the approved postmining land use.

(iii) You may adjust the timing and pattern of redistribution of large woody debris to accommodate the use of mechanized tree-planting equipment on sites with a forestry postmining land use.

(3)(i) The redistribution requirements of paragraph (f)(2)(i) of this section do not apply to those portions of the permit area—

(A) Upon which row crops will be planted as part of the postmining land use before final bond release under §§ 800.40 through 800.43 of this chapter;

(B) That will be intensively managed for hay production as part of the postmining land use before final bond release under §§ 800.40 through 800.43 of this chapter; or

(C) Upon which structures, roads, other impervious surfaces, or water impoundments have been or will be constructed as part of the postmining land use before final bond release under §§ 800.40 through 800.43 of this chapter.

(ii) When the circumstances described in paragraph (f)(3)(i) of this section apply, you must make reasonable efforts to redistribute the salvaged organic matter on other portions of the permit area or use woody debris to construct stream improvement or fish and wildlife habitat enhancement features consistent with the approved postmining land use. If you demonstrate, and the regulatory authority finds, that it is not reasonably possible to use all available organic matter for these purposes, you may bury it in the backfill.

(4)(i) You may not burn organic matter.

(ii) You may bury organic matter in the backfill only as provided in paragraphs (f)(1)(ii) and (3)(ii) of this section.

§ 816.34 How must I protect the hydrologic balance?

(a) You, the permittee, must conduct all surface mining and reclamation activities in a manner that will—

(1) Minimize disturbance of the hydrologic balance within the permit and adjacent areas.

(2) Prevent material damage to the hydrologic balance outside the permit area.

(3) Protect streams in accordance with §§ 780.28 and 816.57 of this chapter.

(4) Assure the protection or replacement of water supplies to the extent required by § 816.40 of this part.

(5) Protect existing water rights under state law.

(6) Support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part.

(7) Comply with the hydrologic reclamation plan as submitted under

§ 780.22 of this chapter and approved in the permit.

(8) Protect groundwater quality by using best management practices to handle earth materials and runoff in a manner that avoids the formation of acid or toxic mine drainage and by managing excavations and other disturbances to prevent or control groundwater degradation. The regulatory authority will determine the meaning of the term ''best management practices'' on a site-specific basis. At a minimum, the term includes equipment, devices, systems, methods, and techniques that the Director determines to be best management practices.

(9) Protect groundwater quantity by handling earth materials and runoff in a manner that will restore the approximate premining recharge capacity of the reclaimed area as a whole, excluding coal mine waste disposal areas and excess spoil fills, so as to allow the movement of water into the groundwater system.

(10) Protect surface-water quality by using best management practices, as described in paragraph (a)(8) of this section, to handle earth materials, groundwater discharges, and runoff in a manner that—

(i) Prevents postmining discharges of acid or toxic mine drainage.

(ii) Prevents additional contribution of suspended solids to streamflow or runoff outside the permit area to the extent possible, using the best technology currently available.

(iii) Otherwise prevents water pollution.

(11) Protect surface-water quality and flow rates by handling earth materials and runoff in accordance with the steps outlined in the hydrologic reclamation plan and the surface-water runoff control plan approved in the permit in accordance with §§ 780.22 and 780.29 of this chapter, respectively.

(b)(1) To the maximum extent practicable, you must use mining and reclamation practices that minimize water pollution, changes in flow, and adverse impacts on stream biota rather than relying upon water treatment to minimize those impacts.

(2) You must install, use, and maintain any necessary water-treatment facilities or water-quality controls if drainage control, materials handling, stabilization and revegetation of disturbed areas, diversion of runoff, mulching, and other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42 of this part.

(c) The regulatory authority may require that you take preventive, remedial, or monitoring measures in addition to those set forth in this part to prevent material damage to the hydrologic balance outside the permit area.

(d)(1) You must examine the runoff-control structures identified under § 780.29 of this chapter within 72 hours of cessation of each occurrence of the following precipitation events:

(i) In areas with an average annual precipitation of more than 26.0 inches, an event of a size equal to or greater than that of a storm with a 2-year recurrence interval. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine peak flow for a storm with that recurrence interval.

(ii) In areas with an average annual precipitation of 26.0 inches or less, a significant event of a size specified by the regulatory authority.

(2)(i) You must prepare a report, which must be certified by a registered professional engineer, and submit the report to the regulatory authority within 30 days of cessation of the applicable precipitation event under paragraph (d)(1) of this section. The report must address the performance of the runoff-control structures, identify and describe any material damage to the hydrologic balance outside the permit area that occurred, and identify and describe the remedial measures taken in response to that damage.

(ii) The report prepared under paragraph (d)(2)(i) of this section may include all precipitation events that occur within 30 days of cessation of the applicable precipitation event under paragraph (d)(1) of this section.

§ 816.35 How must I monitor groundwater?

(a)(1)(i) You, the permittee, must monitor groundwater in the manner specified in the groundwater monitoring plan approved in the permit in accordance with § 780.23(a) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter when conducting monitoring under this section.

(2) At a minimum, you must conduct monitoring through mining, reclamation, and the revegetation responsibility period under § 816.115 of this part for the monitored area. Monitoring must continue beyond that minimum for any additional time needed for monitoring results to demonstrate that the criteria of § 816.35(d)(1) and (2) of this section have been met, as determined by the regulatory authority.

(b)(1) You must submit groundwater monitoring data to the regulatory authority every 3 months, or more frequently if prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(c) When the analysis of any sample indicates noncompliance with the terms and conditions of the permit, you must promptly notify the regulatory authority, take any applicable actions required under § 773.17(e) of this chapter, and implement any applicable remedial measures required by the hydrologic reclamation plan approved in the permit in accordance with § 780.22 of this chapter.

(d) You may use the permit revision procedures of § 774.13 of this chapter to request that the regulatory authority modify the groundwater monitoring requirements, including the parameters covered and the sampling frequency. The regulatory authority may approve your request if you demonstrate, using the monitoring data obtained under this section, that—

(1) Future adverse changes in groundwater quantity or quality are unlikely to occur.

(2) The operation has—

(i) Minimized disturbance to the hydrologic balance in the permit and adjacent areas.

(ii) Prevented material damage to the hydrologic balance outside the permit area.

(iii) Preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas for which baseline biological condition data was collected under § 780.19(c)(6)(vi) of this chapter when groundwater from the permit area provides all or part of the base flow of those streams.

(iv) Maintained or restored the availability and quality of groundwater to the extent necessary to support the approved postmining land uses within the permit area.

(v) Protected or replaced the water rights of other users.

(e) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, to detect hydrologic changes, or to meet other requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

(f) You must install, maintain, operate, and, when no longer needed, remove all equipment, structures, and

other devices used in conjunction with monitoring groundwater, consistent with §§ 816.13 and 816.39 of this part.

§ 816.36 How must I monitor surface water?

(a)(1)(i) You, the permittee, must monitor surface water in the manner specified in the surface-water monitoring plan approved in the permit in accordance with § 780.23(b) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until the regulatory authority releases the entire bond amount for the monitored area under §§ 800.40 through 800.43 of this chapter.

(b)(1) You must submit surface-water monitoring data to the regulatory authority every 3 months, or more frequently when prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(3) The reporting requirements of paragraph (b) of this section do not exempt you from meeting any National Pollutant Discharge Elimination System (NPDES) reporting requirements.

(c) When the analysis of any sample indicates noncompliance with the terms and conditions of the permit, you must promptly notify the regulatory authority, take any applicable actions required under § 773.17(e) of this chapter, and implement any applicable remedial measures required by the hydrologic reclamation plan approved in the permit in accordance with § 780.22 of this chapter.

(d) You may use the permit revision procedures of § 774.13 of this chapter to request that the regulatory authority modify the surface-water monitoring requirements (except those required by the NPDES permitting authority), including the parameters covered and the sampling frequency. The regulatory authority may approve your request if you demonstrate, using the monitoring data obtained under this section, that—

(1) Future adverse changes in surface-water quantity or quality are unlikely to occur.

(2) The operation has—

(i) Minimized disturbance to the hydrologic balance in the permit and adjacent areas.

(ii) Prevented material damage to the hydrologic balance outside the permit area.

(iii) Preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas for which baseline biological condition data was collected under § 780.19(c)(6)(vi) of this chapter.

(iv) Maintained or restored the availability and quality of surface water to the extent necessary to support the approved postmining land uses within the permit area.

(v) Not precluded attainment of any designated use of a surface water under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(vi) Protected or replaced the water rights of other users.

(e) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, to detect hydrologic changes, or to meet other requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

(f) You must install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring surface water.

§ 816.37 How must I monitor the biological condition of streams?

(a)(1)(i) You must monitor the biological condition of perennial and intermittent streams in the manner specified in the plan approved in the permit in accordance with § 780.23(c) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter and use a bioassessment protocol that complies with § 780.19(c)(6)(vii) of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until the regulatory authority releases the entire bond amount for the monitored area under §§ 800.40 through 800.43 of this chapter.

(b) You must submit biological condition monitoring data to the regulatory authority on an annual basis, or more frequently if prescribed by the regulatory authority.

(c) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to meet the requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

§ 816.38 How must I handle acid-forming and toxic-forming materials?

(a) You, the permittee, must use the best technology currently available to handle acid-forming and toxic-forming materials in a manner that will avoid the creation of acid or toxic mine drainage into surface water and groundwater. At a minimum, you must comply with the plan approved in the permit in accordance with § 780.12(n) of this chapter and adhere to disposal, treatment, and storage practices that are consistent with other material handling and disposal provisions of this chapter.

(b) You may temporarily store acid-forming and toxic-forming materials only if the regulatory authority specifically approves temporary storage as necessary and finds in writing in the permit that the proposed storage method will protect surface water and groundwater by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water into aquifers. The regulatory authority must specify a maximum time for temporary storage, which may not exceed the period until permanent disposal first becomes feasible. In addition, storage must not result in any risk of water pollution, adverse impacts to the biology of perennial or intermittent streams, or other environmental damage.

§ 816.39 What must I do with exploratory or monitoring wells when I no longer need them?

(a) Except as provided in paragraph (b) of this section, you, the permittee, must permanently seal exploratory or monitoring wells in a safe and environmentally sound manner in accordance with § 816.13 of this part before the regulatory authority may approve full release of the bond posted for the land on which the wells are located under §§ 800.40 through 800.43 of this chapter.

(b) With the prior approval of the regulatory authority, you may transfer wells to another party for further use. The conditions of the transfer must comply with state and local laws. You will remain responsible for the proper management of the wells until full release of the bond posted for the land on which the wells are located under §§ 800.40 through 800.43 of this chapter.

§ 816.40 What responsibility do I have to replace water supplies?

(a) *Replacement of adversely-impacted water supplies.* (1) You, the permittee, must replace the water

supply of an owner of an interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source when the water supply has been adversely impacted by contamination, diminution, or interruption as a result of your surface mining activities.

(2) The replacement supply must be equivalent to the quantity and quality of the premining supply.

(3) Replacement includes provision of an equivalent water supply delivery system and payment of operation and maintenance expenses in excess of customary and reasonable delivery costs for the premining water supply. If you and the water supply owner agree, your obligation to pay operation and maintenance costs may be satisfied by a one-time payment in an amount that covers the present worth of the increased annual operation and maintenance costs for a period upon which you and the water supply owner agree.

(4) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, you may satisfy the replacement requirements by demonstrating that a suitable alternative water source is available and could feasibly be developed, provided you obtain written concurrence from the owner of the affected water supply.

(b) *Measures to address anticipated adverse impacts to protected water supplies.* For anticipated loss of or damage to a protected water supply, you must adhere to the requirements set forth in the permit in accordance with § 780.22(b) of this chapter.

(c) *Measures to address unanticipated adverse impacts to protected water supplies.* For unanticipated loss of or damage to a protected water supply, you must—

(1) Provide an emergency temporary water supply within 24 hours of notification of the loss. The temporary supply must be adequate in quantity and quality to meet normal household needs.

(2) Develop and submit a plan for a permanent replacement supply to the regulatory authority within 30 days of receiving notice that an unanticipated loss of or damage to a protected water supply has occurred.

(3) Provide a permanent replacement water supply within 2 years of the date of receiving notice of an unanticipated loss of or damage to a protected water supply. The regulatory authority may grant an extension if you have made a good-faith effort to meet this deadline, but have been unable to do so for reasons beyond your control.

(d) *Basis for determination of adverse impact.* The regulatory authority must use the baseline hydrologic and geologic information required under § 780.19 of this chapter and all other available information to determine whether and to what extent the mining operation adversely impacted the damaged water supply.

§ 816.41 Under what conditions may I discharge water and other materials into an underground mine?

(a) You may not discharge any water or other materials from a surface coal mining and reclamation operation into an underground mine unless the regulatory authority specifically approves the discharge in writing, based upon a demonstration that—

(1) The discharge will be made in a manner that—

(i) Minimizes disturbances to the hydrologic balance within the permit area;

(ii) Prevents material damage to the hydrologic balance outside the permit area, including the hydrologic balance of the area in which the underground mine receiving the discharge is located;

(iii) Does not adversely impact the biology of perennial or intermittent streams; and

(iv) Otherwise eliminates public hazards resulting from surface mining activities.

(2) The discharge will not cause or contribute to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in any National Pollutant Discharge Elimination System permit issued for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart.

(3)(i) The discharge will be at a known rate and of a quality that will meet the effluent limitations for pH and total suspended solids in 40 CFR part 434.

(ii) The regulatory authority may approve discharges of water that exceed the effluent limitations for pH and total suspended solids in 40 CFR part 434 if the available evidence indicates that there is no direct hydrologic connection between the underground mine and other waters and that those exceedances will not be inconsistent with paragraph (a)(1) of this section.

(4) The discharge will not cause or contribute to a violation of applicable state or tribal water quality standards for groundwater.

(5) The Mine Safety and Health Administration has approved the discharge.

(6) You have obtained written permission from the owner of the mine into which the discharge is to be made and you have provided a copy of that authorization to the regulatory authority.

(b) Discharges are limited to the following materials:

(1) Water.

(2) Coal processing waste.

(3) Fly ash from a coal-fired facility.

(4) Sludge from an acid-mine-drainage treatment facility.

(5) Flue-gas desulfurization sludge.

(6) Inert materials used for stabilizing underground mines.

(7) Underground mine development waste.

§ 816.42 What Clean Water Act requirements apply to discharges from my operation?

(a) Nothing in this section, nor any action taken pursuant to this section, supersedes or modifies—

(1) The authority or jurisdiction of federal, state, or tribal agencies responsible for administration, implementation, and enforcement of the Clean Water Act, 33 U.S.C. 1251 *et seq.;* or

(2) The decisions that those agencies make under the authority of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* including decisions on whether a particular set of facts constitutes a violation of the Clean Water Act.

(b) Discharges of water from surface mining activities and from areas disturbed by surface mining activities must—

(1) Be made in compliance with all applicable water quality laws and regulations, including the effluent limitations established in the National Pollutant Discharge Elimination System permit for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart. The regulatory authority must notify the appropriate Clean Water Act authority whenever it takes action to enforce a permit condition required by § 773.17(i) of this chapter with respect to an effluent limitation in a National Pollutant Discharge Elimination System permit. The regulatory authority must initiate coordination with the Clean Water Act authority before taking enforcement action if coordination is needed to determine whether a violation of the National Pollutant Discharge Elimination System permit exists.

(2) Not cause or contribute to a violation of applicable water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or other applicable state or tribal water quality standards.

(c) Discharges of overburden, coal mine waste, and other materials into waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* must be made in compliance with section 404 of the Clean Water Act, 33 U.S.C. 1344, and its implementing regulations.

(d) The regulatory authority will coordinate an investigation with the appropriate Clean Water Act authority whenever information available to the regulatory authority indicates that mining activities may be causing or contributing to a violation of the water quality standards to which paragraph (b)(2) of this section refers, or to a violation of section 404 of the Clean Water Act, 33 U.S.C. 1344, and its implementing regulations. If, after coordination with the appropriate Clean Water Act authority, it is determined that mining activities are causing or contributing to a Clean Water Act violation, the regulatory authority must, in addition to any action taken by the appropriate Clean Water Act authority, independently take enforcement or other appropriate action to correct the cause of the violation.

(e) You must construct water treatment facilities for discharges from the operation as soon as the need for those facilities becomes evident.

(f)(1) You must remove precipitates and otherwise maintain all water treatment facilities requiring the use of settling ponds or lagoons as necessary to maintain the functionality of those facilities.

(2) You must dispose of all precipitates removed from facilities under paragraph (f)(1) of this section either in an approved solid waste landfill or within the permit area in accordance with a plan approved by the regulatory authority.

(g) You must operate and maintain water treatment facilities until the regulatory authority authorizes removal based upon monitoring data demonstrating that influent to the facilities meets all applicable effluent limitations without treatment and that discharges would not cause or contribute to a violation of applicable water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or other applicable state or tribal water quality standards if left untreated.

§ 816.43 How must I construct and maintain diversions?

(a) *Classification.* The term *diversion* applies to the following categories of channels that convey surface water flow:

(1) *Diversion Ditches.* Diversion ditches are channels constructed to convey surface water runoff or other flows from areas not disturbed by mining activities away from or around disturbed areas. Diversion ditches may be temporary or permanent.

(i) You must remove a temporary diversion ditch as soon as it is no longer needed. You must restore the land disturbed by the removal process in accordance with the approved permit and § 816.55 of this part. Before removing a temporary diversion ditch, you must modify or remove downstream water treatment facilities previously protected by the ditch to prevent overtopping or failure of the facilities. You must continue to maintain water treatment facilities until they are no longer needed.

(ii) You may retain a *diversion ditch* as a permanent structure if you demonstrate and the regulatory authority finds that retention of that diversion ditch would—

(A) Be environmentally beneficial;

(B) Meet the requirements of the reclamation plan approved under § 780.12 of this chapter; and

(C) Be consistent with the surface drainage pattern restoration requirements of §§ 816.56 and 816.57 of this part.

(iii) When approved in the permit, you may divert the following flows away from the disturbed area by means of temporary or permanent diversion ditches without treatment:

(A) Any surface runoff or other flows from mined areas abandoned before May 3, 1978.

(B) Any surface runoff or other flows from undisturbed areas.

(C) Any surface runoff or other flows from reclaimed areas for which the criteria of § 816.46 of this part for siltation structure removal have been met.

(2) *Stream diversions.* Stream diversions are temporary or permanent relocations of perennial or intermittent streams. Diversions of perennial and intermittent streams must comply with the applicable requirements of this section, § 780.28 of this chapter, and § 816.57 of this part.

(i) You must remove *temporary stream diversions* after the original stream channel is reconstructed after mining. As set forth in § 780.28(f) of this chapter, different requirements apply to temporary stream diversions depending on whether they will be in existence for less or more than 3 years.

(ii) *Permanent stream diversions* remain in their locations following mining and reclamation.

(3) *Conveyances and channels within the disturbed area.* All other conveyances and channels that are constructed within the disturbed area to transport surface water are also diversions. During mining, these channels or conveyances must deliver all captured surface water flow to siltation structures.

(i) You must remove temporary conveyances or channels when they are no longer needed for their intended purpose.

(ii) When approved in the permit, you may retain conveyances or channels that support or enhance the approved postmining land use.

(b) *Design criteria.* When the permit requires the use of siltation structures for sediment control, you must construct diversions designed to the standards of this section to convey runoff from the disturbed area to the siltation structures unless the topography will naturally direct all surface runoff or other flows to a siltation structure.

(1) You must design all diversions to—

(i) Ensure the safety of the public.

(ii) Minimize adverse impacts to the hydrologic balance, including the biology of perennial and intermittent streams, within the permit and adjacent areas.

(iii) Prevent material damage to the hydrologic balance outside the permit area.

(2) You must design, locate, construct, maintain, and use each diversion and its appurtenant structures to—

(i) Be stable.

(ii) Provide and maintain the capacity to safely pass the peak flow of surface runoff from a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion. Flow capacity for stream diversions includes both the in-channel capacity and the flood-prone area overbank capacity. Flow capacity for diversion ditches and conveyances or channels includes only in-channel capacity, with adequate freeboard to prevent out-of-channel flow. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine peak flows.

(iii) Prevent, to the extent possible using the best technology currently available, additional contributions of

suspended solids to streamflow or runoff outside the permit area.

(iv) Comply with all applicable federal, state, tribal, and local laws and regulations.

(c) *Application to § 816.41.* You may not divert surface runoff or other flows into underground mines without approval of the regulatory authority under § 816.41 of this part.

(d) *Additional requirements.* The regulatory authority may specify additional design criteria for diversions to meet the requirements of this section.

§ 816.45 What sediment control measures must I implement?

(a) You must design, construct, and maintain appropriate sediment control measures, using the best technology currently available to—

(1) Prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(2) Meet the applicable effluent limitations referenced in § 816.42(a) of this part.

(3) Minimize erosion to the extent possible.

(b) Sediment control measures include practices carried out within the disturbed area. Sediment control measures consist of the use of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include but are not limited to—

(1) Disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation.

(2) Shaping and stabilizing the backfilled material to promote a reduction in the rate and volume of runoff.

(3) Retaining sediment within disturbed areas.

(4) Diverting surface runoff from undisturbed areas away from disturbed areas.

(5) Using protected channels or pipes to convey surface runoff from undisturbed areas through disturbed areas so as not to cause additional erosion.

(6) Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland flow velocity, reduce runoff volume, or trap sediment.

(7) Treating surface runoff collected in sedimentation ponds with flocculants or other chemicals.

§ 816.46 What requirements apply to siltation structures?

(a) *Scope.* For the purpose of this section only, the phrase ''disturb the land surface'' does not include those areas—

(1) In which the only surface mining activities consist of diversions, siltation structures, or roads that are designed, constructed, and maintained in accordance with this part; and

(2) For which you do not plan to otherwise disturb the land surface upgradient of the diversion, siltation structure, or road.

(b) *General requirements.* (1) When siltation structures will be used to achieve the requirements of § 816.45 of this part, you must construct those structures before beginning any surface mining activities that will disturb the land surface.

(2) Upon completion of construction of a siltation structure, a qualified registered professional engineer, or, in any state that authorizes land surveyors to prepare and certify plans in accordance with § 780.25(a) of this chapter, a qualified registered professional land surveyor, must certify that the structure has been constructed as designed and as approved in the reclamation plan in the permit.

(3) Any siltation structure that impounds water must be designed, constructed and maintained in accordance with § 816.49 of this chapter.

(4) You must maintain siltation structures until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated.

(5)(i) When a siltation structure is removed, you must regrade the land upon which the structure was located and revegetate the land in accordance with the reclamation plan and §§ 816.111 and 816.116 of this chapter.

(ii) Paragraph (b)(5)(i) of this section does not apply to sedimentation ponds approved by the regulatory authority for retention as permanent impoundments under § 816.49(b) of this part if the maintenance requirements of § 800.42(c)(5) of this chapter are met.

(c) *Sedimentation ponds.* (1) When used, sedimentation ponds must—

(i) Be located as near as possible to the disturbed area and outside perennial or intermittent stream channels unless approved by the regulatory authority in the permit in accordance with §§ 780.28 and 816.57(c) of this chapter.

(ii) Be designed, constructed, and maintained to—

(A) Provide adequate sediment storage volume.

(B) Provide adequate detention time to allow the effluent from the ponds to meet applicable effluent limitations.

(C) Contain or treat the 10-year, 24-hour precipitation event (''design event'') unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions, and a demonstration that the effluent limitations referenced in § 816.42 of this part will be met.

(D) Provide a nonclogging dewatering device adequate to maintain the detention time required under paragraph (c)(1)(ii)(B) of this section.

(E) Minimize short circuiting to the extent possible.

(F) Provide periodic sediment removal sufficient to maintain adequate volume for the design event.

(G) Ensure against excessive settlement.

(H) Be free of sod, large roots, frozen soil, and acid-forming or toxic-forming materials.

(I) Be compacted properly.

(2) *Spillways.* A sedimentation pond must include either a combination of principal and emergency spillways or a single spillway configured as specified in § 816.49(a)(9) of this part.

(d) *Other treatment facilities.* (1) You must design other treatment facilities to treat the 10-year, 24-hour precipitation event unless the regulatory authority approves a lesser design event based upon terrain, climate, other site-specific conditions, and a demonstration that the effluent limitations referenced in § 816.42 of this part will be met.

(2) You must design other treatment facilities in accordance with the applicable requirements of paragraph (c) of this section.

(e) *Exemptions.* The regulatory authority may grant an exemption from the requirements of this section if—

(1) The disturbed drainage area within the total disturbed area is small; and

(2) You demonstrate that neither siltation structures nor alternate sediment control measures are necessary for drainage from the disturbed drainage area to comply with § 816.42 of this part.

§ 816.47 What requirements apply to discharge structures for impoundments?

You must control discharges from sedimentation ponds, permanent and temporary impoundments, coal mine waste impounding structures, and diversions by energy dissipators, riprap channels, and other devices when necessary to reduce erosion, to control meander migration, to prevent deepening or enlargement of stream channels, or to minimize disturbance of

the hydrologic balance. You must design discharge structures according to standard engineering design procedures.

§ 816.49 What requirements apply to impoundments?

(a) *Requirements that apply to both permanent and temporary impoundments.—*

(1) *MSHA requirements.* An impoundment meeting the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216 of this title and this section.

(2) *Stability.* (i) An impoundment that meets the criteria of § 77.216(a) of this title or that includes a dam with a significant or high hazard potential classification under § 780.25(a) of this chapter must have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions and a seismic safety factor of at least 1.2.

(ii) Impoundments not included in paragraph (a)(2)(i) of this section, except for a coal mine waste impounding structure, must have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of § 780.25(e)(2) of this chapter.

(3) *Freeboard.* (i) Impoundments must have adequate freeboard to resist overtopping by waves that occur in conjunction with the typical increase in water elevation at the downwind edge of any body of water, waves resulting from sudden influxes of surface runoff from precipitation events, or waves resulting from any combination of these events or other events.

(ii) An impoundment that includes a dam with a significant or high hazard potential classification under § 780.25(a) of this chapter must comply with the freeboard hydrograph criteria in the following table:

MINIMUM AUXILIARY SPILLWAY HYDROLOGIC CRITERIA

Hazard potential classification of embankment	Design precipitation event for—	
	Auxiliary spillway hydrograph	Freeboard hydrograph
Significant	P_{100} [1] + 0.12(PMP [2] − P_{100})	P_{100} + 0.40(PMP − P_{100}).
High	P_{100} + 0.26(PMP − P_{100})	PMP.

[1] P_{100} = Precipitation event for 100-year return interval.
[2] PMP = Probable Maximum Precipitation event.

(4) *Foundation.* (i) Foundations and abutments for an impounding structure must be stable during all phases of construction and operation and must be designed based on adequate and accurate information on the foundation and abutment conditions.

(ii) You must conduct foundation and abutment investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability and control of underseepage for an impoundment that includes a dam with a significant or high hazard potential classification under § 780.25(a) of this chapter.

(iii) You must remove all vegetative and organic materials from the foundation area and excavate and prepare the foundation area to resist failure. You must install cutoff trenches if necessary to ensure stability.

(5) *Protection of impoundment slopes.* You must take measures to protect impoundment slopes from surface erosion and the adverse impacts of a sudden drawdown.

(6) *Protection of embankment faces.* Faces of embankments and surrounding areas shall be vegetated, except that faces where water is impounded may be riprapped or otherwise stabilized in accordance with accepted design practices.

(7) *Spillways.* An impoundment must include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (a)(7)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (a)(7)(ii) of this section, except as set forth in paragraph (c)(2) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of paragraph (a)(7) of this section is:

(A) For an impoundment that includes a dam with a significant or high hazard potential classification under § 780.25(a) of this chapter, the design precipitation event specified in the auxiliary spillway hydrograph column in the table in paragraph (a)(3)(ii) of this section, or any greater event specified by the regulatory authority.

(B) For an impoundment meeting the criteria of § 77.216(a) of this title, the 100-year, 6-hour event, or any greater event specified by the regulatory authority.

(C) For an impoundment not included in paragraphs (a)(7)(ii)(A) and (B) of this section, the 25-year, 6-hour event, or any greater event specified by the regulatory authority.

(8) *Highwalls.* The vertical portion of any highwall remnant within the impoundment must be located far enough below the low-water line along the full extent of the highwall to provide adequate safety and access for the proposed water users.

(9) *Inspections.* Except as provided in paragraph (a)(9)(iv) of this section, a qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer must inspect each impoundment as provided in paragraph (a)(9)(i) of this section. The professional engineer or specialist must be experienced in the construction of impoundments.

(i) Inspections must be made regularly during construction, upon completion of construction, and at least yearly until removal of the structure or release of the performance bond.

(ii) After each inspection required by paragraph (a)(9)(i) of this section, the qualified registered professional engineer, or qualified registered professional land surveyor as specified in paragraph (a)(9)(iv) of this section, must promptly provide to the regulatory authority a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report must include a discussion of any appearance of instability, any structural weakness or other hazardous condition, the depth and elevation of any impounded waters, the existing storage capacity, any

existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

(iii) You must retain a copy of the report at or near the minesite.

(iv) In any state that authorizes land surveyors to prepare and certify plans in accordance with § 780.25(b)(1) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the criteria of § 77.216(a) of this title, or that is not classified as having a significant or high hazard potential under § 780.25(a) of this chapter, and certify and submit the report required by paragraph (a)(9)(ii) of this section, except that a qualified registered professional engineer must certify all coal mine waste impounding structures covered by § 816.84 of this chapter. The professional land surveyor must be experienced in the construction of impoundments.

(10) *Examinations.* (i) Impoundments that meet the criteria of § 77.216 of this title, or that are classified as having a significant or high hazard potential under § 780.25(a) of this chapter, must be examined in accordance with § 77.216–3 of this title.

(ii) Impoundments that are not subject to § 77.216 of this title, or that are not classified as having a significant or high hazard potential under § 780.25(a) of this chapter, must be examined at least quarterly. A qualified person designated by the operator must examine impoundments for the appearance of structural weakness and other hazardous conditions.

(11) *Emergency procedures.* If any examination or inspection discloses that a potential hazard exists, the person who examined the impoundment must promptly inform the regulatory authority of the finding and of the emergency procedures formulated for public protection and remedial action. The regulatory authority must be notified immediately if adequate procedures cannot be formulated or implemented. The regulatory authority then must notify the appropriate agencies that other emergency procedures are required to protect the public.

(b) *Requirements that apply only to permanent impoundments.* A permanent impoundment of water may be created if authorized by the regulatory authority in the approved permit based upon the following demonstration:

(1) The size and configuration of the impoundment will be adequate for its intended purposes.

(2) The quality of impounded water will be suitable on a permanent basis for its intended use and, after reclamation, discharges from the impoundment will not cause or contribute to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in the National Pollutant Discharge Elimination System permit for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart.

(3) The water level will be sufficiently stable and be capable of supporting the intended use.

(4) Final grading will provide for adequate safety and access for proposed water users.

(5) The impoundment will not result in diminution of the quality or quantity of surface water or groundwater used by surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(6) The impoundment will be suitable for the approved postmining land use.

(7) Approval of the impoundment will not result in retention of spoil piles or ridges that are inconsistent with the definition of approximate original contour.

(8) Approval of the impoundment will not result in the creation of an excess spoil fill elsewhere within the permit area.

(9) The impoundment has been designed with dimensions, features, and other characteristics that will enhance fish and wildlife habitat to the extent that doing so is not inconsistent with the intended use.

(c) *Requirements that apply only to temporary impoundments that rely primarily upon storage.* (1) In lieu of meeting the requirements in paragraph (a)(7)(i) of this section, the regulatory authority may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when you demonstrate, and a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 780.25(b) of this chapter certifies, that the impoundment will safely control the design precipitation event.

(2) You must use current prudent engineering practices to safely remove the water from an impoundment constructed in accordance with paragraph (c)(1) of this section.

(3) An impoundment constructed in accordance with paragraph (c)(1) of this section must be located where failure would not be expected to cause loss of life or serious property damage, unless the impoundment meets one of the following exceptions:

(i) An impoundment that meets the criteria of § 77.216(a) of this title, or that is classified as having a significant or high hazard potential under § 780.25(a) of this chapter, and is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or any greater event specified by the regulatory authority.

(ii) An impoundment not included in paragraph (c)(3)(i) of this section that is designed to control the precipitation of the 100-year, 6-hour event, or any greater event specified by the regulatory authority.

§ 816.55 What must I do with sedimentation ponds, diversions, impoundments, and treatment facilities after I no longer need them?

(a) Before seeking final bond release under § 800.42(d) of this chapter, you must—

(1) Remove all temporary structures and reclaim the land upon which those structures were located in accordance with the approved permit; and

(2) Ensure that all sedimentation ponds, diversions, and impoundments approved for retention after final bond release have been maintained properly and meet all applicable requirements of the approved permit and this chapter for retention as permanent structures. You must renovate the structures if necessary to meet the requirements for retention.

(b) [Reserved]

§ 816.56 What additional performance standards apply to mining activities conducted in or through an ephemeral stream?

(a) *Compliance with federal, state, and tribal water quality laws and regulations.* (1) You may conduct surface mining activities in or affecting waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* only if you first obtain all necessary authorizations, certifications, and permits under that law.

(2) Surface mining activities must comply with all applicable state and tribal laws and regulations concerning surface water and groundwater.

(b) *Postmining surface drainage pattern and stream-channel configuration.* If you mine through an ephemeral stream, you must construct a postmining surface drainage pattern and stream-channel configurations that are consistent with the surface drainage pattern and stream-channel configurations approved in the permit

in accordance with § 780.27 of this chapter.

(c) *Establishment of streamside vegetative corridors.* (1) If you mine through an ephemeral stream, you must establish a vegetative corridor at least 100 feet wide along each bank of the reconstructed stream channel. The 100-foot distance must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark. The corridor must be consistent with natural vegetation patterns.

(2) When planting the streamside vegetative corridors required by paragraph (c)(1) of this section, you must—

(i) Use appropriate native species adapted to the area, unless an agency responsible for implementing section 404 of the Clean Water Act, 33 U.S.C. 1344, requires the use of non-native species.

(ii) Ensure that the species planted are consistent with the revegetation plan approved in the permit.

(iii) Include appropriate native hydrophytic vegetation, vegetation typical of floodplains, or hydrophilic vegetation characteristic of riparian areas and wetlands to the extent that the corridor contains suitable habitat for those species and the stream and the geomorphology of the area are capable of supporting vegetation of that nature.

(iv) Use native trees and shrubs when planting areas within the streamside corridor that were forested at the time of application or that would revert to forest under conditions of natural succession.

(3) Paragraphs (c)(1) and (2) of this section do not require planting of hydrophytic or hydrophilic species within those portions of streamside corridors where the stream, soils, or climate are incapable of providing the moisture or other growing conditions needed to support and sustain hydrophytic or hydrophilic species. In those situations, you must plant the corridor with appropriate native species that are consistent with the baseline information concerning natural streamside vegetation included in the permit application under § 779.19 of this chapter, unless otherwise directed by an agency responsible for implementing section 404 of the Clean Water Act, 33 U.S.C. 1344.

(4) Paragraphs (c)(1) through (3) of this section do not apply to—

(i) Prime farmland historically used for cropland; or

(ii) Situations in which establishment of a streamside vegetative corridor comprised of native species would be incompatible with an approved postmining land use that is implemented before final bond release under §§ 800.40 through 800.43 of this chapter.

§ 816.57 What additional performance standards apply to mining activities conducted in or through a perennial or intermittent stream or on the surface of land within 100 feet of a perennial or intermittent stream?

(a) *Compliance with federal, state, and tribal water quality laws and regulations.* (1) You may conduct surface mining activities in or affecting waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* only if you first obtain all necessary authorizations, certifications, and permits under that law.

(2) Surface mining activities must comply with all applicable state and tribal laws and regulations concerning surface water and groundwater.

(b) *Prohibition on mining in or within 100 feet of a perennial or intermittent stream.* You may not conduct surface mining activities in or through a perennial or intermittent stream, or that would disturb the surface of land within 100 feet of a perennial or intermittent stream, unless the regulatory authority authorizes you to do so in the permit after making the findings required under § 780.28 of this chapter. The 100-foot distance must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(c) *Postmining surface drainage pattern and stream-channel configuration.* (1) If you mine through or permanently divert a perennial or intermittent stream, you must construct a postmining surface drainage pattern and stream-channel configurations that are consistent with the surface drainage pattern and stream-channel configurations approved in the permit in accordance with § 780.28 of this chapter.

(2) Upon completion of construction of a stream-channel diversion for a perennial or intermittent stream, or reconstruction of a stream channel after mining through a perennial or intermittent stream, you must obtain a certification from a qualified registered professional engineer that the stream-channel diversion or reconstructed stream channel has been constructed in accordance with the design approved in the permit and that it meets all engineering-related requirements of this section. This certification may be limited to the location, dimensions, and physical characteristics of the stream channel.

(d) *Establishment of streamside vegetative corridors.* (1)(i) If you mine through a perennial or intermittent stream, you must establish a vegetative corridor at least 100 feet wide along each bank of the reconstructed stream channel. The corridor must be consistent with natural vegetation patterns.

(ii) You must establish a vegetative corridor on any land that you disturb within 100 feet of a perennial or intermittent stream. The corridor must be consistent with natural vegetation patterns.

(iii) If you divert a perennial or intermittent stream, you must establish a vegetative corridor at least 100 feet wide along each bank of the stream-channel diversion, with the exception of temporary diversions that will be in place less than 3 years. The corridor must be consistent with natural vegetation patterns.

(iv) The 100-foot distance mentioned in paragraphs (d)(1)(i) through (iii) of this section must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(2) When planting the streamside vegetative corridors required by paragraph (d)(1) of this section, you must—

(i) Use appropriate native species adapted to the area, unless an agency responsible for implementing section 404 of the Clean Water Act, 33 U.S.C. 1344, requires the use of non-native species.

(ii) Ensure that the species planted are consistent with the revegetation plan approved in the permit.

(iii) Include appropriate native hydrophytic vegetation, vegetation typical of floodplains, or hydrophilic vegetation characteristic of riparian areas and wetlands to the extent that the corridor contains suitable habitat for those species and the stream and the geomorphology of the area are capable of supporting vegetation of that nature.

(iv) Use native trees and shrubs when planting areas within the streamside corridor that were forested at the time of application or that would revert to forest under conditions of natural succession.

(3) Paragraphs (d)(1) and (2) of this section do not require planting of hydrophytic or hydrophilic species within those portions of streamside corridors where the stream, soils, or climate are incapable of providing the moisture or other growing conditions needed to support and sustain hydrophytic or hydrophilic species. In those situations, you must plant the corridor with appropriate native species that are consistent with the baseline information concerning natural

streamside vegetation included in the permit application under § 779.19 of this chapter, unless otherwise directed by an agency responsible for implementing section 404 of the Clean Water Act, 33 U.S.C. 1344.

(4) Paragraphs (d)(1) through (3) of this section do not apply to—

(i) Prime farmland historically used for cropland; or

(ii) Situations in which establishment of a streamside vegetative corridor comprised of native species would be incompatible with an approved postmining land use that is implemented before final bond release under §§ 800.40 through 800.43 of this chapter.

(e) *Restoration of form.* If you mine through or permanently divert a perennial or intermittent stream, you must demonstrate successful restoration or reconstruction of the form of the stream channel in accordance with the design approved in the permit before you qualify for Phase I bond release under § 800.42(b)(1) of this chapter.

(f) *Restoration of hydrologic function.* If you mine through or permanently divert a perennial or intermittent stream, you must demonstrate restoration of the hydrologic function of the reconstructed stream segment before you qualify for Phase II bond release under § 800.42(b)(2) of this chapter. Restoration of the hydrologic function includes, but is not limited to, restoration of the flow regime, except as otherwise approved in the permit under § 780.28(e)(2) of this chapter.

(g) *Restoration of ecological function.* If you mine through or permanently divert a perennial or intermittent stream, the reconstructed stream or stream-channel diversion must meet the criteria approved in the permit for determining restoration of ecological function, as established by the regulatory authority under § 780.28(g) of this chapter, before you qualify for final bond release under §§ 800.40 through 800.43 of this chapter.

(h) *Prohibition on placement of siltation structures in perennial or intermittent streams.* (1)(i) Except as provided in paragraph (h)(2) of this section, you may not construct a siltation structure in a perennial or intermittent stream or use perennial or intermittent streams as waste treatment systems to convey surface runoff from the disturbed area to a sedimentation pond.

(ii) Paragraph (h)(1)(i) of this section does not prohibit the construction of a siltation structure in a stream channel immediately downstream of a stream segment that is mined through.

(2) If approved in the permit, the prohibition in paragraph (h)(1) of this section will not apply to excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures in steep-slope areas when you demonstrate, and the regulatory authority finds in writing, that use of a perennial or intermittent stream segment as a waste treatment system for sediment control or construction of a sedimentation pond or other siltation structure in a perennial or an intermittent stream would have less overall adverse impact on fish, wildlife, and related environmental values than construction of diversions and sedimentation ponds or other siltation structures on slopes above the stream.

(3) When the circumstances described in paragraph (h)(2) of this section exist, the following requirements apply:

(i) You must minimize the length of stream used as a waste treatment system to the extent possible and, when practicable, maintain an undisturbed buffer along that stream segment in accordance with paragraph (b) of this section.

(ii) You must place the sedimentation pond or other siltation structure as close to the toe of the excess spoil fill, coal mine waste refuse pile, or coal mine waste impounding structure as possible.

(iii) Following the completion of construction and revegetation of the fill or coal mine waste structure, you must—

(A) Remove and properly dispose of accumulated sediment in the siltation structure and any stream segment between the inlet of the siltation structure and the toe of the excess spoil fill or coal mine waste structure;

(B) Remove the sedimentation pond or other siltation structure; and

(C) Restore the stream segment in accordance with paragraphs (e) through (g) of this section.

(i) *Programmatic alternative.* Paragraphs (b) through (h) of this section will not apply to a state program approved under subchapter T of this chapter if that program is amended to expressly prohibit all surface mining activities, including the construction of stream-channel diversions, that would result in more than a de minimis disturbance of land in or within 100 feet of a perennial or intermittent stream.

§ 816.59 How must I maximize coal recovery?

You must conduct surface mining activities so as to maximize the utilization and conservation of the coal, while using the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

§ 816.61 Use of explosives: General requirements.

(a) *Compliance with other laws and regulations.* You must comply with all applicable state and federal laws and regulations governing the use of explosives.

(b) *Compliance with blasting schedule.* Blasts that use more than 5 pounds of explosive or blasting agent must be conducted according to the schedule required by § 816.64 of this part.

(c) *Requirements for blasters.* (1) No later than 12 months after the blaster certification program for a state required by part 850 of this chapter has been approved under the procedures of subchapter C of this chapter, all blasting operations in that state must be conducted under the direction of a certified blaster. Before that time, all blasting operations in that state must be conducted by competent, experienced persons who understand the hazards involved.

(2) Certificates of blaster certification must be carried by blasters or be on file at the permit area during blasting operations.

(3) A blaster and at least one other person shall be present at the firing of a blast.

(4) Any blaster who is responsible for conducting blasting operations at a blasting site must:

(i) Be familiar with the blasting plan and site-specific performance standards; and

(ii) Give direction and on-the-job training to persons who are not certified and who are assigned to the blasting crew or who assist in the use of explosives.

(d) *Blast design.* (1) You must submit an anticipated blast design if blasting operations will be conducted within—

(i) 1,000 feet of any building used as a dwelling, public building, school, church, or community or institutional building outside the permit area; or

(ii) 500 feet of an active or abandoned underground mine.

(2) You must submit the blast design required by paragraph (d)(1) of this section either as part of the permit application or, if approved by the regulatory authority, at a later date before blasting begins. Regulatory authority approval of the blast design is not required, but, as provided in paragraph (d)(5) of this section, the regulatory authority may require changes to the design.

(3) The blast design must contain—

(i) Sketches of the drill patterns, delay periods, and decking.

(ii) The type and amount of explosives to be used.

(iii) Critical dimensions.

(iv) The location and general description of structures to be protected.

(v) A discussion of design factors to be used to protect the public and meet the applicable airblast, flyrock, and ground-vibration standards in § 816.67 of this part.

(4) A certified blaster must prepare and sign the blast design.

(5) The regulatory authority may require changes to the design submitted.

§ 816.62 Use of explosives: Preblasting survey.

(a) At least 30 days before initiation of blasting, you must notify, in writing, all residents or owners of dwellings or other structures located within ½ mile of the permit area how to request a preblasting survey.

(b)(1) A resident or owner of a dwelling or structure within ½ mile of any part of the permit area may request a preblasting survey. This request must be made, in writing, directly to you or to the regulatory authority. If the request is made to the regulatory authority, the regulatory authority will promptly notify you.

(2) You must promptly conduct a preblasting survey of the dwelling or structure and promptly prepare a written report of the survey.

(3) You must conduct an updated survey of any subsequent additions, modifications, or renovations to the dwelling or structure, if requested by the resident or owner.

(c) You must determine the condition of the dwelling or structure and document any preblasting damage and other physical factors that could reasonably be affected by the blasting. Structures such as pipelines, cables, transmission lines, and cisterns, wells, and other water systems warrant special attention; however, the assessment of these structures may be limited to surface conditions and other readily available data.

(d)(1) The person who conducted the survey must sign the written report of the survey.

(2) You must promptly provide copies of the report to the regulatory authority and to the person requesting the survey.

(3) If the person requesting the survey disagrees with the contents or recommendations of the survey, he or she may submit a detailed description of the specific areas of disagreement to both you and the regulatory authority.

(e) You must complete any surveys requested more than 10 days before the planned initiation of blasting before the initiation of blasting.

§ 816.64 Use of explosives: Blasting schedule.

(a) *General requirements.* (1) You must conduct blasting operations at times approved by the regulatory authority and announced in the blasting schedule. The regulatory authority may limit the area covered, the timing, and the sequence of blasting if those limitations are necessary and reasonable to protect public health and safety or welfare.

(2) You must conduct all blasting between sunrise and sunset, unless the regulatory authority approves night-time blasting based upon a showing that the public will be protected from adverse noise and other impacts. The regulatory authority may specify more restrictive time periods for blasting.

(3)(i) You may conduct unscheduled blasts only where public or operator health and safety so require and for emergency blasting actions.

(ii) When you conduct an unscheduled blast, you must use audible signals to notify residents within ½ mile of the blasting site.

(iii) You must document the reason for the unscheduled blast in accordance with § 816.68(c)(16) of this part.

(b) *Blasting schedule publication and distribution.* (1) You must publish the blasting schedule in a newspaper of general circulation in the locality of the blasting site at least 10 days, but not more than 30 days, before beginning a blasting program.

(2) You must distribute copies of the schedule to local governments and public utilities and to each local residence within ½ mile of the proposed blasting site described in the schedule.

(3) You must republish and redistribute the schedule at least every 12 months and revise and republish the schedule at least 10 days, but not more than 30 days, before blasting whenever the area covered by the schedule changes or actual times for blasting significantly differ from the prior announcement.

(c) *Blasting schedule contents.* The blasting schedule must contain, at a minimum, the—

(1) Name, address, and telephone number of the operator;

(2) Identification of the specific areas in which blasting will take place;

(3) Dates and times when explosives are to be detonated;

(4) Methods to be used to control access to the blasting area; and

(5) Type and patterns of audible blast warning and all-clear signals to be used before and after blasting.

§ 816.66 Use of explosives: Blasting signs, warnings, and access control.

(a) *Blasting signs.* Blasting signs must meet the specifications of § 816.11 of this part.

(1) You must place conspicuous signs reading ''Blasting Area'' along the edge of any blasting area that comes within 100 feet of any public road right-of-way and at the point where any other road provides access to the blasting area.

(2) You must place conspicuous signs reading ''Warning! Explosives in Use'' at all entrances to the permit area from public roads or highways. The signs must clearly list and describe the meaning of the audible blast warning and all-clear signals that are in use and explain the marking of blasting areas and charged holes awaiting firing within the permit area.

(b) *Warnings.* You must give blast warning and all-clear signals of different character or pattern that are audible within a range of ½ mile from the point of the blast. You must notify each person within the permit area and each person who resides or regularly works within ½ mile of the permit area of the meaning of the signals in the blasting schedule.

(c) *Access control.* You must control access within the blasting area to prevent presence of livestock or unauthorized persons during blasting and until your authorized representative has reasonably determined that—

(1) No unusual hazards, such as imminent slides or undetonated charges, exist; and

(2) Access to and travel within the blasting area can be safely resumed.

§ 816.67 Use of explosives: Control of adverse effects.

(a) *General requirements.* You must conduct blasting in a manner that prevents—

(1) Injury to persons;

(2) Damage to public or private property outside the permit area;

(3) Adverse impacts on any underground mine; or

(4) Change in the course, channel, or availability of surface water or groundwater outside the permit area.

(b) *Airblast.*—(1) *Limits.* (i) Airblast must not exceed the maximum limits listed below at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area, except as provided in paragraph (e) of this section.

Lower frequency limit of measuring system in Hertz (Hz), plus or minus 3 decibels	Maximum level in decibels (dB)
0.1 Hz or lower—flat response [1]	134 peak.
2 Hz or lower—flat response	133 peak.
6 Hz or lower—flat response	129 peak.
C-weighted—slow response [1]	105 peak dBC.

[1] Only when approved by the regulatory authority.

(ii) If necessary to prevent damage, the regulatory authority must specify lower maximum allowable airblast levels than those of paragraph (b)(1)(i) of this section for use in the vicinity of a specific blasting operation.

(2) *Monitoring.* (i) You must conduct periodic monitoring to ensure compliance with the airblast standards. The regulatory authority may require airblast measurement of any or all blasts and may specify the locations at which measurements are taken.

(ii) The measuring systems must have an upper-end flat-frequency response of at least 200 Hz.

(c) *Flyrock.* Flyrock travelling in the air or along the ground must not be cast from the blasting site—

(1) More than one-half the distance to the nearest dwelling or other occupied structure;

(2) Beyond the area of control required under § 816.66(c) of this part; or

(3) Beyond the permit boundary.

(d) *Ground vibration.*—(1) *General requirements.* (i) In all blasting operations, except as otherwise authorized in paragraph (e) of this section, the maximum ground vibration must not exceed the values approved in the blasting plan required under § 780.15 of this chapter.

(ii) The maximum ground vibration for protected structures listed in paragraph (d)(2)(i) of this section must be established in accordance with either the maximum peak-particle-velocity limits of paragraph (d)(2) of this section, the scaled-distance equation of paragraph (d)(3) of this section, the blasting-level chart of paragraph (d)(4) of this section, or by the regulatory authority under paragraph (d)(5) of this section.

(iii) All structures in the vicinity of the blasting area not listed in paragraph (d)(2)(i) of this section, such as water towers, pipelines and other utilities, tunnels, dams, impoundments, and underground mines, must be protected from damage by establishment of a maximum allowable limit on the ground vibration, submitted by the operator in the blasting plan and approved by the regulatory authority.

(2) *Maximum peak particle velocity.* (i) The maximum ground vibration must not exceed the following limits at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area:

Distance (D), from the blasting site, in feet	Maximum allowable peak particle velocity for ground vibration, in inches/second [1]	Scaled-distance factor to be applied without seismic monitoring (Ds) [2]
0 to 300	1.25	50
301 to 5,000	1.00	55
5,001 and beyond	0.75	65

[1] Ground vibration must be measured as the particle velocity. Particle velocity must be recorded in three mutually perpendicular directions. The maximum allowable peak particle velocity applies to each of the three measurements.

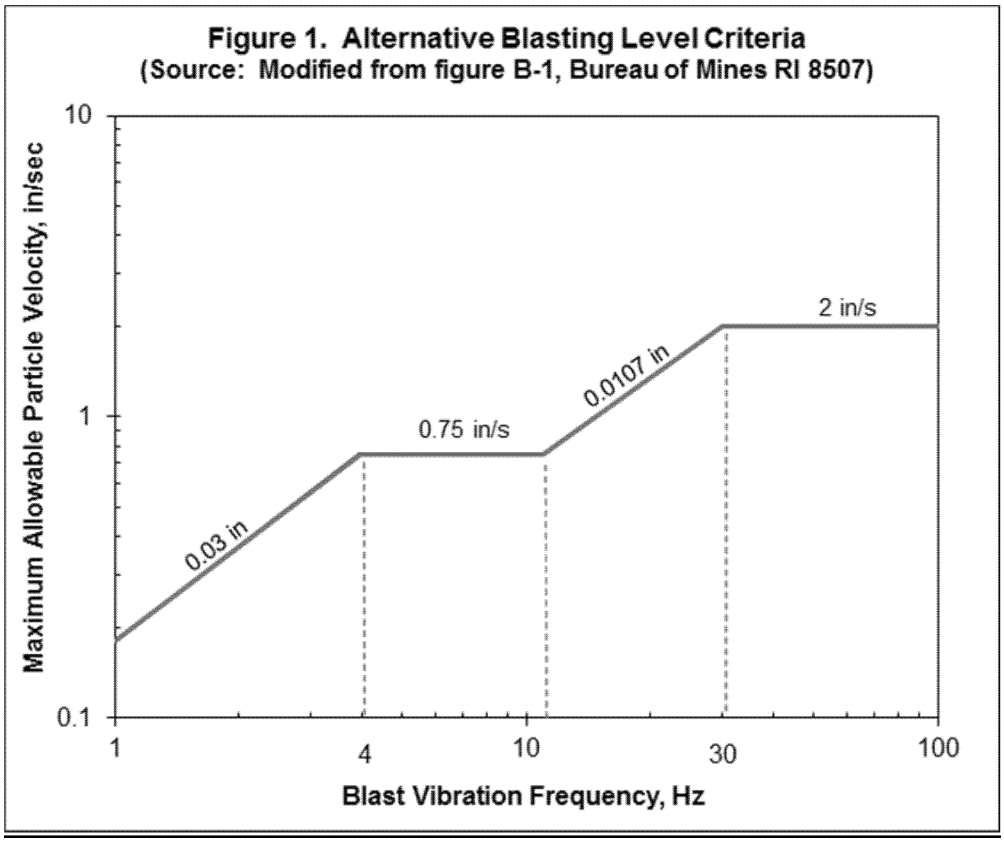
[2] Applicable to the scaled-distance equation of paragraph (d)(3)(i) of this section.

(ii) You must provide a seismographic record for each blast.

(3) *Scaled-distance equation.* (i) You may use the scaled-distance equation, $W=(D/Ds)^2$, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period, without seismic monitoring, where W=the maximum weight of explosives, in pounds; D=the distance, in feet, from the blasting site to the nearest protected structure; and Ds=the scaled-distance factor. The regulatory authority may initially approve the scaled-distance equation using the values for the scaled-distance factor listed in paragraph (d)(2)(i) of this section.

(ii) The regulatory authority may authorize development of a modified scaled-distance factor upon receipt of a written request by the operator, supported by seismographic records of blasting at the minesite. The modified scale-distance factor must be determined such that the particle velocity of the predicted ground vibration will not exceed the prescribed maximum allowable peak particle velocity of paragraph (d)(2)(i) of this section at a 95-percent confidence level.

(4) *Blasting-level chart.* (i) You may use the ground-vibration limits in Figure 1 to determine the maximum allowable ground vibration.



(ii) If the Figure 1 limits are used, you must provide a seismographic record including both particle velocity and vibration-frequency levels for each blast. The regulatory authority must approve the method for the analysis of the predominant frequency contained in the blasting records before application of this alternative blasting criterion.

(5) The regulatory authority must reduce the maximum allowable ground vibration beyond the limits otherwise provided by this section, if determined necessary to provide damage protection.

(6) The regulatory authority may require that you conduct seismic monitoring of any or all blasts or may specify the location at which the measurements are taken and the degree of detail necessary in the measurement.

(e) The maximum airblast and ground-vibration standards of paragraphs (b) and (d) of this section do not apply at the following locations:

(1) At structures owned by the permittee and not leased to another person.

(2) At structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the regulatory authority before blasting.

§ 816.68 Use of explosives: Records of blasting operations

(a) You must retain a record of all blasts for at least 3 years.

(b) Upon request, you must make copies of these records available to the regulatory authority and to the public for inspection.

(c) The records must contain the following data:

(1) Name of the operator conducting the blast.

(2) Location, date, and time of the blast.

(3) Name, signature, and certification number of the blaster conducting the blast.

(4) Identification, direction, and distance, in feet, from the nearest blast hole to the nearest dwelling, public building, school, church, community or institutional building outside the permit area, except those described in § 816.67(e) of this part.

(5) Weather conditions, including those which may cause possible adverse blasting effects.

(6) Type of material blasted.

(7) Sketches of the blast pattern, including number of holes, burden, spacing, decks, and delay pattern.

(8) Diameter and depth of holes.

(9) Types of explosives used.

(10) Total weight of explosives used per hole.

(11) The maximum weight of explosives detonated in an 8-millisecond period.

(12) Initiation system.

(13) Type and length of stemming.

(14) Mats or other protections used.

(15) Seismographic and airblast records, if required, which must include—

(i) Type of instrument, sensitivity, and calibration signal or certification of annual calibration;

(ii) Exact location of instrument and the date, time, and distance from the blast;

(iii) Name of the person and firm taking the reading;

(iv) Name of the person and firm analyzing the seismographic record; and

(v) The vibration and/or airblast level recorded.

(16) Reasons and conditions for each unscheduled blast.

§ 816.71 How must I dispose of excess spoil?

(a) *General requirements.* You, the permittee or operator, must mechanically transport and place excess spoil in designated disposal areas, including approved valley fills and other types of approved fills, within the permit area in a controlled manner in compliance with the requirements of this section. In general, you must place excess spoil in a manner that will—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on groundwater and surface water, including aquatic life, within the permit and adjacent areas.

(2) Ensure mass stability and prevent mass movement during and after construction.

(3) Ensure that the final surface configuration of the fill is suitable for revegetation and the approved postmining land use or uses and is compatible with the natural drainage pattern and surroundings.

(4) Minimize disturbances to, and adverse impacts on, fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

(5) Ensure that the fill will not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in an increase in flooding when compared with the impacts of premining peak flows.

(6) Ensure that the fill will not cause or contribute to a violation of applicable state or tribal groundwater standards or preclude any premining use of groundwater.

(7) Ensure that the fill will not cause or contribute to a violation of applicable state or tribal water quality standards for surface water located downstream of the toe of the fill, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(b) *Stability requirements*—(1) *Static safety factor.* You must design and construct the fill to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(2) *Special requirement for steep-slope conditions.* Where the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated by the regulatory authority based on local conditions, you must construct bench cuts (excavations into stable bedrock) or rock-toe buttresses to ensure fill stability.

(c) *Compliance with permit.* You must construct the fill in accordance with the design and plans approved in the permit in accordance with § 780.35 of this chapter.

(d) *Requirements for handling of organic matter and soil materials.* You must remove all vegetation, other organic matter, and soil materials from the disposal area prior to placement of the excess spoil. You must store, redistribute, or otherwise use those materials in accordance with § 816.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 780.12(e) of this chapter.

(e) *Surface runoff control requirements.* (1) You must direct surface runoff from areas above the fill and runoff from the surface of the fill into stabilized channels designed to—

(i) Meet the requirements of § 816.43 of this part; and

(ii) Safely pass the runoff from the 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(2) You must grade the top surface of a completed fill such that the final slope after settlement will be toward properly designed drainage channels. You may not direct uncontrolled surface runoff over the outslope of the fill.

(f) *Control of water within the footprint of the fill.*—(1) *General requirements.* If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, you must design and construct underdrains and temporary diversions as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

(2) *Temporary diversions.* Temporary diversions must comply with the requirements of § 816.43 of this part.

(3) *Underdrains.* (i) You must construct underdrains that are comprised of hard rock that is resistant to weathering.

(ii) You must design and construct underdrains using current, prudent engineering practices and any design criteria established by the regulatory authority.

(iii) In constructing rock underdrains, you may use only hard rock that is resistant to weathering, such as well-cemented sandstone and massive limestone, and that is not acid-forming or toxic-forming. The underdrain must be free of soil and fine-grained, clastic rocks such as siltstone, shale, mudstone, and claystone. All rock used to construct underdrains must meet the criteria in the following table:

Test	ASTM standard	AASHTO standard	Acceptable results
Los Angeles Abrasion	C 131 or C 535	T 96	Loss of no more than 50 percent of test sample by weight.
Sulfate Soundness	C 88 or C 5240	T 104	Sodium sulfate test: Loss of no more than 12 percent of test sample by weight. Magnesium sulfate test: Loss of no more than 18 percent of test sample by weight.

(iv) The underdrain system must be designed and constructed to carry the maximum anticipated infiltration of water due to precipitation, snowmelt, and water from seeps and springs in the foundation of the disposal area away from the excess spoil fill.

(v) To provide a safety factor against future changes in local surface-water and groundwater hydrology, perforated pipe may be embedded within the rock underdrain to enhance the underdrain capacity to carry water in excess of the anticipated maximum infiltration away from the excess spoil fill. The pipe must be manufactured of materials that are not susceptible to corrosion and must be demonstrated to be suitable for the deep burial conditions commonly associated with excess spoil fill underdrains.

(vi) The underdrain system must be protected from material piping, clogging, and contamination by an adequate filter system designed and constructed using current, prudent engineering practices to ensure the long-term functioning of the underdrain system.

(g) *Placement of excess spoil.* (1) Using mechanized equipment, you must transport and place excess spoil in a controlled manner in horizontal lifts not exceeding 4 feet in thickness; concurrently compacted as necessary to ensure mass stability and to prevent mass movement during and after construction; and graded so that surface and subsurface drainage is compatible with the natural surroundings.

(2) You may not use any excess spoil transport and placement technique that involves end-dumping, wing-dumping, cast-blasting, gravity placement, or casting spoil downslope.

(3) *Acid-forming, toxic-forming, and combustible materials.* (i) You must handle acid-forming and toxic-forming materials in accordance with § 816.38 of this part and in a manner that will minimize adverse effects on plant

growth and the approved postmining land use.

(ii) You must cover combustible materials with noncombustible materials in a manner that will prevent sustained combustion and minimize adverse effects on plant growth and the approved postmining land use.

(h) *Final configuration.* (1) The final configuration of the fill must be suitable for the approved postmining land use, compatible with the natural drainage pattern and the surrounding terrain, and, to the extent practicable, consistent with natural landforms.

(2) You may construct terraces on the outslope of the fill if required for stability, to control erosion, to conserve soil moisture, or to facilitate the approved postmining land use. The grade of the outslope between terrace benches may not be steeper than 2h: 1v (50 percent).

(3)(i) You must configure the top surface of the fill to create a topography that includes ridgelines and valleys with varied hillslope configurations when practicable, compatible with stability and postmining land use considerations, and generally consistent with the topography of the area before any mining.

(ii) The final surface elevation of the fill may exceed the elevation of the surrounding terrain when necessary to minimize placement of excess spoil in perennial and intermittent streams, provided the final configuration complies with the requirements of paragraphs (a)(3) and (h)(1) of this section.

(iii) The geomorphic reclamation requirements of paragraph (h)(3)(i) of this section do not apply in situations in which they would result in burial of a greater length of perennial or intermittent streams than traditional fill design and construction techniques.

(i) *Impoundments and depressions.* No permanent impoundments are allowed on the completed fill. You may construct small depressions if they—

(1) Are needed to retain moisture, minimize erosion, create or enhance wildlife habitat, or assist revegetation;

(2) Are not incompatible with the stability of the fill;

(3) Are consistent with the hydrologic reclamation plan approved in the permit in accordance with § 780.22 of this chapter;

(4) Will not result in elevated levels of parameters of concern in discharges from the fill; and

(5) Are approved by the regulatory authority.

(j) *Surface area stabilization.* You must provide slope protection to minimize surface erosion at the site. You must revegetate all disturbed areas, including diversion channels that are not riprapped or otherwise protected, upon completion of construction.

(k) *Inspections and examinations.* (1) A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, must inspect the fill at least quarterly during construction, with additional complete inspections conducted during critical construction periods. The professional engineer or specialist must be experienced in the construction of earth and rock fills. Critical construction periods include, at a minimum—

(i) Foundation preparation, including the removal of all organic matter and soil materials.

(ii) Placement of underdrains and protective filter systems.

(iii) Installation of final surface drainage systems.

(2) An engineer or specialist meeting the qualifications of paragraph (k)(1) of this section also must—

(i) Conduct daily examinations during placement and compaction of fill materials or, when more than one lift is completed per day, upon completion of each 4-foot lift. As an alternative, the engineer or specialist may conduct examinations on a weekly basis if a mine representative takes photographs on a daily basis to document the lift thickness and elevation with visual reference features. The certified report required by paragraph (k)(3) of this section must include this photographic documentation.

(ii) Maintain a log recording the examinations conducted under paragraph (k)(2)(i) of this section for each 4-foot lift in each fill. The log must include a description of the specific work locations, excess spoil placement methods, compaction adequacy, lift thickness, suitability of fill material, special handling of acid-forming and toxic-forming materials, deviations from the approved permit, and remedial measures taken.

(3)(i) The qualified registered professional engineer to which paragraph (k)(1) of this section refers must provide a certified report to the regulatory authority on a quarterly basis.

(ii) In each report prepared under paragraph (k)(3)(i) of this section, the engineer must certify that the fill has been constructed and maintained as designed and in accordance with the approved plan and this chapter.

(iii) The report prepared under paragraph (k)(3)(i) of this section must identify and discuss any evidence of instability, structural weakness, or other hazardous conditions. If one of more of those conditions exists, you must submit an application for a permit revision that includes appropriate remedial design specifications.

(iv) The report prepared under paragraph (k)(3)(i) of this section must contain—

(A) A review and summary of all complete inspections conducted during the quarter under paragraph (k)(1) of this section.

(B) A review and summary of all examinations conducted during the quarter under paragraph (k)(2) of this section, including the logs maintained under paragraph (k)(2)(ii) of this section.

(C) The photographs taken under paragraph (k)(2)(i) of this section.

(v) Each certified report prepared under paragraph (k)(3) of this section for a quarter in which construction activities include placement of underdrains and protective filter systems must include color photographs taken during and after construction, but before underdrains are covered with excess spoil. If the underdrain system is constructed in phases, each phase must be certified separately. The photographs must be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(4) You must retain a copy of each certified report prepared under paragraph (k)(3) of this section at or near the mine site.

(l) *Coal mine waste.* You may dispose of coal mine waste in excess spoil fills only if approved by the regulatory authority and only if—

(1) You demonstrate, and the regulatory authority finds in writing, that the disposal of coal mine waste in the excess spoil fill will not—

(i) Cause or contribute to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in any National Pollutant Discharge Elimination System permit issued for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart;

(ii) Cause or contribute to a violation of applicable state or tribal water quality standards for groundwater; or

(iii) Result in material damage to the hydrologic balance outside the permit area.

(2) The waste is placed in accordance with §§ 816.81 and 816.83 of this part.

(3) The waste is nontoxic-forming, nonacid-forming, and non-combustible.

(4) The waste is of the proper characteristics to be consistent with the design stability of the fill.

(m) *Underground disposal.* You may dispose of excess spoil in underground mine workings only in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration under § 784.26 of this chapter.

§ 816.72 [Reserved]

§ 816.73 [Reserved]

§ 816.74 What special requirements apply to the disposal of excess spoil on a preexisting bench?

(a) *General requirements.* The regulatory authority may approve the disposal of excess spoil through placement on a preexisting bench on a previously mined area or a bond forfeiture site if—

(1) The proposed permit area includes the portion of the preexisting bench on which the spoil will be placed;

(2) The proposed operation will comply with the applicable requirements of § 816.102 of this part; and

(3) The requirements of this section are met.

(b) *Requirements for removal and disposition of vegetation, other organic matter, and soil materials.* You must remove all vegetation, other organic matter, topsoil, and subsoil from the disposal area prior to placement of the excess spoil and store, redistribute, or otherwise use those materials in accordance with § 816.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 780.12(e) of this chapter.

(c)(1) The fill must be designed and constructed using current, prudent engineering practices.

(2) The design must be certified by a registered professional engineer.

(3) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design must include underdrains and temporary diversions as necessary to control erosion, prevent water infiltration into the fill, and ensure stability. Underdrains must comply with the requirements of § 816.71(f)(3) of this part.

(d)(1) The spoil must be placed on the solid portion of the bench in a controlled manner and concurrently compacted as necessary to attain a long-term static safety factor of 1.3 for all portions of the fill.

(2) Any spoil deposited on any fill portion of the bench must be treated as an excess spoil fill under § 816.71 of this part.

(e) You must grade the spoil placed on the preexisting bench to—

(1) Achieve a stable slope that does not exceed the angle of repose.

(2) Eliminate the preexisting highwall to the maximum extent technically practical, using all reasonably available spoil, as that term is defined in § 701.5 of this chapter.

(3) Minimize erosion and water pollution both on and off the site.

(f) All disturbed areas, including diversion channels that are not riprapped or otherwise protected, must be revegetated upon completion of construction.

(g) You may not construct permanent impoundments on preexisting benches on which excess spoil is placed under this section.

(h) The final configuration of the fill on the preexisting bench must—

(1) Be compatible with natural drainage patterns and the surrounding area.

(2) Support the approved postmining land use.

§ 816.79 What measures must I take to protect underground mines in the vicinity of my surface mine?

No surface mining activities may be conducted closer than 500 feet to any point of either an active or abandoned underground mine, except to the extent that—

(a) The activities result in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public; and

(b) The nature, timing, and sequence of the activities that propose to mine closer than 500 feet to an active underground mine are jointly approved by the regulatory authority, the Mine Safety and Health Administration, and the state agency, if any, responsible for the safety of underground mine workers.

§ 816.81 How must I dispose of coal mine waste?

(a) *General requirements.* If you, the permittee, intend to dispose of coal mine waste in an area other than the mine workings or excavations, you must place the waste in new or existing disposal areas within a permit area in accordance with this section and, as applicable, §§ 816.83 and 816.84 of this part.

(b) *Basic performance standards.* You must haul or convey and place the coal mine waste in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface-water runoff on groundwater and surface water, including aquatic life, within the permit and adjacent areas to the extent possible, using the best technology currently available.

(2) Ensure mass stability and prevent mass movement during and after construction.

(3) Ensure that the final disposal facility is suitable for revegetation, compatible with the natural surroundings, and consistent with the approved postmining land use.

(4) Not create a public hazard.

(5) Prevent combustion.

(6) Ensure that the disposal facility will not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in an increase in flooding when compared with the impacts of premining peak flows.

(7) Ensure that the disposal facility will not cause or contribute to a violation of applicable state or tribal groundwater standards or preclude any premining use of groundwater.

(8) Ensure that the disposal facility will not cause or contribute to a violation of applicable state or tribal water quality standards for surface water located downstream of the toe of the fill, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(9) Ensure that the disposal facility will not discharge acid or toxic mine drainage.

(c) *Coal mine waste from outside the permit area.* You may dispose of coal mine waste materials from activities located outside the permit area within the permit area only if approved by the regulatory authority. Approval must be based upon a showing that disposal will be in accordance with the standards of this section.

(d) *Design and construction requirements.* (1)(i) You must design and construct coal mine waste disposal facilities using current, prudent engineering practices and any design or construction criteria established by the regulatory authority.

(ii) A qualified registered professional engineer, experienced in the design and construction of similar earth and waste structures, must certify the design of the disposal facility. The engineer must specifically certify that any existing and planned underground mine workings in the vicinity of the disposal facility will not adversely impact the stability of the structure.

(iii) You must construct the disposal facility in accordance with the design and plans submitted under § 780.25 of this chapter and approved in the permit.

A qualified registered professional engineer experienced in the design and construction of similar earth and waste structures must certify that the facility has been constructed in accordance with the requirements of this paragraph.

(2) You must design and construct the disposal facility to attain a minimum long-term static safety factor of 1.5. The foundation and abutments must be stable under all conditions of construction.

(e) *Foundation investigations.* You must perform sufficient foundation and abutment investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability and control of underseepage. The analyses of the foundation conditions must take into consideration the effect of any underground mine workings located in the permit and adjacent areas upon the stability of the disposal facility.

(f) *Soil handling requirements.* You must remove all vegetation, other organic matter, and soil materials from the disposal area prior to placement of the coal mine waste. You must store, redistribute, or otherwise use those materials in accordance with § 816.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 780.12(e) of this chapter.

(g) *Emergency procedures.* (1) If any examination or inspection discloses that a potential hazard exists, you must inform the regulatory authority promptly of the finding and of the emergency procedures formulated for public protection and remedial action.

(2) If adequate procedures cannot be formulated or implemented, you must notify the regulatory authority immediately. The regulatory authority then must notify the appropriate agencies that other emergency procedures are required to protect the public.

(h) *Underground disposal.* You may dispose of coal mine waste in underground mine workings only in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration under § 784.26 of this chapter.

§ 816.83 What special requirements apply to coal mine waste refuse piles?

(a) *General requirements.* Refuse piles must meet the applicable requirements of § 816.81 of this part, the additional requirements of this section, and the requirements of §§ 77.214 and 77.215 of this title.

(b) *Surface runoff and drainage control.* (1) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, you must design and construct the refuse pile with diversions and underdrains as necessary to control erosion, prevent water infiltration into the disposal facility, and ensure stability.

(2) You may not direct or divert uncontrolled surface runoff over the outslope of the refuse pile.

(3) You must direct runoff from areas above the refuse pile and runoff from the surface of the refuse pile into stabilized channels designed to meet the requirements of § 816.43 of this part and to safely pass the runoff from the 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(4) Runoff diverted from undisturbed areas need not be commingled with runoff from the surface of the refuse pile.

(5) Underdrains must comply with the requirements of § 816.71(f) of this part.

(c) *Surface area stabilization.* You must provide slope protection to minimize surface erosion at the site. You must revegetate all disturbed areas, including diversion channels that are not riprapped or otherwise protected, upon completion of construction.

(d) *Final configuration and cover.* (1) The final configuration of the refuse pile must be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the refuse pile if required for stability, erosion control, conservation of soil moisture, or facilitation of the approved postmining land use. The grade of the outslope between terrace benches may not be steeper than 2h:1v (50 percent).

(2) No permanent impoundments or depressions are allowed on the completed refuse pile.

(3) Following final grading of the refuse pile, you must cover the coal mine waste with a minimum of 4 feet of the best available, nontoxic, and noncombustible material in a manner that does not impede drainage from the underdrains. The regulatory authority may allow less than 4 feet of cover material based on physical and chemical analyses showing that the revegetation requirements of §§ 816.111 and 816.116 of this part will be met.

(e) *Inspections.* You must comply with the inspection and examination requirements of § 816.71(k) of this part.

§ 816.84 What special requirements apply to coal mine waste impounding structures?

(a) Impounding structures constructed of coal mine waste or intended to impound coal mine waste must meet the requirements of § 816.81 of this part.

(b) You may not use coal mine waste to construct impounding structures unless you demonstrate, and the regulatory authority finds in writing, that the stability of such a structure conforms to the requirements of this part and that the use of coal mine waste will not have a detrimental effect on downstream water quality or the environment as a result of acid drainage or toxic seepage through the impounding structure. You must discuss the stability of the structure and the prevention and potential impact of acid drainage or toxic seepage through the impounding structure in detail in the design plan submitted to the regulatory authority in accordance with § 780.25 of this chapter.

(c)(1) You must design, construct, and maintain each impounding structure constructed of coal mine waste or intended to impound coal mine waste in accordance with paragraphs (a) and (c) of § 816.49 of this part.

(2) You may not retain these structures permanently as part of the approved postmining land use.

(3) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste that meets the criteria of § 77.216(a) of this title must have sufficient spillway capacity to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event or greater event as specified by the regulatory authority.

(d) You must design spillways and outlet works to provide adequate protection against erosion and corrosion. Inlets must be protected against blockage.

(e) You must direct surface runoff from areas above the disposal facility and runoff from the surface of the facility that may cause instability or erosion of the impounding structure into stabilized channels designed and constructed to meet the requirements of § 816.43 of this part and to safely pass the runoff from a 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(f) For an impounding structure constructed of or impounding coal mine waste, you must remove at least 90 percent of the water stored during the design precipitation event within the 10-day period following the design precipitation event.

§ 816.87 What special requirements apply to burning and burned coal mine waste?

(a) You must extinguish coal mine waste fires in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration. The plan must contain, at a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the procedures to be used, are involved in the extinguishing operations.

(b) You may not remove burning or burned coal mine waste from a permitted coal mine waste disposal area without a removal plan approved by the regulatory authority. Consideration must be given to potential hazards to persons working or living in the vicinity of the structure.

§ 816.89 How must I dispose of noncoal mine wastes?

(a)(1) You must place and store noncoal mine wastes including, but not limited to, grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber, and other combustible materials generated during mining activities, in a controlled manner in a designated portion of the permit area.

(2) Placement and storage of noncoal wastes must ensure that leachate and surface runoff do not degrade surface water or groundwater, that fires are prevented, and that the area remains stable and suitable for reclamation and revegetation compatible with the natural surroundings.

(b)(1) Final disposal of noncoal mine wastes must be in a designated disposal site within the permit area or in a state-approved solid waste disposal area.

(2) Disposal sites within the permit area must meet the following requirements:

(i) The site must be designed and constructed to ensure that leachate and drainage from the noncoal mine waste area does not degrade surface water or groundwater.

(ii) Wastes must be routinely compacted and covered to prevent combustion and wind-borne waste.

(iii) When the disposal of noncoal wastes is completed, the site must be covered with a minimum of 2 feet of soil, slopes must be stabilized, and the site must be revegetated in accordance with §§ 816.111 through 816.116 of this part.

(iv) The disposal site must be operated in accordance with all local, state and federal requirements.

(c) At no time may any noncoal mine waste be deposited in a coal mine waste refuse pile or impounding structure, nor may an excavation for a noncoal mine waste disposal site be located within 8 feet of any coal outcrop or coal storage area.

§ 816.95 How must I protect surface areas from wind and water erosion?

(a) You must protect and stabilize all exposed surface areas to effectively control erosion and air pollution attendant to erosion.

(b)(1) You must fill, regrade, or otherwise stabilize rills and gullies that form in areas that have been regraded and upon which soil or soil substitute materials have been redistributed. This requirement applies only to rills and gullies that—

(i) Disrupt the approved postmining land use or reestablishment of the vegetative cover;

(ii) Cause or contribute to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in any National Pollutant Discharge Elimination System permit issued for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart;

(iii) Cause or contribute to a violation of applicable state or tribal water quality standards for groundwater; or

(iv) Result in material damage to the hydrologic balance outside the permit area.

(2) You must reapply soil materials to the filled or regraded rills and gullies when necessary to reestablish a vegetative cover. You must then replant those areas.

§ 816.97 How must I protect and enhance fish, wildlife, and related environmental values?

(a) *General requirements.* You, the permittee, must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and achieve enhancement of those resources where practicable, as described in detail in the fish and wildlife protection and enhancement plan approved in the permit in accordance with § 780.16 of this chapter.

(b) *Requirements related to federal, state, and tribal endangered species laws.*—(1) *Requirements related to the Endangered Species Act of 1973.* (i) You may not conduct any surface mining activity that is in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* Nothing in this chapter authorizes the taking of a species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or the destruction or adverse modification of designated critical habitat unless the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as applicable, authorizes the taking of a threatened or endangered species or the destruction or adverse modification of designated critical habitat under 16 U.S.C. 1536(b)(4) or 1539(a)(1)(B).

(ii) You must promptly report to the regulatory authority the presence of any previously unreported species listed as threatened or endangered, or any previously unreported species proposed for listing as threatened or endangered, under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* within the permit or adjacent areas. This requirement applies regardless of whether the species was listed before or after permit issuance.

(iii)(A) Upon receipt of a notification under paragraph (b)(2)(ii) of this section, the regulatory authority will contact and coordinate with the appropriate state, tribal, and federal fish and wildlife agencies.

(B) The regulatory authority, in coordination with the appropriate state, tribal, and federal fish and wildlife agencies, will identify whether, and under what conditions, you may proceed. When necessary to ensure compliance with the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* the regulatory authority will issue an order under § 774.10(b) of this chapter requiring that you revise the permit.

(iv) You must comply with any species-specific protection measures required by the regulatory authority in coordination with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as applicable.

(2) *Requirements related to state and tribal endangered species laws.* (i) You must promptly report to the regulatory authority any previously unreported state-listed or tribally-listed threatened or endangered species within the permit or adjacent areas whenever you become aware of its presence. This requirement applies regardless of whether the species was listed before or after permit issuance.

(ii)(A) Upon receipt of a notification under paragraph (b)(2)(i) of this section, the regulatory authority will contact and coordinate with the appropriate state or tribal fish and wildlife agencies.

(B) The regulatory authority, in coordination with the appropriate state or tribal fish and wildlife agencies, will

identify whether, and under what conditions, you may proceed. When necessary, the regulatory authority will issue an order under § 774.10(b) of this chapter requiring that you revise the permit.

(c) *Bald and golden eagles.* (1) You may not conduct any surface mining activity in a manner that would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs.

(2) You must promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which you become aware.

(3) Upon notification, the regulatory authority will contact and coordinate with the U.S. Fish and Wildlife Service and, when appropriate, the state or tribal fish and wildlife agency to identify whether, and under what conditions, you may proceed.

(4) Nothing in this chapter authorizes the taking of a bald or golden eagle, its nest, or any of its eggs in violation of the Bald and Golden Eagle Protection Act, 16 U.S.C. 668–668d.

(d) *Miscellaneous protective measures for other species of fish and wildlife.* To the extent possible, using the best technology currently available, you must—

(1) Ensure that electric power transmission lines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors and other avian species with large wingspans.

(2) Locate, construct, operate, and maintain haul and access roads and sedimentation control structures in a manner that avoids or minimizes impacts on important fish and wildlife species or other species protected by state or federal law.

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals, except where the regulatory authority determines that such requirements are unnecessary.

(4) Fence, cover, or use other appropriate methods to exclude wildlife from ponds that contain hazardous concentrations of toxic or toxic-forming materials.

(5) Reclaim and reforest lands that were forested at the time of application and lands that would revert to forest under conditions of natural succession in a manner that enhances recovery of the native forest ecosystem as expeditiously as practicable.

(e) *Wetlands.* (1) To the extent possible, using the best technology currently available, you must avoid disturbances to wetlands and, where practicable, enhance them. If avoidance is not possible, you must restore or replace wetlands that you disturb and, where practicable, enhance them.

(2) Nothing in paragraph (e)(1) of this section authorizes destruction or degradation of wetlands in violation of section 404 of the Clean Water Act, 33 U.S.C. 1344.

(f) *Habitat of unusually high value for fish and wildlife.* To the extent possible, using the best technology currently available, you must avoid disturbances to and, where practicable, enhance riparian and other native vegetation along rivers and streams, lentic vegetation bordering ponds and lakes, and habitat of unusually high value for fish and wildlife, as described in § 779.20(c)(3) of this chapter. If avoidance of these features is not possible, you must restore or replace those features and, where practicable, enhance them.

(g) *Vegetation requirements for fish and wildlife habitat postmining land use.* Where fish and wildlife habitat is a postmining land use, you must select and arrange the plant species to be used for revegetation to maximize the benefits to fish and wildlife. Plant species must be native to the area and must be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their value as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds.

(4) Their ability to sustain natural succession by allowing the establishment and spread of plant species across ecological gradients. You may not use invasive plant species that are known to inhibit natural succession.

(h) *Vegetation requirements for cropland postmining land use.* Where cropland is the postmining land use, and where appropriate for wildlife-management and crop-management practices, you must intersperse the crop fields with trees, hedges, or fence rows to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(i) *Vegetation requirements for forestry postmining land uses.* Where forestry, whether managed or unmanaged, is the postmining land use, you must plant native tree and understory species to the extent that doing so is not inconsistent with the type of forestry to be practiced as part of the postmining land use. In all cases, regardless of the type of forestry to be practiced as part of the postmining land use, you must intersperse plantings of commercial species with plantings of native trees and shrubs of high value to wildlife.

(j) *Vegetation requirements for other postmining land uses.* Where residential, public service, commercial, industrial, or intensive recreational uses are the postmining land use, you must establish—

(1) Greenbelts comprised of non-invasive native plants that provide food or cover for wildlife, unless greenbelts would be inconsistent with the approved postmining land use plan for that site.

(2)(i) A vegetated buffer at least 100 feet wide along each bank of all perennial and intermittent streams within the permit area. The width of the buffer must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark. The buffer must be planted with species native to the area, including species adapted to and suitable for planting in any floodplains or other riparian habitat located within the buffer. The species planted must consist of native tree and understory species if the land was forested at the time of application or if it would revert to forest under conditions of natural succession.

(ii) Paragraph (j)(2)(i) of this section does not apply to situations in which a vegetated buffer comprised of native species would be incompatible with an approved postmining land use that is implemented before final bond release under §§ 800.40 through 800.43 of this chapter.

(k) *Planting arrangement requirements.* You must design and arrange plantings in a manner that optimizes benefits to wildlife to the extent practicable and consistent with the postmining land use.

§ 816.99 What measures must I take to prevent and remediate landslides?

(a) You, the permittee or operator, must provide an undisturbed natural barrier beginning at the elevation of the lowest coal seam to be mined and extending from the outslope for the distance that the regulatory authority determines is needed to assure stability. The barrier must be retained in place to prevent slides.

(b)(1) You must notify the regulatory authority by the fastest available means whenever a landslide occurs that has the potential to adversely affect public property, health, safety, or the environment.

(2) You must comply with any remedial measures that the regulatory authority requires in response to the notification provided in paragraph (b)(1) of this section.

§ 816.100 What are the standards for conducting reclamation contemporaneously with mining?

You must reclaim all land disturbed by surface mining activities as contemporaneously as practicable with the mining operations, except when the mining operations are conducted in accordance with a variance for concurrent surface and underground mining activities under § 785.18 of this chapter. Reclamation activities include, but are not limited to, backfilling, grading, soil replacement, revegetation, and stream restoration.

§ 816.101 [Reserved]

§ 816.102 How must I backfill the mined area and grade and configure the land surface?

(a) You, the permittee or operator, must backfill all mined areas and grade all disturbed areas in compliance with the plan approved in the permit in accordance with § 780.12(d) of this chapter to—

(1) Restore the approximate original contour as the final surface configuration, except in the following situations:

(i) Mountaintop removal mining operations approved under § 785.14 of this chapter.

(ii) Sites for which the regulatory authority has approved a variance under § 785.16 of this chapter.

(iii) Operations to which the thin overburden standards of § 816.104 of this part apply.

(iv) Operations to which the thick overburden standards of § 816.105 of this part apply.

(v) Remining operations on previously mined areas, but only to the extent specified in § 816.106(b) of this part.

(vi) Excess spoil fills constructed in accordance with § 816.71 or § 816.74 of this part.

(vii) Refuse piles constructed in accordance with § 816.83 of this part.

(viii) Permanent impoundments that meet the requirements of paragraph (a)(3)(ii) of this section and § 780.35(b)(4) of this chapter.

(ix) The placement, in accordance with § 780.35(b)(3) of this chapter, of what would otherwise be excess spoil on the mined-out area to heights in excess of the premining elevation when necessary to avoid or minimize construction of excess spoil fills on undisturbed land.

(2) Minimize the creation of uniform slopes and cut-and-fill terraces. The regulatory authority may approve cut-and-fill terraces only if—

(i) They are compatible with the approved postmining land use and are needed to conserve soil moisture, ensure stability, or control erosion on final-graded slopes; or

(ii) Specialized grading, foundation conditions, or roads are required for the approved postmining land use, in which case the final grading may include a terrace of adequate width to ensure the safety, stability, and erosion control necessary to implement the postmining land use.

(3) Eliminate all highwalls, spoil piles, impoundments, and depressions, except in the following situations:

(i) You may construct or retain small depressions if—

(A) They are needed to retain moisture, minimize erosion, create or enhance wildlife habitat, or assist revegetation;

(B) They are consistent with the hydrologic reclamation plan approved in the permit in accordance with § 780.22 of this chapter; and

(C) You demonstrate that they will not result in elevated levels of parameters of concern in discharges from the backfilled and graded area.

(ii) The regulatory authority may approve the retention of permanent impoundments if—

(A) They meet the requirements of §§ 816.49 and 816.55 of this part;

(B) They are suitable for the approved postmining land use;

(C) You demonstrate compliance with the future maintenance provisions of § 800.42(c)(5) of this chapter; and

(D) You have obtained all necessary approvals and authorizations under section 404 of the Clean Water Act, 33 U.S.C. 1344, when the impoundment is located in waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(iii) You may retain highwalls on previously mined areas to the extent provided in § 816.106(b) of this part.

(iv) You may retain modified highwall segments to the extent necessary to replace similar natural landforms removed by the mining operation. The regulatory program must establish the conditions under which these highwall segments may be retained and the modifications that must be made to the highwall to ensure that—

(A) The retained segment resembles similar landforms that existed before any mining and restores the ecological niches that those landforms provided. Nothing in this paragraph authorizes the retention of modified highwall segments in excess of the number, length, and height needed to replace similar landforms that existed before any mining.

(B) The retained segment is stable. Features that result in the creation of talus slopes for wildlife habitat are acceptable if they meet the requirements of paragraph (a)(3)(iv)(A) of this section.

(C) The retained segment does not create an increased safety hazard compared to the features that existed before any mining.

(D) The exposure of water-bearing strata, if any, in the retained segment does not adversely impact the hydrologic balance.

(4) Achieve a postmining slope that does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides.

(5) Minimize erosion and water pollution, both on and off the site.

(6) Support the approved postmining land use.

(b) You must return all spoil to the mined-out area. This requirement does not apply to—

(1) Excess spoil disposed of in accordance with § 816.71 or § 816.74 of this part.

(2) Mountaintop removal mining operations approved under § 785.14 of this chapter.

(3) Spoil placed outside the mined-out area in non-steep slope areas to restore the approximate original contour by blending the spoil into the surrounding terrain, provided that you comply with the following requirements:

(i) You must remove all vegetation and other organic matter from the area outside the mined-out area before spoil placement begins. You may not burn these materials; you must store, redistribute, use, or bury them in the manner specified in § 816.22(f) of this part.

(ii) You must remove, segregate, store, and redistribute topsoil on the area outside the mined-out area in accordance with § 816.22 of this part.

(c) You must compact spoil and waste materials when necessary to ensure stability or to prevent the formation of acid or toxic mine drainage, but, to the extent possible, you must avoid compacting spoil, soil, and other materials placed in what will be the root zone of the species planted under the revegetation plan approved in the permit in accordance with § 780.12(g) of this chapter.

(d)(1) You must cover all exposed coal seams with material that is noncombustible, nonacid-forming, and nontoxic-forming.

(2) You must handle and dispose of all other combustible materials exposed, used, or produced during mining in accordance with § 816.89 of this part in a manner that will prevent sustained combustion, as approved in the permit

in accordance with § 780.12(j) of this chapter.

(3) You must handle all other acid-forming and toxic-forming materials—

(i) In compliance with the plan approved in the permit in accordance with § 780.12(n) of this chapter;

(ii) In compliance with § 816.38 of this part;

(iii) In compliance with the hydrologic reclamation plan approved in the permit in accordance with § 780.22(a) of this chapter; and

(iv) In a manner that will minimize adverse effects on plant growth and the approved postmining land use.

(e) You must dispose of any coal mine waste placed in the mined-out area in accordance with §§ 816.81 and 816.83 of this part, except that a long-term static safety factor of 1.3 will apply instead of the 1.5 factor specified in § 816.81(d)(2) of this part.

(f) You must prepare final-graded surfaces in a manner that minimizes erosion and provides a surface for replacement of soil materials that will minimize slippage.

§ 816.104 What special provisions for backfilling, grading, and surface configuration apply to sites with thin overburden?

(a) *Applicability.* This section applies only where the thickness of all overburden strata multiplied by the swell factor for those strata plus the thickness of any waste materials to be returned to the mined-out area is less than the combined thickness of the overburden and coal seam or seams prior to removing the coal to the extent that there is insufficient material to restore the approximate original contour. Specifically, there is insufficient material to achieve a surface configuration that—

(1) Closely resembles the surface configuration of the mined area prior to any mining; and

(2) Blends into and complements the drainage pattern of the surrounding terrain.

(b) *Performance standards.* Where thin overburden as described in paragraph (a) of this section occurs within the permit area, you must backfill all mined areas and grade all disturbed areas in accordance with the plan approved in the permit under § 780.12(d) of this chapter. At a minimum, you must—

(1) Use all spoil and waste materials available from the entire permit area to attain the lowest practicable grade that does not exceed the angle of repose.

(2) Comply with the requirements of paragraphs (a)(2) through (f) of § 816.102 of this part.

(3) Ensure that the final surface configuration blends into and complements the drainage pattern of the surrounding terrain to the extent possible.

§ 816.105 What special provisions for backfilling, grading, and surface configuration apply to sites with thick overburden?

(a) *Applicability.* This section applies only where the thickness of all overburden strata multiplied by the swell factor for those strata plus the thickness of any waste materials to be returned to the mined-out area exceeds the combined thickness of the overburden strata and the coal seam or seams in place to the extent that there is more material than can be used to restore the approximate original contour. Specifically, the amount of material to be returned to the mined-out area is so large that it is not possible to achieve a surface configuration that closely resembles the surface configuration of the mined land prior to any mining.

(b) *Performance standards.* Where thick overburden as described in paragraph (a) of this section occurs within the permit area, you must backfill all mined areas and grade all disturbed areas in accordance with the plan approved in the permit under § 780.12(d) of this chapter. At a minimum, you must—

(1) Backfill the mined-out area to the approximate original contour and then place the remaining spoil and waste materials on top of the backfilled area to the extent possible, as determined in accordance with the excess spoil minimization requirements of § 780.35(b) of this chapter.

(2) Grade the backfilled area to the lowest practicable grade that is ecologically sound, consistent with the postmining land use, and compatible with the surrounding region. No slope may exceed the angle of repose.

(3) Comply with the requirements of paragraphs (a)(2) through (f) of § 816.102 of this part.

(4) Dispose of any excess spoil in accordance with § 816.71 or § 816.74 of this part.

(5) Ensure that the final surface configuration blends into and complements the drainage pattern of the surrounding terrain to the extent possible.

§ 816.106 What special provisions for backfilling, grading, and surface configuration apply to previously mined areas with a preexisting highwall?

(a) Remining operations on previously mined areas that contain a preexisting highwall must comply with the requirements of §§ 816.102 through 816.107 of this part, except as provided in this section.

(b) The highwall elimination requirements of § 816.102(a) of this part do not apply to remining operations for which you demonstrate in writing, to the regulatory authority's satisfaction, that the volume of all reasonably available spoil is insufficient to completely backfill the reaffected or enlarged highwall. Instead, for those operations, you must eliminate the highwall to the maximum extent technically practical in accordance with the following criteria:

(1) You must use all spoil generated by the remining operation and any other reasonably available spoil to backfill the area. You must include reasonably available spoil in the immediate vicinity of the remining operation within the permit area.

(2) You must grade the backfilled area to a slope that is compatible with the approved postmining land use and that provides adequate drainage and long-term stability.

(3) Any highwall remnant must be stable and not pose a hazard to the public health and safety or to the environment. You must demonstrate, to the satisfaction of the regulatory authority, that the highwall remnant is stable.

(4) You must not disturb spoil placed on the outslope during previous mining operations if disturbance would cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

§ 816.107 What special provisions for backfilling, grading, and surface configuration apply to operations on steep slopes?

(a) Surface mining activities on steep slopes must comply with this section and the requirements of §§ 816.102 through 816.106 of this part, except where—

(1) Mining is conducted on flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominantly flat area; or

(2) Operations are conducted in accordance with part 824 of this chapter.

(b) You may not place the following materials on the downslope:

(1) Spoil.

(2) Waste materials of any type.

(3) Debris, including debris from clearing and grubbing, except for woody materials used to enhance fish and wildlife habitat.

(4) Abandoned or disabled equipment.

(c) You may not disturb land above the highwall unless the regulatory authority finds that disturbance will facilitate compliance with the environmental protection standards of this subchapter and the disturbance is limited to that necessary to facilitate compliance.

(d) You must handle woody materials in accordance with § 816.22(f) of this part.

§ 816.111 How must I revegetate areas disturbed by mining activities?

(a) You, the permittee, must establish a diverse, effective, permanent vegetative cover on regraded areas and on all other disturbed areas except—

(1) Water areas approved as a postmining land use or in support of the postmining land use.

(2) The surfaces of roads approved for retention to support the postmining land use.

(3) Rock piles, water areas, and other non-vegetative features created to restore or enhance wildlife habitat under the fish and wildlife protection and enhancement plan approved in the permit in accordance with § 780.16 of this chapter.

(4) Any other impervious surface, such as a building or a parking lot, approved as part of or in support of the postmining land use. This provision applies only to structures and facilities constructed before expiration of the revegetation responsibility period.

(b) The reestablished vegetative cover must—

(1) Comply with the revegetation plan approved in the permit in accordance with § 780.12(g) of this chapter.

(2) Be consistent with the approved postmining land use and, except as provided in the revegetation plan approved in the permit in accordance with § 780.12(g) of this chapter, the native plant communities described in § 779.19 of this chapter.

(3) Be at least equal in extent of cover to the natural vegetation of the area.

(4) Be capable of stabilizing the soil surface and, in the long term, preventing erosion in excess of what would have occurred naturally had the site not been disturbed.

(5) Not inhibit the establishment of trees and shrubs when the revegetation plan approved in the permit requires the use of woody plants.

(c) Volunteer plants of species that are desirable components of the plant communities described in the permit application under § 779.19 of this chapter and that are not inconsistent with the postmining land use may be considered in determining whether the requirements of §§ 816.111 and 816.116 have been met.

(d) You must stabilize all areas upon which you have redistributed soil or soil substitute materials. You must use one or a combination of the following methods, unless the regulatory authority determines that neither method is necessary to stabilize the surface and control erosion—

(1) Establishing a temporary vegetative cover consisting of noncompetitive and non-invasive species, either native or domesticated or a combination thereof.

(2) Applying a suitable mulch free of weed and noxious plant seeds.

(e) You must plant all disturbed areas with the species needed to establish a permanent vegetative cover during the first normal period for favorable planting conditions after redistribution of the topsoil or other plant-growth medium. The normal period for favorable planting conditions is the generally accepted local planting time for the type of plant materials approved in the permit as part of the revegetation plan under § 780.12(g) of this chapter.

§ 816.113 [Reserved]

§ 816.114 [Reserved]

§ 816.115 How long am I responsible for revegetation after planting?

(a) *General provisions.* (1) The period of extended responsibility for successful revegetation will begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with paragraph (d) of this section.

(2) The initial planting of small areas that are regraded and planted as a result of the removal of sediment control structures and associated structures and facilities, including ancillary roads used to access those structures, need not be considered an augmented seeding necessitating an extended or separate revegetation responsibility period. This paragraph also applies to areas upon which accumulated sediment and materials resulting from removal of sedimentation pond embankments are spread.

(b) *Areas of more than 26.0 inches of average annual precipitation.* In areas of more than 26.0 inches of annual average precipitation, the period of responsibility will continue for a period of not less than—

(1) Five full years, except as provided in paragraph (b)(2) of this section.

(i) The vegetation parameters for grazing land, pasture land, or cropland must equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year.

(ii) On all other areas, the parameters must equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(2) Two full years for lands eligible for remining included in a permit approved under § 785.25 of this chapter. The lands must equal or exceed the applicable ground cover standard during the growing season of the last year of the responsibility period.

(c) *Areas of 26.0 inches or less average annual precipitation.* In areas of 26.0 inches or less average annual precipitation, the period of responsibility will continue for a period of not less than:

(1) Ten full years, except as provided in paragraph (c)(2) of this section.

(i) The vegetation parameters for grazing land, pasture land, or cropland must equal or exceed the approved success standard during the growing season of any two years after year six of the responsibility period.

(ii) On all other areas, the parameters must equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(2) Five full years for lands eligible for remining included in a permit approved under § 785.25 of this chapter. The lands must equal or exceed the applicable ground cover standard during the growing seasons of the last two consecutive years of the responsibility period.

(d) *Normal husbandry practices.* (1) The regulatory authority may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from OSMRE in accordance with § 732.17 of this chapter that the practices are normal husbandry practices, without extending the period of responsibility for revegetation success and bond liability, if those practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success.

(2) Approved practices must be normal husbandry practices within the region for unmined lands having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding, and transplanting specifically necessitated by such actions.

§ 816.116 What requirements apply to standards for determining revegetation success?

(a) The regulatory authority must select standards for revegetation success and statistically valid sampling techniques for measuring revegetation success. The standards and techniques must be made available to the public in written form.

(b) The standards for success applied to a specific permit must reflect the revegetation plan requirements of § 780.12(g) of this chapter. They must be based upon the following data—

(1) The plant community and vegetation information required under § 779.19 of this chapter.

(2) The soil type and productivity information required under § 779.21 of this chapter.

(3) The land use capability and productivity information required under § 779.22 of this chapter.

(4) The postmining land use approved under § 780.24 of this chapter, but only to the extent that the approved postmining land use will be implemented before final bond release under §§ 800.40 through 800.43 of this chapter. Otherwise, the site must be revegetated in a manner that will restore native plant communities and the revegetation success standards for the site must reflect that requirement.

(c) Except for the areas identified in § 816.111(a) of this part, standards for success must include—

(1) Species diversity.

(2) Areal distribution of species.

(3) Ground cover, except for land actually used for cropland after the completion of regrading and redistribution of soil materials.

(4) Production, for land used for cropland, pasture, or grazing land either before permit issuance or after the completion of regrading and redistribution of soil materials.

(5) Stocking, for areas revegetated with woody plants.

(d) The ground cover, production, or stocking of the revegetated area will be considered equal to the approved success standard for those parameters when the measured values are not less than 90 percent of the success standard, using a 90-percent statistical confidence interval (*i.e.,* a one-sided test with a 0.10 alpha error).

(e) For all areas revegetated with woody plants, regardless of the postmining land use, the regulatory authority must specify minimum stocking and planting arrangements on the basis of local and regional conditions and after coordination with and approval by the state agencies responsible for the administration of forestry and wildlife programs. Coordination and approval may occur on either a program-wide basis or a permit-specific basis.

(f)(1) Only those species of trees and shrubs approved in the permit as part of the revegetation plan under § 780.12(g) of this chapter or volunteer trees and shrubs of species that meet the requirements of § 816.111(c) of this part may be counted in determining whether stocking standards have been met.

(2)(i) At the time of final bond release under §§ 800.40 through 800.43 of this chapter, at least 80 percent of the trees and shrubs used to determine success must have been in place for 60 percent of the applicable minimum period of responsibility under § 816.115 of this part.

(ii) Trees and shrubs counted in determining revegetation success must be healthy and have been in place for not less than two growing seasons. Any replanting must be done by means of transplants to allow for proper accounting of plant stocking.

(iii)(A) For purposes of paragraph (f)(2)(ii) of this section, volunteer trees and shrubs of species that meet the requirements of § 816.111(c) of this part may be deemed equivalent to planted specimens two years of age or older.

(B) Suckers on shrubby vegetation can be counted as volunteer plants when it is evident that the shrub community is vigorous and expanding.

(iv) The requirements of paragraphs (f)(2)(i) and (ii) of this section will be deemed met when records of woody vegetation planted show that—

(A) No woody plants were planted during the last two growing seasons of the responsibility period; and

(B) If any replanting of woody plants took place earlier during the responsibility period, the total number planted during the last 60 percent of that period is less than 20 percent of the total number of woody plants required to meet the stocking standard.

(3) Vegetative ground cover on areas planted with trees or shrubs must be of a nature that allows for natural establishment and succession of native plants, including trees and shrubs.

(g) *Special provision for areas that are to be developed within the revegetation responsibility period.* Portions of the permit area that are to be developed for industrial, commercial, or residential use within the revegetation responsibility period need not meet production or stocking standards. For those areas, the vegetative ground cover must not be less than that required to control erosion.

(h) *Special provision for previously mined areas.* Previously mined areas need only meet a vegetative ground cover standard, unless the regulatory authority specifies otherwise. At a minimum, the cover on the revegetated previously mined area must not be less than the ground cover existing before redisturbance and must be adequate to control erosion.

(i) *Special provision for prime farmland.* For prime farmland historically used for cropland, the revegetation success standard provisions of § 823.15 of this chapter apply in lieu of the requirements of paragraphs (b) through (h) of this section.

§ 816.131 What actions must I take when I temporarily cease mining operations?

(a)(1) Each person who temporarily ceases to conduct surface mining activities at a particular site must effectively secure surface facilities in areas in which there are no current operations, but where operations are to be resumed under an approved permit.

(2) Temporary cessation does not relieve a person of his or her obligation to comply with any provisions of the approved permit.

(b)(1) You must submit a notice of intent to temporarily cease operations to the regulatory authority before ceasing mining and reclamation operations for 30 or more days, or as soon as you know that a temporary cessation will extend beyond 30 days.

(2) The notice of temporary cessation must include a statement of the—

(i) Exact number of surface acres disturbed within the permit area prior to temporary cessation;

(ii) Extent and kind of reclamation accomplished before temporary cessation; and

(iii) Backfilling, regrading, revegetation, environmental monitoring, and water treatment activities that will continue during temporary cessation.

§ 816.132 What actions must I take when I permanently cease mining operations?

(a) Persons who permanently cease surface mining activities at a particular site must close, backfill, or otherwise permanently reclaim all disturbed areas in accordance with this chapter and the permit approved by the regulatory authority.

(b) All equipment, structures, underground openings, or other facilities must be removed and the affected land reclaimed, unless the regulatory authority approves retention of those features because they are suitable for the postmining land use or environmental monitoring.

§ 816.133 What provisions concerning postmining land use apply to my operation?

You, the permittee, must restore all disturbed areas in a timely manner to conditions that are capable of supporting—

(a) The uses they were capable of supporting before any mining, as described under § 779.22 of this chapter; or

(b) Higher or better uses approved under § 780.24(b) of this chapter.

§ 816.150 What are the general requirements for haul and access roads?

(a) *Road classification system.* (1) Each road meeting the definition of that term in § 701.5 of this chapter must be classified as either a primary road or an ancillary road.

(2) A primary road is any road that is—

(i) Used for transporting coal or spoil;

(ii) Frequently used for access or other purposes for a period in excess of 6 months; or

(iii) To be retained for an approved postmining land use.

(3) An ancillary road is any road not classified as a primary road.

(b) *Performance standards.* Each road must be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to—

(1) Control or prevent erosion, siltation, and air pollution attendant to erosion, including road dust and dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices.

(2) Control or prevent damage to fish, wildlife, or their habitat and related environmental values.

(3) Control or prevent additional contributions of suspended solids to streamflow or runoff outside the permit area;

(4) Neither cause nor contribute, directly or indirectly, to a violation of applicable state or tribal water quality standards for surface water and groundwater, including, but not limited to, surface water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(5) Refrain from seriously altering the normal flow of water in streambeds or drainage channels.

(6) Prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress.

(7) Use nonacid- and nontoxic-forming substances in road surfacing.

(c) *Design and construction limits and establishment of design criteria.* To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads must include appropriate limits for grade, width, surface materials, surface drainage control, culvert placement, and culvert size, in accordance with current, prudent engineering practices, and any necessary design criteria established by the regulatory authority.

(d) *Location.* (1) No part of any road may be located in the channel of an intermittent or perennial stream unless specifically approved by the regulatory authority in accordance with § 780.28 of this chapter and § 816.57 of this part.

(2) Roads must be located to minimize downstream sedimentation and flooding.

(e) *Maintenance.* (1) A road must be maintained to meet the performance standards of this part and any additional criteria specified by the regulatory authority.

(2) A road damaged by a catastrophic event, such as a flood or earthquake, must be repaired as soon as is practicable after the damage has occurred.

(f) *Reclamation.* A road not to be retained as part of an approved postmining land use must be reclaimed in accordance with the approved reclamation plan as soon as practicable after it is no longer needed for mining and reclamation operations. Reclamation must include—

(1) Closing the road to traffic.

(2) Removing all bridges and culverts unless approved as part of the postmining land use.

(3) Removing or otherwise disposing of road-surfacing materials that are incompatible with the postmining land use and revegetation requirements.

(4) Reshaping the slopes of road cuts and fills as necessary to be compatible with the postmining land use and to complement the natural drainage pattern of the surrounding terrain.

(5) Protecting the natural drainage patterns by installing dikes or cross-drains as necessary to control surface runoff and erosion.

(6) Scarifying or ripping the roadbed, replacing topsoil or substitute material in accordance with § 816.22 of this part, and revegetating disturbed surfaces in accordance with §§ 816.111, 816.115, and 816.116 of this chapter.

§ 816.151 What additional requirements apply to primary roads?

(a) Primary roads must meet the requirements of § 816.150 of this part and the additional requirements of this section.

(b) *Certification.* The construction or reconstruction of primary roads must be certified in a report to the regulatory authority by a qualified registered professional engineer, or in any state that authorizes land surveyors to certify the construction or reconstruction of primary roads, a qualified registered professional land surveyor with experience in the design and construction of roads. The report must indicate that the primary road has been constructed or reconstructed as designed and in accordance with the approved plan.

(c) *Safety factor.* Each primary road embankment must have a minimum static factor of 1.3 or meet the requirements established under § 780.37(c) of this chapter.

(d) *Location.* (1) To minimize erosion, a primary road must be located, insofar as is practicable, on the most stable available surface.

(2) Fords of perennial or intermittent streams are prohibited unless they are specifically approved by the regulatory authority as temporary routes during periods of road construction.

(e) *Drainage control.* In accordance with the approved plan—

(1) Each primary road must be constructed, or reconstructed, and maintained to have adequate drainage control, using structures such as, but not limited to, bridges, ditches, cross drains, and ditch relief drains. The drainage control system must be designed to safely pass the peak runoff from the 10-year, 6-hour precipitation event, or any greater event specified by the regulatory authority.

(2) Drainage pipes and culverts must be installed as designed, and maintained in a free and operating condition and to prevent or control erosion at inlets and outlets.

(3) Drainage ditches must be constructed and maintained to prevent uncontrolled drainage over the road surface and embankment.

(4) Culverts must be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles using the road.

(5) Natural stream channels must not be altered or relocated without the prior approval of the regulatory authority in

accordance with § 780.28 of this chapter and § 816.57 of this part.

(6) Except as provided in paragraph (d)(2) of this section, structures for perennial or intermittent stream channel crossings must be made using bridges, culverts, low-water crossings, or other structures designed, constructed, and maintained using current prudent engineering practices. The regulatory authority must ensure that low-water crossings are designed, constructed, and maintained to prevent erosion of the structure or streambed and additional contributions of suspended solids to streamflow.

(f) *Surfacing.* Primary roads must be surfaced with material approved by the regulatory authority as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road.

§ 816.180 To what extent must I protect utility installations?

You must conduct all surface coal mining operations in a manner that minimizes damage, destruction, or disruption of services provided by oil, gas, and water wells; oil, gas, and coal-slurry pipelines; railroads; electric and telephone lines; and water and sewage lines that pass over, under, or through the permit area, unless otherwise approved by the owner of those facilities and the regulatory authority.

§ 816.181 What requirements apply to support facilities?

(a) You must operate each support facility in accordance with the permit issued for the mine or coal preparation plant to which the facility is incident or from which its operation results.

(b) In addition to the other provisions of this part, you must locate, maintain, and use support facilities in a manner that—

(1) Prevents or controls erosion and siltation, water pollution, and damage to public or private property; and

(2) To the extent possible using the best technology currently available—

(i) Minimizes damage to fish, wildlife, and related environmental values; and

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. Any such contributions may not be in excess of limitations of state or federal law.

§ 816.200 [Reserved]

■ 35. Lift the suspension of § 817.121(c)(4)(i) through (iv), and revise part 817 to read as follows:

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

Sec.

Authority: 30 U.S.C. 1201 *et seq.*

§ 817.1 What does this part do?

This part sets forth the minimum environmental protection performance standards for underground mining activities under the Act.

§ 817.2 What is the objective of this part?

This part is intended to ensure that all underground mining activities are conducted in an environmentally sound manner in accordance with the Act.

§ 817.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.,* the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned it control number 1029–0047. Collection of this information is required under section 516 of SMCRA, which provides that permittees conducting underground coal mining operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that underground mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending to conduct such operations must respond to obtain a benefit. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Send comments regarding burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 203–SIB, 1951 Constitution Avenue NW., Washington, DC 20240.

§ 817.11 What signs and markers must I post?

(a) *General specifications.* Signs and markers required under this part must—

(1) Be posted and maintained by the person who conducts the underground mining activities;

(2) Be of a uniform design throughout the operation;

(3) Be easily seen and read;

(4) Be made of durable material; and

(5) Conform to local ordinances and codes.

(b) *Duration of maintenance.* You must maintain signs and markers during the conduct of all activities to which they pertain.

(c) *Mine and permit identification signs.* (1) You must display identification signs at each point of access from public roads to areas of surface operations and facilities on permit areas for underground mining activities.

(2) The signs must show the name, business address, and telephone number of the person who conducts the underground mining activities and the identification number of the current SMCRA permit authorizing underground mining activities.

(3) You must retain and maintain the signs until the release of all bonds for the permit area.

(d) *Perimeter markers.* You must clearly mark the perimeter of all areas to be disturbed by surface operations or facilities before beginning mining activities on the surface of land within the permit area.

(e) *Stream buffer zone markers.* You must clearly mark the boundaries of any buffer to be maintained between surface activities and a perennial or intermittent stream in accordance with §§ 784.28 and 817.57 of this chapter to avoid disturbance by surface operations and facilities.

(f) *Topsoil markers.* You must clearly mark stockpiles of topsoil, subsoil, or other plant growth media segregated and stored as required in the permit in accordance with § 817.22 of this part.

§ 817.13 What special requirements apply to drilled holes, wells, and exposed underground openings?

(a) Except as provided in paragraph (f) of this section, you must case, line, otherwise manage each exploration hole, drilled hole, borehole, shaft, well, or other exposed underground opening in a manner approved by the regulatory authority to—

(1) Prevent acid or other toxic drainage from entering groundwater and surface water.

(2) Minimize disturbance to the prevailing hydrologic balance.

(3) Ensure the safety of people, livestock, fish and wildlife, and machinery in the permit area and the adjacent area.

(b) You must prevent access to each temporarily inactive mine entry by constructing fences and barricades or other covering devices and posting signs that identify the hazardous nature of the opening. You must periodically inspect and maintain these fences and barricades in good operating condition.

(c) You must temporarily seal each exploration hole, drilled hole, borehole, shaft, well, or other exposed underground opening that the approved permit identifies for use to monitor groundwater or to return underground development waste, coal processing waste, or water to underground workings until you are ready to actually use the hole or opening for that purpose.

(d) You may retain a drilled hole or groundwater monitoring well for use as a water well under the conditions established in § 817.39 of this part.

(e) Except as provided in paragraph (d) of this section, you must permanently close each exploration hole, drilled hole, borehole, well, or underground opening that mining activities uncover or expose within the permit area, unless the regulatory authority—

(1) Approves use of the hole, well, or opening for water monitoring purposes; or

(2) Authorizes other management of the hole or well.

(f)(1) Except as provided in paragraph (d) of this section, you must cap, seal, backfill, or otherwise properly manage each shaft, drift, adit, tunnel, exploratory hole, entryway or other opening to the surface when no longer needed for monitoring or any other use that the regulatory authority approves after finding that the use would not adversely affect the environment or public health and safety.

(2) Permanent closure measures taken under paragraph (f)(1) of this section must be—

(i) Consistent with § 75.1771 of this title;

(ii) Designed to prevent access to the mine workings by people, livestock, fish and wildlife, and machinery; and

(iii) Designed to keep acid or toxic mine drainage from entering groundwater or surface water.

(g) The requirements of this section do not apply to holes drilled and used for blasting as part of surface operations.

§ 817.14 [Reserved]

§ 817.15 [Reserved]

§ 817.22 How must I handle topsoil, subsoil, and other plant growth media?

(a) *Removal and salvage.* (1)(i) You, the permittee, must remove and salvage all topsoil and other soil materials identified for salvage and use as postmining plant growth media in the soil handling plan approved in the permit under § 784.12(e) of this chapter.

(ii) The soil handling plan approved in the permit under § 784.12(e) of this chapter will specify which soil horizons and underlying strata, or portions thereof, you must separately remove and salvage. The plan also will specify whether some or all of those soil horizons and soil substitute materials may or must be blended to achieve an improved plant growth medium.

(iii) Except as provided in the soil handling plan approved in the permit under § 784.12(e) of this chapter, you must complete removal and salvage of topsoil, subsoil, and organic matter in advance of any mining-related surface disturbance other than the minor disturbances identified in paragraph (a)(2) of this section.

(2) Unless otherwise specified by the regulatory authority, you need not remove and salvage topsoil and other soil materials for minor disturbances that—

(i) Occur at the site of small structures, such as power poles, signs, monitoring wells, or fence lines; or

(ii) Will not destroy the existing vegetation and will not cause erosion.

(b) *Handling and storage.* (1) You must segregate and separately handle the materials removed under paragraph (a) of this section to the extent required in the soil handling plan approved in the permit pursuant to § 784.12(e). You must redistribute those materials promptly on regraded areas or stockpile them when prompt redistribution is impractical.

(2) Stockpiled materials must—

(i) Be selectively placed on a stable site within the permit area;

(ii) Be protected from contaminants and unnecessary compaction that would interfere with revegetation;

(iii) Be protected from wind and water erosion through prompt establishment and maintenance of an effective, quick-growing, non-invasive vegetative cover or through other measures approved by the regulatory authority; and

(iv) Not be moved until required for redistribution unless approved by the regulatory authority.

(3) When stockpiling of organic matter and soil materials removed under paragraphs (a) and (f) of this section would be detrimental to the quality or quantity of those materials, you may temporarily redistribute those soil materials on an approved site within the permit area to enhance the current use of that site until the materials are needed for later reclamation, provided that—

(i) Temporary redistribution will not permanently diminish the capability of the topsoil of the host site; and

(ii) The redistributed material will be preserved in a condition more suitable for redistribution than if it were stockpiled.

(c) *Soil substitutes and supplements.* When the soil handling plan approved in the permit in accordance with § 784.12(e) of this chapter provides for the use of substitutes for or supplements to the existing topsoil or subsoil, you must salvage, store, and redistribute the overburden materials selected and approved for that purpose in a manner consistent with paragraphs (a), (b), and (e) of this section.

(d) *Site preparation.* If necessary to reduce potential slippage of the redistributed material or to promote root penetration, you must rip, chisel-plow, deep-till, or otherwise mechanically treat backfilled and graded areas either before or after redistribution of soil materials, whichever time is agronomically appropriate.

(e) *Redistribution.* (1) You must redistribute the materials removed, salvaged, and, if necessary, stored under paragraphs (a) through (c) of this section in a manner that—

(i) Complies with the soil handling plan developed under § 784.12(e) of this chapter and approved as part of the permit.

(ii) Is consistent with the approved postmining land use, the final surface configuration, and surface water drainage systems.

(iii) Minimizes compaction of the topsoil and soil materials in the root zone to the extent possible and alleviates any excess compaction that may occur. You must limit your use of measures that result in increased compaction to those situations in which added compaction is necessary to ensure stability.

(iv) Protects the materials from wind and water erosion before and after seeding and planting to the extent necessary to ensure establishment of a successful vegetative cover and to avoid causing or contributing to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in any National Pollutant Discharge Elimination System permit issued for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart.

(v) Achieves an approximately uniform, stable thickness across the regraded area. The thickness may vary when consistent with the approved postmining land use, the final surface configuration, surface water drainage systems, and the requirement in § 817.133 of this part for restoration of all disturbed areas to conditions that are capable of supporting the uses they were capable of supporting before any mining or higher or better uses approved under § 784.24(b) of this chapter. The thickness also may vary when variations are necessary or desirable to achieve specific revegetation goals and ecological diversity, as set forth in the revegetation plan developed under § 784.12(g) of this chapter and approved as part of the permit.

(2) You must use a statistically valid sampling technique to document that soil materials have been redistributed in the locations and depths required by the soil handling plan developed under § 784.12(e) of this chapter and approved as part of the permit.

(3) The regulatory authority may choose not to require the redistribution of topsoil on the embankments of permanent impoundments or on the embankments of roads to be retained as part of the postmining land use if it determines that—

(i) Placement of topsoil on those embankments is inconsistent with the requirement to use the best technology currently available to prevent sedimentation, and

(ii) The embankments will be otherwise stabilized.

(f) *Organic matter.* (1)(i) You must salvage duff, other organic litter, and vegetative materials such as tree tops and branches, small logs, and root balls. When practicable and consistent with the approved postmining land use, you may salvage organic matter and topsoil in a single operation that blends those materials.

(ii) Paragraph (f)(1)(i) of this section does not apply to organic matter from areas identified under § 783.19(b) of this chapter as containing significant populations of invasive or noxious non-native species. You must bury organic matter from those areas in the backfill at a sufficient depth to prevent regeneration or proliferation of undesirable species.

(2)(i) Except as otherwise provided in paragraphs (f)(2)(ii) and (iii) and (3) of this section, you must redistribute the organic matter salvaged under paragraph (f)(1) of this section across the regraded surface or incorporate it into the soil to control erosion, promote growth of vegetation, serve as a source of native plant seeds and soil inoculants to speed restoration of the soil's ecological community, and increase the moisture retention capability of the soil.

(ii) You may use vegetative debris to construct stream improvement or fish and wildlife habitat enhancement features consistent with the approved postmining land use.

(iii) You may adjust the timing and pattern of redistribution of large woody debris to accommodate the use of mechanized tree-planting equipment on sites with a forestry postmining land use.

(3)(i) The redistribution requirements of paragraph (f)(2)(i) of this section do not apply to those portions of the permit area—

(A) Upon which row crops will be planted as part of the postmining land use before final bond release under §§ 800.40 through 800.43 of this chapter;

(B) That will be intensively managed for hay production as part of the postmining land use before final bond release under §§ 800.40 through 800.43 of this chapter; or

(C) Upon which structures, roads, other impervious surfaces, or water impoundments have been or will be constructed as part of the postmining land use before final bond release under §§ 800.40 through 800.43 of this chapter.

(ii) When the circumstances described in paragraph (f)(3)(i) of this section apply, you must make reasonable efforts to redistribute the salvaged organic matter on other portions of the permit area or use woody debris to construct stream improvement or fish and wildlife habitat enhancement features consistent with the approved postmining land use. If you demonstrate, and the regulatory authority finds, that it is not reasonably possible to use all available organic matter for these purposes, you may bury it in the backfill.

(4)(i) You may not burn organic matter.

(ii) You may bury organic matter in the backfill only as provided in paragraphs (f)(1)(ii) and (3)(ii) of this section.

§ 817.34 How must I protect the hydrologic balance?

(a) You, the permittee, must conduct all underground mining and reclamation activities in a manner that will—

(1) Minimize disturbance of the hydrologic balance within the permit and adjacent areas.

(2) Prevent material damage to the hydrologic balance outside the permit area. Material damage resulting from subsidence may not constitute material damage to the hydrologic balance outside the permit area if that damage is repaired or corrected under § 817.40 or § 817.121(c) of this part.

(3) Protect streams in accordance with §§ 784.28 and 817.57 of this chapter.

(4) Assure the replacement of water supplies to the extent required by § 817.40 of this part.

(5) Protect existing water rights under state law.

(6) Support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part.

(7) Comply with the hydrologic reclamation plan as submitted under § 784.22 of this chapter and approved in the permit.

(8) Protect groundwater quality by using best management practices to handle earth materials and runoff in a manner that avoids the formation of acid or toxic mine drainage and by managing excavations and other disturbances to prevent or control groundwater degradation. The regulatory authority will determine the meaning of the term ''best management practices'' on a site-specific basis. At a minimum, the term includes equipment, devices, systems, methods, and techniques that the Director determines to be best management practices.

(9) Protect surface-water quality by using best management practices, as described in paragraph (a)(8) of this section, to handle earth materials, groundwater discharges, and runoff in a manner that—

(i) Prevents postmining discharges of acid or toxic mine drainage.

(ii) Prevents additional contribution of suspended solids to streamflow or runoff outside the permit area to the extent possible, using the best technology currently available.

(iii) Otherwise prevents water pollution.

(10) Protect surface-water quality and flow rates by handling earth materials and runoff in accordance with the steps outlined in the hydrologic reclamation plan and the surface-water runoff control plan approved in the permit in accordance with §§ 784.22 and 780.29 of this chapter, respectively.

(b)(1) To the maximum extent practicable, you must use mining and reclamation practices that minimize water pollution, changes in flow, and adverse impacts on stream biota rather than relying upon water treatment to minimize those impacts.

(2) You must install, use, and maintain any necessary water-treatment facilities or water-quality controls if drainage control, materials handling, stabilization and revegetation of disturbed areas, diversion of runoff, mulching, and other reclamation and remedial practices are not adequate to meet the requirements of this section and § 817.42 of this part.

(c) The regulatory authority may require that you take preventive, remedial, or monitoring measures in addition to those set forth in this part to prevent material damage to the hydrologic balance outside the permit area.

(d)(1) You must examine the runoff-control structures identified under § 784.29 of this chapter within 72 hours of cessation of each occurrence of the following precipitation events:

(i) In areas with an average annual precipitation of more than 26.0 inches, an event of a size equal to or greater than that of a storm with a 2-year recurrence interval. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine peak flow for a storm with that recurrence interval.

(ii) In areas with an average annual precipitation of 26.0 inches or less, a significant event of a size specified by the regulatory authority.

(2)(i) You must prepare a report, which must be certified by a registered professional engineer, and submit the report to the regulatory authority within 30 days of cessation of the applicable precipitation event under paragraph (d)(1) of this section. The report must address the performance of the runoff-control structures, identify and describe any material damage to the hydrologic balance outside the permit area that occurred, and identify and describe the remedial measures taken in response to that damage.

(ii) The report prepared under paragraph (d)(2)(i) of this section may include all precipitation events that occur within 30 days of cessation of the applicable precipitation event under paragraph (d)(1) of this section.

§ 817.35 How must I monitor groundwater?

(a)(1)(i) You, the permittee, must monitor groundwater in the manner specified in the groundwater monitoring plan approved in the permit in accordance with § 784.23(a) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter when conducting monitoring under this section.

(2) At a minimum, you must conduct monitoring through mining, reclamation, and the revegetation responsibility period under § 817.115 of this part for the monitored area. Monitoring must continue beyond that minimum for any additional time needed for monitoring results to demonstrate that the criteria of § 817.35(d)(1) and (2) of this section have been met, as determined by the regulatory authority.

(b)(1) You must submit groundwater monitoring data to the regulatory authority every 3 months, or more frequently if prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(c) When the analysis of any sample indicates noncompliance with the terms and conditions of the permit, you must promptly notify the regulatory authority, take any applicable actions required under § 773.17(e) of this chapter, and implement any applicable

remedial measures required by the hydrologic reclamation plan approved in the permit in accordance with § 784.22 of this chapter.

(d) You may use the permit revision procedures of § 774.13 of this chapter to request that the regulatory authority modify the groundwater monitoring requirements, including the parameters covered and the sampling frequency. The regulatory authority may approve your request if you demonstrate, using the monitoring data obtained under this section, that—

(1) Future adverse changes in groundwater quantity or quality are unlikely to occur.

(2) The operation has—

(i) Minimized disturbance to the hydrologic balance in the permit and adjacent areas.

(ii) Prevented material damage to the hydrologic balance outside the permit area.

(iii) Preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas for which baseline biological condition data was collected under § 784.19(c)(6)(vi) of this chapter when groundwater from the permit area provides all or part of the base flow of those streams.

(iv) Maintained or restored the availability and quality of groundwater to the extent necessary to support the approved postmining land uses within the permit area.

(v) Protected or replaced the water rights of other users.

(e) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, to detect hydrologic changes, or to meet other requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

(f) You must install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring groundwater, consistent with §§ 817.13 and 817.39 of this part.

§ 817.36 How must I monitor surface water?

(a)(1)(i) You, the permittee, must monitor surface water in the manner specified in the surface-water monitoring plan approved in the permit in accordance with § 784.23(b) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until the regulatory authority releases the entire bond amount for the monitored area under §§ 800.40 through 800.43 of this chapter.

(b)(1) You must submit surface-water monitoring data to the regulatory authority every 3 months, or more frequently when prescribed by the regulatory authority.

(2) Monitoring reports must include analytical results from each sample taken during the reporting period.

(3) The reporting requirements of paragraph (b) of this section do not exempt you from meeting any National Pollutant Discharge Elimination System (NPDES) reporting requirements.

(c) When the analysis of any sample indicates noncompliance with the terms and conditions of the permit, you must promptly notify the regulatory authority, take any applicable actions required under § 773.17(e) of this chapter, and implement any applicable remedial measures required by the hydrologic reclamation plan approved in the permit in accordance with § 784.22 of this chapter.

(d) You may use the permit revision procedures of § 774.13 of this chapter to request that the regulatory authority modify the surface-water monitoring requirements (except those required by the NPDES permitting authority), including the parameters covered and the sampling frequency. The regulatory authority may approve your request if you demonstrate, using the monitoring data obtained under this section, that—

(1) Future adverse changes in surface-water quantity or quality are unlikely to occur.

(2) The operation has—

(i) Minimized disturbance to the hydrologic balance in the permit and adjacent areas.

(ii) Prevented material damage to the hydrologic balance outside the permit area.

(iii) Preserved or restored the biological condition of perennial and intermittent streams within the permit and adjacent areas for which baseline biological condition data was collected under § 784.19(c)(6)(vi) of this chapter.

(iv) Maintained or restored the availability and quality of surface water to the extent necessary to support the approved postmining land uses within the permit area.

(v) Not precluded attainment of any designated use of surface water under section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(vi) Protected or replaced the water rights of other users.

(e) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to protect the hydrologic balance, to detect hydrologic changes, or to meet other requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

(f) You must install, maintain, operate, and, when no longer needed, remove all equipment, structures, and other devices used in conjunction with monitoring surface water.

§ 817.37 How must I monitor the biological condition of streams?

(a)(1)(i) You must monitor the biological condition of perennial and intermittent streams in the manner specified in the plan approved in the permit in accordance with § 784.23(c) of this chapter.

(ii) You must adhere to the data collection, analysis, and reporting requirements of paragraphs (a) and (b) of § 777.13 of this chapter and use a bioassessment protocol that complies with § 784.19(c)(6)(vii) of this chapter when conducting monitoring under this section.

(2) Monitoring must continue through mining and during reclamation until the regulatory authority releases the entire bond amount for the monitored area under §§ 800.40 through 800.43 of this chapter.

(b) You must submit biological condition monitoring data to the regulatory authority on an annual basis, or more frequently if prescribed by the regulatory authority.

(d) Whenever information available to the regulatory authority indicates that additional monitoring is necessary to meet the requirements of the regulatory program, the regulatory authority must issue an order under § 774.10(b) of this chapter requiring that you revise your permit to include the necessary additional monitoring.

§ 817.38 How must I handle acid-forming and toxic-forming materials?

(a) You, the permittee, must use the best technology currently available to handle acid-forming and toxic-forming materials and underground development waste in a manner that will avoid the creation of acid or toxic mine drainage into surface water and groundwater. At a minimum, you must comply with the plan approved in the permit in accordance with § 784.12(n) of this chapter and adhere to disposal,

treatment, and storage practices that are consistent with other material handling and disposal provisions of this chapter.

(b) You may temporarily store acid-forming and toxic-forming materials only if the regulatory authority specifically approves temporary storage as necessary and finds in writing in the permit that the proposed storage method will protect surface water and groundwater by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water into aquifers. The regulatory authority must specify a maximum time for temporary storage, which may not exceed the period until permanent disposal first becomes feasible. In addition, storage must not result in any risk of water pollution, adverse impacts to the biology of perennial or intermittent streams, or other environmental damage.

§ 817.39 What must I do with exploratory or monitoring wells when I no longer need them?

(a) Except as provided in paragraph (b) of this section, you, the permittee, must permanently seal exploratory or monitoring wells in a safe and environmentally sound manner in accordance with § 817.13 of this part before the regulatory authority may approve full release of the bond posted for the land on which the wells are located under §§ 800.40 through 800.43 of this chapter.

(b) With the prior approval of the regulatory authority, you may transfer wells to another party for further use. The conditions of the transfer must comply with state and local laws. You will remain responsible for the proper management of the wells until full release of the bond posted for the land on which the wells are located under §§ 800.40 through 800.43 of this chapter.

§ 817.40 What responsibility do I have to replace water supplies?

(a) *Replacement of adversely-impacted water supplies.* (1) You, the permittee, must promptly replace any drinking, domestic or residential water supply that is contaminated, diminished or interrupted as a result of underground mining activities that you conducted after October 24, 1992, if the affected well or spring was in existence before the date the regulatory authority received the permit application for the activities causing the loss, contamination or interruption.

(2) The replacement supply must be equivalent to the quantity and quality of the premining supply.

(3) Replacement includes provision of an equivalent water supply delivery system and payment of operation and maintenance expenses in excess of customary and reasonable delivery costs for the premining water supply. If you and the water supply owner agree, your obligation to pay operation and maintenance costs may be satisfied by a one-time payment in an amount that covers the present worth of the increased annual operation and maintenance costs for a period upon which you and the water supply owner agree.

(4) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, you may satisfy the replacement requirements by demonstrating that a suitable alternative water source is available and could feasibly be developed, provided you obtain written concurrence from the owner of the affected water supply.

(b) *Measures to address anticipated adverse impacts to protected water supplies.* For anticipated loss of or damage to a protected water supply, you must adhere to the requirements set forth in the permit in accordance with § 784.22(b) of this chapter.

(c) *Measures to address unanticipated adverse impacts to protected water supplies.* For unanticipated loss of or damage to a protected water supply, you must—

(1) Provide an emergency temporary water supply within 24 hours of notification of the loss. The temporary supply must be adequate in quantity and quality to meet normal household needs.

(2) Develop and submit a plan for a permanent replacement supply to the regulatory authority within 30 days of receiving notice that an unanticipated loss of or damage to a protected water supply has occurred.

(3) Provide a permanent replacement water supply within 2 years of the date of receiving notice of an unanticipated loss of or damage to a protected water supply. The regulatory authority may grant an extension if you have made a good-faith effort to meet this deadline, but have been unable to do so for reasons beyond your control.

(d) *Basis for determination of adverse impact.* The regulatory authority must use the baseline hydrologic and geologic information required under § 784.19 of this chapter and all other available information to determine whether and to what extent the mining operation adversely impacted the damaged water supply.

§ 817.41 Under what conditions may I discharge water and other materials into an underground mine?

(a) You may not discharge any water or other materials from your operation into an underground mine unless the regulatory authority specifically approves the discharge in writing, based upon a demonstration that—

(1) The discharge will be made in a manner that—

(i) Minimizes disturbances to the hydrologic balance within the permit area;

(ii) Prevents material damage to the hydrologic balance outside the permit area, including the hydrologic balance of the area in which the underground mine receiving the discharge is located;

(iii) Does not adversely impact the biology of perennial or intermittent streams; and

(iv) Otherwise eliminates public hazards resulting from surface mining activities.

(2) The discharge will not cause or contribute to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in any National Pollutant Discharge Elimination System permit issued for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart.

(3)(i) The discharge will be at a known rate and of a quality that will meet the effluent limitations for pH and total suspended solids in 40 CFR part 434.

(ii) The regulatory authority may approve discharges of water that exceed the effluent limitations for pH and total suspended solids in 40 CFR part 434 if the available evidence indicates that there is no direct hydrologic connection between the underground mine and other waters and that those exceedances will not be inconsistent with paragraph (a)(1) of this section.

(4) The discharge will not cause or contribute to a violation of applicable state or tribal water quality standards for groundwater.

(5) The Mine Safety and Health Administration has approved the discharge.

(6) You have obtained written permission from the owner of the mine into which the discharge is to be made and you have provided a copy of that authorization to the regulatory authority.

(b) Discharges are limited to the following materials:

(1) Water.
(2) Coal processing waste.
(3) Fly ash from a coal-fired facility.
(4) Sludge from an acid-mine-drainage treatment facility.
(5) Flue-gas desulfurization sludge.
(6) Inert materials used for stabilizing underground mines.
(7) Underground mine development waste.

§ 817.42 What Clean Water Act requirements apply to discharges from my operation?

(a) Nothing in this section, nor any action taken pursuant to this section, supersedes or modifies—
(1) The authority or jurisdiction of federal, state, or tribal agencies responsible for administration, implementation, and enforcement of the Clean Water Act, 33 U.S.C. 1251 *et seq.;* or
(2) The decisions that those agencies make under the authority of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* including decisions on whether a particular set of facts constitutes a violation of the Clean Water Act.
(b) Discharges of water from underground mining activities and from areas disturbed by underground mining activities must—
(1) Be made in compliance with all applicable water quality laws and regulations, including the effluent limitations established in the National Pollutant Discharge Elimination System permit for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart. The regulatory authority must notify the appropriate Clean Water Act authority whenever it takes action to enforce a permit condition required by § 773.17(i) of this chapter with respect to an effluent limitation in a National Pollutant Discharge Elimination System permit. The regulatory authority must initiate coordination with the Clean Water Act authority before taking enforcement action if coordination is needed to determine whether a violation of the National Pollutant Discharge Elimination System permit exists.
(2) Not cause or contribute to a violation of applicable water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or other applicable state or tribal water quality standards.
(c) Discharges of overburden, coal mine waste, and other materials into waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* must be made in compliance with section 404 of the Clean Water Act, 33 U.S.C. 1344, and its implementing regulations.
(d) The regulatory authority will coordinate an investigation with the appropriate Clean Water Act authority whenever information available to the regulatory authority indicates that mining activities may be causing or contributing to a violation of the water quality standards to which paragraph (b)(2) of this section refers, or to a violation of section 404 of the Clean Water Act, 33 U.S.C. 1344, and its implementing regulations. If, after coordination with the appropriate Clean Water Act authority, it is determined that mining activities are causing or contributing to a Clean Water Act violation, the regulatory authority must, in addition to any action taken by the appropriate Clean Water Act authority, independently take enforcement or other appropriate action to correct the cause of the violation.
(e) You must construct water treatment facilities for discharges from the operation as soon as the need for those facilities becomes evident.
(f)(1) You must remove precipitates and otherwise maintain all water treatment facilities requiring the use of settling ponds or lagoons as necessary to maintain the functionality of those facilities.
(2) You must dispose of all precipitates removed from facilities under paragraph (f)(1) of this section either in an approved solid waste landfill or within the permit area in accordance with a plan approved by the regulatory authority.
(g) You must operate and maintain water treatment facilities until the regulatory authority authorizes removal based upon monitoring data demonstrating that influent to the facilities meets all applicable effluent limitations without treatment and that discharges would not cause or contribute to a violation of applicable water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), or other applicable state or tribal water quality standards if left untreated.

§ 817.43 How must I construct and maintain diversions?

(a) *Classification.* The term *diversion* applies to the following categories of channels that convey surface water flow:
(1) *Diversion Ditches.* Diversion ditches are channels constructed to convey surface water runoff or other flows from areas not disturbed by mining activities away from or around disturbed areas. Diversion ditches may be temporary or permanent.
(i) You must remove a temporary diversion ditch as soon as it is no longer needed. You must restore the land disturbed by the removal process in accordance with the approved permit and § 817.55 of this part. Before removing a temporary diversion ditch, you must modify or remove downstream water treatment facilities previously protected by the ditch to prevent overtopping or failure of the facilities. You must continue to maintain water treatment facilities until they are no longer needed.
(ii) You may retain a *diversion ditch* as a permanent structure if you demonstrate and the regulatory authority finds that retention of that diversion ditch would—
(A) Be environmentally beneficial;
(B) Meet the requirements of the reclamation plan approved under § 784.12 of this chapter; and
(C) Be consistent with the surface drainage pattern restoration requirements of §§ 817.56 and 817.57 of this part.
(iii) When approved in the permit, you may divert the following flows away from the disturbed area by means of temporary or permanent diversion ditches without treatment:
(A) Any surface runoff or other flows from mined areas abandoned before May 3, 1978.
(B) Any surface runoff or other flows from undisturbed areas.
(C) Any surface runoff or other flows from reclaimed areas for which the criteria of § 817.46 of this part for siltation structure removal have been met.
(2) *Stream diversions.* Stream diversions are temporary or permanent relocations of perennial or intermittent streams. Diversions of perennial and intermittent streams must comply with the applicable requirements of this section, § 784.28 of this chapter, and § 817.57 of this part.
(i) You must remove t*emporary stream diversions* after the original stream channel is reconstructed after mining. As set forth in § 784.28(f) of this chapter, different requirements apply to temporary stream diversions depending on whether they will be in existence for less or more than 3 years.
(ii) *Permanent stream diversions* remain in their locations following mining and reclamation.
(3) *Conveyances and channels within the disturbed area.* All other conveyances and channels that are constructed within the disturbed area to transport surface water are also diversions. During mining, these channels or conveyances must deliver all captured surface water flow to siltation structures.

(i) You must remove temporary conveyances or channels when they are no longer needed for their intended purpose.

(ii) When approved in the permit, you may retain conveyances or channels that support or enhance the approved postmining land use.

(b) *Design criteria.* When the permit requires the use of siltation structures for sediment control, you must construct diversions designed to the standards of this section to convey runoff from the disturbed area to the siltation structures unless the topography will naturally direct all surface runoff or other flows to a siltation structure.

(1) You must design all diversions to—

(i) Ensure the safety of the public.

(ii) Minimize adverse impacts to the hydrologic balance, including the biology of perennial and intermittent streams, within the permit and adjacent areas.

(iii) Prevent material damage to the hydrologic balance outside the permit area.

(2) You must design, locate, construct, maintain, and use each diversion and its appurtenant structures to—

(i) Be stable.

(ii) Provide and maintain the capacity to safely pass the peak flow of surface runoff from a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion. Flow capacity for stream diversions includes both the in-channel capacity and the flood-prone area overbank capacity. Flow capacity for diversion ditches and conveyances or channels includes only in-channel capacity, with adequate freeboard to prevent out-of-channel flow. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine peak flows.

(iii) Prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area.

(iv) Comply with all applicable federal, state, tribal, and local laws and regulations.

(c) *Application to § 817.41.* You may not divert surface runoff or other flows into underground mines without approval of the regulatory authority under § 817.41 of this part.

(d) *Additional requirements.* The regulatory authority may specify additional design criteria for diversions to meet the requirements of this section.

§ 817.44 What restrictions apply to gravity discharges from underground mines?

(a)(1) You must locate and manage surface entries and accesses to underground workings to prevent or control gravity discharge of water from the mine.

(2) The regulatory authority may approve gravity discharges of water from an underground mine, other than a drift mine subject to paragraph (b) of this section, if you—

(i) Demonstrate that the untreated or treated discharge will comply with the performance standards of this part and any additional National Pollutant Discharge Elimination System permit requirements under the Clean Water Act.

(ii) Design the discharge control structure to prevent a mine pool blowout.

(3) You must construct and maintain the discharge control structure in accordance with the design approved by the regulatory authority and any other conditions imposed by the regulatory authority.

(b) Notwithstanding anything to the contrary in paragraph (a) of this section, you must locate the surface entries and accesses of drift mines first used after the implementation of a state, federal, or federal lands program under this chapter and located in acid-producing or iron-producing coal seams in such a manner as to prevent any gravity discharge from the mine.

§ 817.45 What sediment control measures must I implement?

(a) You must design, construct, and maintain appropriate sediment control measures, using the best technology currently available to—

(1) Prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(2) Meet the applicable effluent limitations referenced in § 817.42(a) of this part.

(3) Minimize erosion to the extent possible.

(b) Sediment control measures include practices carried out within the disturbed area. Sediment control measures consist of the use of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include but are not limited to—

(1) Disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation.

(2) Shaping and stabilizing the backfilled material to promote a reduction in the rate and volume of runoff.

(3) Retaining sediment within disturbed areas.

(4) Diverting surface runoff from undisturbed areas away from disturbed areas.

(5) Using protected channels or pipes to convey surface runoff from undisturbed areas through disturbed areas so as not to cause additional erosion.

(6) Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland flow velocity, reduce runoff volume, or trap sediment.

(7) Treating surface runoff collected in sedimentation ponds with flocculants or other chemicals.

§ 817.46 What requirements apply to siltation structures?

(a) *Scope.* For the purpose of this section only, the phrase ''disturb the land surface'' does not include those areas—

(1) In which the only underground mining activities conducted on the land surface consist of diversions, siltation structures, or roads that are designed, constructed, and maintained in accordance with this part; and

(2) For which you do not plan to otherwise disturb the land surface upgradient of the diversion, siltation structure, or road.

(b) *General requirements.* (1) When siltation structures will be used to achieve the requirements of § 817.45 of this part, you must construct those structures before beginning any underground mining activities that will disturb the land surface.

(2) Upon completion of construction of a siltation structure, a qualified registered professional engineer, or, in any state that authorizes land surveyors to prepare and certify plans in accordance with § 784.25(a) of this chapter, a qualified registered professional land surveyor, must certify that the structure has been constructed as designed and as approved in the reclamation plan in the permit.

(3) Any siltation structure that impounds water must be designed, constructed and maintained in accordance with § 817.49 of this chapter.

(4) You must maintain siltation structures until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated.

(5)(i) When a siltation structure is removed, you must regrade the land upon which the structure was located

and revegetate the land in accordance with the reclamation plan and §§ 817.111 and 817.116 of this chapter.

(ii) Paragraph (b)(5)(i) of this section does not apply to sedimentation ponds approved by the regulatory authority for retention as permanent impoundments under § 817.49(b) of this part if the maintenance requirements of § 800.42(c)(5) of this chapter are met.

(c) *Sedimentation ponds.* (1) When used, sedimentation ponds must—

(i) Be located as near as possible to the disturbed area and outside perennial or intermittent stream channels unless approved by the regulatory authority in the permit in accordance with §§ 784.28 and 817.57(c) of this chapter.

(ii) Be designed, constructed, and maintained to—

(A) Provide adequate sediment storage volume.

(B) Provide adequate detention time to allow the effluent from the ponds to meet applicable effluent limitations.

(C) Contain or treat the 10-year, 24-hour precipitation event (''design event'') unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions, and a demonstration that the effluent limitations referenced in § 817.42 of this part will be met.

(D) Provide a nonclogging dewatering device adequate to maintain the detention time required under paragraph (c)(1)(ii)(B) of this section.

(E) Minimize short circuiting to the extent possible.

(F) Provide periodic sediment removal sufficient to maintain adequate volume for the design event.

(G) Ensure against excessive settlement.

(H) Be free of sod, large roots, frozen soil, and acid-forming or toxic-forming materials.

(I) Be compacted properly.

(2) *Spillways.* A sedimentation pond must include either a combination of principal and emergency spillways or a single spillway configured as specified in § 817.49(a)(9) of this part.

(d) *Other treatment facilities.* (1) You must design other treatment facilities to treat the 10-year, 24-hour precipitation event unless the regulatory authority approves a lesser design event based upon terrain, climate, other site-specific conditions, and a demonstration that the effluent limitations referenced in § 817.42 of this part will be met.

(2) You must design other treatment facilities in accordance with the applicable requirements of paragraph (c) of this section.

(e) *Exemptions.* The regulatory authority may grant an exemption from the requirements of this section if—

(1) The disturbed drainage area within the total disturbed area is small; and

(2) You demonstrate that neither siltation structures nor alternate sediment control measures are necessary for drainage from the disturbed drainage area to comply with § 817.42 of this part.

§ 817.47 What requirements apply to discharge structures for impoundments?

You must control discharges from sedimentation ponds, permanent and temporary impoundments, coal mine waste impounding structures, and diversions by energy dissipators, riprap channels, and other devices when necessary to reduce erosion, to prevent deepening or enlargement of stream channels, to control meander migration, or to minimize disturbance of the hydrologic balance. You must design discharge structures according to standard engineering design procedures.

§ 817.49 What requirements apply to impoundments?

(a) *Requirements that apply to both permanent and temporary impoundments.—*

(1) *MSHA requirements.* An impoundment meeting the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216 of this title and this section.

(2) *Stability.* (i) An impoundment that meets the criteria of § 77.216(a) of this title or that includes a dam with a significant or high hazard potential classification under § 784.25(a) of this chapter must have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions and a seismic safety factor of at least 1.2.

(ii) Impoundments not included in paragraph (a)(2)(i) of this section, except for a coal mine waste impounding structure, must have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of § 784.25(e)(2) of this chapter.

(3) *Freeboard.* (i) Impoundments must have adequate freeboard to resist overtopping by waves that occur in conjunction with the typical increase in water elevation at the downwind edge of any body of water, waves resulting from sudden influxes of surface runoff from precipitation events, or waves resulting from any combination of these events or other events.

(ii) An impoundment that includes a dam with a significant or high hazard potential classification under § 784.25(a) of this chapter must comply with the freeboard hydrograph criteria in the following table:

MINIMUM AUXILIARY SPILLWAY HYDROLOGIC CRITERIA

Hazard potential classification of embankment	Design precipitation event for—	
	Auxiliary spillway hydrograph	Freeboard hydrograph
Significant	P_{100}[1] + 0.12(PMP[2] − P_{100})	P_{100} + 0.40(PMP − P_{100})
High	P_{100} + 0.26(PMP − P_{100})	PMP

[1] P_{100} = Precipitation event for 100-year return interval.
[2] PMP = Probable Maximum Precipitation event.

(4) *Foundation.* (i) Foundations and abutments for an impounding structure must be stable during all phases of construction and operation and must be designed based on adequate and accurate information on the foundation and abutment conditions.

(ii) You must conduct foundation and abutment investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability and control of underseepage for an impoundment that includes a dam with a significant or high hazard potential classification under § 784.25(a) of this chapter.

(iii) You must remove all vegetative and organic materials from the foundation area and excavate and prepare the foundation area to resist failure. You must install cutoff trenches if necessary to ensure stability.

(5) *Protection of impoundment slopes.* You must take measures to protect impoundment slopes from surface

erosion and the adverse impacts of a sudden drawdown.

(6) *Protection of embankment faces.* Faces of embankments and surrounding areas shall be vegetated, except that faces where water is impounded may be riprapped or otherwise stabilized in accordance with accepted design practices.

(7) *Spillways.* An impoundment must include either a combination of principal and emergency spillways or a single spillway configured as specified in paragraph (a)(7)(i) of this section, designed and constructed to safely pass the applicable design precipitation event specified in paragraph (a)(7)(ii) of this section, except as set forth in paragraph (c)(2) of this section.

(i) The regulatory authority may approve a single open-channel spillway that is:

(A) Of nonerodible construction and designed to carry sustained flows; or

(B) Earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(ii) Except as specified in paragraph (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of paragraph (a)(7) of this section is:

(A) For an impoundment that includes a dam with a significant or high hazard potential classification under § 784.25(a) of this chapter, the design precipitation event specified in the auxiliary spillway hydrograph column in the table in paragraph (a)(3)(ii) of this section, or any greater event specified by the regulatory authority.

(B) For an impoundment meeting the criteria of § 77.216(a) of this title, the 100-year, 6-hour event, or any greater event specified by the regulatory authority.

(C) For an impoundment not included in paragraphs (a)(7)(ii) (A) and (B) of this section, the 25-year, 6-hour event, or any greater event specified by the regulatory authority.

(8) *Highwalls.* The vertical portion of any highwall remnant within the impoundment must be located far enough below the low-water line along the full extent of the highwall to provide adequate safety and access for the proposed water users.

(9) *Inspections.* Except as provided in paragraph (a)(9)(iv) of this section, a qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer must inspect each impoundment as provided in paragraph (a)(9)(i) of this section. The professional engineer or specialist must be experienced in the construction of impoundments.

(i) Inspections must be made regularly during construction, upon completion of construction, and at least yearly until removal of the structure or release of the performance bond.

(ii) After each inspection required by paragraph (a)(9)(i) of this section, the qualified registered professional engineer, or qualified registered professional land surveyor as specified in paragraph (a)(9)(iv) of this section, must promptly provide to the regulatory authority a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report must include a discussion of any appearance of instability, any structural weakness or other hazardous condition, the depth and elevation of any impounded waters, the existing storage capacity, any existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

(iii) You must retain a copy of the report at or near the minesite.

(iv) In any state that authorizes land surveyors to prepare and certify plans in accordance with § 784.25(b)(1) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the criteria of § 77.216(a) of this title, or that is not classified as having a significant or high hazard potential under § 784.25(a) of this chapter, and certify and submit the report required by paragraph (a)(9)(ii) of this section, except that a qualified registered professional engineer must certify all coal mine waste impounding structures covered by § 817.84 of this chapter. The professional land surveyor must be experienced in the construction of impoundments.

(10) *Examinations.* (i) Impoundments that meet the criteria of § 77.216 of this title, or that are classified as having a significant or high hazard potential under § 784.25(a) of this chapter, must be examined in accordance with § 77.216–3 of this title.

(ii) Impoundments that are not subject to § 77.216 of this title, or that are not classified as having a significant or high hazard potential under § 784.25(a) of this chapter, must be examined at least quarterly. A qualified person designated by the operator must examine impoundments for the appearance of structural weakness and other hazardous conditions.

(11) *Emergency procedures.* If any examination or inspection discloses that a potential hazard exists, the person who examined the impoundment must promptly inform the regulatory authority of the finding and of the emergency procedures formulated for public protection and remedial action. The regulatory authority must be notified immediately if adequate procedures cannot be formulated or implemented. The regulatory authority then must notify the appropriate agencies that other emergency procedures are required to protect the public.

(b) *Requirements that apply only to permanent impoundments.* A permanent impoundment of water may be created if authorized by the regulatory authority in the approved permit based upon the following demonstration:

(1) The size and configuration of the impoundment will be adequate for its intended purposes.

(2) The quality of impounded water will be suitable on a permanent basis for its intended use and, after reclamation, discharges from the impoundment will not cause or contribute to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in the National Pollutant Discharge Elimination System permit for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart.

(3) The water level will be sufficiently stable and be capable of supporting the intended use.

(4) Final grading will provide for adequate safety and access for proposed water users.

(5) The impoundment will not result in diminution of the quality or quantity of surface water or groundwater used by surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(6) The impoundment will be suitable for the approved postmining land use.

(7) Approval of the impoundment will not result in retention of spoil piles or ridges that are inconsistent with the definition of approximate original contour.

(8) Approval of the impoundment will not result in the creation of an excess spoil fill elsewhere within the permit area.

(9) The impoundment has been designed with dimensions, features, and other characteristics that will enhance fish and wildlife habitat to the extent

that doing so is not inconsistent with the intended use.

(c) *Requirements that apply only to temporary impoundments that rely primarily upon storage.* (1) In lieu of meeting the requirements in paragraph (a)(7)(i) of this section, the regulatory authority may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when you demonstrate, and a qualified registered professional engineer or qualified registered professional land surveyor in accordance with § 784.25(b) of this chapter certifies, that the impoundment will safely control the design precipitation event.

(2) You must use current prudent engineering practices to safely remove the water from an impoundment constructed in accordance with paragraph (c)(1) of this section.

(3) An impoundment constructed in accordance with paragraph (c)(1) of this section must be located where failure would not be expected to cause loss of life or serious property damage, unless the impoundment meets one of the following exceptions:

(i) An impoundment that meets the criteria of § 77.216(a) of this title, or that is classified as having a significant or high hazard potential under § 784.25(a) of this chapter, and is designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or any greater event specified by the regulatory authority.

(ii) An impoundment not included in paragraph (c)(3)(i) of this section that is designed to control the precipitation of the 100-year, 6-hour event, or any greater event specified by the regulatory authority.

§ 817.55 What must I do with sedimentation ponds, diversions, impoundments, and treatment facilities after I no longer need them?

(a) Before seeking final bond release under § 800.42(d) of this chapter, you must—

(1) Remove all temporary structures and reclaim the land upon which those structures were located in accordance with the approved permit; and

(2) Ensure that all sedimentation ponds, diversions, and impoundments approved for retention after final bond release have been maintained properly and meet all applicable requirements of the approved permit and this chapter for retention as permanent structures. You must renovate the structures if necessary to meet the requirements for retention.

(b) [Reserved]

§ 817.56 What additional performance standards apply to mining activities conducted in or through an ephemeral stream?

(a) *Compliance with federal, state, and tribal water quality laws and regulations.* (1) You may conduct mining activities in or affecting waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* only if you first obtain all necessary authorizations, certifications, and permits under that law.

(2) Mining activities must comply with all applicable state and tribal laws and regulations concerning surface water and groundwater.

(b) *Postmining surface drainage pattern and stream-channel configuration.* If you mine through an ephemeral stream, you must construct a postmining surface drainage pattern and stream-channel configurations that are consistent with the surface drainage pattern and stream-channel configurations approved in the permit in accordance with § 784.27 of this chapter.

(c) *Establishment of streamside vegetative corridors.* (1) If you mine through an ephemeral stream, you must establish a vegetative corridor at least 100 feet wide along each bank of the reconstructed stream channel. The 100-foot distance must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark. The corridor must be consistent with natural vegetation patterns.

(2) When planting the streamside vegetative corridors required by paragraph (c)(1) of this section, you must—

(i) Use appropriate native species adapted to the area, unless an agency responsible for implementing section 404 of the Clean Water Act, 33 U.S.C. 1344, requires the use of non-native species.

(ii) Ensure that the species planted are consistent with the revegetation plan approved in the permit.

(iii) Include appropriate native hydrophytic vegetation, vegetation typical of floodplains, or hydrophilic vegetation characteristic of riparian areas and wetlands to the extent that the corridor contains suitable habitat for those species and the stream and the geomorphology of the area are capable of supporting vegetation of that nature.

(iv) Use native trees and shrubs when planting areas within the streamside corridor that were forested at the time of application or that would revert to forest under conditions of natural succession.

(3) Paragraphs (c)(1) and (2) of this section do not require planting of hydrophytic or hydrophilic species within those portions of streamside corridors where the stream, soils, or climate are incapable of providing the moisture or other growing conditions needed to support and sustain hydrophytic or hydrophilic species. In those situations, you must plant the corridor with appropriate native species that are consistent with the baseline information concerning natural streamside vegetation included in the permit application under § 783.19 of this chapter, unless otherwise directed by an agency responsible for implementing section 404 of the Clean Water Act, 33 U.S.C. 1344.

(4) Paragraphs (c)(1) through (3) of this section do not apply to—

(i) Prime farmland historically used for cropland; or

(ii) Situations in which establishment of a streamside vegetative corridor comprised of native species would be incompatible with an approved postmining land use that is implemented before final bond release under §§ 800.40 through 800.43 of this chapter.

§ 817.57 What additional performance standards apply to mining activities conducted in or through a perennial or intermittent stream or on the surface of land within 100 feet of a perennial or intermittent stream?

(a) *Compliance with federal, state, and tribal water quality laws and regulations.* (1) You may conduct mining activities in or affecting waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.,* only if you first obtain all necessary authorizations, certifications, and permits under that law.

(2) Mining activities must comply with all applicable state and tribal laws and regulations concerning surface water and groundwater.

(b) *Prohibition on mining in or within 100 feet of a perennial or intermittent stream.* You may not conduct mining activities in or through a perennial or intermittent stream, or that would disturb the surface of land within 100 feet of a perennial or intermittent stream, unless the regulatory authority authorizes you to do so in the permit after making the findings required under § 784.28 of this chapter. The 100-foot distance must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(c) *Postmining surface drainage pattern and stream-channel configuration.* (1) If you mine through or

permanently divert a perennial or intermittent stream, you must construct a postmining surface drainage pattern and stream-channel configurations that are consistent with the surface drainage pattern and stream-channel configurations approved in the permit in accordance with § 784.28 of this chapter.

(2) Upon completion of construction of a stream-channel diversion for a perennial or intermittent stream, or reconstruction of a stream channel after mining through a perennial or intermittent stream, you must obtain a certification from a qualified registered professional engineer that the stream-channel diversion or reconstructed stream channel has been constructed in accordance with the design approved in the permit and that it meets all engineering-related requirements of this section. This certification may be limited to the location, dimensions, and physical characteristics of the stream channel.

(d) *Establishment of streamside vegetative corridors.* (1)(i) If you mine through a perennial or intermittent stream, you must establish a vegetative corridor at least 100 feet wide along each bank of the reconstructed stream channel. The corridor must be consistent with natural vegetation patterns.

(ii) You must establish a vegetative corridor on any land that you disturb within 100 feet of a perennial or intermittent stream. The corridor must be consistent with natural vegetation patterns.

(iii) If you divert a perennial or intermittent stream, you must establish a vegetative corridor at least 100 feet wide along each bank of the stream-channel diversion, with the exception of temporary diversions that will be in place less than 3 years. The corridor must be consistent with natural vegetation patterns.

(iv) The 100-foot distance mentioned in paragraphs (d)(1)(i) through (iii) of this section must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark.

(2) When planting the streamside vegetative corridors required by paragraph (d)(1) of this section, you must—

(i) Use appropriate native species adapted to the area, unless an agency responsible for implementing section 404 of the Clean Water Act, 33 U.S.C. 1344, requires the use of non-native species.

(ii) Ensure that the species planted are consistent with the revegetation plan approved in the permit.

(iii) Include appropriate native hydrophytic vegetation, vegetation typical of floodplains, or hydrophilic vegetation characteristic of riparian areas and wetlands to the extent that the corridor contains suitable habitat for those species and the stream and the geomorphology of the area are capable of supporting vegetation of that nature.

(iv) Use native trees and shrubs when planting areas within the streamside corridor that were forested at the time of application or that would revert to forest under conditions of natural succession.

(3) Paragraphs (d)(1) and (2) of this section do not require planting of hydrophytic or hydrophilic species within those portions of streamside corridors where the stream, soils, or climate are incapable of providing the moisture or other growing conditions needed to support and sustain hydrophytic or hydrophilic species. In those situations, you must plant the corridor with appropriate native species that are consistent with the baseline information concerning natural streamside vegetation included in the permit application under § 783.19 of this chapter, unless otherwise directed by an agency responsible for implementing section 404 of the Clean Water Act, 33 U.S.C. 1344.

(4) Paragraphs (d)(1) through (3) of this section do not apply to—

(i) Prime farmland historically used for cropland; or

(ii) Situations in which establishment of a streamside vegetative corridor comprised of native species would be incompatible with an approved postmining land use that is implemented before final bond release under §§ 800.40 through 800.43 of this chapter.

(e) *Restoration of form.* If you mine through or permanently divert a perennial or intermittent stream, you must demonstrate successful restoration or reconstruction of the form of the stream channel in accordance with the design approved in the permit before you qualify for Phase I bond release under § 800.42(b)(1) of this chapter.

(f) *Restoration of hydrologic function.* If you mine through or permanently divert a perennial or intermittent stream, you must demonstrate restoration of the hydrologic function of the reconstructed stream before you qualify for Phase II bond release under § 800.42(b)(2) of this chapter. Restoration of the hydrologic function includes, but is not limited to, restoration of the flow regime, except as otherwise approved in the permit under § 784.28(e)(2) of this chapter.

(g) *Restoration of ecological function.* If you mine through or permanently divert a perennial or intermittent stream, the reconstructed stream or stream-channel diversion must meet the criteria approved in the permit for determining restoration of ecological function, as established by the regulatory authority under § 784.28(g) of this chapter, before you qualify for final bond release under §§ 800.40 through 800.43 of this chapter.

(h) *Prohibition on placement of siltation structures in perennial or intermittent streams.* (1)(i) Except as provided in paragraph (h)(2) of this section, you may not construct a siltation structure in a perennial or intermittent stream or use perennial or intermittent streams as waste treatment systems to convey surface runoff from the disturbed area to a sedimentation pond.

(ii) Paragraph (h)(1)(i) of this section does not prohibit the construction of a siltation structure in a stream channel immediately downstream of a stream segment that is mined through.

(2) If approved in the permit, the prohibition in paragraph (h)(1) of this section will not apply to excess spoil fills, coal mine waste refuse piles, or coal mine waste impounding structures in steep-slope areas when you demonstrate, and the regulatory authority finds in writing, that use of a perennial or intermittent stream segment as a waste treatment system for sediment control or construction of a sedimentation pond or other siltation structure in a perennial or an intermittent stream would have less overall adverse impact on fish, wildlife, and related environmental values than construction of diversions and sedimentation ponds or other siltation structures on slopes above the stream.

(3) When the circumstances described in paragraph (h)(2) of this section exist, the following requirements apply:

(i) You must minimize the length of stream used as a waste treatment system to the extent possible and, when practicable, maintain an undisturbed buffer along that stream segment in accordance with paragraph (b) of this section.

(ii) You must place the sedimentation pond or other siltation structure as close to the toe of the excess spoil fill, coal mine waste refuse pile, or coal mine waste impounding structure as possible.

(iii) Following the completion of construction and revegetation of the fill or coal mine waste structure, you must—

(A) Remove and properly dispose of accumulated sediment in the siltation structure and any stream segment

between the inlet of the siltation structure and the toe of the excess spoil fill or coal mine waste structure;

(B) Remove the sedimentation pond or other siltation structure; and

(C) Restore the stream segment in accordance with paragraphs (e) through (g) of this section.

(i) *Programmatic alternative.* Paragraphs (b) through (h) of this section will not apply to a state program approved under subchapter T of this chapter if that program is amended to expressly prohibit all surface mining activities, including the construction of stream-channel diversions, that would result in more than a de minimis disturbance of land in or within 100 feet of a perennial or intermittent stream.

§ 817.59 How must I maximize coal recovery?

You must conduct underground mining activities so as to maximize the utilization and conservation of the coal, while using the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

§ 817.61 Use of explosives: General requirements.

(a) *Applicability.* Sections 817.61 through 817.68 apply to surface blasting activities incident to underground coal mining, including, but not limited to, initial rounds of slopes and shafts.

(b) *Compliance with other laws and regulations.* You must comply with all applicable state and federal laws and regulations governing the use of explosives.

(c) *Requirements for blasters.* (1) No later than 12 months after the blaster certification program for a state required by part 850 of this chapter has been approved under the procedures of subchapter C of this chapter, all blasting operations in that state must be conducted under the direction of a certified blaster. Before that time, all blasting operations in that state must be conducted by competent, experienced persons who understand the hazards involved.

(2) Certificates of blaster certification must be carried by blasters or be on file at the permit area during blasting operations.

(3) A blaster and at least one other person shall be present at the firing of a blast.

(4) Any blaster who is responsible for conducting blasting operations at a blasting site must:

(i) Be familiar with the site-specific performance standards; and

(ii) Give direction and on-the-job training to persons who are not certified and who are assigned to the blasting crew or who assist in the use of explosives.

(d) *Blast design.* (1) You must submit an anticipated blast design if blasting operations will be conducted within—

(i) 1,000 feet of any building used as a dwelling, public building, school, church, or community or institutional building outside the permit area; or

(ii) 500 feet of an active or abandoned underground mine.

(2) You must submit the blast design required by paragraph (d)(1) of this section either as part of the permit application or, if approved by the regulatory authority, at a later date before blasting begins. Regulatory authority approval of the blast design is not required, but, as provided in paragraph (d)(5) of this section, the regulatory authority may require changes to the design.

(3) The blast design must contain—

(i) Sketches of the drill patterns, delay periods, and decking.

(ii) The type and amount of explosives to be used.

(iii) Critical dimensions.

(iv) The location and general description of structures to be protected.

(v) A discussion of design factors to be used to protect the public and meet the applicable airblast, flyrock, and ground-vibration standards in § 817.67 of this part.

(4) A certified blaster must prepare and sign the blast design.

(5) The regulatory authority may require changes to the design submitted.

§ 817.62 Use of explosives: Preblasting survey.

(a) At least 30 days before initiation of blasting, you must notify, in writing, all residents or owners of dwellings or other structures located within ½ mile of the permit area how to request a preblasting survey.

(b)(1) A resident or owner of a dwelling or structure within ½ mile of any part of the permit area may request a preblasting survey. This request must be made, in writing, directly to you or to the regulatory authority. If the request is made to the regulatory authority, the regulatory authority will promptly notify you.

(2) You must promptly conduct a preblasting survey of the dwelling or structure and promptly prepare a written report of the survey.

(3) You must conduct an updated survey of any subsequent additions, modifications, or renovations to the dwelling or structure, if requested by the resident or owner.

(c) You must determine the condition of the dwelling or structure and document any preblasting damage and other physical factors that could reasonably be affected by the blasting. Structures such as pipelines, cables, transmission lines, and cisterns, wells, and other water systems warrant special attention; however, the assessment of these structures may be limited to surface conditions and other readily available data.

(d)(1) The person who conducted the survey must sign the written report of the survey.

(2) You must promptly provide copies of the report to the regulatory authority and to the person requesting the survey.

(3) If the person requesting the survey disagrees with the contents or recommendations of the survey, he or she may submit a detailed description of the specific areas of disagreement to both you and the regulatory authority.

(e) You must complete any surveys requested more than 10 days before the planned initiation of blasting before the initiation of blasting.

§ 817.64 Use of explosives: General performance standards.

(a)(1) You must notify, in writing, residents within ½ mile of the blasting site and local governments of the proposed times and locations of blasting operations.

(2) You may provide this notice weekly, but in no case less than 24 hours before blasting will occur.

(b) You must conduct all blasting between sunrise and sunset, unless the regulatory authority approves night-time blasting based upon a showing that the public will be protected from adverse noise and other impacts. The regulatory authority may specify more restrictive time periods for blasting.

(c)(1) You may conduct unscheduled blasts only where public or operator health and safety so require and for emergency blasting actions.

(2) When you conduct an unscheduled blast, you must use audible signals to notify residents within ½ mile of the blasting site.

(3) You must document the reason for the unscheduled blast in accordance with § 817.68(c)(16) of this part.

§ 817.66 Use of explosives: Blasting signs, warnings, and access control.

(a) *Blasting signs.* Blasting signs must meet the specifications of § 817.11 of this part.

(1) You must place conspicuous signs reading ''Blasting Area'' along the edge of any blasting area that comes within 100 feet of any public road right-of-way and at the point where any other road provides access to the blasting area.

(2) You must place conspicuous signs reading ''Warning! Explosives in Use'' at all entrances to the permit area from public roads or highways. The signs must clearly list and describe the meaning of the audible blast warning and all-clear signals that are in use and explain the marking of blasting areas and charged holes awaiting firing within the permit area.

(b) *Warnings.* You must give blast warning and all-clear signals of different character or pattern that are audible within a range of ½ mile from the point of the blast. You must notify each person within the permit area and each person who resides or regularly works within ½ mile of the permit area of the meaning of the signals in the blasting notification required in § 817.64(a) of this part.

(c) *Access control.* You must control access within the blasting area to prevent presence of livestock or unauthorized persons during blasting and until your authorized representative has reasonably determined that—

(1) No unusual hazards, such as imminent slides or undetonated charges, exist; and

(2) Access to and travel within the blasting area can be safely resumed.

§ 817.67 Use of explosives: Control of adverse effects.

(a) *General requirements.* You must conduct blasting in a manner that prevents—

(1) Injury to persons;

(2) Damage to public or private property outside the permit area;

(3) Adverse impacts on any underground mine; or

(4) Change in the course, channel, or availability of surface water or groundwater outside the permit area.

(b) *Airblast.*—(1) *Limits.* (i) Airblast must not exceed the maximum limits listed below at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area, except as provided in paragraph (e) of this section.

Lower frequency limit of measuring system in Hertz (Hz), plus or minus 3 decibels	Maximum level in decibels (dB)
0.1 Hz or lower—flat response[1].	134 peak.
2 Hz or lower—flat response	133 peak.
6 Hz or lower—flat response	129 peak.
C-weighted—slow response [1]	105 peak dBC.

[1] Only when approved by the regulatory authority.

(ii) If necessary to prevent damage, the regulatory authority must specify lower maximum allowable airblast levels than those of paragraph (b)(1)(i) of this section for use in the vicinity of a specific blasting operation.

(2) *Monitoring.* (i) You must conduct periodic monitoring to ensure compliance with the airblast standards. The regulatory authority may require airblast measurement of any or all blasts and may specify the locations at which measurements are taken.

(ii) The measuring systems must have an upper-end flat-frequency response of at least 200 Hz.

(c) *Flyrock.* Flyrock travelling in the air or along the ground must not be cast from the blasting site—

(1) More than one-half the distance to the nearest dwelling or other occupied structure;

(2) Beyond the area of control required under § 817.66(c) of this part; or

(3) Beyond the permit boundary.

(d) *Ground vibration.*—(1) *General requirements.* (i) In all blasting operations, except as otherwise authorized in paragraph (e) of this section, the maximum ground vibration must not exceed the values approved in the blasting plan required under § 784.15 of this chapter.

(ii) The maximum ground vibration for protected structures listed in paragraph (d)(2)(i) of this section must be established in accordance with either the maximum peak-particle-velocity limits of paragraph (d)(2) of this section, the scaled-distance equation of paragraph (d)(3) of this section, the blasting-level chart of paragraph (d)(4) of this section, or by the regulatory authority under paragraph (d)(5) of this section.

(iii) All structures in the vicinity of the blasting area not listed in paragraph (d)(2)(i) of this section, such as water towers, pipelines and other utilities, tunnels, dams, impoundments, and underground mines, must be protected from damage by establishment of a maximum allowable limit on the ground vibration, submitted by the operator in the blasting plan and approved by the regulatory authority.

(2) *Maximum peak particle velocity.* (i) The maximum ground vibration must not exceed the following limits at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area:

Distance (D), from the blasting site, in feet	Maximum allowable peak particle velocity for ground vibration, in inches/second [1]	Scaled-distance factor to be applied without seismic monitoring (Ds) [2]
0 to 300	1.25	50
301 to 5,000	1.00	55
5,001 and beyond	0.75	65

[1] Ground vibration must be measured as the particle velocity. Particle velocity must be recorded in three mutually perpendicular directions. The maximum allowable peak particle velocity applies to each of the three measurements.

[2] Applicable to the scaled-distance equation of paragraph (d)(3)(i) of this section.

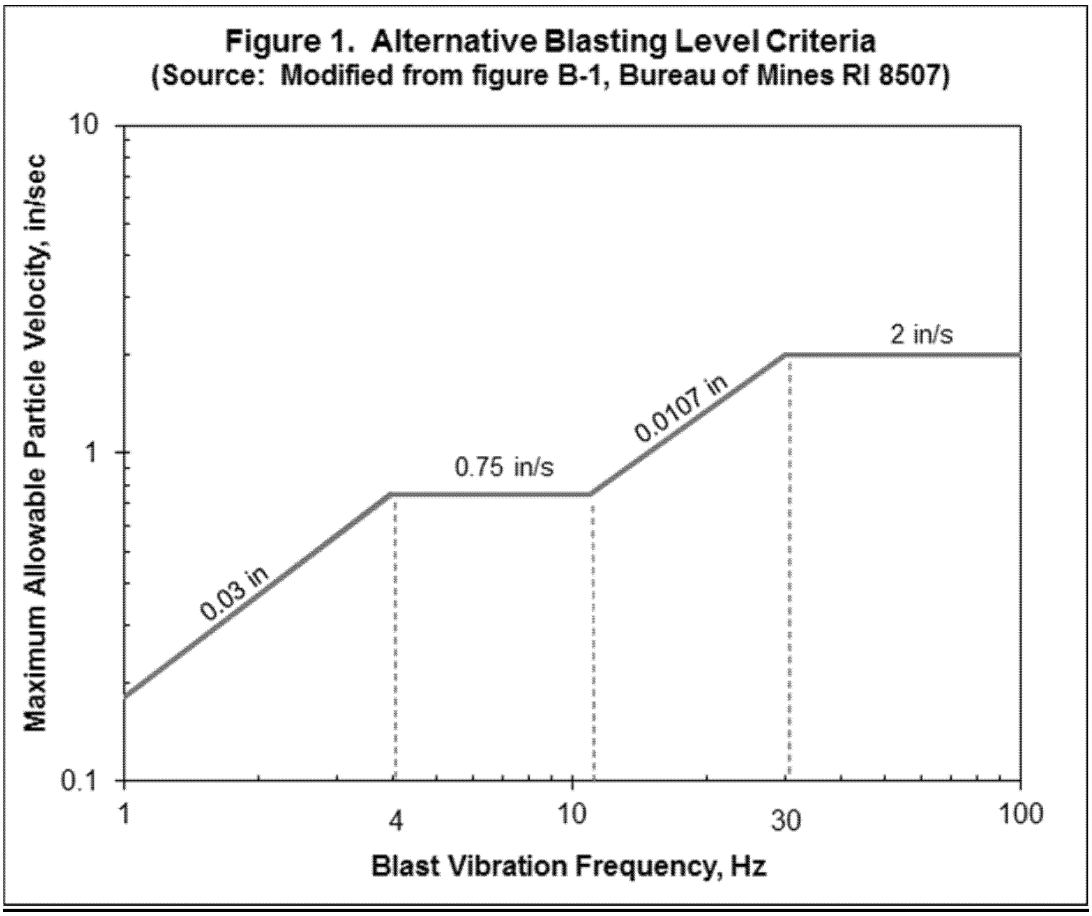
(ii) You must provide a seismographic record for each blast.

(3) *Scaled-distance equation.* (i) You may use the scaled-distance equation, $W = (D/Ds)^2$, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period, without seismic monitoring, where W = the maximum weight of explosives, in pounds; D = the distance, in feet, from the blasting site to the nearest protected structure; and Ds = the scaled-distance factor. The regulatory authority may initially approve the scaled-distance equation using the values for the scaled-distance factor listed in paragraph (d)(2)(i) of this section.

(ii) The regulatory authority may authorize development of a modified scaled-distance factor upon receipt of a written request by the operator, supported by seismographic records of blasting at the minesite. The modified scale-distance factor must be determined such that the particle velocity of the predicted ground vibration will not exceed the prescribed maximum allowable peak particle velocity of paragraph (d)(2)(i) of this section at a 95-percent confidence level.

(4) *Blasting-level chart.* (i) You may use the ground-vibration limits in

Figure 1 to determine the maximum allowable ground vibration.



(ii) If the Figure 1 limits are used, you must provide a seismographic record including both particle velocity and vibration-frequency levels for each blast. The regulatory authority must approve the method for the analysis of the predominant frequency contained in the blasting records before application of this alternative blasting criterion.

(5) The regulatory authority must reduce the maximum allowable ground vibration beyond the limits otherwise provided by this section, if determined necessary to provide damage protection.

(6) The regulatory authority may require that you conduct seismic monitoring of any or all blasts or may specify the location at which the measurements are taken and the degree of detail necessary in the measurement.

(e) The maximum airblast and ground-vibration standards of paragraphs (b) and (d) of this section do not apply at the following locations:

(1) At structures owned by the permittee and not leased to another person.

(2) At structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the regulatory authority before blasting.

§ 817.68 Use of explosives: Records of blasting operations.

(a) You must retain a record of all blasts for at least 3 years.

(b) Upon request, you must make copies of these records available to the regulatory authority and to the public for inspection.

(c) The records must contain the following data:

(1) Name of the operator conducting the blast.

(2) Location, date, and time of the blast.

(3) Name, signature, and certification number of the blaster conducting the blast.

(4) Identification, direction, and distance, in feet, from the nearest blast hole to the nearest dwelling, public building, school, church, community or institutional building outside the permit area, except those described in § 817.67(e) of this part.

(5) Weather conditions, including those which may cause possible adverse blasting effects.

(6) Type of material blasted.

(7) Sketches of the blast pattern, including number of holes, burden, spacing, decks, and delay pattern.

(8) Diameter and depth of holes.

(9) Types of explosives used.

(10) Total weight of explosives used per hole.

(11) The maximum weight of explosives detonated in an 8-millisecond period.

(12) Initiation system.

(13) Type and length of stemming.

(14) Mats or other protections used.

(15) Seismographic and airblast records, if required, which must include—

(i) Type of instrument, sensitivity, and calibration signal or certification of annual calibration;

(ii) Exact location of instrument and the date, time, and distance from the blast;

(iii) Name of the person and firm taking the reading;

(iv) Name of the person and firm analyzing the seismographic record; and

(v) The vibration and/or airblast level recorded.

(16) Reasons and conditions for each unscheduled blast.

§ 817.71 How must I dispose of excess spoil?

(a) *General requirements.* You, the permittee or operator, must mechanically transport and place excess spoil in designated disposal areas, including approved valley fills and other types of approved fills, within the permit area in a controlled manner in compliance with the requirements of this section. In general, you must place excess spoil in a manner that will—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on groundwater and surface water, including aquatic life, within the permit and adjacent areas.

(2) Ensure mass stability and prevent mass movement during and after construction.

(3) Ensure that the final surface configuration of the fill is suitable for revegetation and the approved postmining land use or uses and is compatible with the natural drainage pattern and surroundings.

(4) Minimize disturbances to, and adverse impacts on, fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

(5) Ensure that the fill will not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in an increase in flooding when compared with the impacts of premining peak flows.

(6) Ensure that the fill will not cause or contribute to a violation of applicable state or tribal groundwater standards or preclude any premining use of groundwater.

(7) Ensure that the fill will not cause or contribute to a violation of applicable state or tribal water quality standards for surface water located downstream of the toe of the fill, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(b) *Stability requirements.*—(1) *Static safety factor.* You must design and construct the fill to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(2) *Special requirement for steep-slope conditions.* Where the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated by the regulatory authority based on local conditions, you must construct bench cuts (excavations into stable bedrock) or rock-toe buttresses to ensure fill stability.

(c) *Compliance with permit.* You must construct the fill in accordance with the design and plans approved in the permit in accordance with § 784.35 of this chapter.

(d) *Requirements for handling of organic matter and soil materials.* You must remove all vegetation, other organic matter, and soil materials from the disposal area prior to placement of the excess spoil. You must store, redistribute, or otherwise use those materials in accordance with § 817.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 784.12(e) of this chapter.

(e) *Surface runoff control requirements.* (1) You must direct surface runoff from areas above the fill and runoff from the surface of the fill into stabilized channels designed to—

(i) Meet the requirements of § 817.43 of this part; and

(ii) Safely pass the runoff from a 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(2) You must grade the top surface of a completed fill such that the final slope after settlement will be toward properly designed drainage channels. You may not direct uncontrolled surface runoff over the outslope of the fill.

(f) *Control of water within the footprint of the fill.*—(1) *General requirements.* If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, you must design and construct underdrains and temporary diversions as necessary to control erosion, prevent water infiltration into the fill, and ensure stability.

(2) *Temporary diversions.* Temporary diversions must comply with the requirements of § 817.43 of this part.

(3) *Underdrains.* (i) You must construct underdrains that are comprised of hard rock that is resistant to weathering.

(ii) You must design and construct underdrains using current, prudent engineering practices and any design criteria established by the regulatory authority.

(iii) In constructing rock underdrains, you may use only hard rock that is resistant to weathering, such as well-cemented sandstone and massive limestone, and that is not acid-forming or toxic-forming. The underdrain must be free of soil and fine-grained, clastic rocks such as siltstone, shale, mudstone, and claystone. All rock used to construct underdrains must meet the criteria in the following table:

Test	ASTM standard	AASHTO standard	Acceptable results
Los Angeles Abrasion	C 131 or C 535	T 96	Loss of no more than 50 percent of test sample by weight.
Sulfate Soundness	C 88 or C 5240	T 104	Sodium sulfate test: Loss of no more than 12 percent of test sample by weight. Magnesium sulfate test: Loss of no more than 18 percent of test sample by weight.

(iv) The underdrain system must be designed and constructed to carry the maximum anticipated infiltration of water due to precipitation, snowmelt, and water from seeps and springs in the foundation of the disposal area away from the excess spoil fill.

(v) To provide a safety factor against future changes in local surface-water and groundwater hydrology, perforated pipe may be embedded within the rock underdrain to enhance the underdrain capacity to carry water in excess of the anticipated maximum infiltration away from the excess spoil fill. The pipe must be manufactured of materials that are not susceptible to corrosion and must be demonstrated to be suitable for the deep burial conditions commonly associated with excess spoil fill underdrains.

(vi) The underdrain system must be protected from material piping, clogging, and contamination by an adequate filter system designed and constructed using current, prudent engineering practices to ensure the long-term functioning of the underdrain system.

(g) *Placement of excess spoil.* (1) Using mechanized equipment, you must transport and place excess spoil in a controlled manner in horizontal lifts not exceeding 4 feet in thickness; concurrently compacted as necessary to ensure mass stability and to prevent mass movement during and after

construction; and graded so that surface and subsurface drainage is compatible with the natural surroundings.

(2) You may not use any excess spoil transport and placement technique that involves end-dumping, wing-dumping, cast-blasting, gravity placement, or casting spoil downslope.

(3) *Acid-forming, toxic-forming, and combustible materials.* (i) You must handle acid-forming and toxic-forming materials in accordance with § 817.38 of this part and in a manner that will minimize adverse effects on plant growth and the approved postmining land use.

(ii) You must cover combustible materials with noncombustible materials in a manner that will prevent sustained combustion and minimize adverse effects on plant growth and the approved postmining land use.

(h) *Final configuration.* (1) The final configuration of the fill must be suitable for the approved postmining land use, compatible with the natural drainage pattern and the surrounding terrain, and, to the extent practicable, consistent with natural landforms.

(2) You may construct terraces on the outslope of the fill if required for stability, to control erosion, to conserve soil moisture, or to facilitate the approved postmining land use. The grade of the outslope between terrace benches may not be steeper than 2h: 1v (50 percent).

(3)(i) You must configure the top surface of the fill to create a topography that includes ridgelines and valleys with varied hillslope configurations when practicable, compatible with stability and postmining land use considerations, and generally consistent with the topography that existed before any mining.

(ii) The final surface elevation of the fill may exceed the elevation of the surrounding terrain when necessary to minimize placement of excess spoil in perennial and intermittent streams, provided the final configuration complies with the requirements of paragraphs (a)(3) and (h)(1) of this section.

(iii) The geomorphic reclamation requirements of paragraph (h)(3)(i) of this section do not apply in situations in which they would result in burial of a greater length of perennial or intermittent streams than traditional fill design and construction techniques.

(i) *Impoundments and depressions.* No permanent impoundments are allowed on the completed fill. You may construct small depressions if they—

(1) Are needed to retain moisture, minimize erosion, create or enhance wildlife habitat, or assist revegetation;

(2) Are not incompatible with the stability of the fill;

(3) Are consistent with the hydrologic reclamation plan approved in the permit in accordance with § 784.22 of this chapter;

(4) Will not result in elevated levels of parameters of concern in discharges from the fill; and

(5) Are approved by the regulatory authority.

(j) *Surface area stabilization.* You must provide slope protection to minimize surface erosion at the site. You must revegetate all disturbed areas, including diversion channels that are not riprapped or otherwise protected, upon completion of construction.

(k) *Inspections and examinations.* (1) A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, must inspect the fill at least quarterly during construction, with additional complete inspections conducted during critical construction periods. The professional engineer or specialist must be experienced in the construction of earth and rock fills. Critical construction periods include, at a minimum—

(i) Foundation preparation, including the removal of all organic matter and soil materials.

(ii) Placement of underdrains and protective filter systems.

(iii) Installation of final surface drainage systems.

(2) An engineer or specialist meeting the qualifications of paragraph (k)(1) of this section also must—

(i) Conduct daily examinations during placement and compaction of fill materials or, when more than one lift is completed per day, upon completion of each 4-foot lift. As an alternative, the engineer or specialist may conduct examinations on a weekly basis if a mine representative takes photographs on a daily basis to document the lift thickness and elevation with visual reference features. The certified report required by paragraph (k)(3) of this section must include this photographic documentation.

(ii) Maintain a log recording the examinations conducted under paragraph (k)(2)(i) of this section for each 4-foot lift in each fill. The log must include a description of the specific work locations, excess spoil placement methods, compaction adequacy, lift thickness, suitability of fill material, special handling of acid-forming and toxic-forming materials, deviations from the approved permit, and remedial measures taken.

(3)(i) The qualified registered professional engineer to which paragraph (k)(1) of this section refers must provide a certified report to the regulatory authority on a quarterly basis.

(ii) In each report prepared under paragraph (k)(3)(i) of this section, the engineer must certify that the fill has been constructed and maintained as designed and in accordance with the approved plan and this chapter.

(iii) The report prepared under paragraph (k)(3)(i) of this section must identify and discuss any evidence of instability, structural weakness, or other hazardous conditions. If one of more of those conditions exists, you must submit an application for a permit revision that includes appropriate remedial design specifications.

(iv) The report prepared under paragraph (k)(3)(i) of this section must contain—

(A) A review and summary of all complete inspections conducted during the quarter under paragraph (k)(1) of this section.

(B) A review and summary of all examinations conducted during the quarter under paragraph (k)(2) of this section, including the logs maintained under paragraph (k)(2)(ii) of this section.

(C) The photographs taken under paragraph (k)(2)(i) of this section.

(iv) Each certified report prepared under paragraph (k)(3) of this section for a quarter in which construction activities include placement of underdrains and protective filter systems must include color photographs taken during and after construction, but before underdrains are covered with excess spoil. If the underdrain system is constructed in phases, each phase must be certified separately. The photographs must be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(4) You must retain a copy of each certified report prepared under paragraph (k)(3) of this section at or near the mine site.

(l) *Coal mine waste.* You may dispose of coal mine waste in excess spoil fills only if approved by the regulatory authority and only if—

(1) You demonstrate, and the regulatory authority finds in writing, that the disposal of coal mine waste in the excess spoil fill will not—

(i) Cause or contribute to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in any

National Pollutant Discharge Elimination System permit issued for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart;

(ii) Cause or contribute to a violation of applicable state or tribal water quality standards for groundwater; or

(iii) Result in material damage to the hydrologic balance outside the permit area.

(2) The waste is placed in accordance with §§ 817.81 and 817.83 of this part.

(3) The waste is nontoxic-forming, nonacid-forming, and non-combustible.

(4) The waste is of the proper characteristics to be consistent with the design stability of the fill.

(m) *Underground disposal.* You may dispose of excess spoil in underground mine workings only in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration under § 784.26 of this chapter.

§ 817.72 [Reserved]

§ 817.73 [Reserved]

§ 817.74 What special requirements apply to disposal of excess spoil on a preexisting bench?

(a) *General requirements.* The regulatory authority may approve the disposal of excess spoil through placement on a preexisting bench on a previously mined area or a bond forfeiture site if—

(1) The proposed permit area includes the portion of the preexisting bench on which the spoil will be placed;

(2) The proposed operation will comply with the applicable requirements of § 817.102 of this part; and

(3) The requirements of this section are met.

(b) *Requirements for removal and disposition of vegetation, other organic matter, and soil materials.* You must remove all vegetation, other organic matter, topsoil, and subsoil from the disposal area prior to placement of the excess spoil and store, redistribute, or otherwise use those materials in accordance with § 817.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 784.12(e) of this chapter.

(c)(1) The fill must be designed and constructed using current, prudent engineering practices.

(2) The design must be certified by a registered professional engineer.

(3) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, the fill design must include underdrains and temporary diversions as necessary to control erosion, prevent water infiltration into the fill, and ensure stability. Underdrains must comply with the requirements of § 817.71(f)(3) of this part.

(d)(1) The spoil must be placed on the solid portion of the bench in a controlled manner and concurrently compacted as necessary to attain a long-term static safety factor of 1.3 for all portions of the fill.

(2) Any spoil deposited on any fill portion of the bench must be treated as an excess spoil fill under § 817.71 of this part.

(e) You must grade the spoil placed on the preexisting bench to—

(1) Achieve a stable slope that does not exceed the angle of repose.

(2) Eliminate the preexisting highwall to the maximum extent technically practical, using all reasonably available spoil, as that term is defined in § 701.5 of this chapter.

(3) Minimize erosion and water pollution both on and off the site.

(f) All disturbed areas, including diversion channels that are not riprapped or otherwise protected, must be revegetated upon completion of construction.

(g) You may not construct permanent impoundments on preexisting benches on which excess spoil is placed under this section.

(h) The final configuration of the fill on the preexisting bench must—

(1) Be compatible with natural drainage patterns and the surrounding area.

(2) Support the approved postmining land use.

§ 817.81 How must I dispose of coal mine waste?

(a) *General requirements.* If you, the permittee, intend to dispose of coal mine waste in an area other than the mine workings or excavations, you must place the waste in new or existing disposal areas within a permit area in accordance with this section and, as applicable, §§ 817.83 and 817.84 of this part.

(b) *Basic performance standards.* You must haul or convey and place the coal mine waste in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface-water runoff on groundwater and surface water, including aquatic life, within the permit and adjacent areas to the extent possible, using the best technology currently available.

(2) Ensure mass stability and prevent mass movement during and after construction.

(3) Ensure that the final disposal facility is suitable for revegetation, compatible with the natural surroundings, and consistent with the approved postmining land use.

(4) Not create a public hazard.

(5) Prevent combustion.

(6) Ensure that the disposal facility will not change the size or frequency of peak flows from precipitation events or thaws in a way that would result in an increase in flooding when compared with the impacts of premining peak flows.

(7) Ensure that the disposal facility will not cause or contribute to a violation of applicable state or tribal groundwater standards or preclude any premining use of groundwater.

(8) Ensure that the disposal facility will not cause or contribute to a violation of applicable state or tribal water quality standards for surface water located downstream of the toe of the fill, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(9) Ensure that the disposal facility will not discharge acid or toxic mine drainage.

(c) *Coal mine waste from outside the permit area.* You may dispose of coal mine waste materials from activities located outside the permit area within the permit area only if approved by the regulatory authority. Approval must be based upon a showing that disposal will be in accordance with the standards of this section.

(d) *Design and construction requirements.* (1)(i) You must design and construct coal mine waste disposal facilities using current, prudent engineering practices and any design and construction criteria established by the regulatory authority.

(ii) A qualified registered professional engineer, experienced in the design and construction of similar earth and waste structures, must certify the design of the disposal facility. The engineer must specifically certify that any existing and planned underground mine workings in the vicinity of the disposal facility will not adversely impact the stability of the structure.

(iii) You must construct the disposal facility in accordance with the design and plans submitted under § 784.25 of this chapter and approved in the permit. A qualified registered professional engineer experienced in the design and construction of similar earth and waste structures must certify that the facility has been constructed in accordance with the requirements of this paragraph.

(2) You must design and construct the disposal facility to attain a minimum long-term static safety factor of 1.5. The foundation and abutments must be

stable under all conditions of construction.

(e) *Foundation investigations.* (1) You must perform sufficient foundation and abutment investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability and control of underseepage. The analyses of the foundation conditions must take into consideration the effect of any underground mine workings located in the permit and adjacent areas upon the stability of the disposal facility.

(f) *Soil handling requirements.* You must remove all vegetation, organic matter, and soil materials from the disposal area prior to placement of the coal mine waste. You must store, redistribute, or otherwise use those materials in accordance with § 817.22 of this part. You may use soil substitutes and supplements if approved in the permit in accordance with § 784.12(e) of this chapter.

(g) *Emergency procedures.* (1) If any examination or inspection discloses that a potential hazard exists, you must inform the regulatory authority promptly of the finding and of the emergency procedures formulated for public protection and remedial action.

(2) If adequate procedures cannot be formulated or implemented, you must notify the regulatory authority immediately. The regulatory authority then must notify the appropriate agencies that other emergency procedures are required to protect the public.

(h) *Underground disposal.* You may dispose of coal mine waste in underground mine workings only in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration under § 784.26 of this chapter.

§ 817.83 What special requirements apply to coal mine waste refuse piles?

(a) *General requirements.* Refuse piles must meet the requirements of § 817.81 of this part, the additional requirements of this section, and the requirements of §§ 77.214 and 77.215 of this title.

(b) *Surface runoff and drainage control.* (1) If the disposal area contains springs, natural or manmade water courses, or wet weather seeps, you must design and construct the refuse pile with diversions and underdrains as necessary to control erosion, prevent water infiltration into the disposal facility, and ensure stability.

(2) You may not direct or divert uncontrolled surface runoff over the outslope of the refuse pile.

(3) You must direct runoff from areas above the refuse pile and runoff from the surface of the refuse pile into stabilized channels designed to meet the requirements of § 817.43 of this part and to safely pass the runoff from the 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(4) Runoff diverted from undisturbed areas need not be commingled with runoff from the surface of the refuse pile.

(5) Underdrains must comply with the requirements of § 817.71(f) of this part.

(c) *Surface area stabilization.* You must provide slope protection to minimize surface erosion at the site. You must revegetate all disturbed areas, including diversion channels that are not riprapped or otherwise protected, upon completion of construction.

(d) *Final configuration and cover.* (1) The final configuration of the refuse pile must be suitable for the approved postmining land use. Terraces may be constructed on the outslope of the refuse pile if required for stability, erosion control, conservation of soil moisture, or facilitation of the approved postmining land use. The grade of the outslope between terrace benches may not be steeper than 2h:1v (50 percent).

(2) No permanent impoundments or depressions are allowed on the completed refuse pile.

(3) Following final grading of the refuse pile, you must cover the coal mine waste with a minimum of 4 feet of the best available, nontoxic, and noncombustible material in a manner that does not impede drainage from the underdrains. The regulatory authority may allow less than 4 feet of cover material based on physical and chemical analyses showing that the revegetation requirements of §§ 817.111 and 817.116 of this part will be met.

(e) *Inspections.* You must comply with the inspection and examination requirements of § 817.71(k) of this part.

§ 817.84 What special requirements apply to coal mine waste impounding structures?

(a) Impounding structures constructed of coal mine waste or intended to impound coal mine waste must meet the requirements of § 817.81 of this part.

(b) You may not use coal mine waste to construct impounding structures unless you demonstrate, and the regulatory authority finds in writing, that the stability of such a structure conforms to the requirements of this part and that the use of coal mine waste will not have a detrimental effect on downstream water quality or the environment as a result of acid drainage or toxic seepage through the impounding structure. You must discuss the stability of the structure and the prevention and potential impact of acid drainage or toxic seepage through the impounding structure in detail in the design plan submitted to the regulatory authority in accordance with § 784.25 of this chapter.

(c)(1) You must design, construct, and maintain each impounding structure constructed of coal mine waste or intended to impound coal mine waste in accordance with paragraphs (a) and (c) of § 817.49 of this part.

(2) You may not retain these structures permanently as part of the approved postmining land use.

(3) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste that meets the criteria of § 77.216(a) of this title must have sufficient spillway capacity to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event, or greater event as specified by the regulatory authority.

(d) You must design spillways and outlet works to provide adequate protection against erosion and corrosion. Inlets must be protected against blockage.

(e) You must direct surface runoff from areas above the disposal facility and runoff from the surface of the facility that may cause instability or erosion of the impounding structure into stabilized channels designed and constructed to meet the requirements of § 817.43 of this part and to safely pass the runoff from a 100-year, 6-hour precipitation event. You must use the appropriate regional Natural Resources Conservation Service synthetic storm distribution to determine the peak flow from surface runoff from this event.

(f) For an impounding structure constructed of or impounding coal mine waste, you must remove at least 90 percent of the water stored during the design precipitation event within the 10-day period following the design precipitation event.

§ 817.87 What special requirements apply to burning and burned coal mine waste?

(a) You must extinguish coal mine waste fires in accordance with a plan approved by the regulatory authority and the Mine Safety and Health Administration. The plan must contain, at a minimum, provisions to ensure that only those persons authorized by the

operator, and who have an understanding of the procedures to be used, are involved in the extinguishing operations.

(b) You may not remove burning or burned coal mine waste from a permitted coal mine waste disposal area without a removal plan approved by the regulatory authority. Consideration must be given to potential hazards to persons working or living in the vicinity of the structure.

§ 817.89 How must I dispose of noncoal mine wastes?

(a)(1) You must place and store noncoal mine wastes, including, but not limited to, grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber, and other combustible materials generated during mining activities, in a controlled manner in a designated portion of the permit area.

(2) Placement and storage of noncoal wastes must ensure that leachate and surface runoff do not degrade surface water or groundwater, that fires are prevented, and that the area remains stable and suitable for reclamation and revegetation compatible with the natural surroundings.

(b)(1) Final disposal of noncoal mine wastes must be in a designated disposal site within the permit area or in a state-approved solid waste disposal area.

(2) Disposal sites within the permit area must meet the following requirements:

(i) The site must be designed and constructed to ensure that leachate and drainage from the noncoal mine waste area does not degrade surface water or groundwater.

(ii) Wastes must be routinely compacted and covered to prevent combustion and wind-borne waste.

(iii) When the disposal of noncoal wastes is completed, the site must be covered with a minimum of 2 feet of soil, slopes must be stabilized, and the site must be revegetated in accordance with §§ 817.111 through 817.116 of this part.

(iv) The disposal site must be operated in accordance with all local, state and federal requirements.

(c) At no time may any noncoal mine waste be deposited in a coal mine waste refuse pile or impounding structure, nor may an excavation for a noncoal mine waste disposal site be located within 8 feet of any coal outcrop or coal storage area.

§ 817.95 How must I protect surface areas from wind and water erosion?

(a) You must protect and stabilize all exposed surface areas to effectively control erosion and air pollution attendant to erosion.

(b)(1) You must fill, regrade, or otherwise stabilize rills and gullies that form in areas that have been regraded and upon which soil or soil substitute materials have been redistributed. This requirement applies only to rills and gullies that—

(i) Disrupt the approved postmining land use or reestablishment of the vegetative cover;

(ii) Cause or contribute to a violation of applicable state or tribal water quality standards or effluent limitations, including, but not limited to, water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c), and effluent limitations established in any National Pollutant Discharge Elimination System permit issued for the operation under section 402 of the Clean Water Act, 33 U.S.C. 1342, or its state or tribal counterpart;

(iii) Cause or contribute to a violation of applicable state or tribal water quality standards for groundwater; or

(iv) Result in material damage to the hydrologic balance outside the permit area.

(2) You must reapply soil materials to the filled or regraded rills and gullies when necessary to reestablish a vegetative cover. You must then replant those areas.

§ 817.97 How must I protect and enhance fish, wildlife, and related environmental values?

(a) *General requirements.* You, the permittee, must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and achieve enhancement of those resources where practicable, as described in detail in the fish and wildlife protection and enhancement plan approved in the permit in accordance with § 784.16 of this chapter.

(b) *Requirements related to federal, state, and tribal endangered species laws.*—(1) *Requirements related to the Endangered Species Act of 1973.* (i) You may not conduct any surface mining activity that is in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* Nothing in this chapter authorizes the taking of a species listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* or the destruction or adverse modification of designated critical habitat unless the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as applicable, authorizes the taking of a threatened or endangered species or the destruction or adverse modification of designated critical habitat under 16 U.S.C. 1536(b)(4) or 1539(a)(1)(B).

(ii) You must promptly report to the regulatory authority the presence of any previously unreported species listed as threatened or endangered, or any previously unreported species proposed for listing as threatened or endangered, under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* within the permit or adjacent areas. This requirement applies regardless of whether the species was listed before or after permit issuance.

(iii) (A) Upon receipt of a notification under paragraph (b)(2)(ii) of this section, the regulatory authority will contact and coordinate with the appropriate state, tribal, and federal fish and wildlife agencies.

(B) The regulatory authority, in coordination with the appropriate state, tribal, and federal fish and wildlife agencies, will identify whether, and under what conditions, you may proceed. When necessary to ensure compliance with the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.,* the regulatory authority will issue an order under § 774.10(b) of this chapter requiring that you revise the permit.

(iv) You must comply with any species-specific protection measures required by the regulatory authority in coordination with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as applicable.

(2) *Requirements related to state or tribal endangered species laws.* (i) You must promptly report to the regulatory authority any previously unreported state-listed or tribally-listed threatened or endangered species within the permit or adjacent areas whenever you become aware of its presence. This requirement applies regardless of whether the species was listed before or after permit issuance.

(ii) (A) Upon receipt of a notification under paragraph (b)(2)(i) of this section, the regulatory authority will contact and coordinate with the appropriate state or tribal fish and wildlife agencies.

(B) The regulatory authority, in coordination with the appropriate state or tribal fish and wildlife agencies, will identify whether, and under what conditions, you may proceed. When necessary, the regulatory authority will issue an order under § 774.10(b) of this chapter requiring that you revise the permit.

(c) *Bald and golden eagles.* (1) You may not conduct any underground mining activity in a manner that would

result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs.

(2) You must promptly report to the regulatory authority any golden or bald eagle nest within the permit area of which you become aware.

(3) Upon notification, the regulatory authority will contact and coordinate with the U.S. Fish and Wildlife Service and, when appropriate, the state or tribal fish and wildlife agency to identify whether, and under what conditions, you may proceed.

(4) Nothing in this chapter authorizes the taking of a bald or golden eagle, its nest, or any of its eggs in violation of the Bald and Golden Eagle Protection Act, 16 U.S.C. 668–668d.

(d) *Miscellaneous protective measures for other species of fish and wildlife.* To the extent possible, using the best technology currently available, you must—

(1) Ensure that electric power transmission lines and other transmission facilities used for, or incidental to, surface mining activities on the permit area are designed and constructed to minimize electrocution hazards to raptors and other avian species with large wingspans.

(2) Locate, construct, operate, and maintain haul and access roads and sedimentation control structures in a manner that avoids or minimizes impacts on important fish and wildlife species or other species protected by state or federal law.

(3) Design fences, overland conveyors, and other potential barriers to permit passage for large mammals, except where the regulatory authority determines that such requirements are unnecessary.

(4) Fence, cover, or use other appropriate methods to exclude wildlife from ponds that contain hazardous concentrations of toxic or toxic-forming materials.

(5) Reclaim and reforest lands that were forested at the time of application and lands that would revert to forest under conditions of natural succession in a manner that enhances recovery of the native forest ecosystem as expeditiously as practicable.

(e) *Wetlands.* (1) To the extent possible, using the best technology currently available, you must avoid disturbances to wetlands and, where practicable, enhance them. If avoidance is not possible, you must restore or replace wetlands that you disturb and, where practicable, enhance them.

(2) Nothing in paragraph (e)(1) of this section authorizes destruction or degradation of wetlands in violation of section 404 of the Clean Water Act, 33 U.S.C. 1344.

(f) *Habitat of unusually high value for fish and wildlife.* To the extent possible, using the best technology currently available, you must avoid disturbances to and, where practicable, enhance riparian and other native vegetation along rivers and streams, lentic vegetation bordering ponds and lakes, and habitat of unusually high value for fish and wildlife, as described in § 783.20(c)(3) of this chapter. If avoidance of these features is not possible, you must restore or replace those features and, where practicable, enhance them.

(g) *Vegetation requirements for fish and wildlife habitat postmining land use.* Where fish and wildlife habitat is a postmining land use, you must select and arrange the plant species to be used for revegetation to maximize the benefits to fish and wildlife. Plant species must be native to the area and must be selected on the basis of the following criteria:

(1) Their proven nutritional value for fish or wildlife.

(2) Their value as cover for fish or wildlife.

(3) Their ability to support and enhance fish or wildlife habitat after the release of performance bonds.

(4) Their ability to sustain natural succession by allowing the establishment and spread of plant species across ecological gradients. You may not use invasive plant species that are known to inhibit natural succession.

(h) *Vegetation requirements for cropland postmining land use.* Where cropland is the postmining land use, and where appropriate for wildlife-management and crop-management practices, you must intersperse the crop fields with trees, hedges, or fence rows to break up large blocks of monoculture and to diversify habitat types for birds and other animals.

(i) *Vegetation requirements for forestry postmining land uses.* Where forestry, whether managed or unmanaged, is the postmining land use, you must plant native tree and understory species to the extent that doing so is not inconsistent with the type of forestry to be practiced as part of the postmining land use. In all cases, regardless of the type of forestry to be practiced as part of the postmining land use, you must intersperse plantings of commercial species with plantings of native trees and shrubs of high value to wildlife.

(j) *Vegetation requirements for other postmining land uses.* Where residential, public service, commercial, industrial, or intensive recreational uses are the postmining land use, you must establish—

(1) Greenbelts comprised of non-invasive native plants that provide food or cover for wildlife, unless greenbelts would be inconsistent with the approved postmining land use plan for that site.

(2)(i) A vegetated buffer at least 100 feet wide along each bank of all perennial and intermittent streams within the permit area. The width of the buffer must be measured horizontally on a line perpendicular to the stream, beginning at the ordinary high water mark. The buffer must be planted with species native to the area, including species adapted to and suitable for planting in any floodplains or other riparian habitat located within the buffer. The species planted must consist of native tree and understory species if the land was forested at the time of application or if it would revert to forest under conditions of natural succession.

(ii) Paragraph (i)(2)(i) of this section does not apply to situations in which a vegetated buffer comprised of native species would be incompatible with an approved postmining land use that is implemented before final bond release under §§ 800.40 through 800.43 of this chapter.

(k) *Planting arrangement requirements.* You must design and arrange plantings in a manner that optimizes benefits to wildlife to the extent practicable and consistent with the postmining land use.

§ 817.99 What measures must I take to prevent and remediate landslides?

(a) You must notify the regulatory authority by the fastest available means whenever a landslide occurs that has the potential to adversely affect public property, health, safety, or the environment.

(b) You must comply with any remedial measures that the regulatory authority requires in response to the notification provided in paragraph (a) of this section.

§ 817.100 What are the standards for conducting reclamation contemporaneously with mining?

(a) You must reclaim all areas disturbed by surface impacts incident to an underground coal mine as contemporaneously as practicable with the mining operations, except when the mining operations are conducted in accordance with a variance for concurrent surface and underground mining activities under § 785.18 of this chapter. Reclamation activities include, but are not limited to, backfilling, grading, soil replacement, revegetation, and stream restoration.

(b) The regulatory authority may establish schedules that define contemporaneous reclamation.

§ 817.102 How must I backfill surface excavations and grade and configure the land surface?

(a) You, the permittee or operator, must backfill all surface excavations and grade all disturbed areas in compliance with the plan approved in the permit in accordance with § 784.12(d) of this chapter to—

(1) Restore the approximate original contour as the final surface configuration, except in the following situations:

(i) Sites for which the regulatory authority has approved a variance under § 785.16 of this chapter.

(ii) Remining operations on previously mined areas, but only to the extent specified in § 817.106(b) of this part.

(iii) Excess spoil fills constructed in accordance with § 817.71 or § 817.74 of this part.

(iv) Refuse piles constructed in accordance with § 817.83 of this part.

(v) Permanent impoundments that meet the requirements of paragraph (a)(3)(ii) of this section and § 784.35(b)(4) of this chapter.

(vi) The placement, in accordance with § 784.35(b)(3) of this chapter, of what would otherwise be excess spoil on the mined-out area to heights in excess of the premining elevation when necessary to avoid or minimize construction of excess spoil fills on undisturbed land.

(vii) Regrading of settled and revegetated spoil storage sites at the conclusion of underground mining activities, provided the following conditions are met:

(A) The settled and revegetated storage sites are composed of spoil or non-acid-forming or non-toxic-forming underground development waste.

(B) The spoil or underground development waste is not located so as to be detrimental to the environment, the health and safety of the public, or the approved postmining land use.

(C) You demonstrate, through standard geotechnical analysis, that the spoil or underground development waste has a 1.3 static safety factor for material placed on a solid bench and a 1.5 static safety factor for material not placed on a solid bench.

(D) The surface of the spoil or underground development waste is revegetated in accordance with §§ 817.111 and 817.116 of this part.

(E) Surface runoff is controlled in accordance with § 784.29 of this chapter and §§ 817.43 and 817.45 of this part.

(F) The regulatory authority determines that disturbance of the existing spoil or underground development waste would increase environmental harm or adversely affect the health or safety of the public.

(G) The spoil is not needed to eliminate the highwall or to meet other regulatory program requirements.

(2) Minimize the creation of uniform slopes and cut-and-fill terraces. The regulatory authority may approve cut-and-fill terraces only if—

(i) They are compatible with the approved postmining land use and are needed to conserve soil moisture, ensure stability, or control erosion on final-graded slopes; or

(ii) Specialized grading, foundation conditions, or roads are required for the approved postmining land use, in which case the final grading may include a terrace of adequate width to ensure the safety, stability, and erosion control necessary to implement the postmining land use.

(3) Eliminate all highwalls, spoil piles, impoundments, and depressions, except in the following situations:

(i) You may construct or retain small depressions if—

(A) They are needed to retain moisture, minimize erosion, create or enhance wildlife habitat, or assist revegetation;

(B) They are consistent with the hydrologic reclamation plan approved in the permit in accordance with § 784.22 of this chapter; and

(C) You demonstrate that they will not result in elevated levels of parameters of concern in discharges from the backfilled and graded area.

(ii) The regulatory authority may approve the retention of permanent impoundments if—

(A) They meet the requirements of §§ 817.49 and 817.55 of this part;

(B) They are suitable for the approved postmining land use; and

(C) You demonstrate compliance with the future maintenance provisions of § 800.42(c)(5) of this chapter.

(D) You have obtained all necessary approvals and authorizations under section 404 of the Clean Water Act, 33 U.S.C. 1344, when the impoundment is located in waters subject to the jurisdiction of the Clean Water Act, 33 U.S.C. 1251 *et seq.*

(iii) You may retain highwalls on previously mined areas to the extent provided in § 817.106(b) of this part.

(iv) You may retain modified highwall segments to the extent necessary to replace similar natural landforms removed by the mining operation. The regulatory program must establish the conditions under which these highwall segments may be retained and the modifications that must be made to the highwall to ensure that—

(A) The retained segment resembles similar landforms that existed before any mining and restores the ecological niches that those landforms provided. Nothing in this paragraph authorizes the retention of modified highwall segments in excess of the number, length, and height needed to replace similar landforms that existed before any mining.

(B) The retained segment is stable. Features that result in the creation of talus slopes for wildlife habitat are acceptable if they meet the requirements of paragraph (a)(3)(iv)(A) of this section.

(C) The retained segment does not create an increased safety hazard compared to the features that existed before any mining.

(D) The exposure of water-bearing strata, if any, in the retained segment does not adversely impact the hydrologic balance.

(v) You may retain settled and revegetated spoil storage sites under the conditions specified in paragraph (a)(1)(vii) of this section.

(4) Achieve a postmining slope that does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum long-term static safety factor of 1.3 and to prevent slides.

(5) Minimize erosion and water pollution, both on and off the site.

(6) Support the approved postmining land use.

(b) You must return all spoil to the surface excavations from which the spoil was removed. This requirement does not apply to—

(1) Excess spoil disposed of in accordance with § 817.71 or § 817.74 of this part.

(2) Spoil placed outside surface excavations in non-steep slope areas to restore the approximate original contour by blending the spoil into the surrounding terrain, provided that you comply with the following requirements:

(i) You must remove all vegetation and other organic matter from the area upon which you intend to place spoil for blending purposes. You may not burn these materials; you must store, redistribute, use, or bury them in the manner specified in § 817.22(f) of this part.

(ii) You must remove, segregate, store, and redistribute topsoil, in accordance with § 817.22 of this part, from the area upon which you intend to place spoil for blending purposes.

(3) Settled and revegetated spoil storage sites under the conditions

specified in paragraph (a)(1)(vii) of this section.

(c) You must compact spoil and waste materials when necessary to ensure stability or to prevent the formation of acid or toxic mine drainage, but, to the extent possible, you must avoid compacting spoil, soil, and other materials placed in what will be the root zone of the species planted under the revegetation plan approved in the permit in accordance with § 784.12(g) of this chapter.

(d)(1) You must cover all exposed coal seams with material that is noncombustible, nonacid-forming, and nontoxic-forming.

(2) You must handle and dispose of all other combustible materials exposed, used, or produced during mining in accordance with § 817.89 of this part in a manner that will prevent sustained combustion, as approved in the permit in accordance with § 784.12(j) of this chapter.

(3) You must handle all other acid-forming and toxic-forming materials—

(i) In compliance with the plan approved in the permit in accordance with § 784.12(n) of this chapter;

(ii) In compliance with § 817.38 of this part;

(iii) In compliance with the hydrologic reclamation plan approved in the permit in accordance with § 784.22(a) of this chapter; and

(iv) In a manner that will minimize adverse effects on plant growth and the approved postmining land use.

(e) You must dispose of any coal mine waste placed in the surface excavation in accordance with §§ 817.81 and 817.83 of this part, except that a long-term static safety factor of 1.3 will apply instead of the 1.5 factor specified in § 817.81(d)(2) of this part.

(f) You must prepare final-graded surfaces in a manner that minimizes erosion and provides a surface for replacement of soil materials that will minimize slippage.

§ 817.106 What special provisions for backfilling, grading, and surface configuration apply to previously mined areas with a preexisting highwall?

(a) Remining operations on previously mined areas that contain a preexisting highwall must comply with the requirements of §§ 817.102 through 817.107 of this part, except as provided in this section.

(b) The highwall elimination requirements of § 817.102(a) of this part do not apply to remining operations for which you demonstrate in writing, to the regulatory authority's satisfaction, that the volume of all reasonably available spoil is insufficient to completely backfill the reaffected or enlarged highwall. Instead, for those operations, you must eliminate the highwall to the maximum extent technically practical in accordance with the following criteria:

(1) You must use all spoil generated by the remining operation and any other reasonably available spoil to backfill the area. You must include reasonably available spoil in the immediate vicinity of the remining operation within the permit area.

(2) You must grade the backfilled area to a slope that is compatible with the approved postmining land use and that provides adequate drainage and long-term stability.

(3) Any highwall remnant must be stable and not pose a hazard to the public health and safety or to the environment. You must demonstrate, to the satisfaction of the regulatory authority, that the highwall remnant is stable.

(4) You must not disturb spoil placed on the outslope during previous mining operations if disturbance would cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

§ 817.107 What special provisions for backfilling, grading, and surface configuration apply to operations on steep slopes?

(a) Underground mining activities on steep slopes must comply with this section and the requirements of §§ 817.102 through 817.106 of this part.

(b) You may not place the following materials on the downslope:

(1) Spoil.

(2) Waste materials of any type.

(3) Debris, including debris from clearing and grubbing, except for woody materials used to enhance fish and wildlife habitat.

(4) Abandoned or disabled equipment.

(c) You may not disturb land above the highwall unless the regulatory authority finds that disturbance will facilitate compliance with the environmental protection standards of this subchapter and the disturbance is limited to that necessary to facilitate compliance.

(d) You must handle woody materials in accordance with § 817.22(f) of this part.

§ 817.111 How must I revegetate areas disturbed by mining activities?

(a) You, the permittee, must establish a diverse, effective, permanent vegetative cover on regraded areas and on all other disturbed areas except—

(1) Water areas approved as a postmining land use or in support of the postmining land use.

(2) The surfaces of roads approved for retention to support the postmining land use.

(3) Rock piles, water areas, and other non-vegetative features created to restore or enhance wildlife habitat under the fish and wildlife protection and enhancement plan approved in the permit in accordance with § 784.16 of this chapter.

(4) Any other impervious surface, such as a building or a parking lot, approved as part of or in support of the postmining land use. This provision applies only to structures and facilities constructed before expiration of the revegetation responsibility period.

(b) The reestablished vegetative cover must—

(1) Comply with the revegetation plan approved in the permit in accordance with § 784.12(g) of this chapter.

(2) Be consistent with the approved postmining land use and, except as provided in the revegetation plan approved in the permit in accordance with § 784.12(g) of this chapter, the native plant communities described in § 783.19 of this chapter.

(3) Be at least equal in extent of cover to the natural vegetation of the area.

(4) Be capable of stabilizing the soil surface and, in the long term, preventing erosion in excess of what would have occurred naturally had the site not been disturbed.

(5) Not inhibit the establishment of trees and shrubs when the revegetation plan approved in the permit requires the use of woody plants.

(c) Volunteer plants of species that are desirable components of the plant communities described in the permit application under § 783.19 of this chapter and that are not inconsistent with the postmining land use may be considered in determining whether the requirements of §§ 817.111 and 817.116 have been met.

(d) You must stabilize all areas upon which you have redistributed soil or soil substitute materials. You must use one or a combination of the following methods, unless the regulatory authority determines that neither method is necessary to stabilize the surface and control erosion—

(1) Establishing a temporary vegetative cover consisting of noncompetitive and non-invasive species, either native or domesticated or a combination thereof.

(2) Applying suitable mulch free of weed and noxious plant seeds.

(e) You must plant all disturbed areas with the species needed to establish a

permanent vegetative cover during the first normal period for favorable planting conditions after redistribution of the topsoil or other plant-growth medium. The normal period for favorable planting conditions is the generally accepted local planting time for the type of plant materials approved in the permit as part of the revegetation plan under § 784.12(g) of this chapter.

§ 817.113 [Reserved]

§ 817.114 [Reserved]

§ 817.115 How long am I responsible for revegetation after planting?

(a) *General provisions.* (1) The period of extended responsibility for successful revegetation will begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the regulatory authority in accordance with paragraph (d) of this section.

(2) The initial planting of small areas that are regraded and planted as a result of the removal of sediment control structures and associated structures and facilities, including ancillary roads used to access those structures, need not be considered an augmented seeding necessitating an extended or separate revegetation responsibility period. This paragraph also applies to areas upon which accumulated sediment and materials resulting from removal of sedimentation pond embankments are spread.

(b) *Areas of more than 26.0 inches of average annual precipitation.* In areas of more than 26.0 inches of annual average precipitation, the period of responsibility will continue for a period of not less than—

(1) Five full years, except as provided in paragraph (b)(2) of this section.

(i) The vegetation parameters for grazing land, pasture land, or cropland must equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year.

(ii) On all other areas, the parameters must equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(2) Two full years for lands eligible for remining included in a permit approved under § 785.25 of this chapter. The lands must equal or exceed the applicable ground cover standard during the growing season of the last year of the responsibility period.

(c) *Areas of 26.0 inches or less average annual precipitation.* In areas of 26.0 inches or less average annual precipitation, the period of responsibility will continue for a period of not less than:

(1) Ten full years, except as provided in paragraph (c)(2) of this section.

(i) The vegetation parameters for grazing land, pasture land, or cropland must equal or exceed the approved success standard during the growing season of any two years after year six of the responsibility period.

(ii) On all other areas, the parameters must equal or exceed the applicable success standard during the growing season of the last year of the responsibility period.

(2) Five full years for lands eligible for remining included in a permit approved under § 785.25 of this chapter. The lands must equal or exceed the applicable ground cover standard during the growing seasons of the last two consecutive years of the responsibility period.

(d) *Normal husbandry practices.* (1) The regulatory authority may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from OSMRE in accordance with § 732.17 of this chapter that the practices are normal husbandry practices, without extending the period of responsibility for revegetation success and bond liability, if those practices can be expected to continue as part of the postmining land use or if discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success.

(2) Approved practices must be normal husbandry practices within the region for unmined lands having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding, and transplanting specifically necessitated by such actions.

§ 817.116 What requirements apply to standards for determining revegetation success?

(a) The regulatory authority must select standards for revegetation success and statistically valid sampling techniques for measuring revegetation success. The standards and techniques must be made available to the public in written form.

(b) The standards for success applied to a specific permit must reflect the revegetation plan requirements of § 784.12(g) of this chapter. They must be based upon the following data—

(1) The plant community and vegetation information required under § 783.19 of this chapter.

(2) The soil type and productivity information required under § 783.21 of this chapter.

(3) The land use capability and productivity information required under § 783.22 of this chapter.

(4) The postmining land use approved under § 784.24 of this chapter, but only to the extent that the approved postmining land use will be implemented before final bond release under §§ 800.40 through 800.43 of this chapter. Otherwise, the site must be revegetated in a manner that will restore native plant communities and the revegetation success standards for the site must reflect that requirement.

(c) Except for the areas identified in § 817.111(a) of this part, standards for success must include—

(1) Species diversity.

(2) Areal distribution of species.

(3) Ground cover, except for land actually used for cropland after the completion of regrading and redistribution of soil materials.

(4) Production, for land used for cropland, pasture, or grazing land either before permit issuance or after the completion of regrading and redistribution of soil materials.

(5) Stocking, for areas revegetated with woody plants.

(d) The ground cover, production, or stocking of the revegetated area will be considered equal to the approved success standard for those parameters when the measured values are not less than 90 percent of the success standard, using a 90-percent statistical confidence interval (*i.e.,* a one-sided test with a 0.10 alpha error).

(e) For all areas revegetated with woody plants, regardless of the postmining land use), the regulatory authority must specify minimum stocking and planting arrangements on the basis of local and regional conditions and after coordination with and approval by the state agencies responsible for the administration of forestry and wildlife programs. Coordination and approval may occur on either a program-wide basis or a permit-specific basis.

(f)(1) Only those species of trees and shrubs approved in the permit as part of the revegetation plan under § 784.12(g) of this chapter or volunteer trees and shrubs of species that meet the requirements of § 817.111(c) of this part may be counted in determining whether stocking standards have been met.

(2)(i) At the time of final bond release under §§ 800.40 through 800.43 of this chapter, at least 80 percent of the trees and shrubs used to determine success must have been in place for 60 percent of the applicable minimum period of

responsibility under § 817.115 of this part.

(ii) Trees and shrubs counted in determining revegetation success must be healthy and have been in place for not less than two growing seasons. Any replanting must be done by means of transplants to allow for proper accounting of plant stocking.

(iii)(A) For purposes of paragraph (f)(2)(ii) of this section, volunteer trees and shrubs of species that meet the requirements of § 817.111(c) of this part may be deemed equivalent to planted specimens two years of age or older.

(B) Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding.

(iv) The requirements of paragraphs (f)(2)(i) and (ii) of this section will be deemed met when records of woody vegetation planted show that—

(A) No woody plants were planted during the last two growing seasons of the responsibility period; and,

(B) If any replanting of woody plants took place earlier during the responsibility period, the total number planted during the last 60 percent of that period is less than 20 percent of the total number of woody plants required to meet the stocking standard.

(3) Vegetative ground cover on areas planted with trees or shrubs must be of a nature that allows for natural establishment and succession of native plants, including trees and shrubs.

(g) *Special provision for areas that are developed within the revegetation responsibility period.* Portions of the permit area that are developed for industrial, commercial, or residential use within the revegetation responsibility period need not meet production or stocking standards. For those areas, the vegetative ground cover must not be less than that required to control erosion.

(h) *Special provision for previously mined areas.* Previously mined areas need only meet a vegetative ground cover standard, unless the regulatory authority specifies otherwise. At a minimum, the cover on the revegetated previously mined area must not be less than the ground cover existing before redisturbance and must be adequate to control erosion.

(i) *Special provision for prime farmland.* For prime farmland historically used for cropland, the revegetation success standard provisions of § 823.15 of this chapter apply in lieu of the requirements of paragraphs (b) through (h) of this section.

§ 817.121 What measures must I take to prevent, control, or correct damage resulting from subsidence?

(a) *Measures to prevent or minimize damage.* (1) You, the permittee or operator, must either—

(i) Adopt measures consistent with known technology that prevent subsidence from causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or

(ii) Adopt mining technology that provides for planned subsidence in a predictable and controlled manner.

(2) If you employ mining technology that provides for planned subsidence in a predictable and controlled manner under paragraph (a)(1)(ii) of this section, you must take necessary and prudent measures, consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to non-commercial buildings and occupied residential dwellings and structures related thereto unless—

(i) You have obtained the written consent of the owners of those structures; or

(ii) The costs of those measures would exceed the anticipated costs of repair. This exception does not apply if the anticipated damage would constitute a threat to health or safety.

(3) Nothing in this part prohibits the standard method of room-and-pillar mining.

(b) You must comply with all provisions of the subsidence control plan prepared pursuant to § 784.30 of this chapter and approved in the permit.

(c) *Repair of damage to surface lands and waters.* (1) To the extent technologically and economically feasible, you must correct any subsidence-related material damage to surface lands, wetlands, streams, or water bodies by restoring the land and water features to a condition capable of maintaining the value and reasonably foreseeable uses that the land was capable of supporting before the subsidence-related damage occurred.

(2) When correction of subsidence-related material damage to wetlands or a perennial or intermittent stream is technologically and economically infeasible, you must implement fish and wildlife enhancement measures, as approved by the regulatory authority in a permit revision, to offset the material damage.

(d) *Repair or compensation for damage to non-commercial buildings, occupied residential dwellings and related structures.* (1) You must promptly repair, or compensate the owner for, material damage resulting from subsidence caused to any non-commercial building or occupied residential dwelling or structure related thereto that existed at the time of mining.

(2) If you select the repair option, you must fully rehabilitate, restore, or replace the damaged structure.

(3) If you select the compensation option, you must compensate the owner of the damaged structure for the full amount of the decrease in value resulting from the subsidence-related damage. You may provide compensation by the purchase, before mining, of a non-cancellable, premium-prepaid insurance policy.

(4) The requirements of paragraph (d) of this section apply only to subsidence-related damage caused by underground mining activities conducted after October 24, 1992.

(e) *Repair or compensation for damage to other structures.* To the extent required under applicable provisions of state law, you must correct material damage resulting from subsidence caused to any structures or facilities not protected by paragraph (d) of this section by either repairing the damage or compensating the owner of the structures or facilities for the full amount of the decrease in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase before mining of a non-cancellable, premium-prepaid insurance policy.

(f) *Information to be considered in determination of causation.* The regulatory authority must consider all relevant and reasonably available information in determining whether damage to protected structures was caused by subsidence from underground mining.

(g) *Adjustment of bond amount for subsidence damage.* (1) When subsidence-related material damage to land (including wetlands, streams, and water bodies), structures or facilities protected under paragraphs (c) through (e) of this section occurs, or when contamination, diminution, or interruption to a water supply protected under § 817.40 of this part occurs, the regulatory authority must require the permittee to post additional performance bond until the repair, compensation, or replacement is completed.

(2)(i) For structures protected under paragraphs (d) and (e) of this section, the amount of additional bond required

under paragraph (g)(1) of this section must equal the—

(A) Estimated cost of the repairs if the repair option is selected.

(B) Decrease in value if the compensation option is selected.

(ii) For water supplies protected under § 817.40 of this part, the amount of additional bond required under paragraph (g)(1) of this section must equal the estimated cost to replace the protected water supply, unless the conditions described in § 817.40(a)(4) of this part apply.

(iii) For surface lands and waters to which paragraph (c) of this section applies, the amount of additional bond required under paragraph (g)(1) of this section must equal the estimated cost of restoring the land and waters to a condition capable of maintaining the value and reasonably foreseeable uses that they were capable of supporting before the material damage from subsidence occurred.

(3)(i) The requirements of paragraph (g)(1) of this section do not apply if repair, compensation, or replacement is completed within 90 days of the occurrence of damage. The regulatory authority may extend the 90-day time frame, provided that the total time allowed does not exceed one year, if you demonstrate, and the regulatory authority finds in writing, that repair of subsidence-related material damage to lands, waters, or protected structures or replacement of an adversely impacted protected water supply within 90 days would be unreasonable because—

(A) Subsidence is not complete;

(B) All probable subsidence-related material damage to lands, waters, or protected structures has not yet occurred; or

(C) All reasonably anticipated changes that may affect an adversely impacted protected water supply have not yet occurred.

(ii)(A) If you have not completed correction or repair of subsidence-related material damage to surface lands or waters or replaced adversely impacted protected water supplies within 2 years following the occurrence of that damage, the regulatory authority must initiate bond forfeiture proceedings under § 800.50 of this chapter and use the funds collected to repair the surface lands and waters or replace the protected water supplies.

(B) Paragraph (g)(3)(ii)(A) of this section does not apply if—

(*1*) The landowner refuses to allow access to conduct the corrective measures; or

(*2*) You demonstrate, and the regulatory authority finds, that correction or repair of the material damage to surface lands or waters is not technologically or economically feasible. In that situation, you must complete the enhancement measures required under paragraph (c)(2) of this section.

(h) *Prohibitions and limitations on underground mining.* (1) You may not conduct underground mining activities beneath or adjacent to—

(i) Public buildings and facilities.

(ii) Churches, schools, and hospitals.

(iii) Impoundments with a storage capacity of 20 acre-feet or more or bodies of water with a volume of 20 acre-feet or more.

(2) The prohibitions of paragraph (h)(1) of this section do not apply if the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of, the features or facilities listed in paragraphs (h)(1)(i) through (iii) of this section.

(3) The regulatory authority may limit the percentage of coal extracted under or adjacent to the features and facilities listed in paragraphs (h)(1)(i) through (iii) of this section if it determines that the limitation is necessary to minimize the potential for material damage to those features or facilities or to any aquifer or body of water that serves as a significant water source for any public water supply system.

(i) If subsidence causes material damage to any of the features or facilities listed in paragraphs (h)(1)(i) through (iii) of this section, the regulatory authority may suspend mining under or adjacent to those features or facilities until the subsidence control plan is modified to ensure prevention of further material damage to those features or facilities.

(j) The regulatory authority must suspend underground mining activities under urbanized areas, cities, towns, and communities, and adjacent to industrial or commercial buildings, major impoundments, or perennial streams, if it finds that the mining activities pose an imminent danger to inhabitants of the urbanized areas, cities, towns, or communities.

(k) You must submit a detailed plan of the underground workings of your mine in accordance with a schedule approved by the regulatory authority. The detailed plan must include maps and descriptions, as appropriate, of significant features of the underground mine, including the size, configuration, and approximate location of pillars and entries, extraction ratios, measures taken to prevent or minimize subsidence and related damage, areas of full extraction, and other information required by the regulatory authority. The regulatory authority may hold the information submitted with the detailed plan as confidential, in accordance with § 773.6(d) of this chapter, upon your request.

§ 817.122 How and when must I provide notice of planned underground mining?

(a) At least 6 months prior to mining, or within that period if approved by the regulatory authority, you, the underground mine operator, must mail a notification to all owners and occupants of surface property and structures above the planned underground workings.

(b) The notification must include, at a minimum—

(1) Identification of specific areas in which mining will take place;

(2) Dates that specific areas will be undermined; and

(3) The location or locations where the subsidence control plan may be examined.

§ 817.131 What actions must I take when I temporarily cease mining operations?

(a)(1) Each person who temporarily ceases to conduct underground mining activities at a particular site must effectively support and maintain all surface access openings to underground operations and secure surface facilities in areas in which there are no current operations, but where operations are to be resumed under an approved permit.

(2) Temporary cessation does not relieve a person of his or her obligation to comply with any provisions of the approved permit.

(b)(1) You must submit a notice of intent to temporarily cease operations to the regulatory authority before ceasing mining and reclamation operations for 30 or more days, or as soon as you know that a temporary cessation will extend beyond 30 days.

(2) The notice of temporary cessation must include a statement of the—

(i) Exact number of surface acres disturbed within the permit area prior to temporary cessation;

(ii) Extent and kind of reclamation accomplished before temporary cessation; and

(iii) Backfilling, regrading, revegetation, environmental monitoring, underground opening closures, and water treatment activities that will continue during temporary cessation.

§ 817.132 What actions must I take when I permanently cease mining operations?

(a) Persons who permanently cease conducting underground mining activities at a particular site must close, backfill, or otherwise permanently reclaim all disturbed areas in accordance with this chapter and the

permit approved by the regulatory authority.

(b) All underground openings, surface equipment, surface structures, or other surface facilities must be removed and the affected land reclaimed, unless the regulatory authority approves retention of those features because they are suitable for the postmining land use or environmental monitoring.

§ 817.133 What provisions concerning postmining land use apply to my operation?

You, the permittee, must restore all disturbed areas in a timely manner to conditions that are capable of supporting—

(a) The uses they were capable of supporting before any mining; as described under § 783.22 of this chapter; or

(b) Higher or better uses approved under § 784.24(b) of this chapter.

§ 817.150 What are the general requirements for haul and access roads?

(a) *Road classification system.* (1) Each road meeting the definition of that term in § 701.5 of this chapter must be classified as either a primary road or an ancillary road.

(2) A primary road is any road that is—

(i) Used for transporting coal or spoil;

(ii) Frequently used for access or other purposes for a period in excess of 6 months; or

(iii) To be retained for an approved postmining land use.

(3) An ancillary road is any road not classified as a primary road.

(b) *Performance standards.* Each road must be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to—

(1) Control or prevent erosion, siltation, and air pollution attendant to erosion, including road dust and dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices.

(2) Control or prevent damage to fish, wildlife, or their habitat and related environmental values.

(3) Control or prevent additional contributions of suspended solids to streamflow or runoff outside the permit area.

(4) Neither cause nor contribute, directly or indirectly, to a violation of applicable state or tribal water quality standards for surface water and groundwater, including, but not limited to, surface water quality standards established under the authority of section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c).

(5) Refrain from seriously altering the normal flow of water in streambeds or drainage channels.

(6) Prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress.

(7) Use nonacid- and nontoxic-forming substances in road surfacing.

(c) *Design and construction limits and establishment of design criteria.* To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads must include appropriate limits for grade, width, surface materials, surface drainage control, culvert placement, and culvert size, in accordance with current, prudent engineering practices, and any necessary design criteria established by the regulatory authority.

(d) *Location.* (1) No part of any road may be located in the channel of an intermittent or perennial stream unless specifically approved by the regulatory authority in accordance with § 784.28 of this chapter and § 817.57 of this part.

(2) Roads must be located to minimize downstream sedimentation and flooding.

(e) *Maintenance.* (1) A road must be maintained to meet the performance standards of this part and any additional criteria specified by the regulatory authority;

(2) A road damaged by a catastrophic event, such as a flood or earthquake, must be repaired as soon as is practicable after the damage has occurred.

(f) *Reclamation.* A road not to be retained as part of an approved postmining land use must be reclaimed in accordance with the approved reclamation plan as soon as practicable after it is no longer needed for mining and reclamation operations. Reclamation must include—

(1) Closing the road to traffic.

(2) Removing all bridges and culverts unless approved as part of the postmining land use.

(3) Removing or otherwise disposing of road-surfacing materials that are incompatible with the postmining land use and revegetation requirements.

(4) Reshaping the slopes of road cuts and fills as necessary to be compatible with the postmining land use and to complement the natural drainage pattern of the surrounding terrain.

(5) Protecting the natural drainage patterns by installing dikes or cross-drains as necessary to control surface runoff and erosion.

(6) Scarifying or ripping the roadbed, replacing topsoil or substitute material in accordance with § 817.22 of this part, and revegetating disturbed surfaces in accordance with §§ 817.111, 817.115, and 817.116 of this chapter.

§ 817.151 What additional requirements apply to primary roads?

(a) Primary roads must meet the requirements of § 817.150 of this part and the additional requirements of this section.

(b) *Certification.* The construction or reconstruction of primary roads must be certified in a report to the regulatory authority by a qualified registered professional engineer, or in any state that authorizes land surveyors to certify the construction or reconstruction of primary roads, a qualified registered professional land surveyor, with experience in the design and construction of roads. The report must indicate that the primary road has been constructed or reconstructed as designed and in accordance with the approved plan.

(c) *Safety factor.* Each primary road embankment must have a minimum static factor of 1.3 or meet the requirements established under § 784.37(c) of this chapter.

(d) *Location.* (1) To minimize erosion, a primary road must be located, insofar as is practicable, on the most stable available surface.

(2) Fords of perennial or intermittent streams are prohibited unless they are specifically approved by the regulatory authority as temporary routes during periods of road construction.

(e) *Drainage control.* In accordance with the approved plan—

(1) Each primary road must be constructed (or reconstructed) and maintained to have adequate drainage control, using structures such as, but not limited to bridges, ditches, cross drains, and ditch relief drains. The drainage control system must be designed to safely pass the peak runoff from the 10-year, 6-hour precipitation event, or any greater event specified by the regulatory authority.

(2) Drainage pipes and culverts must be installed as designed, and maintained in a free and operating condition and to prevent or control erosion at inlets and outlets.

(3) Drainage ditches must be constructed and maintained to prevent

uncontrolled drainage over the road surface and embankment.

(4) Culverts must be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles using the road.

(5) Natural stream channels must not be altered or relocated without the prior approval of the regulatory authority in accordance with § 784.28 of this chapter and § 817.57 of this part.

(6) Except as provided in paragraph (d)(2) of this section, structures for perennial or intermittent stream channel crossings must be made using bridges, culverts, low-water crossings, or other structures designed, constructed, and maintained using current prudent engineering practices. The regulatory authority must ensure that low-water crossings are designed, constructed, and maintained to prevent erosion of the structure or streambed and additional contributions of suspended solids to streamflow.

(f) *Surfacing.* Primary roads must be surfaced with material approved by the regulatory authority as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road.

§ 817.180 To what extent must I protect utility installations?

You must conduct all underground coal mining operations in a manner that minimizes damage, destruction, or disruption of services provided by oil, gas, and water wells; oil, gas, and coal-slurry pipelines; railroads; electric and telephone lines; and water and sewage lines that pass over, under, or through the permit area, unless otherwise approved by the owner of those facilities and the regulatory authority.

§ 817.181 What requirements apply to support facilities?

(a) You must operate each support facility in accordance with the permit issued for the mine or coal preparation plant to which the facility is incident or from which its operation results.

(b) In addition to the other provisions of this part, you must locate, maintain, and use support facilities in a manner that—

(1) Prevents or controls erosion and siltation, water pollution, and damage to public or private property; and

(2) To the extent possible using the best technology currently available—

(i) Minimizes damage to fish, wildlife, and related environmental values; and

(ii) Minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. Any such contributions may not be in excess of limitations of state or federal law.

§ 817.200 [Reserved]

PART 824—SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS—MOUNTAINTOP REMOVAL MINING OPERATIONS

■ 36. Revise the authority citation for part 824 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 37. Revise the heading for part 824 to read as set forth above.

■ 38. Revise § 824.11 to read as follows:

§ 824.11 What special performance standards apply to mountaintop removal mining operations?

(a) *Applicability.* This section applies to all operations for which the regulatory authority has approved a permit under § 785.14 of this chapter.

(b) *Performance standards.* (1) You, the permittee, must comply with all applicable requirements of this subchapter and the regulatory program, other than the approximate original contour restoration requirements of § 816.102(a)(1) of this chapter and the thick overburden requirements of § 816.105 of this chapter.

(2)(i) You must retain an outcrop barrier, consisting of the toe of the lowest coal seam and its associated overburden, of sufficient width to prevent slides and erosion. You must construct drains through the barrier to the extent necessary to prevent saturation of the backfill.

(ii) The outcrop barrier requirement in paragraph (b)(2)(i) of this section does not apply if the proposed mine site was mined prior to May 3, 1978, and the toe of the lowest coal seam has already been removed.

(iii) You may remove a coal barrier adjacent to a head-of-hollow fill after the elevation of the fill attains the elevation of the coal barrier if the head-of-hollow fill provides the stability otherwise ensured by the retention of a coal barrier.

(iv) The regulatory authority may allow removal of the outcrop barrier required by paragraph (b)(2)(i) of this section if the regulatory program establishes standards for and requires construction of a barrier comprised of alternative materials that will provide equivalent stability.

(3) The final graded slopes must be less than 1v:5h, so as to create a level plateau or gently rolling configuration. The outslopes of the plateau may not exceed 1v:2h except where engineering data substantiate, and the regulatory authority finds in writing and includes in the permit under § 785.14 of this chapter that an alternative configuration will achieve a minimum static safety factor of 1.5.

(4) You must grade the plateau or gently rolling contour to drain inward from the outslope, except at specified points where it drains over the outslope in stable and protected channels.

(5) You must place sufficient spoil on the mountaintop bench to achieve the approved postmining land use. You must place all spoil material not retained on the mountaintop bench in accordance with the excess spoil disposal requirements of § 816.71 or § 816.74 of this chapter.

(6) You must prevent damage to natural watercourses in accordance with the finding made by the regulatory authority under § 785.14 of this chapter.

PART 827—SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS—COAL PREPARATION PLANTS NOT LOCATED WITHIN THE PERMIT AREA OF A MINE

■ 39. The authority citation for part 827 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 40. Revise § 827.12 to read as follows:

§ 827.12 What performance standards apply to coal preparation plants?

Except as provided in § 827.13 of this part, construction, operation, maintenance, modification, reclamation, and removal activities at coal preparation plants must comply with the following provisions of part 816 of this chapter: §§ 816.11, 816.22, 816.34 through 816.57, 816.71, 816.74, 816.79, 816.81 through 816.97, 816.100, 816.102, 816.104, 816.106, 816.111 through 816.116, 816.131 through 816.133, 816.150, 816.151, and 816.181.

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Department of Transportation

Federal Highway Administration
23 CFR Part 450

Federal Transit Administration
49 CFR Part 613

Metropolitan Planning Organization Coordination and Planning Area Reform; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 450

Federal Transit Administration

49 CFR Part 613

[Docket No. FHWA–2016–0016]

FHWA RIN 2125–AF68
FTA RIN 2132–AB28

Metropolitan Planning Organization Coordination and Planning Area Reform

AGENCY: Federal Highway Administration (FHWA), Federal Transit Administration (FTA); U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule revises the transportation planning regulations to promote more effective regional planning by States and metropolitan planning organizations (MPO). The goal of the revisions is to better align the planning regulations with statutory provisions concerning the establishment of metropolitan planning area (MPA) boundaries and the designation of MPOs.

DATES: This final rule is effective January 19, 2017.

FOR FURTHER INFORMATION CONTACT: For FHWA: Mr. Harlan W. Miller, Planning Oversight and Stewardship Team (HEPP–10), (202) 366–0847; or Ms. Janet Myers, Office of the Chief Counsel (HCC–30), (202) 366–2019. For FTA: Ms. Sherry Riklin, Office of Planning and Environment, (202) 366–5407; Mr. Dwayne Weeks, Office of Planning and Environment, (202) 493–0316; or Mr. Christopher Hall, Office of Chief Counsel, (202) 366–5218. Both agencies are located at 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., ET for FHWA, and 9 a.m. to 5:30 p.m., ET for FTA, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: This rule clarifies that an MPA must include an entire urbanized area (UZA) and the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan. The MPOs will have several options to achieve compliance. The MPOs may need to adjust their boundaries, consider mergers, or, if there are multiple MPOs designated within a single MPA, coordinate with the other MPOs to create unified planning products for the MPA. Specifically, the rule requires MPOs within the same MPA to develop a single metropolitan transportation plan (MTP), a single transportation improvement program (TIP), and a jointly established set of performance targets for the MPA (referred to herein as unified planning products). The rule also clarifies operating procedures, and it adopts certain coordination and decisionmaking requirements where more than one MPO serves an MPA. Requiring unified planning products for an MPA with multiple MPOs will result in planning products that reflect the regional needs of the entire UZA.

The final rule includes an exception that, if approved by the Secretary, allows multiple MPOs in an MPA to continue to generate separate planning products if the affected Governor(s) and all MPOs in the MPA submit a joint written request and justification to FHWA and FTA that (1) explains why it is not feasible for the MPOs to produce unified planning products for the MPA, and (2) demonstrates how each MPO is already achieving the goals of the rule through an existing coordination mechanism with all other MPOs in the MPA that achieves consistency of planning documents.

The final rule phases in implementation of these coordination requirements and the requirements for MPA boundary and MPO jurisdiction agreements, with full compliance required not later than 2 years after the date the Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census.

I. Executive Summary

A. Purpose of the Regulatory Action

The purpose of this rulemaking is to improve the transportation planning process by strengthening the coordination of MPOs and States and promoting the use of regional approaches to planning and decisionmaking. To achieve this purpose, the rulemaking incorporates the 23 U.S.C. 134 requirements that the boundaries of MPAs at a minimum include an urbanized area in its entirety and include the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan. The rule emphasizes the importance of undertaking the planning process from a regional perspective. The rule includes new coordination and decisionmaking requirements for MPOs that share an MPA, to better ensure that transportation investments reflect the needs and priorities of an entire region. Recognizing the critical role MPOs play in providing for the well-being of a region, this rule will strengthen the voice of MPOs in the transportation planning process in a State by promoting unified decisionmaking within an MPA and better-coordinated regional decisionmaking so that the affected MPOs speak with ''one voice'' about the area's transportation needs and priorities.

B. Summary of Major Changes Made to the Regulatory Action in Question

This final rule retains many of the major provisions of the NPRM. The rule revises the regulatory definition of ''metropolitan planning area'' to better align with the statutory requirements in 23 U.S.C. 134, specifically to require that the MPA, at a minimum, must include the entire UZA and the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan. Under this final rule, if compliance with the MPA boundary requirements would result in more than one MPO in the MPA, the Governor(s) and affected MPOs may decide it is appropriate for multiple MPOs to serve the MPA because of the size and complexity of the MPA. In such cases, the MPOs will need to jointly develop unified planning products (a single MTP and TIP, and jointly established performance targets). If the Governor(s) and MPOs do not decide to have multiple MPOs serve the MPA, then the Governor(s) and the MPOs will consolidate or establish or adjust conforming MPA boundaries for each MPO by agreement. In response to comments received on the NPRM, FHWA and FTA are making the following significant changes in the final rule:

1. Adding an exception to the requirements for unified planning products. Section 450.312(i) allows multiple MPOs in an MPA to continue to generate separate planning products if the exception is approved by the Secretary. The exception is discussed in detail under *Unified Planning Products: Requirements and Exception* in the ''Discussion of Major Issues Raised by Comments'' section of this preamble.

2. Changing the time period for adjustment of MPA boundaries following a decennial census, as required under § 450.312(j) (as redesignated in this rule) from 180 days to 2 years.

3. Extending the implementation period for MPA boundary and MPO jurisdiction agreement provisions; documentation of the determination of the Governor and MPO(s) that the size

and complexity of the MPA make multiple MPOs appropriate; and MPO compliance with requirements for unified planning products. Compliance is not required until the next MTP update occurring on or after the date 2 years after the date the U.S. Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census. Historically, the Census Bureau issues its notice approximately two years after the census. This extension provides States and MPOs a substantial amount of time to lay the groundwork for changes necessary to comply with the rule. The compliance date for all other changes made by this rule is the effective date of this rule.

C. Costs and Benefits

The FHWA and FTA believe that the benefits of the rule justify the costs. The total costs for merging 142 MPOs,[1] the cost of transportation conformity adjustments, and the one-time cost of developing a dispute resolution process results in an estimated maximum average annual cost of this rule of $86.3 million. Since not all MPOs will choose to merge and some may receive exceptions, this cost estimate is conservative.

The FHWA and FTA were unable to quantify the benefits for this rulemaking. The primary benefit of this rulemaking is to ensure that the MPO(s) is making transportation investment decisions for the entire metropolitan area as envisioned by the statute. If the MPOs within a metropolitan area consolidate or develop unified planning products, FHWA and FTA anticipate that the cost to develop the Metropolitan Transportation Plan (MTP) for the metropolitan area would decrease. We also expect this rule will result in some cost savings for State DOTs, which will benefit from having fewer TIPs to incorporate into their statewide transportation improvement programs (STIPs). There will also be benefits to the public if the coordination requirements result in a planning process in which public participation opportunities are transparent and unified for the entire region, and if members of the public have an easier ability to engage in the planning process.

[1] The total number of MPOs is 409. The USDOT identified that 142 MPOs would be subject to this rulemaking by comparing current MPO boundaries with current UZA boundaries. This comparison identified a number of UZAs that included multiple MPOs as well areas where a UZA had spread into the boundaries of adjacent MPOs.

II. Background

MPA and MPO Boundaries

The metropolitan planning statute defines an MPA as ''the geographic area determined by agreement between the metropolitan planning organization for the area and the Governor under subsection [134](e).'' 23 U.S.C. 134(b)(1).[2] The agreement on the geographic area is subject to the minimum requirements contained in 23 U.S.C. 134(e)(2)(A), which states that each MPA ''shall encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan.'' The MPA and MPO provisions in 23 U.S.C. 134 make it clear that the intent for a typical metropolitan planning structure is to have a single MPO for each UZA. However, the statute creates an exception in 23 U.S.C. 134(d)(7), which provides that more than one MPO may be designated within an existing MPA if the Governor and the existing MPO(s) determine that the size and complexity of the existing MPA make designation of more than one MPO for the area appropriate. Title 23, U.S.C. 134(d)(7) reinforces the interpretation that the norm envisioned by the statute is that UZAs not be divided into multiple planning areas.

In 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act (ISTEA), which included provisions intended to strengthen metropolitan planning. In particular, the law gave MPOs responsibility for coordinated planning to address the challenges of regional congestion and air quality issues. The 1993 planning regulation implemented these statutory changes by defining this enhanced planning role for MPOs. The 1993 planning regulation described a coordinated planning process for the MPA resulting in an overall MTP for the MPA. In several locations, the 1993 regulation recognized the possibility of multiple MPOs serving an MPA, and provided expectations for coordination that would result in an overall transportation plan for the entire area. See 58 FR 58040 (October 28, 1993).

The 1993 regulation stated in the former § 450.310(g) that ''where more than one MPO has authority within a metropolitan planning area or a nonattainment or maintenance area, there shall be an agreement between the State departments(s) of transportation (State DOT) and the MPOs describing how the processes will be coordinated to assure the development of an overall transportation plan for the metropolitan planning area.'' Further, that regulation stated in former § 450.312(e) that where ''more than one MPO has authority in a metropolitan planning area . . . the MPOs and the Governor(s) shall cooperatively establish the boundaries of the metropolitan planning area . . . and the respective jurisdictional responsibilities of each metropolitan planning area.'' In practice, however, many MPOs interpreted the MPA to be synonymous with the boundaries of their MPO's jurisdiction, even in those areas where multiple MPOs existed within a single UZA, resulting in multiple ''MPAs'' within a single urbanized area.

In 2007, FHWA and FTA updated the regulations to align with changes made in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) and its predecessor, the Transportation Equity Act for the 21st Century (TEA–21). The revised regulations reflected the practice of having multiple ''MPAs'' within a single UZA, even though the statute pertaining to this issue had not changed. The 2007 regulation refers to multiple MPOs within an UZA rather than multiple MPOs within an MPA, and the term ''metropolitan planning area'' was used to refer synonymously to the boundaries of an MPO. The regulations stated ''if more than one MPO has been designated to serve an urbanized area, there shall be a written agreement among the MPOs, the State(s), and the public transportation operator(s) describing how the metropolitan transportation planning processes will be coordinated to assure the development of consistent metropolitan transportation plans and TIPs across the MPA boundaries, particularly in cases in which a transportation investment extends across the boundaries of more than one MPA.'' 72 FR 7224, February 14, 2007. The FHWA and FTA adopted that language as § 450.314(d), and redesignated it in a 2016 rulemaking as § 450.314(e). The 2007 rule also added § 450.312(h), which explicitly recognizes that, over time, a UZA may extend across multiple MPAs. The 2007 rulemaking did not address how to reconcile these regulatory changes with the statutory minimum requirement that an MPA include the UZA in its entirety.

As a result, since 2007, the language of the regulation has supported the possibility of multiple MPOs within a UZA rather than within an MPA. The FHWA and FTA have concluded that this 2007 change in the regulatory

[2] For simplicity, the remainder of this notice refers only to the planning provisions codified in Title 23, although corresponding provisions are codified in Chapter 53 of Title 49.

definition has fostered confusion about the statutory requirements and resulted in less efficient planning outcomes where multiple TIPs and MTPs are developed within a single UZA. This rule is designed to correct the problems that have occurred under the 2007 rule and return to the structure in regulation before the 2007 amendments.

MPO Coordination Within an MPA

The metropolitan planning statute calls for each metropolitan planning organization to ''prepare and update a transportation plan for its metropolitan planning area'' and ''develop a TIP for the metropolitan planning area[.]'' 23 U.S.C. 134(i)(1)(A) and (j)(1)(A).[3] As discussed above, the metropolitan planning statute includes an exception provision in 23 U.S.C. 134(d)(7) that allows more than one MPO in an MPA under certain conditions. In some instances, multiple MPOs have been designated not only within a single MPA, but also within a single UZA in an MPA. Presently, such MPOs typically create separate MTPs and TIPs for separate parts of the UZA. Currently, the regulations require that where multiple MPOs exist within the same UZA, their written agreements must describe how they will coordinate their planning activities. However, the extent and effectiveness of coordination varies, and in some cases, effective coordination on regional needs and interests has proved challenging. It can be inefficient and confusing to the public if there are two or more distinct metropolitan transportation planning processes that result in two or more separate MTPs and TIPs for a single MPA (as defined under 23 U.S.C. 134). Further, a regional approach is needed to ensure that metropolitan transportation planning maximizes economic opportunities while also addressing the externalities of growth, such as congestion, air and water quality impacts, and impacts on resilience.

For these reasons, FHWA and FTA have determined that joint decisionmaking leading to unified planning products is necessary where there are multiple MPOs in an MPA in order to best ensure effective regional coordination. Accordingly, this rulemaking addresses coordination and decisionmaking requirements for MPOs that are subject to the 23 U.S.C. 134(d)(7) exception to the one-MPO-per-MPA structure of the metropolitan planning statute.

[3] The process for developing plans and TIPs must be ''continuing, cooperative, and comprehensive to the degree appropriate based on the complexity of the transportation problems to be addressed.'' 23 U.S.C. 134(c)(3).

Coordination Between States and MPOs

The statewide planning statute calls for a continuing, cooperative, and comprehensive process for developing the long-range statewide transportation plan and the statewide transportation improvement program (STIP). 23 U.S.C. 135(a)(3). The statute requires States to develop the long-range statewide transportation plan and the STIP in cooperation with MPOs designated under 23 U.S.C. 134. 23 U.S.C. 135(f)(2)(A) and (g)(2)(A). While these statutes require that States work in cooperation with the MPOs on long-range statewide transportation plans and STIPs, the extent to which MPO voices are heard varies significantly. The nature of decisionmaking authority of MPOs and States varies due to numerous factors, including the extent of local funding for transportation projects. The MPOs will be strengthened by having a single coordinated MTP and TIP in order to create a united position on transportation needs and priorities for each MPA. Ultimately, each relationship between a State and MPO is unique, and there may not be a single coordination process that is appropriate for all areas of the country. However, there must be adequate cooperation between States and MPOs. Therefore, this rule requires that States and MPOs demonstrate evidence of cooperation, including the existence of an agreed upon dispute resolution process.

III. Summary of the NPRM

The FHWA and FTA published the NPRM on June 27, 2016, with a comment period ending on August 26.[4] In a notice published on September 23, 2016, FHWA and FTA reopened the comment period.[5] The second comment period ended on October 24, 2016. The NPRM proposed a revision to the regulatory definition of MPA to better align with the statutory requirements in 23 U.S.C. 134 and 49 U.S.C. 5303. Specifically, the NPRM proposed to amend the definition of MPA in 23 CFR 450.104 to include the conditions in 23 U.S.C. 134(e)(2) that require the MPA, at a minimum, to include the entire UZA and the contiguous area expected to become urbanized within the 20-year forecast period for the MTP. The MPA boundary requirements in the proposed rule would apply even when the MPA, as defined in the rule, would cross State lines. By aligning the regulatory definition of the MPA with the statute, the NPRM acknowledged that the MPA is dynamic. The MPA is the basic geographic unit for metropolitan planning; therefore, this proposed requirement would ensure that planning activities consider the entire region of the UZA consistently.

An exception in 23 U.S.C. 134(d)(7) allows multiple MPOs to be designated within a single MPA if the Governor(s) and MPO(s) determine that the size and complexity of the area makes multiple MPOs appropriate. The NPRM proposed certain requirements applicable in such instances where multiple MPOs serve a single MPA, including instances in which adjustments to urbanized areas, as a result of a U.S. Census Bureau decennial census, will result in multiple MPOs serving a single MPA. First, the NPRM proposed to clarify that MPA boundaries are not necessarily synonymous with MPO boundaries. Second, the NPRM proposed to amend § 450.310(e) of the regulation to clarify that, where more than one MPO serves an MPA, the Governor(s) and affected MPOs must establish or adjust the jurisdiction for each MPO within the MPA by agreement. Third, the NPRM proposed additional coordination requirements for areas where multiple MPOs are designated within the MPA. Under the NPRM, the Governor(s) and MPOs would determine whether the size and complexity of the MPA make the designation of multiple MPOs appropriate; if they were to determine it is not appropriate to have more than one MPO, then the MPOs would be required to merge or adjust their jurisdiction such that there would be only one MPO within the MPA. If they were to determine that designation of multiple MPOs is appropriate, then the MPOs could remain separate, with separate jurisdictions of responsibility within the MPA, as established by the affected MPOs and the Governor(s).

The NPRM proposed to require those multiple separate MPOs in the same MPA to jointly develop unified planning products: A single long-range MTP, a single TIP, and a jointly established set of performance targets for the MPA. These requirements for unified planning products to accommodate the intended growth of a region would enable individuals within that region to better engage in the planning process and facilitate their efforts to ensure that the growth trajectory matches their visions and goals. In order to support the development of these unified planning products, the NPRM proposed to require MPOs to establish procedures for joint decisionmaking, including a process for resolving disagreements.

Additionally, the NPRM proposed to strengthen the role that MPOs would

[4] 81 FR 41473 (June 27, 2016).

[5] 81 FR 65592 (September 23, 2016).

play in the planning process by requiring States and MPOs to agree to a process for resolving disagreements. These proposed changes to the planning regulations were designed to facilitate metropolitan and statewide transportation planning processes that would be more efficient, more comprehensible to stakeholders and the public, and more focused on projects that address critical regional needs. The NPRM was designed to position MPOs to respond to the growing trend of urbanization. It would better align the planning processes with the regional scale envisioned by the performance-based planning framework established by MAP–21, particularly those measures focused on congestion and system performance. The NPRM also would help MPOs to achieve economies of scale in planning by working together and drawing on a larger pool of human, material, financial, and technological resources.

IV. Response to Major Issues Raised by Comments

This final rule is based on FHWA's and FTA's review and analysis of comments received. The FHWA received 660 letters to the docket, which includes 21 duplicate submissions, 4 submissions to the wrong docket, and 23 *ex parte* response letters, for a total of 612 unique letters. The comments included 197 letters from metropolitan planning organizations, 39 letters from State departments of transportation, 29 letters from councils of governments, 29 letters from regional planning associations, 14 letters from transportation management associations, 38 letters from counties, 81 letters from municipalities, 22 letters from professional and trade associations, 21 letters from associations of metropolitan planning organizations and regional planning associations, and 31 letters from individual citizens. The comments also included 18 letters signed or co-signed by Members of Congress, including 12 U.S. Senators and 15 U.S. Representatives, and 20 letters signed or co-signed by State legislators. Given the large number of comments received, FHWA and FTA have decided to organize the response to comments in the following manner. This section of the preamble provides a response to the significant issues raised in the comments received, organized by summarizing and responding to comments that raise significant issues applicable to the NPRM.

Need for the Rule

Sixteen commenters expressed support for the NPRM. The FHWA and FTA received 156 comments in support of the stated purpose of the proposed rule, which is to improve the transportation planning process by strengthening the coordination of MPOs and States and promoting the use of regional approaches to planning and decisionmaking to ensure that transportation investments reflect the needs and priorities of an entire region. While these commenters supported the stated purpose of the rulemaking, they did not support the specific requirements and procedures articulated in the proposed rule because the commenters believe the rule will not strengthen coordination efforts beyond current practices. The FHWA and FTA received 299 comments in opposition to the NPRM, of which 249 requested that FHWA and FTA withdraw the rulemaking. Commenters expressed various concerns about the NPRM.

The FHWA and FTA appreciate the substantial response to the NPRM and have reviewed and carefully considered all of the comments submitted to the docket. The FHWA and FTA believe the rule addresses important aspects of the metropolitan transportation planning process. As such, and as described in the previous section, FHWA and FTA have amended several parts of the proposed rule in response to comments but decline to withdraw the rule.

A number of commenters stated that their MPOs are already engaged in the types of regional coordination activities described in the NPRM, and they questioned the need for this regulation. Many commenters expressing opposition to the proposed rule stated that they believe their current coordination processes are successful; they achieve their local goals and objectives, involve strong coordination with adjacent MPOs and States in urbanized areas, and include many of the activities proposed in the NPRM. A total of 151 commenters stated that they currently have good working relationships with adjacent MPOs, coordinate with States and other MPOs and jurisdictions, or have formal agreements for coordinated planning activities.

Many commenters provided examples from their respective regions, discussed how their current planning processes achieved goals similar to those proposed in the proposed rulemaking, and indicated the proposed changes would disrupt existing coordination efforts. Six commenters stated their existing working agreements for coordinated planning with neighboring MPOs and States would be disrupted by the proposed requirements. Some commenters stated they could not identify a problem the requirements would resolve. Fifteen commenters stated that they currently coordinate with adjacent jurisdictions on regional planning activities, so the proposed requirement for unified, merged planning documents (MTPs, TIPs) is not necessary. Several commenters indicated the success of current MPO practices means additional regulation is not needed to improve MPO coordination. Several commenters stated that the proposed requirements would require them to re-do a recently completed merger of MPOs in Connecticut. One commenter stated that before the MPO is required to merge with another MPO, its current process and agreements with neighboring MPOs should be considered as meeting the proposed requirements.

In response, FHWA and FTA agree that many MPOs are coordinating planning activities with adjacent MPOs and across State and other jurisdictional boundaries. Many of the examples provided exemplify the type of coordinated transportation planning activities that FHWA and FTA are seeking by adopting the final rule. The existence of such exemplary planning practices in some MPOs, however, does not eliminate the need for consistency with statutory MPA boundary requirements or for improvement in the planning practices of other MPOs. This rule adds clarity to those and other planning requirements that FHWA and FTA evaluate when carrying out certification reviews for transportation management areas (TMAs) under 23 U.S.C. 134(k)(5), and when making planning findings in connection with STIP approvals under 23 U.S.C. 135(g)(7)–(8). In particular, this rule will benefit UZAs that presently are under the jurisdiction of more than one MPO. This rule will eliminate the risk of adverse consequences for the UZA that can arise when the MPOs adopt inconsistent or competing planning decisions.

The FHWA and FTA recognize that some regions have formal agreements for MPO coordination that may need to be revisited as a result of the rule, and that the implementation process for this rule could be disruptive in some cases. The FHWA and FTA considered this burden in adopting the final rule. Specifically, the final rule addresses situations where it is not feasible for the multiple MPOs in an MPA to comply with the unified planning requirements. In such situations, MPOs may demonstrate to the Secretary that they already have effective coordination processes that will achieve the purposes of the rule. If adequately demonstrated,

then the Secretary may approve an exception, and those MPOs will not have to produce unified planning products for the MPA. The exception is permanent, but FHWA and FTA will evaluate whether the MPOs are sustaining effective coordination processes consistent with the rule when FHWA and FTA do certification reviews and make planning findings. This new provision balances commenters' concerns about disruption of existing arrangements, including recent mergers and other changes, against the need for the type of holistic MPA planning the statute and this rule require.

The FHWA and FTA also remain sensitive to, and supportive of, the principle and value of local decisionmaking. One purpose of this rule is to support local decisionmaking and involvement in a planning process that increasingly takes place in a regional context. There is a need for better coordinated local decisionmaking, however. Issues like air pollution and traffic congestion do not stop at State boundaries or MPO jurisdictional lines, but planning often does. Planning in jurisdictional silos can occur where two or more MPOs plan for the MPA but do not coordinate effectively and do not produce a single overall plan and TIP for the MPA. Such a situation can interfere with essential coordination of regional transportation planning solutions. In turn, that can lead to project delays, process inconsistencies, and reduced freight reliability.

This rule places a greater emphasis on regional planning to help communities maximize economic opportunities while also addressing the externalities of growth, such as congestion, air and water quality impacts, and impacts on resilience. The FHWA and FTA have long promoted regional planning because of the increasing size, economic interdependence, and quality of life challenges of metropolitan areas. The elimination of possible confusion about MPA boundary requirements is one step toward better regional planning. By clarifying the metropolitan planning regulations implementing the language on boundaries in 23 U.S.C. 134(e)(2), the MPA will include the entire urbanized area plus the areas forecasted to become urbanized over the 20-year period of the transportation plan. This clarification will promote more efficient and effective planning for the MPA as a whole.

Based on experience, FHWA and FTA know that having two or more separate metropolitan transportation planning processes in a single MPA (as defined under 23 U.S.C. 134) can make the planning process confusing and burdensome for the affected public. For example, members of the public may be affected by projects in multiple MPO jurisdictions, either because they live in the area of one MPO and work or regularly travel to another, or because the MPOs' jurisdictional lines bisect a community. Such members of the public, therefore, can find it necessary to participate in each MPO's separate planning process in order to have their regional concerns adequately considered. Having to participate in the planning processes of multiple MPOs, however, can be burdensome and discourage public participation. Where communities have been so bifurcated that they are not able to fully participate in the greater regional economy, this rule will help weave those communities together through new opportunities for regional investments in transportation.

Where regional coordination is already strong, this rule supports those efforts. Multi-jurisdictional planning encourages stakeholders to think beyond traditional borders and adopt a coordinated approach to transportation planning that combines many perspectives to improve coordination and implement effective planning across wide geographic areas. In addition, the requirement for the State and MPO to have a documented dispute resolution process in their metropolitan planning agreement will help ensure the MPOs have an effective means to be heard when investment decisions affecting the MPA are made. With the revisions that FHWA and FTA have made in response to comments received, this rule will serve as a strong tool for State DOTs, MPOs, and providers of public transportation to work together to enhance efficiency and be more responsive to the entire community.

When FHWA and FTA issued the NPRM, the agencies were involved in ongoing non-regulatory planning initiatives to improve MPO coordination. The Fiscal Year 2015 and 2016 FHWA and FTA Planning Emphasis Areas letters from the Administrators of FHWA and FTA to MPO executive directors and heads of State DOTs discussed three planning priorities, including *Regional Models of Cooperation* (RMOC).[6] The objective of the RMOC initiative is to improve the effectiveness of transportation decisionmaking by thinking beyond traditional borders and adopting a coordinated approach to transportation planning. The RMOC promotes improved multi-jurisdictional coordination by State DOTs, MPOs, providers of public transportation, and rural planning organizations to reduce project delivery times and enhance the efficient use of resources, particularly in urbanized areas that are served by multiple MPOs. The RMOC includes technical assistance efforts to assist MPOs and State DOTs in achieving the RMOC objectives.

The FHWA, as part of its *Every Day Counts* initiative (EDC), promotes RMOC and provides a framework and process for State DOTs and MPOs to develop multi-jurisdictional transportation plans and agreements to improve communication, collaboration, policy implementation, technology use, and performance management across agency boundaries.[7] The EDC has identified the benefits of multi-jurisdictional planning as including higher achievement of transportation goals by working together and the potential creation of a more economically competitive region through faster construction, improved freight movement, reduced traffic congestion, and improved quality of life.

Functionality and Effectiveness of the Resulting Metropolitan Planning Areas

Many commenters stated that the current system fosters an environment that allows for right-sized collaboration and is working well. Many contended that their MPOs are properly sized for their respective regions and that they efficiently program their resources in a manner that cannot be achieved at a larger scale. Some commenters expressed concern that, by increasing the size and scope of individual MPOs, the proposed rule would make the transportation planning process less accessible and more confusing to stakeholders and the general public, many of whom are already overwhelmed by the process. Others commented that the rule would not reduce confusion, increase public participation, or increase efficiency in regional planning, arguing that residents who live far away from other residents do not, by default, have the same transportation planning priorities simply because they reside in the same MPA. Others expressed concern that a large MPA with multiple major and minor cities and differing economic bases would limit the potential for common interests and issues, potentially diluting the planning process and limiting locally applicable guidelines. Some commenters asserted

[6] The Fiscal Year 2016 letter is available at *https://www.fhwa.dot.gov/planning/processes/metropolitan/mpo/fy_2016/fy2016pea.pdf.*

[7] See EDC Web site at *http://www.fhwa.dot.gov/innovation/everydaycounts/edc-3/regional.cfm.*

that the proposed rule would result in disconnecting land use and transportation planning, negatively affect transit planning, and undermine congressional intent that an MPO be focused on a UZA's central city.

Several commenters stated that the proposed rule ignored the complex nature of existing regional coordination mechanisms and instead would create an unworkable coordination framework that likely would present challenges to capital planning and project delivery. Some commenters also raised concerns that the proposed rule would significantly change how neighboring communities and States work together, which could have potentially long-lasting negative consequences. Commenters also stated that the proposed rule would weaken the regional planning process by requiring it to be done at such a large scale that it no longer would be reasonably considered as regional planning as Congress intended and would result in MPO policy boards making decisions on transportation investments and policies for geographic areas with which they are unfamiliar.

Several commenters expressed the view that smaller, contiguous MPOs in a shared metropolitan region can be as effective, or more effective, than larger or consolidated MPOs. For instance, smaller organizations are generally more nimble and responsive to members of the public than larger, more artificially stitched-together organizations. These commenters also contended that smaller contiguous MPOs may often be better able to factor in land use, smaller scale projects such as pedestrian and bicycle needs, intersections, and transit, while still maintaining an appropriate focus and cooperation on major system elements such as the National Highway System and long distance freight.

The FHWA and FTA considered the concerns expressed by these commenters but disagree with the view that the rule will lead to the negative results described in their comments. In locations where MPOs have undertaken efforts to merge and rationalize the planning process for their regions, the results have been positive.[8] These examples illustrate that MPOs can implement changes like those adopted in this rule. Implementation will require adjustment of processes and creative thinking about the best ways to conduct successful outreach if the changes required by the rule result in the need to involve a broader group of constituents in the MPA. The FHWA and FTA also acknowledge that the type of decisionmaking the rule requires may force MPOs to make hard choices about investment priorities because they must agree on MPA-wide priorities, rather than priorities for a subarea within the MPA. In the view of FHWA and FTA, this is an appropriate result in the performance-based planning environment in which FHWA, FTA, States, MPOs, and providers of public transportation now operate.

The vast majority of commenters concluded that the proposed rule would result in excessively large planning regions that cover extensive geographic areas, including multiple States and millions of people. The commenters believed this would cause complex and lengthy negotiations among MPOs and States. Many commenters raised concerns that the NPRM would lead to the formation of extremely large MPAs in certain parts of the country and result in either multiple MPOs merging to form a single MPO responsible for a very large geographical area or multiple MPOs in an MPA being required to coordinate to produce unified planning products. Many of these commenters asserted that transportation planning at such a large scale likely would be unmanageable. Miami Valley Regional Planning Commission stated that, if combined, the 10+ MPOs in its region would have a 300+ member MPO policy board, and there would be ''unmanageable'' results of a ''super MPO'' spanning multiple (in some cases five to seven) States. A number of other commenters also suggested the rule would result in ''super MPOs.'' The Connecticut Councils of Governments, including the Western Connecticut Council of Governments, Housatonic Valley MPO, and South Western Region MPO, Naugatuck Valley Council of Governments, and Central Naugatuck Valley Metropolitan Planning Organization cited the example of the Tri-State Regional Planning Commission, a particularly large MPO that formerly served parts of New York, New Jersey, and Connecticut but was deemed unsuccessful and ultimately dissolved. This comment suggested that the proposed rule could result in re-creating a large MPO like that, apparently without learning the lessons of why it failed. The comment stated that following dissolution of the Tri-State Regional Planning Commission, Connecticut and its neighbors developed structures and mechanisms to provide for inter-MPO coordination, and this structure enables MPOs to maintain vigorous local involvement in the context of statewide and multistate corridors.

Several commenters also responded to FHWA's and FTA's request for comments on potential exceptions that should be included in the final rule and criteria for applying such exceptions.[9] A number of commenters recommended providing an exception to boundary requirements where only a small portion of a UZA crosses into the jurisdiction of a neighboring MPO, and they proposed several options for applying such an exception. Twelve commenters proposed using a population threshold for the portion of a UZA crossing MPO jurisdictional boundaries, below which the neighboring MPOs would not need to comply with the rule's requirements, ranging from 5–25 percent of the total population of the UZA. Eight commenters proposed using a land area threshold of 5–25 percent of the total UZA land area crossing MPO jurisdictional boundaries, below which an exception would apply. Six commenters recommended using a threshold of 15–25 percent of the total Federal-aid lane miles in the portion of a UZA crossing MPO jurisdictional boundaries, below which an exception would apply. Four commenters recommended that if a small area of two MPAs were to overlap, ranging from 10–20 percent of the total combined MPA area, that the MPOs serving those MPAs should be excepted from the rule's requirements. Three commenters recommended excepting MPOs that are in nonattainment for at least one criteria pollutant. The Merced County Association of Governments recommended giving special consideration to areas that are predominantly rural.

The FHWA and FTA appreciate the comments submitted and understand commenters' concerns about the potential for extremely large MPAs. The FHWA and FTA believe that some of these concerns are based on a misreading of the proposed rule, particularly relating to UZAs with common boundaries and MPAs with 20-year forecast areas that may overlap. The FHWA and FTA do not intend this rule to require the establishment of extremely large MPAs or to require transportation planning on such a large scale as to be unworkable. The intent is to ensure MPAs comply with statutory boundary requirements, and, if there are multiple MPOs serving an MPA, all such MPOs work together to plan for the

[8] *See, e.g.,* ''Current State of the Practice'' discussion on FHWA's *Every Day Counts* Web page for Regional Models of Cooperation, available at *https://www.fhwa.dot.gov/innovation/everydaycounts/edc-3/regional.cfm.*

[9] See FHWA and FTA notice reopening comments at 81 FR 65592, 65593 (September 23, 2016).

MPA's future transportation needs. Because this rule and the underlying statute require that MPAs include the entire UZA and the surrounding area forecast to become urbanized within a 20-year forecast period for the transportation plan, FHWA and FTA cannot provide exceptions to these requirements based on the population in an MPA, the size of the part of a UZA that crosses into an adjoining MPO's planning jurisdiction, the degree to which the MPA includes rural areas, or the air quality status of the area. Under this rule and the underlying statute, MPA boundaries cannot overlap. The FHWA and FTA will provide guidance in the future about how to accomplish such boundary adjustments.

The NPRM presented MPOs with three compliance options, all of which the final rule retains. First, MPOs may adjust the boundaries of their MPAs to encompass the entire urbanized area plus the contiguous area forecast (by the MPOs) to become urbanized over the 20 years of the metropolitan transportation plan. While the situations of individual areas may vary, many MPOs would be able to adjust MPA boundaries in such a way that they remain separate from contiguous MPOs. For example, in cases where an MPO's current jurisdiction includes a portion of a UZA primarily served by another MPO, the two MPOs can work together to adjust their jurisdictions so each MPO serves an MPA with the appropriate UZA. If the forecasted growth areas for two MPAs overlap, the affected Governor(s) and MPOs can work together to determine the most appropriate way to allocate that growth area between the MPAs. Although Governors and MPOs are encouraged to consider merging multiple MPAs into a single MPA under these circumstances, the rule does not require a merger. Second, multiple MPOs located in a single MPA can merge. Third, if MPOs and their respective Governor(s) determine that the size and complexity of the MPA justifies maintaining multiple MPOs in a single MPA, then they can remain separate MPOs but coordinate to prepare unified planning products.

To address comments stating that in some areas compliance with the rule would be infeasible, overly cumbersome, or contrary to the goal of effective and participatory regional planning, the final rule includes a new compliance option in § 450.312(i) for MPAs with multiple MPOs. This option offers, under certain conditions, an exception to the requirement for unified planning products. The exception is discussed in detail below, under *Unified Planning Products: Requirements and Exception* in ''Discussion of Major Issues Raised by Comments'' section of this preamble.

Commenters raised similar concerns about the potential for large MPAs that cross State lines but cited even greater coordination challenges in that scenario. Commenters expressed concern that if an MPO serves a larger geographical area, particularly in the case of a multistate MPA, the planning discussions will inevitably take place at the State planning level and will not empower MPOs. Commenters stated the result would remove local constituent voices from identifying and implementing projects that provide connectivity and access, and spur economic development initiatives across all areas in the MPA. Commenters stated that the rule should provide greater flexibility where MPAs cross State lines to account for significant differences in transportation planning processes that may exist between two or more States. Some commenters expressed concern that each Governor in a multistate MPA would exercise veto power over the TIP and MTP in the neighboring State, which would delay approval of these products, jeopardizing access to Federal highway and transit funds. Commenters also highlighted differences in State transportation planning processes, planning statutes, budgetary cycles, project prioritization processes, land use authorities, vastly different relationships and involvement of State legislatures in the planning process, and various governance and MPO policy body structures in neighboring States as factors that would further complicate the production of unified planning products across State lines.

In response, FHWA and FTA acknowledge that a multistate MPA typically presents greater coordination challenges than an MPA contained entirely within a single State. For multistate MPAs where the Governors and the MPOs agree it is not feasible to comply with the unified planning products requirements adopted in this rule, the Governors and MPOs may seek an exception under the provision added in § 450.312(i) of the final rule.

Several commenters indicated concerns about the use of UZAs, which are determined by the U.S. Census Bureau, as the basis for establishing MPA boundaries. Commenters noted that UZAs do not necessarily reflect transportation realities for regional roadway and transit networks, and regional travel patterns. Commenters expressed concerns about the UZAs changing after each decennial census, requiring new configurations every 10 years. In response, FHWA and FTA note that Congress required in 23 U.S.C. 134 that UZAs be used to establish MPAs. The MPA boundaries provision in 23 U.S.C. 134(e)(2)(A) states that each MPA ''shall encompass at least the existing urbanized area,'' and 23 U.S.C. 134(b)(7) provides that urbanized area ''means a geographic area with a population of 50,000 or more, as determined by the Bureau of the Census.'' However, FHWA and FTA appreciate the concerns that UZAs may not reflect regional transportation patterns and systems, and, therefore, FHWA and FTA intend to engage with the U.S. Census Bureau to provide input into how UZAs should be delineated following the 2020 decennial census.

Several commenters requested additional guidance on the responsibilities and methodology for determining 20-year growth projections; determining the parameters for designating MPA boundaries when UZAs are contiguous, or when the 20-year forecast growth from two UZAs overlaps; developing dispute resolution agreements; and determining when the size and complexity of an MPA warrants the designation of multiple MPOs. To support efficient and effective implementation of the rule, FHWA and FTA plan to issue guidance and will offer technical assistance to help States and MPOs understand their options for complying with the rule. In addition, not later than 5 years following the compliance dates in § 450.226(g) and § 450.340(h), FHWA and FTA will review how implementation of the new requirements is working and whether the new requirements are proving effective in achieving the intended outcomes. The FHWA and FTA are committed to ensuring the transportation planning process is successful. Through this review, FHWA and FTA will identify any necessary changes to the regulation.

Transportation Conformity

Some commenters raised questions about how the proposed rule would impact existing air quality conformity boundaries and relationships. Two MPOs, the American Association of State Highway and Transportation Officials (AASHTO), the National Association of Regional Councils (NARC), a State health organization and a transit operator noted that there are separately designated nonattainment and/or maintenance areas with air quality boundaries that do not coincide with UZA designations that cross State lines. The concern expressed is that by joining these separate areas into one MPO, or requiring joint planning

documents, those regions that are in attainment or maintenance for air quality would be forced to perform detailed air quality conformity analyses in line with the nonattainment areas. Commenters voiced concern that, in complex regions, every new conformity determination and MTP or TIP amendment involving air quality non-exempt projects would require a multistate technical, administrative, and public and interagency analysis that would delay decisionmaking and hinder progress. In response, FHWA and FTA understand the potential impacts of the final rule on meeting the transportation conformity regulations. The FHWA and FTA are cognizant of the challenges that MPOs and States may face, especially in areas where two or more MPOs in a multistate area may merge into one MPO or develop unified planning products. These areas may have to put extra effort into the interagency consultation and coordination process. They may also have to devote additional resources to address conformity issues, such as developing a single travel demand model; conducting an emissions analysis that covers the new MPA boundary; and aligning the latest planning assumptions, conformity tests, and analysis/horizon years. In addition, areas with nonattainment or maintenance area for multiple pollutants may experience additional complexities. The FHWA and FTA, however, believe that many MPOs already have experience in addressing conformity issues in a complex area. These complex areas may include multiple MPOs, multiple States, multiple pollutants, or a combination of all of these. The FHWA documented the experience of how these complex areas address conformity issues in *Transportation Conformity Practices in Complex Areas.*[10] As a result of reviewing comments, FHWA and FTA have removed the NPRM language in § 450.324(c)(3) and § 450.326(a) that called for MPOs sharing an MPA to agree on a process for making a single conformity determination on their plan and TIP. The change was made to avoid the risk the language would be read as amending conformity requirements. Instead, during implementation of the final rule, FHWA and FTA will coordinate with the Environmental Protection Agency (EPA) on maintaining consistency with EPA's transportation conformity regulations, seeking to avoid the impact on nonattainment and maintenance area designations, and on the need for state and local air quality agencies to revise approved State Implementation Plans (SIPs), motor vehicle emissions budgets, and conformity procedures. The FHWA and FTA also will work with EPA to provide technical assistance and training to help MPOs address conformity issues that may occur.

Furthermore, if it is not feasible for multiple MPOs serving the same MPA to comply with the unified planning products requirements because of conformity issues, the affected MPOs and the Governor(s) may request an exception under § 450.312(i) of the rule. The exception is discussed in detail under *Unified Planning Products: Requirements and Exception* in ''Discussion of Major Issues Raised by Comments'' section of this preamble.

Dispute Resolution Process

The FHWA and FTA received a total of 44 comments on the proposed requirement in § 450.208(a)(1) that States and MPOs establish dispute resolution procedures in their metropolitan planning agreements. Three commenters expressed support for the development of a written dispute resolution process to provide for fair, objective, and consistent resolution of disputes. One commenter asserted that because the FAST Act does not require a dispute resolution process, this is a matter that should be addressed legislatively rather than through a rulemaking. Thirteen commenters noted concern that the inflexibility of a formal dispute resolution process would make it cumbersome and confusing and would create conflict where none existed previously. Five commenters suggested a formal dispute resolution process would unfairly favor States, based on speculation that States would have no incentive to support local control for separate MPOs and would not enter into the dispute resolution process in good faith. Two commenters stated that a formal dispute resolution process would allow for some parties to use the dispute resolution process to hold up the planning process in order to leverage particular outcomes.

The FHWA and FTA view the local planning process as a partnership among the MPOs, the States, and providers of public transportation. The dispute resolution requirement is a tool that, when used correctly, fosters this partnership. Dispute resolution establishes the path for all parties to follow in delivering the planning program, even when consensus is not readily reached. A well-crafted and well-executed dispute resolution process allows the parties to work through disagreements in an objective, fair, and transparent manner that should expedite delivery of planning products in an effective and inclusive fashion. The FHWA and FTA agree that if any party to the planning agreement fails to negotiate in good faith, the result will be suboptimal and not in accord with the intent of the planning statutes. The establishment of an objective, fair, and transparent process, however, will subject all participants to public scrutiny, which is likely to be a strong disincentive to bad-faith negotiation. Further, the type of failure described by the commenters would not be consistent with the ''continuing, cooperative, and comprehensive'' planning requirements in 23 U.S.C. 134–135. Finally, in response to the comment suggesting that requiring a dispute resolution process exceeds FHWA's and FTA's authority, FHWA and FTA believe the requirement is within the scope of the agencies' discretion to interpret the meaning of the statutory requirements for coordination among States, MPOs, and providers of public transportation.

Seven commenters requested that FHWA and FTA provide model dispute resolution language, best practices, or guidance on how to develop a formal dispute resolution agreement. Thirteen commenters noted that the rule is silent on how disputes are to be resolved prior to establishment of a dispute resolution process between Governor(s) and MPOs.

The FHWA and FTA appreciate the request for more specific language, guidance, or best practices. The development of a dispute resolution process is a local decision that will vary depending on the particular needs and relationships that exist in each area. The FHWA and FTA are committed to providing MPOs and States with the technical assistance they need to effectively meet this requirement while taking local conditions and needs into account. The rule is purposely not prescriptive about the contents of a dispute resolution process. The FHWA and FTA do not believe that establishing a default dispute resolution process would further the desired collaboration. The FHWA and FTA understand it will take time to develop the required dispute resolution process, which is addressed by the final rule's compliance deadline of the next MTP update occurring on or after the date 2 years after the date the Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census. Until the process is developed and contained in the metropolitan planning agreements, the parties may continue to use existing practices.

[10] Available as of November 4, 2016, at *https://www.fhwa.dot.gov/environment/air_quality/conformity/research/complex_areas/.*

Unified Planning Products: Requirements and Exception

A number of commenters expressed concern that requiring unified planning products would increase the complexity of the planning process because developing unified planning products through coordination among multiple MPOs in an MPA would be more complicated, take more time, and extend the timeline for approvals, resulting in delays in project funding and delivery. Many asserted that this would require a multi-layered approval process that could jeopardize access to Federal funding. Some also expressed concern that working across State lines on TIPs (and STIPs) would be particularly challenging because different States have different legislative and budget schedules, and different project ranking and funding mechanisms. They also contended that the number of STIP/TIP modifications would increase, and that the multilayered approval process would make it less efficient to make such modifications. Several commenters stated that the sheer volume of projects, size, and diversity of geographical area, and the need to coordinate decisionmaking among multiple jurisdictions, and in some cases across State lines, will impair the region's ability to develop a single MTP and TIP, thus jeopardizing their ability to advance projects and secure FTA grant funds that are critical to maintenance and expansion of transit networks.

The Southeastern Massachusetts Metropolitan Planning Organization (SMMPO) expressed concern that a single TIP and MTP for a larger MPA would require consistent project eligibility and scoring criteria to ensure that the distribution of Federal funds is equitable. The SMMPO commented that even if an agreement can be reached among MPOs on the eligibility for Federal funds, it is unlikely that the MPOs will be able to agree on the requirements to receive State matching funds, because the criteria are established by the legislative bodies of each State and not under the authority of the Governors.

Eight commenters expressed confusion regarding the proposed amendments to the joint planning rule. One respondent requested assistance to understand how the proposed rule would affect its UZA. Two respondents expressed confusion about how the proposed amendments would improve the planning process, citing the complexity of attempting to develop unified planning products for an area that could potentially cover hundreds of municipalities, millions of people, and dozens of counties. Five respondents stated that implementation of the proposed amendments would result in more confusion for the public, locally elected officials, and local units of governments because they would need to plan for such large areas and attempt to work through a very complicated, overwhelming, and inefficient process to approve unified planning products. Several commenters expressed concerns about unintended consequences of the proposed rule. Some commenters indicated that the proposed rule would negatively disrupt existing coordination and collaboration efforts, particularly for transit, economic development, land use, and local planning. Some commenters believed the proposed rule would make the existing transportation planning process more complex, less efficient, and more difficult for MPOs to meet the requirements of Federal and State laws. Other commenters expressed concern about States gaining more power in the metropolitan transportation planning process and the potential increase in competition for funding and resources. Commenters also questioned the impacts to MPO staff employment and the participation of MPO members. One commenter expressed concern about potential conflicts with FHWA's other performance management rulemakings.

In the notice of the reopening of the comment period for this rulemaking, FHWA and FTA asked for comments on potential exceptions that should be included in the final rule and the criteria for applying such exceptions. Commenters recommended several criteria for exceptions to the rule's unified planning products requirements. Eighteen commenters recommended exceptions if multiple MPOs in an MPA can demonstrate a history of coordination, including the existence of formal agreements like memoranda of understanding and/or established processes for neighboring MPOs to consider the content of other MPO's long-range transportation plans when developing their own long-range transportation plan that provide for coordination among contiguous MPOs. Four commenters recommended providing an exception to the rule's requirement for multiple MPOs in an MPA to develop unified planning products if all of the MPOs in the MPA agree to opt out of this requirement. Twelve commenters suggested an exception from this requirement if the MPA crosses State lines. Seven commenters recommended that exceptions be made for MPAs with a population over a certain threshold, with suggested thresholds ranging widely from 300,000 to 2.5 million persons.

In response, FHWA and FTA recognize that many MPOs will have to make adjustments in their jurisdictional boundaries and their planning processes under this rule. A multistate MPA typically will face greater coordination challenges than an MPA contained entirely within a single State. There likely will be a need for additional coordination, as described by commenters. The FHWA and FTA considered the potential impacts cited by commenters when developing this final rule, and decided the benefits of the rule in terms of comprehensive, unified decisionmaking in the transportation planning process outweighed such potential impacts. The FHWA and FTA also carefully considered commenters' recommendations for exceptions to the rule's requirements and have revised the rule by adding an exception from the new unified planning requirements. This exception will not allow multiple MPOs in a single MPA to simply opt out of the requirement to develop unified planning products, but it establishes criteria under which MPOs may seek an exception from this requirement. The exception will address those cases where it is not feasible for MPOs to prepare unified planning products due to conditions affecting coordination or other aspects of the unified planning process. The FHWA and FTA decline to provide an exception for MPAs that cross State lines because effective regional coordination requires coordination across a variety of jurisdictional boundaries, and there are examples of MPOs effectively coordinating across State lines, such as the Delaware Valley Regional Planning Commission (Philadelphia and Trenton), the Memphis Metropolitan Planning Organization (Tennessee and Mississippi), and the Kentucky-Ohio-West Virginia Interstate Planning Commission. The final rule, however, provides flexibility where producing unified planning products is not feasible. The new provision balances the concerns raised by commenters against the need for unified planning to ensure the MTP and TIP appropriately address the needs of the MPA as a whole. The exception is in § 450.312(i) of the rule. To be granted this exception, all MPOs in the MPA and their Governor(s) must submit, and the Secretary must approve, a joint written request and justification. The submittal to the Secretary must: (1) Explain why it is not feasible, for

reasons beyond the reasonable control of the Governor(s) and MPOs, for the multiple MPOs in the MPA to produce unified planning products; and (2) demonstrate how the multiple MPOs in the MPA are effectively coordinating with each other and producing consistent MTPs, TIPs and performance targets, and are, therefore, already achieving the goals of the rule through an existing coordination mechanism. An approved exception is permanent. When FHWA and FTA do certification reviews and make planning findings, FHWA and FTA will evaluate whether the MPOs covered by the exception are sustaining effective coordination processes that meet the requirements described in 23 450.312(i)(2)(i) and (ii).

If the Secretary determines that the request does not meet the requirements established under § 450.312(i), the Secretary will send the Governor(s) and MPOs a written notice of the denial of the exception, including a description of the deficiencies. The Governor(s) and the MPOs have 90 days from receipt of the notice to address the deficiencies identified in the notice and submit supplemental information addressing the identified deficiencies for review and a final determination by the Secretary. The Secretary may extend the 90-day period to cure deficiencies upon request.

The FHWA and FTA intend to provide guidance regarding the types of situations where an exception may be appropriate. Examples in the guidance may include situations where the Governor(s) and MPOs show that the number of MPOs in the MPA, the number of political jurisdictions within separate MPOs serving a single MPA, the involvement of multiple States with differing interests and legal requirements, or transportation conformity issues make it infeasible to develop unified planning products; or they might show there would be unintended consequences of using unified planning products in the MPA that would produce results contrary to the purposes of the rule. The guidance also will address how Governor(s) and MPOs can demonstrate their current coordination procedures meet the exception requirements, such as by (1) documenting a history of effective regional coordination and decisionmaking with other MPOs in the MPA that has resulted in consistent plans and TIPs across the MPA; (2) submitting procedures used by the multiple MPOs in the MPA to achieve consistency on regional priorities and projects of regional impact through plans, TIPs, air quality conformity analyses, project planning, performance targets, and other planning processes to address regional transportation and air quality issues; and (3) demonstrating the technical capacity to support regional coordination.

Implementation Costs

Many commenters expressed concern about the costs, both in terms of financial resources and staff time associated with merging MPOs or coordinating among multiple MPOs in an MPA on unified planning products. Although many commenters did not cite cost estimates, several cited a voluntary MPO merger in Connecticut that cost $1.7 million dollars and took 4 years. Some stated that implementing the proposed rule would divert both financial and staff resources away from core transportation responsibilities because no additional funds would be provided for MPOs to implement the proposed rule. Some commenters cited an expected increase in the cost of the planning process, including longer travel distances and time and travel expenses of MPO board and committee members. The FHWA and FTA address these and other comments on the costs resulting from this rule in the discussion of Executive Order 12866 (Regulatory Planning and Review).

Impacts on the Local Role in Planning and Programming Decisions

The FHWA and FTA received 217 comments expressing concern that the proposed rule would decrease local influence and decisionmaking in the transportation planning processes. Many of these comments included concern that the proposed rule would increase the size of MPAs and MPOs, which would diminish the role and influence of local governments and make the transportation planning and decisionmaking process less responsive to local input. Commenters noted that a larger planning area with more jurisdictions would mean that many local governments and smaller transit systems would not be represented on policy boards or committees. Some stated the belief that this would lead to a focus on funding larger, more expensive projects and decrease the amount of funding available to smaller communities, resulting in local transportation needs not being fully addressed. Several commenters expressed concern that the proposed rule would shift power among jurisdictions, either from rural areas and small towns to urban areas, or from urban areas to suburbs. Nine commenters said larger MPAs, with unified MTPs and TIPs would create more, not fewer, conflicts among neighboring communities and between States, and this would make it more difficult to build consensus.

The FHWA and FTA acknowledge that the rule could have the effect of increasing the size of some MPAs, and that complying with MPA boundary requirements may lead to changes in how the MPOs operate. Commenters may be correct when they suggest decisionmaking under the rule might result in different types of investments than in the past; however, FHWA and FTA believe that this rule will allow MPOs to make more efficient and effective planning decisions by focusing on the overall needs of the MPA. Focusing on the overall needs of the MPA also will support progress towards the national goals described in 23 U.S.C. 150(b). The FHWA and FTA disagree with comments suggesting the rule will necessarily disenfranchise local governments and small transit agencies, but FHWA and FTA also emphasize that the rule provides options for addressing such concerns, including (1) dividing an MPA that contains multiple UZAs into multiple MPAs, each of which contains an urbanized area in its entirety; and (2) retaining the multiple MPOs to serve the MPA. The NPRM provided three compliance options, all of which the final rule retains. First, many MPOs, including those that adjoin other MPOs, may be able to adjust their jurisdiction so each MPO's jurisdiction encompasses an entire MPA—the urbanized area plus the contiguous area forecast (by the MPOs) to become urbanized over the next 20 years. If the forecasted growth areas for two MPAs overlap, the affected Governor(s) and MPOs can work together to determine the most appropriate way to allocate that growth area between the MPAs. Second, multiple MPOs located in a single MPA can merge. Third, if MPOs and their respective Governor(s) determine that the size and complexity of the MPA justifies maintaining multiple MPOs in a single MPA, then they can remain as separate MPOs in the MPA but coordinate to prepare unified planning products. The final rule provides an additional option in § 450.312(i) under which Governor(s) and MPOs can seek an exception to the requirement for unified planning products. The exception is discussed in detail under *Unified Planning Products: Requirements and Exception* in ''Discussion of Major Issues Raised by Comments'' section of this preamble.

Effects on Public Involvement and Persons Protected by Environmental Justice and Title VI

Some commenters asserted the proposed rule would result in significantly larger MPOs and that would negatively impact public involvement. Fourteen MPOs and local governments, as well as a public transit agency, State DOT, national association, chamber of commerce, and a member of Congress noted that large planning entities with unified MTPs and TIPs would dilute the impact of local public input. A few commenters stated that the scale of large MPOs would make public involvement unmanageable and less meaningful. Thirteen MPOs and local governments as well as two associations and one State DOT said the large planning areas would create equity issues for populations unable to travel long distances for public meetings due to time, cost, and accessibility. A number of these commenters noted that this would present Title VI and environmental justice (EJ) concerns because it would be harder to ensure that individuals from low income communities, individuals from minority communities, individuals with limited English proficiency, and individuals with transportation limitations are meaningfully involved in the process.

Twelve commenters suggested the changes proposed in the NPRM would result in disruption to the public involvement process and confusion among the public and may increase the cost of public involvement and/or delay the process. One council of governments commented that the rule would disproportionately negatively impact central cities with Title VI and EJ communities as compared to suburban areas. One transit agency indicated that the changes could cause a mismatch of transit provider districts and the planning functions tied to current MPO jurisdictional boundaries, and this would impact Title VI and EJ populations. One member of Congress said the NPRM did not address the changes that would be required to public involvement plans if multiple MPOs have to coordinate on unified planning documents.

In response, as detailed above in ''Impacts on the Local Role in Planning and Programming Decisions,'' FHWA and FTA believe the rule provides options for addressing concerns about one MPO being responsible for too large a geographic area. Even in cases where MPOs merge, or the decision to have multiple MPOs in an MPA triggers the requirement for unified planning documents, the size of the MPO's planning jurisdiction does not determine the effectiveness of its public involvement. Best practices from existing large MPOs covering both urban and suburban areas indicate that public involvement, including meeting the goals of the Title VI process and EJ requirements, can be effective and can be carried out in a manner that addresses differences between these communities.

The FHWA and FTA recognize that the rule will require changes to ensure an effective public involvement process but believe that these changes are consistent with DOT's encouragement of continuous improvements in all public involvement efforts. The FHWA and FTA have addressed the issue of a more effective consensus building process through Planning Emphasis Areas,[11] the EDC RMOC initiative,[12] and other initiatives. The FHWA and FTA have developed a number of other resources that may be useful to MPOs and States in conducting effective public involvement and meeting Title VI and EJ requirements and expect to continue to provide such technical assistance and share best practices as part of the implementation of this rule.

The FHWA and FTA nevertheless recognize that in some cases, large and complex urban areas may have difficulty effectively addressing these concerns, and FHWA and FTA modified the proposed rule to allow an exception to the requirement for unified planning in § 450.312(i). If applicable, the request for an exception should provide evidence of public involvement, Title VI, or EJ concerns.

Implementation Timeline

The FHWA and FTA received input from 60 commenters on the proposed timeframe for the implementation of the proposed requirements in the NPRM. Many commenters, including 26 MPOs, 11 State DOTs, 9 municipalities, 5 professional associations, 4 COGs, 2 State legislators, 1 member of Congress, and 1 transit agency, raised concerns that the NPRM would require extensive and time-consuming coordination among MPOs and States, and they expressed that it would be unrealistic to complete this coordination within the 2 years required under the proposed rule. Many commenters stated that because of the complex nature of their particular MPA, the requirement to revise MPA boundaries and negotiate agreements among multi-MPO or multistate jurisdictions would be difficult to accomplish within 2 years. Many commenters noted that it would take longer than 2 years to complete new MTPs and TIPs among geographically-large MPAs, particularly in multistate areas.

Four MPOs and one member of Congress noted that 2 years is not enough time for State legislative action and gubernatorial approval that would be required to refine the MPO jurisdictional boundaries and member composition. Two MPOs stated that 2 years for compliance was not sufficient time for MPOs that are organized based upon State legislation, or are part of a Regional Planning Agency (RPA) or Council of Governments (COG) that would require re-establishment of roles through the State legislative process. One State DOT and numerous MPOs commented that the 2-year timeframe proposed in the NPRM was insufficient to draft new agreements and receive approval through multiple agencies. One State DOT commented that if there are disputes between the State and MPOs, it would significantly lengthen the timeframe for implementation. Three MPOs stated that a 2-year phase in period was not sufficient for a large, multistate area to draft new agreements and develop new structures, new rules and new planning processes.

Two COGs and eight local governments commented that 2 years was too aggressive given the extent of the required changes, resignations, and coordination agreements. They cited the experience of merging MPOs to form the Lower Connecticut River Valley Council of Governments, which took 4 years despite being a voluntary merger. Based upon this experience, they expressed doubt that the 2-year timeframe proposed in the NPRM would provide adequate time to complete a merger of MPOs to comply with the proposed rule.

Many commenters cited the complexity of implementing performance-based planning, and of requirements to prepare a new MTP and TIP, in concluding that the 2-year phase-in period was not sufficient. One transit agency noted that the 2-year timeline would be difficult to meet given the requirement to coordinate performance targets, particularly where a UZA crosses State boundaries and the MPOs must reconcile multiple goals and objectives. Two MPOs and one State DOT stated that if the MPOs are on different MTP cycles and need to develop a unified MTP and TIP, the proposed 2-year timeframe would be very tight. One State DOT and one MPO noted that in the case of an expanded

[11] See *https://www.fhwa.dot.gov/planning/processes/metropolitan/mpo/fy_2016/index.cfm.*

[12] See *http://www.fhwa.dot.gov/planning/regional_models/.*

boundary of the MPA, regional travel models would require updates that could not be completed within the 2-year timeframe. With regard to the timeline proposed in the NPRM's § 450.312(i) for MPA boundary redeterminations after release of the U.S. Bureau of the Census notice of the Qualifying Urban Areas, two State DOTs stated that 180 days would not be sufficient for MPOs to determine if they should be merged or develop unified planning products.

One association noted that the phase-in period of 180 days for the metropolitan planning agreements and the phase-in period of 2 years for the coordinated planning products were not aligned, and that the metropolitan planning agreements could not be updated until the MPO boundaries are determined. The commenter proposed that the timeframes for revision of the MPO jurisdictional boundaries and metropolitan planning agreements need to be aligned. Two MPOs recommended that the new requirements be phased in to support the air quality attainment deadlines and requirements that will be established for the phase-in of the revised 2015 National Ambient Air Quality Standards (NAAQS) for Ozone, designations which are to occur by October 1, 2017, in accordance with the Clean Air Act (CAA), recognizing that the nonattainment areas will have to conform their TIPs and MTPs to the SIP.

Eleven MPOs, three State DOTs, two COGs, and three associations requested FHWA and FTA delay the requirement until after the 2020 decennial census to allow more time for implementation and avoid duplication of effort resulting from undertaking MPO coordination activities within 2 years after the effective date of the final rule and another set of MPO coordination activities after the release of the U.S. Census Bureau notice of new UZA boundaries following the 2020 decennial census.

Two State legislators and one local government commented that if the MPOs in Connecticut that recently completed a voluntary merger would be required to do another round of mergers within 2 years as a result of the proposed rule, and then be required to merge again after the 2020 census, it would be inefficient and waste staff time used for the previous MPO merger.

One State DOT commented that the proposed requirement should be suspended until the dispute resolution process could be fully developed. One association recommended that the implementation time should be extended to 4 years.

The FHWA and FTA recognize the challenges involved in defining MPA boundaries, negotiating new agreements, and implementing new planning processes in large and complex MPAs. The FHWA and FTA agree that it would be burdensome for MPOs and local planning partners to reconsider MPA boundaries 2 years after the date of the final rule, and then reconsider the boundaries and agreements after the 2020 census. Therefore, in the final rule FHWA and FTA have changed the compliance date in §§ 450.266(g) and 450.340(h) to the next MTP update occurring on or after the date that is 2 years after the date the Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census. The FHWA and FTA also changed the 180-day deadline, now in redesignated § 450.312(j), to 2 years after the release of the U.S. Bureau of the Census notice of the Qualifying Urban Areas for a decennial census.

Legal Authority

MPA Boundary Requirements

The FHWA and FTA received a number of comments questioning the proposed requirement that the MPA include the entire urbanized area and contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan. Commenters indicated Congress intended the statute to leave all MPA boundary determinations to Governors and local governments. The Capital Region Council of Governments stated that the current planning regulations reflect the flexibility of MPA boundaries implicit in the statute, and the proposed rule removed that flexibility. The Sherman-Denison MPO commented that the statutory language on MPA boundaries has not changed since ISTEA and suggested new statutory language would be required to support a change in interpretation by FHWA and FTA. Commenters cited 23 U.S.C. 134(e)(3)[13] and 23 U.S.C. 135(d)[14] as evidence that FHWA and FTA lack authority to dictate MPA boundaries or to require changes in MPA boundaries. In particular, the Pennsylvania Department of Transportation cited 23 U.S.C. 134(d)(4) and (5) as barring the changes in boundary provisions in the proposed rule. A few commenters asked whether areas designated as nonattainment as of August 10, 2005, would be allowed to retain their boundaries due to provisions in existing 23 CFR 450.312(b) and whether such MPAs would be subject to the proposed rule's unified planning products requirements.

In response to these comments, FHWA and FTA point to the statutory provisions defining MPA boundaries. The statute is explicit with regard to the minimum required inclusions: The existing urbanized area, as designated by the Census Bureau, plus the contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan. 23 U.S.C. 134(e)(2)(A). While setting the boundaries of the 20-year forecast area may be subject to some discretion given the need to make judgments about future events, the statute leaves no room for interpretation about what constitutes the Census Bureau-designated urbanized area. The FHWA and FTA acknowledge their joint metropolitan planning regulations have not been clear with regard to the treatment of urbanized areas under this statutory boundary provision. Due to this lack of clarity, FHWA and FTA have been aware for some time that the practices of some MPOs have not been consistent with these statutory MPA boundary requirements. This rule is intended to correct these problems by more closely aligning the regulatory boundary provisions with 23 U.S.C. 134(e)(2). An agency has discretion to alter a prior interpretation of a statute it administers if the agency follows the proper procedures (*e.g.,* notice-and-comment rulemaking) and engages in reasonable decisionmaking that meets the requirements of the Administrative Procedure Act.[15] The FHWA and FTA believe this rulemaking meets those standards.

The FHWA and FTA do not agree that this rule conflicts with 23 U.S.C. 134(d)(4) and (5). First, if the MPO designation provisions controlled the determination of MPA boundaries, there would be no need for the separate boundary-setting provisions in 23 U.S.C. 134(e). As a matter of statutory interpretation, FHWA and FTA decline

[13] 23 U.S.C. 134(e)(3) provides ''[i]dentification of new urbanized areas within existing planning area boundaries.—The designation by the Bureau of the Census of new urbanized areas within an existing metropolitan planning area shall not require the redesignation of the existing metropolitan planning organization.''

[14] 23 U.S.C. 134(d) establishes in detail the process for designation and redesignation of MPOs by the Governor and local governments, as well as organizational and representation requirements for MPOs. 23 U.S.C. 134(d)(4) and (d)(5) address the continuing authority of agencies with multimodal transportation responsibilities as of December 18, 1991, and continuity of MPO designations until redesignation occurs. 23 U.S.C. 134(d)(7) establishes authority for the designation of more than one MPO in an MPA if the size and complexity of the existing MPA make it appropriate to do so.

[15] *See FCC* v. *Fox Television 556 US 502, 514–16 (2009).*

the commenters' invitation for FHWA and FTA to ignore the boundary provisions when applying the statute. The statute does not support the comments. Section 134(d)(4) contains a grandfathering provision that exempts certain MPOs only from the other requirements of 23 U.S.C. 134(d), and Section 134(d)(5) only states that an MPO designation remains effective until the MPO is redesignated. The remaining paragraphs of 23 U.S.C. 134(d) set methods for designating and redesignating MPOs (paragraphs (1) and (6)), and set a specific structure and board membership for any MPO serving a transportation management area (paragraphs (2) and (3)). Paragraph (7) permits the designation of more than one MPO in an MPA if the MPA is unusually large and complex, a possibility that is fully incorporated into this rule. In summary, Section 134(d) defines how MPOs are designated and the structure of certain MPOs; it does not describe the MPAs that the MPOs must conduct planning for, which is left to Section 134(e). Thus, Section 134(d) does not conflict with this rule's MPA boundary requirements.

Moreover, 23 U.S.C. 134(e)(3) is instructive with respect to the relationship between the designation/redesignation provisions in 23 U.S.C. 134(d) and the MPA boundary provisions in 23 U.S.C. 134(e). The inclusion of the redesignation exception in 23 U.S.C. 134(e)(3) confirms that Congress viewed the MPA boundary provisions to operate independently of the designation/redesignation provisions. Thus, questions about the need for designation or redesignation, and how that would occur, are separate from, and do not alter the effects of, MPA boundary provisions in 23 U.S.C. 134(e).

This rule also does not conflict with 23 U.S.C. 134(e)(3), which provides that if the Bureau of the Census designates a new urbanized area within an existing MPA, a redesignation of the existing MPO is not required. The rule does not alter provisions pertaining to designation of new urbanized areas by the Census Bureau, and it retains the regulatory version found in 23 CFR 450.312(e).

Commenters asked about the effect of 23 CFR 450.312(b) (implementing 23 U.S.C. 134(e)) concerning boundary retention for MPAs in urbanized area designated as nonattainment for ozone or carbon monoxide as of August 10, 2005. The commenters asked what the effect of the rule would be if UZAs extended into two MPAs and whether, if such MPAs kept their August 10, 2005, boundaries under the proposed rule, the MPOs serving such MPAs would be subject to the unified planning requirements in the proposed rule. In response, FHWA and FTA continue to give the same meaning to 23 CFR 450.312(b) and 23 U.S.C. 134(e)(4) as they have since Congress enacted the provision in TEA–21 (1998) and modified it in SAFETEA–LU (2005). The FHWA and FTA conclude that Congress intended the provision to be time-limited to address issues that had arisen at the time these statutes were enacted, not to create a permanent or global exemption from other boundary requirements under the statute, including those in 23 U.S.C. 134(e)(2). Their purpose and effect have lapsed; the exemption found in subsection (e)(4) are bounded by the life of the nonattainment designations for ozone and carbon monoxide that were in effect as of August 10, 2005. In 2012, EPA made new ozone nonattainment designations under the 2008 ozone standards.[16] The EPA also revoked the 1997 ozone standards, under which designations were in effect in 2010.[17] The EPA terminated all nonattainment designations for carbon monoxide by September 27, 2010, when EPA designated all existing nonattainment areas as attainment or maintenance areas.[18] Those urbanized areas originally covered by 23 U.S.C. 134(e)(4), but which are subject to these post-2005 EPA nonattainment designations for ozone and/or carbon monoxide, are now subject to 23 U.S.C. 134(e)(5). Section 134(e)(5) requires the MPA to encompass the entire urbanized area plus the 20-year forecast area as described in 23 U.S.C. 134(e)(2)(A). Similarly, those urbanized areas originally covered by 23 U.S.C. 134(e)(4) but which are subject to the post-2005 EPA designations of areas in attainment or maintenance for ozone or carbon monoxide no longer need the protection that this provision provided; they, too, are subject to boundary requirements of 23 U.S.C. 134(e)(2)(A). Thus, all of these areas are now subject to the boundary and unified planning provisions in this rule.

[16] *See* EPA ozone designation notices at 77 FR 30088 (May 21, 2012) and 77 FR 34221 (June 11, 2012).

[17] The EPA initially issued a notice revoking the 1997 standards for transportation conformity purposes only. *See* EPA notice at 77 FR 30160 (May 21, 2012). As a result of litigation, that partial revocation was determined invalid and EPA issued a full revocation. *See* 80 FR 12264 (March 6, 2015).

[18] A list of EPA's **Federal Register** redesignation notices for carbon monoxide, including redesignations from August 10, 2005, through September 27, 2010, is available at *https://www3.epa.gov/airquality/greenbook/cfrnrpt1.html.*

Unified Planning Products Requirements

A number of commenters stated that the proposed requirement for unified planning products is not found in the metropolitan planning statute and exceeds congressional intent. Some cited language in 23 U.S.C. 134(i)(1)(A) as evidence that the proposed requirement conflicts with the statute.[19] Others cited 23 U.S.C. 134(c)[20] and (j)[21] for the same purpose. A joint comment letter from the Association of Metropolitan Planning Organizations, NARC, and the National Association of Development Organizations stated that the proposal is contrary to the practical framework and to 23 U.S.C. 134(b), (h)(2), (i), and (j). The commenters indicated the plain language of 23 U.S.C. 134, when viewed in the context of the statute, made it evident the proposal exceeds statutory authority. The commenters further stated that coordination among multiple MPOs in the same MPA is governed by 23 U.S.C. 134(f)(1)[22] and 134(g)(1),[23] and that the NPRM proposal exceeds those provisions. According to the commenters, had Congress intended to create such a complicated and intricate

[19] 23 U.S.C. 134(i)(1)(A) states, in part, ''[e]ach metropolitan planning organization shall prepare and update a transportation plan for its metropolitan planning area in accordance with the requirements of this subsection.''

[20] 23 U.S.C. 134(c)(1) provides ''[t]o accomplish the objectives in subsection (a), metropolitan planning organizations designated under subsection (d), in cooperation with the State and public transportation operators, shall develop long-range transportation plans and transportation improvement programs through a performance-driven, outcome-based approach to planning for metropolitan areas of the State .'' Section 134(c)(2) states, in part, ''. . . [t]he plans and TIPs for each metropolitan area shall provide for [systems and facilities] . . . that will function as an intermodal transportation system for the metropolitan planning area . . .''

[21] 23 U.S.C. 134(j)(1)(A) states, in part, ''. . . the metropolitan planning organization designated for a metropolitan area shall develop a TIP for the metropolitan planning area . . .'' Sections 134(j)(1)(B), (j)(1)(C), (j)(1)(D)(ii), (j)(4), (j)(6)(A)–(b) similarly use the singular reference to MPO in provisions concerning development, approval, and publication of the TIP and the selection of projects.

[22] 23 U.S.C. 134(f)(1) states, in part, ''[t]he Secretary shall encourage each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate metropolitan planning organizations to provide coordinated transportation planning for the entire metropolitan area.''

[23] 23 U.S.C. 134(g)(1) reads ''Nonattainment areas.—If more than 1 metropolitan planning organization has authority within a metropolitan area or an area which is designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 *et seq.*), each metropolitan planning organization shall consult with the other metropolitan planning organizations designated for such area and the State in the coordination of plans and TIPs required by this section.''

requirement, it would have explicitly done so. The commenters pointed to 23 U.S.C. 134(g) as the sole part of the statute where Congress addresses MTP and TIP coordination among multiple MPOs in an MPA.[24] The commenters also pointed to the 23 U.S.C. 134(f)(1) provision for coordination across State lines, as well as 23 U.S.C. 134(i), as evidence that Congress did not intend to require unified planning products or to give DOT the authority to do so. The commenters stated that the performance-based planning provisions in 23 U.S.C. 134(h), adopted by Congress in MAP–21, reaffirmed the expectation that each MPO must produce its own planning products because the statute does not explicitly allow for the possibility of unified planning by multiple MPOs in a single MPA. The commenters rebutted the discussion in the NPRM that stated the NPRM proposals represented a return to more extensive coordination and decisionmaking requirements under the 1993 version of the planning regulations.

Several commenters stated that DOT's long-standing interpretation of the planning statute as allowing separate MTPs and TIPs for MPOs sharing an urbanized area confirms that the NPRM proposal for unified planning products is contrary to the existing statute. Commenters stated that the DOT reauthorization proposal, the Generating Renewal, Opportunity and Work with Accelerated Mobility, Efficiency, and Rebuilding of Infrastructure and Communities throughout America Act (GROW AMERICA Act), contained provisions like those in the NPRM. According to the commenters, the GROW AMERICA Act provisions serve as an admission by DOT that new statutory authority is required to support the NPRM's proposals. Some commenters stated that Congress has had a number of opportunities over the years to adopt provisions like those in the NPRM, specifically including enactment of the MAP–21 and the FAST Act, but has chosen not to do so.

The FHWA and FTA have fully considered the comments stating the proposals conflict with 23 U.S.C. 134 in general; conflict specifically with 23 U.S.C. 134(b), (e), (i), (f)(1), (g), (h), and (j); and conflict with existing metropolitan planning practices. The FHWA and FTA understand that the commenters believe the statute makes it evident that: (1) Each MPO is allowed to prepare its own MTP and TIP, regardless of whether the MPO is the sole MPO in its MPA or is one of two or more MPOs in the MPA; and (2) where an MPA crosses State lines, the Secretary's authority is limited to encouraging the affected MPOs to coordinate for the entire MPA.

The FHWA and FTA do not agree that the statute constrains the agencies' authority in the manner commenters suggest. Nothing in 23 U.S.C. 134(f)(1) and (g)(1) or any other part of Section 134 clearly establishes the applicable coordination requirements.

The FHWA and FTA first considered whether 23 U.S.C. 134(f)(1) and (g)(1) expressly address the question of how multiple MPOs in the same MPA handle coordination and decisionmaking within the MPA. The answer rests on whether the use of the term ''metropolitan area'' in the two provisions means ''metropolitan planning area'' as defined in 23 U.S.C. 134(b)(1). The FHWA and FTA believe that the term ''metropolitan area'' in 23 U.S.C. 134(f)(1) and (g)(1) is ambiguous, thus providing FHWA and FTA authority to interpret the vague statutory language.[25]

The enactment of ISTEA in 1991 produced the first detailed metropolitan planning statute, codified in 23 U.S.C. 134. The ISTEA version of the metropolitan planning statute used the term ''metropolitan area'' in various provisions governing planning area boundaries, multistate coordination, and coordination among planning entities.[26] The statute did not define the term. In the next reauthorization act, TEA–21 (1998), Congress reenacted the metropolitan planning statute in its entirety, including substantial amendments to many parts of the statute. Congress substituted the term ''metropolitan planning area'' for both ''urbanized area'' and ''metropolitan area'' in several places in the statute. Specifically, Congress replaced ''metropolitan area'' with ''metropolitan planning area'' in the 23 U.S.C. 134(c) (1998) provision on planning boundaries, but Congress retained ''metropolitan area'' in the multistate coordination provision in 23 U.S.C. 134(d) (1998) and in the coordination provision in section 134(e) (1998). Neither ''metropolitan area'' nor ''metropolitan planning area'' was defined in TEA–21.

In SAFETEA–LU (2005), Congress again reenacted the entire metropolitan planning statute. Congress added a statutory definition for the term ''metropolitan planning area'' that remains in effect today. The statutory definition states ''[t]he term metropolitan planning area means the geographic area determined by agreement between the metropolitan planning organization for the area and the Governor under subsection (e).'' 23 U.S.C. 134(b)(1). Subsection (e), which limits the discretion of the Governor and the MPO in setting MPA boundaries, defines minimum and optional MPA boundaries. As in TEA–21, Congress retained the use of ''metropolitan area'' in a number of provisions, including in (1) the multistate coordination provision, which was redesignated from section 134(d) to section 134(f); and (2) the coordination provision, which was redesignated from section 134(e) to section 134(g). Congress did not adopt a definition of ''metropolitan area'' in SAFETEA–LU or in subsequent legislation.

This history leads FHWA and FTA to conclude that Congress intended the two terms to have different meanings. Even if FHWA and FTA treat the statutory history as insufficient evidence of congressional intent, the conclusion is the same. Under conventions of statutory interpretation, where congressional intent is unclear, if a word is not statutorily defined or a term of art, it is typically given its ordinary meaning.[27] In 23 U.S.C. 134, the terms ''urbanized area'' and ''metropolitan planning area'' are terms defined by the statute. 23 U.S.C. 134(b)(1) and (7). By contrast, ''metropolitan area'' is not defined. That leaves the question whether it is a term of art, or a term that should be given its ordinary meaning. Either result leads FHWA and FTA to conclude that the multistate provision in 23 U.S.C. 134(f)(1), and the coordination provision in 23 U.S.C. 134(g)(1), as well as their statutory predecessors, refer not to metropolitan planning areas as defined in 23 U.S.C. 134(b)(1), but to broader areas that include both an urban core and adjacent communities. The FHWA and FTA believe it is reasonable to consider ''metropolitan area'' a term of art in the context of the metropolitan planning statute, and to look to the U.S. Census Bureau for a definition just as 23 U.S.C. 134(b)(7) looks to the Census

[24] In addition to the nonatttainment area provisions in 23 U.S.C. 134(g)(1), the section includes provisions for coordinating transportation improvements located within the boundaries of more than one MPA (23 U.S.C. 134(g)(2)), and for consultation and consideration of other types of planning activities under the responsibility of other types of entities (23 U.S.C. 134(g)(3)).

[25] *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.,* 464 U.S. 837, 862–864 (1984).

[26] See, *e.g.,* 23 U.S.C. 134(c), (d)(1), and (e).

[27] *See* 2A Sutherland Statutory Construction § 47:29 (7th ed.).

Bureau for the definition of ''urbanized area.''

The Census Bureau describes the term ''metropolitan area'' as having been adopted in 1990 to collectively refer to the metropolitan statistical areas, consolidated metropolitan statistical areas, and primary metropolitan statistical areas.[28] Metropolitan statistical areas are core-based statistical areas ''associated with at least one urbanized area that has a population of at least 50,000; it comprises the central county or counties or equivalent entities containing the core, plus adjacent outlying counties having a high degree of social and economic integration with the central county or counties as measured through commuting.'' [29] The metropolitan planning statute recognizes these larger areas in the 23 U.S.C. 134(e) MPA boundaries provision, which provides the MPA ''may encompass the entire metropolitan statistical area or consolidated metropolitan statistical area, as defined by the Bureau of the Census.'' 23 U.S.C. 134(e)(2)(B).

Based on this analysis, FHWA and FTA have concluded that the coordination provisions of 23 U.S.C. 134(f)(1) and (g)(1) establish the coordination requirements applicable when there are two or more MPOs in a general metropolitan area. Neither provision prescribes requirements that govern coordination among MPOs where more than one MPO has been designated in the same MPA. This interpretation gives meaning to both the undefined term ''metropolitan area'' and the statutorily-defined term ''metropolitan planning area.'' [30]

The remaining parts of 23 U.S.C. 134 also do not definitively establish how multiple MPOs in the same MPA are to coordinate their plans and TIPs. The FHWA and FTA considered both individual provisions in 23 U.S.C. 134, and the statute as a whole, and considered the statute in the context of metropolitan transportation planning practices. Many sections of 23 U.S.C. 134, including those specific to MTP and TIP preparation, reference the responsibilities of MPOs in the singular. The language on MTPs and TIPs refers to ''each'' MPO and ''the'' MPO. Commenters state this use of the singular form means that each MPO has the right to prepare its own plan and TIP, regardless of the presence of other MPOs in the statutorily-defined MPA.

However, the use of the singular in those statutory provisions is subject to different interpretations. First, as a matter of statutory construction, absent clear language to the contrary, the use of the singular in statutory language includes the plural and vice-versa.[31] Thus, the provisions cited by commenters could be read in either the singular or the plural, and the use of the singular is not determinative. Second, it is evident from a comprehensive reading of the MPA and MPO provisions in 23 U.S.C. 134 that the statute intends for a typical MPA to have a single MPO responsible for the entire MPA, including the urbanized area(s) included in the MPA. *E.g.,* MPA boundary provisions in 23 U.S.C. 134(e). If Congress had not intended the norm to be ''one MPO per MPA,'' there would have been no need for the exception provision in 23 U.S.C. 134(b)(7), which allows the designation of more than one MPO in an MPA under certain circumstances. Thus, it is not surprising that statutory provisions addressing the development and use of plans and TIPs are written to address the norm, and are cast in the singular.

The FHWA and FTA have thus determined that Congress did not directly address the question of how multiple MPOs in the same MPA ought to coordinate and make planning decisions for the MPA. This determination includes the situation where the MPA (as defined in 23 U.S.C. 134(b)(1)) crosses State lines. Accordingly, FHWA and FTA are charged with deciding how such coordination ought to occur. This rule addresses that question.

The FHWA and FTA disagree with comments stating the proposed rule exceeds FHWA's and FTA's authority because the rule would change long-standing FHWA/FTA statutory interpretations of MPA boundary requirements that Congress has tacitly endorsed. While FHWA and FTA acknowledge that there is a general presumption that Congress acts with knowledge of agency regulatory interpretations of a statute,[32] the law is clear that an agency has the discretion to alter its interpretation of a statute so long as the agency follows the proper procedures (*e.g.,* notice-and-comment rulemaking) and engages in reasonable decisionmaking that meets the requirements of the Administrative Procedure Act.[33] The FHWA and FTA believe this rulemaking satisfies both of those tests.

The FHWA and FTA also disagree with comments stating that the proposed rule exceeds FHWA's and FTA's authority because Congress rejected or failed to adopt the same provisions in MAP–21 and the FAST Act, including not adopting DOT's GROW AMERICA proposals. An agency's submission of a proposal for legislation does not constitute an admission that additional statutory authority is needed in order to accomplish the objectives of the regulatory proposal. An agency submits legislative proposals for a variety of reasons, including a desire to have Congress clarify existing authority in order to overcome potential opposition from the public or other stakeholders to the agency's exercise of the authority. Similarly, the absence of an agency's submitted legislative proposal in subsequently enacted legislation does not constitute affirmative evidence that Congress rejected the proposal or determined the agency lacked sufficient authority under existing law. There may be many reasons for the legislative outcome, including a congressional decision that existing law is sufficient to authorize the proposal.[34]

Finally, FHWA and FTA considered the comments stating that Congress's enactment of performance-based planning requirements in 23 U.S.C. 134(h) proves the statute requires each MPO to produce its own planning products. The FHWA and FTA believe Congress crafted the provisions in 23 U.S.C. 134(h), like those in other parts of the statute, to establish the process for the typical MPA structure of one MPO per MPA. For the reasons previously discussed, FHWA and FTA believe Congress did not explicitly address the question of how MPOs are to establish targets where there is more

[28] ''About Metropolitan and Micropolitan Statistical Areas,'' U.S. Census Bureau, available online at *http://www.census.gov/population/metro/about/.*

[29] ''Geographic Cores and Concepts—Core-Based Statistical Areas and Related Statistical Areas'', U.S. Census Bureau, available at *https://www.census.gov/geo/reference/gtc/gtc_cbsa.html.*

[30] ''It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.'' Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

[31] 1. U.S.C. 1; *see also* 2A Sutherland Statutory Construction § 47:34 (7th ed.).

[32] *See* 2A Sutherland Statutory Construction § 47:8 (7th ed.).

[33] *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863–864 (1984), ''[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.''

[34] *See Alexander* v. *Sandoval,* 532 U.S. 275, 292–93 (2001).

than one MPO in the same MPA. This rule addresses that question.

V. Summary of Major Changes Made in the Final Rule

The final rule includes the changes proposed in the NPRM, but with the revisions and additions described below, which FHWA and FTA made in response to comments.

Subpart B—Statewide and Nonmetropolitan Transportation Planning and Programming

450.226 Phase-In of New Requirements

Under this final rule, the implementation deadline for the requirement that States, MPOs and operators of public transportation have a current metropolitan planning agreement, which will identify coordination strategies that support cooperative decisionmaking and the resolution of disagreements, is changed from not later than 2 years after the date of publication of the rule to not later than 2 years after the date the Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census.

Subpart C—Metropolitan Transportation Planning and Programming

450.312 Metropolitan Area Boundaries

Section 450.312(i) (as redesignated)—The final rule creates an exception, in new § 450.312(i), to the unified planning products requirements applicable where there are two or more MPOs in the same MPA. The exception allows the multiple MPOs in an MPA to continue to generate separate, but coordinated and consistent, planning products if FHWA and FTA approve a request from the affected Governor(s) and all MPOs in the MPA that meets the requirements established in § 450.450(i). The exception is discussed in detail under *Unified Planning Products: Requirements and Exception* in the ''Discussion of Major Issues Raised by Comments'' section of this preamble.

Section 450.312(j) (as redesignated)—The final rule changes the time period MPOs have to adjust MPA boundaries after a U.S. Census Bureau designation that defines two previously separate UZAs as a single UZA. The final rule changes the time period for review and adjustment of MPA boundaries, so that one MPA includes the entire new UZA area, from 180 days to 2 years after the date the Census Bureau releases its notice of Qualifying Urban Areas following a decennial census.

450.340 Phase-In of New Requirements

In the final rule, FHWA and FTA changed the deadline in § 450.340(h) to provide additional time for compliance and to clarify the scope of the phase-in provision. The deadline for compliance proposed in the NPRM was the next MTP update occurring on or after 2 years after the effective date of the rule. The deadline for compliance in the final rule is the next MTP update occurring on or after the date that is 2-years after the date the U.S. Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census. For clarity, the final rule lists the sections to which this phase-in provision applies.

VI. Section-by-Section Discussion of Changes Made in the Final Rule

Subpart B—Statewide and Nonmetropolitan Transportation Planning and Programming

Section 450.226—Phase-In of New Requirements

The rule provides a phase-in provision for the requirement in 23 CFR 450.208(a)(1) that metropolitan planning agreement must include strategies for coordination and the resolution of disagreements. In § 450.226(h), the rule provides a phase-in period ending 2 years after the date the Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census.

Subpart C—Metropolitan Transportation Planning and Programming

Section 450.312—MPA Boundaries

The rule removes the first sentence of § 450.312(b), which is outdated grandfathering language concerning MPAs with August 10, 2005, nonattainment designations for ozone and carbon monoxide. Comments received in response to the NPRM showed the provision causes confusion about the applicability of other parts of the regulation. The FHWA and FTA have concluded the statutory provision on which the grandfather provision was based no longer has any effect. *See* discussion in *Legal Authority, MPA Boundary Requirements* in the Response to Major Issues Raised by Comments. The FHWA and FTA revised the second sentence to clarify the reference to designation procedures and add a reference to MPA boundary provisions.

The rule adds § 450.312(i) as a result of comments received on the NPRM. The new paragraph creates an exception from the unified planning products requirements established by the rule. The exception is discussed in detail under *Unified Planning Products: Requirements and Exception* in the ''Discussion of Major Issues Raised by Comments'' section of this preamble.

The rule changes the § 450.312(j) (as redesignated) time period for review and adjustment of MPA boundaries after a U.S. Census Bureau designation that defines two previously separate UZAs as a single UZA, so that one MPA includes the entire new UZA area, from 180 days to 2 years after the date the Census Bureau releases its notice of Qualifying Urban Areas following a decennial census. The rule also clarifies that Governor(s) and MPO(s) are responsible for reviewing MPA boundaries after each census and taking action to adjust MPA boundaries as needed to comply with boundary requirements.

Section 450.340—Phase-In of New Requirements

The rule adds phase-in provisions to § 450.340 for certain parts of Subchapter C. In a new paragraph (h), States and MPOs are given a longer time period than proposed in the NPRM to become fully compliant with the new MPA boundary and MPO boundaries agreement provisions, and with the requirements for jointly established performance targets and a single MTP and TIP for the entire MPA. To address comments on implementation timelines and the need for greater clarity in the rule, the phase-in provision lists the specific parts of Subchapter C subject to delayed compliance. Section 450.340 requires the Governor(s) and MPOs to document their determination of whether the size and complexity of the MPA justifies the designation of multiple MPOs; however, that decision is not subject to approval by FHWA and FTA. Full compliance for all MPOs within the MPA will be required before the next regularly scheduled update of an MTP for any MPO within the MPA, following the date that is 2 years after the date the Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census.

VII. Regulatory Analyses and Notices

A. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA and FTA have determined that this rulemaking is a significant regulatory action within the meaning of Executive Order 12866 and within the meaning of DOT regulatory policies and procedures due to significant public interest in the area of MPO reform.

However, this rule is not estimated to be economically significant within the meaning of E.O. 12866. This action complies with E.O.s 12866 and 13563 to improve regulation.

This final rule improves the clarity of the joint FHWA and FTA planning rules by better aligning the regulations with the statute. Additionally, the MPOs within the same MPA must establish procedures for joint decisionmaking as well as a process for resolving disagreements. These changes also are intended to result in better outcomes for the MPOs, State agencies, providers of public transportation, and the public by promoting a regional focus for metropolitan planning, and by unifying MPO processes within an urbanized area in order to improve the ability of the public to understand and participate in the transportation planning process.

The unified planning requirements of this rule affect primarily urbanized areas with multiple MPOs planning for parts of the same UZA, or 142 of the 409 MPOs in the country. The affected MPOs are: (1) MPOs that have been designated for an urbanized area for which other MPOs also have been designated; and/or (2) MPOs where an adjacent urbanized area has spread into its MPA boundary as a result of the periodic U.S. Census Bureau redesignation of UZAs. An MPO designated as an MPO in multiple MPAs, in which one or more other MPOs are also designated, would be required to participate in the planning processes for each MPA. Thus, under this rule, MPOs that have jurisdiction in more than one MPA would be required to participate in multiple separate planning processes. However, the affected MPOs could exercise several options to reduce or eliminate these impacts, including adjusting MPA boundaries to eliminate overlap, or by merging MPOs. In some cases, a Governor (or Governors in the case of multistate urbanized areas) and MPOs could determine that the size and complexity of the area make designation of multiple MPOs in a single MPA appropriate. In that case, the rule requires those multiple MPOs to jointly develop unified planning products: A single MTP, a single TIP, and a jointly-established set of performance targets for the MPA. The final rule includes a new option for MPAs with multiple MPOs that offers, under certain conditions, an exception to the requirement for unified planning products. Further, the final rule requires all MPOs to ensure their agreements with State DOTs and providers of public transportation include written procedures for joint decisionmaking and dispute resolution.

The FHWA and FTA have estimated that the maximum annual cost of implementation of the provisions of this action would be $86.3 million. This estimate used high cost estimates to avoid any risk of underestimation. After evaluating the costs and benefits of this final action, FHWA and FTA conclude that the maximum nationwide impact does not exceed the $100 million annual threshold that defines a significant economic impact.

When extending the comment period FHWA and FTA requested additional comments on the potential costs of the rule, and the analysis conducted drew upon these submitted comments. One hundred fifty-eight respondents commented on FHWA's and FTA's evaluation of the costs and benefits of these proposed amendments. All of the respondents who commented on this section indicated that the evaluation underestimated the cost to implement the proposed regulatory provisions. Some respondents noted the following: The analysis of the costs of the proposed changes seems simplistic and inadequate; the NPRM provides no calculations or evidence to justify its assertion that costs will be minimal; the proposed rule does not fully contemplate the level of additional work that will be required for State DOTs and MPOs to comply with the changes; and evidence suggests that the costs will not be minimal. Others claimed that the increased costs would be considerable or significant and that merging MPOs is a time-consuming, complex and costly process. One stated that merging MPOs would require the involvement of multiple boards, commissions, and councils, as well as cost time and money, highlighting that the attorney fees alone for the multiple organizations in the process of any merger would be daunting. Many claimed that the NPRM would impose immense budgetary and administrative burdens on their jurisdictions, and that the administrative effort and expense would be huge. Thirteen respondents noted that the formation of the Lower Connecticut River Valley Council of Governments resulting from the voluntary merger of Connecticut River Estuary Regional Planning Agency and Midstate Regional Planning Agency cost approximately $1.7 million in staff time and direct costs and took 4 years to complete. The Michigan Department of Transportation noted that the process to establish a new MPO for the Midland UZA took 18 months and approximately $300,000. The Richmond Regional Transportation Planning Organization stated that FHWA and FTA should consider the direct capital costs, lost productivity and opportunity costs for staff and elected officials, and other indirect costs in analyzing the financial impact of the proposed rule upon affected MPOs.

The AASHTO noted that the NPRM does not take into account the additional resources needed to implement the proposed provisions. Others pointed out that no additional funding is proposed and suggested that additional Federal funds should be provided to MPOs to offset the cost of implementing the proposed requirements.

In response, FHWA and FTA note that the total Federal, State, and local cost in FY 2016 of the planning program is approximately $1.5 billion. Generally, 80 percent of these eligible costs are directly reimbursable through Federal transportation funds; however, AMPO's 2013 MPO Salary Survey Results [35] indicated that ''the vast majority of MPOs received more than 70% of their funding from federal sources'' including Federal transportation funds allocated for metropolitan planning (23 U.S.C. 104(d) and 49 U.S.C. 5305(f)) and for State planning and research (23 U.S.C. 505 and 49 U.S.C. 5305(f)). While no additional funds will be provided to the MPOs to implement the provisions of the final rule, FHWA and FTA note that MPOs have the flexibility to use some FHWA capital funds or some FTA formula funds for transportation planning (23 U.S.C. 133(b)(1), 49 U.S.C. 5307(a)(1)(B) and 5311(b)(1)(A)). The FHWA and FTA also expect there will be some cost savings for State DOTs, which will benefit from having fewer TIPs to incorporate into their STIPs.

Multiple respondents emphasized that requiring MPOs to merge and re-organize or to develop new memoranda of understanding (MOUs), representation selection processes, and unified planning products without additional funds would only serve to undermine transportation planning because it would require them to redirect considerable resources from core planning functions. Federal funding spent to implement the proposed rule would reduce the amount of planning funds now being used by MPOs and States to meet their current responsibilities. Seven respondents asserted that implementation of the proposed amendments would increase the cost of the planning process, as conducting metropolitan planning over

[35] Association of Metropolitan Planning Organizations, 2013 MPO Salary Survey, published: January 23, 2014, page 2.

more expansive areas would lead to less efficient and less effective planning and decisionmaking. Two respondents noted that larger MPOs would require MPO members to travel longer distances to attend meetings, resulting in higher travel costs to MPOs. Two respondents cited delays and added costs that would result from the need to coordinate among four State DOTs and Governors and three MPOs, which would be an unnecessary burden on completing critical transportation projects in the region. Others noted that such large MPOs would add significant time, logistical challenges, complexities, effort, and cost to the project development process, which goes against the intent of the FAST Act to streamline project delivery. Finally, multiple respondents asserted that the inefficiency implications of the NPRM far outweigh the benefits that would be achieved.

In response to these comments, FHWA and FTA have estimated the maximum average annual costs of the implementation of the provisions of this final rule using the assumption that all 142 MPOs would choose the option to merge. While this scenario produces the highest cost estimates of all the options for compliance with the rule, and it is considered to be highly unlikely since the final rule provides three options in addition to a merger: To adjust boundaries, to develop unified planning products, or to seek an exception from the unified planning products requirement. The FHWA and FTA have estimated the cost to merge on the basis of information provided by the Michigan Transportation Planning Association, the Midland Area Transportation Study (MATS), the Genesee County Metropolitan Alliance, and the Lower Connecticut River Valley Council of Governments (River COG) in response to the NPRM. The total cost to merge is assumed to be equivalent to the combined annual budget of each agency involved in the merger. As suggested by MATS in their response to the NPRM, cost of the merger would include direct, indirect, and opportunity costs, such as merger process development, merger formal agreements, legal counsel, MPO structure/organization development, merged MPO administrative issues, merged MPO committees development, merged MPO task development, loss of institutional knowledge, funding instability costs, loss of public participation, and delays and loss of projects.[36] [37] Any mergers are assumed to be implemented over a 4-year period, which is consistent with the experience of the River COG merger and with an MPO's 4-year cycle to develop its principal planning products: The MTP and the TIP. The Michigan respondents also suggested that the cost of using the option to develop unified planning products would be approximately 45 percent to 50 percent of the cost to merge.

To estimate the annual operating budget for the MPOs subject to this regulation, FHWA and FTA relied upon the Association of Metropolitan Planning Organizations' (AMPO) 2013 MPO Salary Survey Results, published January 23, 2014 (Table 1: MPO Survey Data). The AMPO Salary Survey included 135 MPOs; however, only 35 of the 142 affected MPOs were included in the survey results. While this survey represents 25 percent of the affected MPOs, FHWA and FTA determined that it would provide an adequate indication of MPO operating budgets.

TABLE 1—MPO SURVEY DATA

MPOs	Number of affected MPOs in AMPO sample	Number of MPOs affected	Sample size (%)
>1,000,000	9	31	29
200,000 to 1,000,000	17	70	24
<200,000	9	41	22
Total	35	142	25

Applying the operating budget information from the AMPO Survey, FHWA and FTA estimated the average annual operating budget for the MPOs affected by this rulemaking on the basis of the size of the MPO: MPOs with greater than 1 million population; MPOs with populations from 200,000 to 1 million; and MPOs with populations less than 200,000 (non-TMAs). The resulting distribution is shown in Table 2: MPO Average Annual Operating Budgets. As the survey was undertaken in 2013, FHWA and FTA escalated the average annual operating budgets to 2015 using the Consumer Price Index.[38] The estimated operating budgets by size of MPO are reported in Table 2: MPO Average Annual Operating Budgets.

TABLE 2—MPO AVERAGE ANNUAL OPERATING BUDGETS

MPO population	Average annual operating budget 2013 [1]	Average annual operating budget 2015 [2]
>1,000,000	$6,260,000	$6,370,000
200,000 to 1,000,000	1,800,000	1,830,000
<200,000	416,110	423,000
Total	8,476,110	8,623,000

[1] Association of Metropolitan Planning Organizations, 2013 MPO Salary Survey Results, Published January 23, 2014.
[2] Escalated to 2015 dollars using the Consumer Price Index for All Urban Consumers.

[36] Comments from Midland Area Transportation Study, Posted 10/24/2016; ID: FHWA–2016–0016–0597.

[37] The FHWA and FTA do not agree that the rule would result in the loss of public participation and the delay and/or loss of projects. However, those costs are embedded in MATS overall cost estimate. For this reason, the estimates of the costs of the rule may be overstated.

[38] The Consumer Price Index for All Urban Consumers rose by 1.74 percent from 2013 to 2015.

On the basis of the estimated 2016 MPO operating budgets, and assuming that the merger process will be undertaken over 4 years and be completed within 2 years after the U.S. Census Bureau publishes the delineation of new UZA boundaries based on the 2020 Census of the Population, FHWA and FTA estimated the average annual cost to an MPO choosing the option to merge. The estimated average annual cost to an MPO to merge, presented in Table 3 below, is: $1.6 million for very large MPOs with populations greater than 1 million; $460,000 for MPOs with populations from 200,000 to 1 million; and $106,000 for small MPOs with a population less than 200,000. In essence, these assumptions suggest that the cost of the merge option would be 25 percent of an MPO's annual operating budget for each of the four years of the merger process. The estimates are presented in Table 3: Estimated Average Annual Cost of Option to Merge.

TABLE 3—ESTIMATED AVERAGE ANNUAL COST OF OPTION TO MERGE

MPO population	Number of MPOS affected B	Average annual operating budget 2016 C	Total annual operating budget D B × C	Total annual cost for 142 MPOs to merge (4 years) E D/4	Average annual cost to merge per MPO F E/B
>1,000,000	31	$6,370,000	$197,470,000	$49,368,000	$1,593,000
200,000 to 1,000,000	70	1,830,000	128,100,000	32,025,000	458,000
<200,000	41	423,000	17,343,000	4,336,000	106,000
Total	142	.....	.....	85,729,000	.....

To test the methodology, FHWA and FTA applied this approach to estimate the merger cost for the River COG. The methodology produced a total estimated cost of the merger of approximately $1.83 million. The actual total cost of the River COG merger was $1.7 million. The FHWA and FTA also applied the methodology to a prospective merger of the Midland Area Transportation Study (population 83,629), Saginaw Area Transportation Study (population 200,169), and the Bay City Transportation Study (population 107,771). The estimated cost of the merger based on the methodology would be $2.6 million. This amount is significantly higher than the merger cost estimated by MATS in its comments for these three contiguous MPOs (which was $1.05 to $1.8 million).[39] This difference suggests that, in instances where an MPO's population is on the lower end of the mid-size MPO, such as the Saginaw Area Transportation Study with a population of 200,169, the estimation methodology used in this analysis would tend to overestimate the cost to MPOs that choose the option to merge. Based on this comparison, FHWA and FTA concluded that their approach to estimating the maximum average annual cost of the implementation of this rule is acceptable because it provides the estimated cost of the highest cost option.

Thus, based on the assumption that the total cost to merge is equivalent to the combined annual operating budgets and that a merger would be implemented over a 4-year period, the total annual cost for 142 MPOs to choose the option to merge over a 4-year period is estimated to be approximately $86 million.

The FHWA and FTA note that to estimate the cost to MPOs that choose the option to develop unified planning products in lieu of merging, FHWA and FTA applied the assumption proposed by MATS: That the cost to develop unified planning products would be up to 50 percent of the cost to merge. The MATS commented that the cost to develop the unified planning products, as proposed in the NPRM, includes unified processes development, supplemental formal documentation, legal counsel, joint unified planning work program (UPWP) development, UPWP administration/amendment processing, joint TIP development, TIP administration and amendment processing, joint metropolitan transportation planning development, metropolitan transportation plan administration and amendment processing, loss of public participation and the delay and/or loss of projects.[40]

There may be costs associated with this rule that would be related to transportation conformity activities. The costs associated with transportation conformity would be captured in the future in the Information Collection Request done by EPA for its transportation conformity regulations.

It also was unclear whether the cost to address the rule's dispute resolution requirements was included in the MATS cost estimating approach. The FHWA and FTA estimated the one-time cost to develop a dispute resolution process, as required by Section 450.208(a)(1). This estimate assumes it will take 100 person-hours for an average State and an average MPO to craft written dispute resolution procedures. The average loaded wage for a planner is $50.19.[41] Based on these assumptions, the total, nationwide, one-time cost to establish written State/MPO dispute resolution processes in 2014 dollars is estimated to be $2,313,759 ($50.19/hour) × (100 hours/entity) × (52 State DOTs + 409 MPOs) = $2,313,759).

[39] Comments from Midland Area Transportation Study, Posted 10/24/2016; ID: FHWA–2016–0016–0597.

[40] The FHWA and FTA do not agree that the rule would result in the loss of public participation and the delay and/or loss of projects. However, those costs are embedded in MATS overall cost estimate. For this reason, the estimates of the costs of the rule may be overstated.

[41] Source: Bureau of Labor Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999000—Federal, State, and Local Government, Occupation code #19–3051, Occupation title—Urban and Regional Planners. Loaded wage rate is (32.59/hr) × (1.54) = $50.19/hour.

TABLE 4—ESTIMATED TOTAL ANNUAL COSTS OF FINAL RULE

MPO population	Total estimated cost of dispute resolution process	Total annual cost for 142 MPOs to merge	Estimated annual cost of final rule
	$2,314,000	.....	.....
>1,000,000	.....	$49,368,000	$49,368,000
200,000 to 1,000,000	.....	32,025,000	32,025,000
<200,000	.....	4,336,000	4,336,000
Total	[1] 578,500	85,729,000	86,307,500

[1] Assumes a four year process.

The total costs for merging all 142 MPOs, and the one-time cost of developing a dispute resolution process results in an estimated maximum average annual cost of this rule of $86.3 million. The actual average annual cost will range from $578,500 (if all 142 MPOs were to request and receive an exception from the unified product requirement) to a maximum of $86.3 million (if all 142 affected MPOs were to choose the merger option). On the basis of this analysis, FHWA and FTA conclude that the economic impact of the final rule would not exceed the $100 million annual threshold that defines a significant economic impact.

The FHWA and FTA have not been able to locate data or empirical studies to assist in monetizing or quantifying the benefits of the final rule. Given the limited quantitative information on these benefits of coordination, FHWA and FTA used a break-even analysis as the primary approach to quantify benefits. This approach determines the point at which the benefits from the final rule exceed the annual costs of compliance. The total FAST Act annual funding programmed for surface transportation investments subject to the metropolitan and statewide and non-metropolitan transportation planning process in FY2016 is $39.7 billion in FHWA funds and $11.7 billion in FTA funds. This is the entire FHWA Federal-aid Highway Program and FTA Transit Program. The maximum annual average cost for implementing this final rule, *i.e.,* if all 142 MPOs choose the option to merge, is estimated to be $86.3 million per year for a 4-year period. At the upper end, if the return on investment increases by at least 0.17 percent of the combined FHWA and FTA annual funding programs, the benefits of the regulation exceed the costs.

The FHWA and FTA believe the benefits of the regulation exceed the cost due to the following reasons. The rule will enhance efficiency in planning processes for some areas, and generate cost-savings by creating single rather than multiple documents and through the greater pooling of resources and increased sharing data, models and other tools. Because multiple MPOs within the same UZA will produce unified planning products, there will be less overlapping and duplicative work, such as developing multiple MTPs and TIPs for a single UZA. The FHWA and FTA also expect there will be some cost savings for State DOTs, which will benefit from having fewer TIPs to incorporate into their STIPs. There will also be benefits to the public if the coordination requirements result in a planning process in which public participation opportunities are transparent and unified for an entire region.

Based on experience, FHWA and FTA know that having two or more separate metropolitan transportation planning processes in a single MPA (as defined under 23 U.S.C. 134) can make the planning process confusing and burdensome for the affected public. For example, members of the public may be affected by projects in multiple MPO jurisdictions, either because they live in the area of one MPO and work or regularly travel to another, or because the MPOs' jurisdictional lines bisect a community. Such members of the public, therefore, can find it necessary to participate in each MPO's separate planning process in order to have their regional concerns adequately considered. Having to participate in the planning processes of multiple MPOs, however, can be burdensome and discourage public participation. Where communities have been so bifurcated that they are not able to fully participate in the greater regional economy, this rule will help weave those communities together through new opportunities for regional investments in transportation.

The FHWA and FTA have conservatively estimated that the maximum annual cost of implementation of the provisions of this action would be $86.3 million. After evaluating the costs and benefits of this final action, FHWA and FTA conclude that the maximum nationwide impact does not exceed the $100 million annual threshold that defines a significant economic impact. These changes are not anticipated to adversely affect, in any material way, any sector of the economy. In addition, these changes will not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

B. Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FHWA and FTA have evaluated the effects of this rule on small entities and have determined that the rule will not have a significant economic impact on a substantial number of small entities. The rule addresses the obligation of Federal funds to State DOTs for Federal-aid highway projects. The rule affects two types of entities: State governments and MPOs. State governments do not meet the definition of a small entity under 5 U.S.C. 601, which have a population of less than 50,000.

The MPOs are considered governmental jurisdictions, and to qualify as a small entity they need to serve less than 50,000 people. The MPOs serve urbanized areas with populations of 50,000 or more. Therefore, the MPOs that might incur economic impacts under this rule do not meet the definition of a small entity.

I hereby certify that this rule will not have a significant impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

The FHWA and FTA have determined that this rule does not impose unfunded mandates, as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This rule does not include a Federal

mandate that may result in expenditures of $155.1 million or more in any one year (when adjusted for inflation) in 2012 dollars for either State, local, and tribal governments in the aggregate, or by the private sector. Additionally, the definition of ''Federal mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program and Federal Transit Act permit this type of flexibility.

D. Executive Order 13132 (Federalism Assessment)

Three commenters (Chicago Metropolitan Agency for Planning (CMAP); Wisconsin congressional delegation, Southeastern Wisconsin Regional Planning Commission (SEWRPC), Kenosha County, Wisconsin; and one individual) submitted comments pertaining to federalism. The CMAP and Wisconsin congressional delegation, SEWRPC, Kenosha County, commented that the proposed rule would exceed the Secretary's authority and contradict congressional intent. These two commenters also asserted that the proposed rule would appear to override the intent of the State laws that created CMAP, Northwestern Indiana Regional Planning Commission (NIRPC), and SEWRPC, noting that the direction of these organizations and the contents of their plans are influenced by State law and asserting that the proposed rule would make it difficult for these organizations to meet certain State mandates. The CMAP and Wisconsin congressional delegation, SEWRPC, Kenosha County, also commented that the proposed rule would require CMAP, NIPRC, and SEWRPC to set identical targets for certain performance measures for peak hour travel time and traffic congestion for the UZA, and if States cannot agree on a UZA target, then the MPO(s) would violate Federal law.

The individual commented that the proposed rule would constitute an unnecessary Federal Government overreach into planning decisions and would adversely impact the ability of regional planners to carry out their work and contribute to decisions regarding projects carried out in their communities and areas of jurisdiction.

The FHWA and FTA have analyzed this rule in accordance with the principles and criteria contained in Executive Order 13132. The FHWA and FTA have determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA and FTA also have determined that this rule does not preempt any State law or State regulation or affect a State's ability to discharge traditional State governmental functions. The FHWA and FTA do not agree that the statute constraints the Secretary's authority in the manner commenters suggest. Rather, this rule is intended to better align the planning regulations with existing statutory provisions concerning the establishment of MPA boundaries and the designation of MPOs. For multistate MPAs where the Governors and the MPOs agree it is not feasible to comply with the unified planning requirements adopted in this rule, the Governors and MPOs may seek an exception. Further, FHWA and FTA do not agree that this rule expands the Federal Government's role in planning decisions. While this rule is intended to improve regional collaboration and guide decisionmaking, planning decisions will remain in the hands of States, MPOs, and local authorities.

E. Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

F. Paperwork Reduction Act

Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA and FTA have analyzed this rule under the PRA and believe that this final rule does not impose additional information collection requirements for the purposes of the Paperwork Reduction Act above and beyond existing information collection clearances from OMB. The FHWA and FTA, however, invite commenters to document and submit estimates of any incremental burdens that they believe would be imposed under this final rule when FHWA and FTA publish its Notice of Request for Comments seeking OMB renewal of the currently approved information collection activities (OMB Control Number 2132–0529) in early 2017.

G. National Environmental Policy Act

Federal agencies are required to adopt implementing procedures for the National Environmental Policy Act (NEPA) that establish specific criteria for, and identification of, three classes of actions: (1) Those that normally require preparation of an Environmental Impact Statement, (2) those that normally require preparation of an Environmental Assessment, and (3) those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). This rule qualifies for categorical exclusions under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives) and 771.117(c)(1) (activities that do not involve or lead directly to construction) for FHWA, and 23 CFR 771.118(c)(4) (planning and administrative activities that do not involve or lead directly to construction) for FTA. The FHWA and FTA have evaluated whether the rule will involve unusual or extraordinary circumstances and have determined that this rule will not.

H. Executive Order 12630 (Taking of Private Property)

The FHWA and FTA have analyzed this rule under Executive Order (E.O.) 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA and FTA do not believe this rule affects a taking of private property or otherwise has taking implications under E.O. 12630.

I. Executive Order 12988 (Civil Justice Reform)

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

J. Executive Order 13045 (Protection of Children)

The FHWA and FTA have analyzed this rule under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA and FTA certify that this rule will not cause an environmental risk to health or safety that might disproportionately affect children.

K. Executive Order 13175 (Tribal Consultation)

The FHWA and FTA have analyzed this rule under E.O. 13175, dated November 6, 2000, and believe that the rule will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. The rule addresses obligations of Federal funds to State DOTs for Federal-aid highway projects and will not impose any direct

compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

L. Executive Order 13211 (Energy Effects)

The FHWA and FTA have analyzed this rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA and FTA have determined that this rule is not a significant energy action under that order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

M. Executive Order 12898 (Environmental Justice)

The E.O. 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) and DOT Order 5610.2(a) (77 FR 27534, May 10, 2012) (available online at *http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/order_56102a/index.cfm*) require DOT agencies to achieve Environmental Justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority and low-income populations. The DOT agencies must address compliance with E.O. 12898 and the DOT Order in all rulemaking activities.

The FHWA and FTA have issued additional documents relating to administration of E.O. 12898 and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A (FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations (available online at *http://www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm*)). On August 15, 2012, FTA's Circular 4703.1 became effective, which contains guidance for States and MPOs to incorporate EJ into their planning processes (available online at *http://www.fta.dot.gov/documents/FTA_EJ_Circular_7.14-12_FINAL.pdf*).

The FHWA and FTA have evaluated the final rule under the Executive order, the DOT Order, the FHWA Order, and the FTA Circular. The EJ principles, in the context of planning, should be considered when the planning process is being implemented at the State and local level. As part of their stewardship and oversight of the federally aided transportation planning process of the States, MPOs, and operators of public transportation, FHWA and FTA encourage these entities to incorporate EJ principles into the statewide and metropolitan planning processes and documents, as appropriate and consistent with the applicable orders and the FTA Circular. When FHWA and FTA make a future funding or other approval decision on a project basis, they will consider EJ.

Nothing inherent in the rule will disproportionately impact minority or low-income populations. The rule establishes procedures and other requirements to guide future State and local decisionmaking on programs and projects. Neither the rule nor 23 U.S.C. 134 and 135 dictate the outcome of those decisions. The FHWA and FTA have determined that the rule will not cause disproportionately high and adverse human health and environmental effects on minority or low-income populations.

N. Regulation Identifier Number

A Regulation Identifier Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this rule with the Unified Agenda.

List of Subjects

23 CFR Part 450

Grant programs—transportation, Highway and roads, Mass transportation, Reporting and record keeping requirements.

49 CFR Part 613

Grant programs—transportation, Highways and roads, Mass transportation.

Issued in Washington, DC, on December 14, 2016, under authority delegated in 49 CFR 1.85.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

Carolyn Flowers,

Acting Administrator, Federal Transit Administration.

In consideration of the foregoing, FHWA and FTA amend title 23, Code of Federal Regulations, part 450, and title 49, Code of Federal Regulations, part 613, as set forth below:

Title 23—Highways

PART 450—PLANNING ASSISTANCE AND STANDARDS

■ 1. The authority citation for part 450 continues to read as follows:

Authority: 23 U.S.C. 134, 135, and 315; 42 U.S.C. 7410 *et seq.;* 49 U.S.C. 5303 and 5304; 49 CFR 1.85 and 1.90.

■ 2. Amend § 450.104 by revising the definitions for ''Metropolitan planning agreement'', ''Metropolitan planning area (MPA)'', ''Metropolitan transportation plan'', and ''Transportation improvement program (TIP)'' to read as follows:

§ 450.104 Definitions.

* * * * *

Metropolitan planning agreement means a written agreement between the MPO(s), the State(s), and the providers of public transportation serving the metropolitan planning area that describes how they will work cooperatively to meet their mutual responsibilities in carrying out the metropolitan transportation planning process.

Metropolitan planning area (MPA) means the geographic area determined by agreement between the MPO(s) for the area and the Governor(s), which must at a minimum include the entire urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan, and may include additional areas.

* * * * *

Metropolitan transportation plan means the official multimodal transportation plan addressing no less than a 20-year planning horizon, that is developed, adopted, and updated by the MPO or MPOs through the metropolitan transportation planning process for the MPA.

* * * * *

Transportation improvement program (TIP) means a prioritized listing/program of transportation projects covering a period of 4 years that is developed and formally adopted by an MPO or MPOs as part of the metropolitan transportation planning process for the MPA, consistent with the metropolitan transportation plan, and required for projects to be eligible for funding under title 23 U.S.C. and title 49 U.S.C. chapter 53.

* * * * *

■ 3. Amend § 450.208 by revising paragraph (a)(1) to read as follows:

§ 450.208 Coordination of planning process activities.

(a) * * *

(1) Coordinate planning carried out under this subpart with the metropolitan transportation planning activities carried out under subpart C of this part for metropolitan areas of the State. When carrying out transportation planning activities under this part, the State and MPOs shall coordinate on information, studies, or analyses for portions of the transportation system located in MPAs. The State(s), the MPO(s), and the operators of public transportation must have a current metropolitan planning agreement, which will identify coordination strategies that support cooperative decisionmaking and the resolution of disagreements;

* * * * *

§ 450.218 [Amended]

■ 4. Amend § 450.218(b) by removing ''MPO'' and adding in its place ''MPO(s)'' in both places it appears.

■ 5. Amend § 450.226 by adding paragraph (g) to read as follows:

§ 450.226 Phase-in of new requirements.

* * * * *

(g) With respect to requirements added in § 450.208(a)(1) on January 19, 2017: On and after the date 2 years after the date that the U.S. Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census, the State(s), the MPO(s) and the operators of public transportation must comply with the new requirements, including the requirement for a current metropolitan planning agreement that identifies coordination strategies that support cooperative decision-making and the resolution of disagreements.

Subpart C—Metropolitan Transportation Planning and Programming

■ 6. Amend § 450.300 by:

■ a. Revising paragraph (a); and

■ b. Removing from paragraph (b) the word ''Encourages'' and adding in its place ''Encourage''.

The revision reads as follows:

§ 450.300 Purpose.

* * * * *

(a) Set forth the national policy that the MPO designated for each UZA is to carry out a continuing, cooperative, and comprehensive performance-based multimodal transportation planning process for its MPA, including the development of a metropolitan transportation plan and a TIP, that encourages and promotes the safe and efficient development, management, and operation of surface transportation systems to serve the mobility needs of people and freight (including accessible pedestrian walkways, bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter vanpool providers) and foster economic growth and development, and takes into consideration resiliency needs, while minimizing transportation-related fuel consumption and air pollution; and

* * * * *

■ 7. Amend § 450.306 by adding paragraph (d)(5) and revising paragraph (i) to read as follows:

§ 450.306 Scope of the metropolitan transportation planning process.

* * * * *

(d) * * *

(5) In MPAs in which multiple MPOs have been designated, the MPOs shall jointly establish, for the MPA, the performance targets that address performance measures or standards established under 23 CFR part 490 (where applicable), 49 U.S.C. 5326(c) and 49 U.S.C. 5329(d).

* * * * *

(i) In an UZA not designated as a TMA that is an air quality attainment area, the MPO(s) may propose and submit to the FHWA and the FTA for approval a procedure for developing an abbreviated metropolitan transportation plan and TIP. In developing proposed simplified planning procedures, consideration shall be given to whether the abbreviated metropolitan transportation plan and TIP will achieve the purposes of 23 U.S.C. 134, 49 U.S.C. 5303, and this part, taking into account the complexity of the transportation problems in the area. The MPO(s) shall develop simplified procedures in cooperation with the State(s) and public transportation operator(s).

■ 8. Amend § 450.310 by revising paragraphs (e) and (m) introductory text to read as follows:

§ 450.310 Metropolitan planning organization designation and redesignation.

* * * * *

(e) Except as provided in this paragraph, only one MPO shall be designated for each MPA. More than one MPO may be designated to serve an MPA only if the Governor(s) and the existing MPO(s), if applicable, determine that the size and complexity of the MPA make designation of more than one MPO in the MPA appropriate. In those cases where the Governor(s) and existing MPO(s) determine that the size and complexity of the MPA do make it appropriate that two or more MPOs serve within the same MPA, the Governor and affected MPOs by agreement shall jointly establish or adjust the boundaries for each MPO within the MPA, and the MPOs shall establish official, written agreements that clearly identify areas of coordination, the division of transportation planning responsibilities within the MPA among and between the MPOs, and procedures for joint decisionmaking and the resolution of disagreements. If multiple MPOs were designated in a single MPA prior to this rule or in multiple MPAs that merged into a single MPA following a Decennial Census by the Bureau of the Census, and the Governor(s) and the existing MPOs determine that the size and complexity do not make the designation of more than one MPO in the MPA appropriate, then those MPOs must merge together in accordance with the redesignation procedures in this section.

* * * * *

(m) Each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate MPOs shall, to the extent practicable, provide coordinated transportation planning for the entire metropolitan area. The consent of Congress is granted to any two or more States to:

* * * * *

■ 9. Section 450.312 is revised to read as follows:

§ 450.312 Metropolitan Planning Area boundaries.

(a) At a minimum, the boundaries of an MPA shall encompass the entire existing UZA (as defined by the Bureau of the Census) plus the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan.

(1) Subject to this minimum requirement, the boundaries of an MPA shall be determined through an agreement between the MPO and the Governor.

(2) If two or more MPAs otherwise include the same non-urbanized area that is expected to become urbanized within a 20-year forecast period for the transportation plan, the Governor and the relevant MPOs are required to agree on the final boundaries of the MPA or MPAs such that the boundaries of the MPAs do not overlap. In such situations, the Governor and MPOs are encouraged, but not required, to combine the MPAs into a single MPA. Merger into a single MPA also require the MPOs to merge in accordance with the redesignation procedures described in § 450.310(h), unless the Governor and MPO(s) determine that the size and

complexity of the MPA make multiple MPOs appropriate, as described in § 450.310(e).

(3) The MPA boundaries may be further expanded to encompass the entire metropolitan statistical area or combined statistical area, as defined by the Office of Management and Budget.

(b) The boundaries for an MPA that includes an UZA designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 *et seq.*) after August 10, 2005, may be established to coincide with the designated boundaries of the ozone and/or carbon monoxide nonattainment area, in accordance with this section and the requirements in § 450.310(b).

(c) An MPA boundary may encompass more than one UZA, but each UZA must be included in its entirety.

(d) MPA boundaries may be established to coincide with the geography of regional economic development and growth forecasting areas.

(e) Identification of new UZAs within an existing MPA by the Bureau of the Census shall not require redesignation of the existing MPO.

(f) In multistate metropolitan areas, the Governors with responsibility for a portion of the multistate metropolitan area, the appropriate MPO(s), and the public transportation operator(s) are strongly encouraged to coordinate transportation planning for the entire multistate metropolitan area. States involved in such multistate transportation planning may:

(1) Enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and

(2) Establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(g) The MPA boundaries shall not overlap with each other.

(h) Subject to paragraph (i) of this section, where the Governor(s) and MPO(s) have determined that the size and complexity of the MPA make it appropriate to have more than one MPO designated for an MPA, the MPOs within the same MPA shall, at a minimum:

(1) Establish written agreements that clearly identify coordination processes, the division of transportation planning responsibilities among and between the MPOs, and procedures for joint decisionmaking and the resolution of disagreements;

(2) Through a joint decisionmaking process, develop a single TIP and a single metropolitan transportation plan for the entire MPA as required under §§ 450.324(c) and 450.326(a); and

(3) Establish the boundaries for each MPO within the MPA, by agreement among all affected MPOs and the Governor(s).

(i) Upon written request from all MPOs in an MPA and the Governor(s) of each State in the MPA, the Secretary may approve an exception to the requirements for a single metropolitan transportation plan, a single TIP, and jointly-established targets if the request satisfies the following requirements.

(1) The written request must include documentation showing compliance with the requirements in paragraph (h)(2) of this section is not feasible for reasons beyond the reasonable control of the Governor(s) and MPOs, such as clear and convincing evidence that

(i) The MPOs cannot meet paragraph (h)(2) requirements because of the extraordinary size of the MPA, the large number of MPOs or State/local governmental jurisdictions required to participate, and/or because of Clean Air Act planning requirements; or

(ii) Complying with paragraph (h)(2) requirements would produce adverse results that contravene the effective regional planning purposes of paragraph (h)(2).

(2) The request must include documentation demonstrating that:

(i) The MPOs already use coordinated planning procedures that result in consistent plans, TIPs, performance targets, and air quality conformity analyses and other planning products that effectively address regional transportation and air quality issues;

(ii) The MPOs have jointly adopted a formal written agreement with adequate procedures for coordination among the MPOs to achieve the effective regional planning purposes of paragraph (h)(2) of this section; and

(iii) Coordination and decisionmaking during at least the two most recent STIP update cycles that produced results consistent with the effective planning purposes of paragraph (h)(2) of this section.

(3) Based on the documentation provided with the request, the Secretary will determine whether to approve an exception to the requirements of paragraph (h)(2) of this section. If the Secretary determines that the request does not meet the requirements established under this paragraph, the Secretary will send the MPOs and Governor(s) a written notice of the denial of the exception, including a description of the deficiencies. The Governor(s) and MPOs shall have 90 days from receipt of the notice to address the deficiencies identified in the notice and submit supplemental information addressing the identified deficiencies to the Secretary for review and a final determination. The Secretary may extend the 90-day period to cure deficiencies upon request.

(4) An approved exception is permanent. When FHWA and FTA do certification reviews and make planning findings, FHWA and FTA will evaluate whether the MPOs covered by the exception are sustaining effective coordination processes that meet the requirements in paragraphs (i)(2)(i) and (ii) of this section.

(j) The Governor(s) and MPO(s) (in cooperation with the State and public transportation operator(s)) shall review the MPA boundaries after each Census to determine if existing MPA boundaries meet the minimum statutory requirements for new and updated UZA(s), and the Governor(s) and MPOs shall adjust them as necessary in order to encompass the entire existing UZA(s) plus the contiguous area expected to become urbanized within the 20-year forecast period of the metropolitan transportation plan. If after a Census, two previously separate UZAs are defined as a single UZA, not later than 2 years after the release of the U.S. Bureau of the Census notice of the Qualifying Urban Areas for a decennial census, the Governor(s) and MPO(s) shall redetermine the affected MPAs as a single MPA that includes the entire new UZA plus the contiguous area expected to become urbanized within the 20-year forecast period of the metropolitan transportation plan. As appropriate, additional adjustments should be made to reflect the most comprehensive boundary to foster an effective planning process that ensures connectivity between modes, improves access to modal systems, and promotes efficient overall transportation investment strategies. If more than one MPO is designated for UZAs that are merged following a Decennial Census by the Bureau of the Census, the Governor(s) and the MPOs shall comply with the MPA boundary and MPO boundaries agreement provisions in §§ 450.310 and 450.312, and the Governor(s) and MPOs shall determine whether the size and complexity of the MPA make it appropriate for there to be more than one MPO designated within the MPA. If the size and complexity of the MPA do not make it appropriate to have multiple MPOs, the MPOs shall merge, in accordance with the

redesignation procedures in § 450.310(h). If the size and complexity do warrant the designation of multiple MPOs within the MPA, the MPOs shall comply with the requirements for jointly established performance targets, and a single metropolitan transportation plan and TIP for the entire MPA, before the next metropolitan transportation plan update that occurs on or after 2 years after the release of the Qualifying Urban Areas for the Decennial Census by the Bureau of the Census.

(k) The Governor and MPOs are encouraged to consider merging multiple MPAs into a single MPA when:

(1) Two or more UZAs are adjacent to each other;

(2) Two or more UZAs are expected to expand and become adjacent within a 20-year forecast period for the transportation plan; or

(3) Two or more neighboring MPAs otherwise both include the same non-UZA that is expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan.

(l) Following MPA boundary approval by the MPO(s) and the Governor, the MPA boundary descriptions shall be provided for informational purposes to the FHWA and the FTA. The MPA boundary descriptions shall be submitted either as a geo-spatial database or described in sufficient detail to enable the boundaries to be accurately delineated on a map.

■ 10. Section 450.314 is revised to read as follows:

§ 450.314 Metropolitan planning agreements.

(a) The MPO(s), the State(s), and the providers of public transportation shall cooperatively determine their mutual responsibilities in carrying out the metropolitan transportation planning process. These responsibilities shall be clearly identified in written agreements among the MPO(s), the State(s), and the providers of public transportation serving the MPA. To the extent possible, a single agreement among all responsible parties should be developed. The written agreement(s) shall include specific provisions for the development of financial plans that support the metropolitan transportation plan (see § 450.324) and the metropolitan TIP (see § 450.326), and development of the annual listing of obligated projects (see § 450.334).

(b) The MPO(s), the State(s), and the providers of public transportation should periodically review and update the agreement, as appropriate, to reflect effective changes.

(c) If the MPA does not include the entire nonattainment or maintenance area, there shall be a written agreement among the State department of transportation, State air quality agency, affected local agencies, and the MPO(s) describing the process for cooperative planning and analysis of all projects outside the MPA within the nonattainment or maintenance area. The agreement must also indicate how the total transportation-related emissions for the nonattainment or maintenance area, including areas outside the MPA, will be treated for the purposes of determining conformity in accordance with the EPA's transportation conformity regulations (40 CFR part 93, subpart A). The agreement shall address policy mechanisms for resolving conflicts concerning transportation related emissions that may arise between the MPA and the portion of the nonattainment or maintenance area outside the MPA.

(d) In nonattainment or maintenance areas, if the MPO is not the designated agency for air quality planning under section 174 of the Clean Air Act (42 U.S.C. 7504), there shall be a written agreement between the MPO and the designated air quality planning agency describing their respective roles and responsibilities for air quality related transportation planning.

(e) If more than one MPO has been designated to serve an MPA, there shall be a written agreement among the MPOs, the State(s), and the public transportation operator(s) describing how the metropolitan transportation planning processes will be coordinated to assure the development of a single metropolitan transportation plan and TIP for the MPA. In cases in which a transportation investment extends across the boundaries of more than one MPA, the MPOs shall coordinate to assure the development of consistent metropolitan transportation plans and TIPs with respect to that transportation improvement. If any part of the UZA is a nonattainment or maintenance area, the agreement also shall include State and local air quality agencies. If more than one MPO has been designated to serve an MPA, the metropolitan transportation planning processes for affected MPOs must reflect coordinated data collection, analysis, and planning assumptions across the MPA. Coordination of data collection, analysis, and planning assumptions is also strongly encouraged for neighboring MPOs that are not within the same MPA. Coordination efforts and outcomes shall be documented in subsequent transmittals of the UPWP and other planning products, including the metropolitan transportation plan and TIP, to the State(s), the FHWA, and the FTA.

(f) Where the boundaries of the MPA extend across two or more States, the Governors with responsibility for a portion of the multistate MPA, the appropriate MPO(s), and the public transportation operator(s) shall coordinate transportation planning for the entire multistate MPA, including jointly developing planning products for the MPA. States involved in such multistate transportation planning may:

(1) Enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and

(2) Establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(g) If an MPA includes a UZA that has been designated as a TMA in addition to an UZA that is not designated as a TMA, the non-TMA UZA shall not be treated as a TMA. However, if more than one MPO serves the MPA, a written agreement shall be established between the MPOs within the MPA boundaries, which clearly identifies the roles and responsibilities of each MPO in meeting specific TMA requirements (*e.g.,* congestion management process, Surface Transportation Program funds suballocated to the UZA over 200,000 population, and project selection).

(h) The MPO(s), State(s), and the providers of public transportation shall jointly agree upon and develop specific written provisions for cooperatively developing and sharing information related to transportation performance data, the selection of performance targets, the reporting of performance targets, the reporting of performance to be used in tracking progress toward attainment of critical outcomes for the region of the MPO (see § 450.306(d)), and the collection of data for the State asset management plans for the NHS for each of the following circumstances: When one MPO serves an UZA, when more than one MPO serves an UZA, and when an MPA includes an UZA that has been designated as a TMA as well as a UZA that is not a TMA. These provisions shall be documented either as part of the metropolitan planning agreements required under paragraphs (a), (e), and (g) of this section, or documented it in some other means outside of the metropolitan planning agreements as determined cooperatively

by the MPO(s), State(s), and providers of public transportation.

§ 450.316 [Amended]

■ 11. Amend § 450.316, in paragraphs (b) introductory text, (c), and (d) by removing ''MPO'' and adding in its place ''MPO(s)'' wherever it occurs.

■ 12. Amend § 450.324 as follows:

■ a. In paragraph (a), remove ''MPO'' and add in its place ''MPO(s)'' wherever it occurs;

■ b. Redesignate paragraphs (c) through (m) as paragraphs (d) through (n), respectively;

■ c. Add new paragraph (c); and

■ d. In newly redesignated paragraphs (d), (e), (f), (g)(10), (g)(11)(iv), (h), (k), (l), and (n), remove ''MPO'' with and add in its place ''MPO(s)'' wherever it occurs.

The revisions read as follows:

§ 450.324 Development and content of the metropolitan transportation plan.

* * * * *

(c) If more than one MPO has been designated to serve an MPA, those MPOs within the MPA shall:

(1) Jointly develop a single metropolitan transportation plan for the MPA; and

(2) Jointly establish, for the MPA, the performance targets that address the performance measures described in 23 CFR part 490 (where applicable), 49 U.S.C. 5326(c) and 49 U.S.C. 5329(d).

* * * * *

■ 13. Amend § 450.326 as follows:

■ a. Revise paragraph (a); and

■ b. In paragraphs (b), (j), and (p) remove ''MPO'' and add in its place ''MPO(s)'' wherever it occurs.

The revision reads as follows:

§ 450.326 Development and content of the transportation improvement program (TIP).

(a) The MPO, in cooperation with the State(s) and any affected public transportation operator(s), shall develop a TIP for the MPA. If more than one MPO has been designated to serve an MPA, those MPOs within the MPA shall jointly develop a single TIP for the MPA. The TIP shall reflect the investment priorities established in the current metropolitan transportation plan and shall cover a period of no less than 4 years, be updated at least every 4 years, and be approved by the MPO(s) and the Governor(s). However, if the TIP covers more than 4 years, the FHWA and the FTA will consider the projects in the additional years as informational. The MPO(s) may update the TIP more frequently, but the cycle for updating the TIP must be compatible with the STIP development and approval process. The TIP expires when the FHWA/FTA approval of the STIP expires. Copies of any updated or revised TIPs must be provided to the FHWA and the FTA. In nonattainment and maintenance areas subject to transportation conformity requirements, the FHWA and the FTA, as well as the MPO(s), must make a conformity determination on any updated or amended TIP, in accordance with the Clean Air Act requirements and the EPA's transportation conformity regulations (40 CFR part 93, subpart A).

* * * * *

§ 450.328 [Amended]

■ 14. Amend § 450.328 by removing ''MPO'' and adding in its place ''MPO(s)'' wherever it occurs.

§ 450.330 [Amended]

■ 15. Amend § 450.330, in paragraphs (a) and (c) by removing ''MPO'' and adding in its place ''MPO(s)'' wherever it occurs.

§ 450.332 [Amended]

■ 16. Amend § 450.332, in paragraphs (b) and (c) by removing ''MPO'' and adding in its place ''MPO(s)'' wherever it occurs.

§ 450.334 [Amended]

■ 17. Amend § 450.334, in paragraph (a) by removing ''MPO'' and adding in its place ''MPO(s)'' and in paragraph (c) by removing ''MPO's'' and adding in its place ''MPO(s)''.

§ 450.336 [Amended]

■ 18. Amend § 450.336, in paragraphs (b)(1)(i) and (ii) and (b)(2) by removing ''MPO'' and adding in its place ''MPO(s)'' wherever it occurs.

■ 19. Amend § 450.340 as follows:

■ a. In paragraph (a) adding ''or MPOs'' after ''MPO'' wherever it occurs; and

■ b. Adding paragraph (h).

The addition reads as follows:

§ 450.340 Phase-in of new requirements.

* * * * *

(h) With respect to requirements added in §§ 450.306(d)(5); 450.310(e); 450.312(a), (h), (i), and (j); 450.314(e), (f), (g), and (h); 450.324(c), (d), (e), (f), (h), (k), (l), and (n); 450.326; 450.330; 450.332(c); 450.334(a); and 450.336(b) on January 19, 2017: States and MPOs shall comply with the MPA boundary and MPO boundaries agreement provisions, shall document the determination of the Governor and MPO(s) whether the size and complexity of the MPA make multiple MPOs appropriate, and the MPOs shall comply with the requirements for jointly established performance targets, and a single metropolitan transportation plan and TIP for the entire MPA, prior to the next metropolitan transportation plan update occurring on or after the date that is 2 years after the date the U.S. Census Bureau releases its notice of Qualifying Urban Areas following the 2020 census.

Title 49—Transportation

PART 613—METROPOLITAN AND STATEWIDE AND NONMETROPOLITAN PLANNING

■ 20. The authority citation for part 613 is revised to read as follows:

Authority: 23 U.S.C. 134, 135, and 217(g); 42 U.S.C. 3334, 4233, 4332, 7410 *et seq.;* 49 U.S.C. 5303–5306, 5323(k); and 49 CFR 1.51(f) and 21.7(a).

[FR Doc. 2016–30478 Filed 12–19–16; 8:45 am]

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Part VI

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Chapter 1
Federal Acquisition Regulations; Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2016–0051, Sequence No. 8]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–94; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005–94. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates see the separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2005–94 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755.

RULES LISTED IN FAC 2005–94

Item	Subject	FAR Case	Analyst
I	Privacy Training	2010–013	Gray.
II	Payment of Subcontractors	2014–004	Glover.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2005–94 amends the FAR as follows:

Item I—Privacy Training (FAR Case 2010–013)

This final rule amends the Federal Acquisition Regulation to clarify the training requirements for contractors whose employees will have access to a system of records on individuals or handle personally identifiable information. These training requirements are consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and OMB Circular A–130, Managing Federal Information as a Strategic Resource. Prime contractors are required to flow down these requirements to all applicable subcontracts.

Item II—Payment of Subcontractors (FAR Case 2014–004)

This final rule amends the Federal Acquisition Regulation (FAR) to implement section 1334 of the Small Business Jobs Act of 2010 and the Small Business Administration's (SBA) final rule, published July 16, 2013. If a contract requires a subcontracting plan, the prime contractor must notify the contracting officer in writing if the prime contractor pays a reduced payment to a small business subcontractor, or an untimely payment if the payment to a small business subcontractor is more than 90 days past due for supplies or services for which the Government has paid the contractor. The contractor is also to include the reason for the reduction in payment or failure to pay. A contracting officer will then use his or her best judgment in determining whether the reduced or untimely payments were justified. The contracting officer must record the identity of a prime contractor with a history of three or more unjustified reduced or untimely payments to subcontractors within a 12-month period under a single contract, in the Federal Awardee Performance and Integrity Information System (FAPIIS). This regulation will benefit small business subcontractors by encouraging large business prime contractors to pay small business

subcontractors in a timely manner and at the agreed upon contractual price.

Dated: December 9, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2005–94 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–94 is effective December 20, 2016 except for items I, and II, which are effective January 19, 2017.

Dated: December 9, 2016.

Claire M. Grady,

Director, Defense Procurement and Acquisition Policy.

Dated: December 8, 2016.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: December 8, 2016.

William P. McNally,

Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.

[FR Doc. 2016–30212 Filed 12–19–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR parts 1, 24, and 52

[FAC 2005–94; FAR Case 2010–013; Item I; Docket No. 2010–0013; Sequence No. 1]

RIN 9000–AM06

Federal Acquisition Regulation; Privacy Training

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to require that contractors, whose

employees have access to a system of records or handle personally identifiable information, complete privacy training.

DATES: *Effective:* January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Gray, Procurement Analyst, at 703–795–6328 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–94, FAR Case 2010–013.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 76 FR 63896 on October 14, 2011, to provide guidance to contractors regarding the requirement to complete training that addresses the protection of privacy in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, as amended, and the handling and safeguarding of personally identifiable information (PII). The rule ensures that contractors identify employees who handle PII, have access to a system of records, or design, develop, maintain, or operate a system of records. These employees are required to complete initial privacy training and annual privacy training thereafter. A contractor who has employees involved in these activities is also required to maintain records indicating that its employees have completed the requisite training and provide these records to the contracting officer upon request. In addition, the prime contractor is required to flow-down these requirements to all applicable subcontracts.

Fifteen respondents submitted comments, including comments regarding the Initial Regulatory Flexibility Analysis (IRFA), and the Paperwork Reduction Act (PRA) analysis.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided as follows (comments pertaining to the IRFA and PRA analysis are addressed in sections V and VI of this preamble):

A. Summary of Significant Changes

The final rule clarifies the responsibilities for contractors awarded contracts involving access to PII and streamlines the options for providing training. These clarifications include—

- Alternate I of the clause is amended to replace the proposed text, which gave the option to agencies to have contractors furnish their own training materials. The final rule no longer contains this option and what was Alternate II in the proposed rule now becomes Alternate I in the final rule; and
- The applicability of the rule to commercial items is clarified.

The final rule also provides a number of clarifications consistent with Office of Management and Budget (OMB) Circular A–130, which was revised on July 28, 2016. These clarifications address the substance of the minimal privacy training requirements, to include—

- A revised definition for PII;
- The requirement for foundational as well as more advanced levels of privacy training;
- The requirement for there to be measures in place to test the knowledge level of the employee; and
- The requirement for role-based privacy training.

B. Analysis of Public Comments

1. Requests To Withdraw the Proposed Rule

Comment: Several respondents suggested that the proposed rule should be withdrawn, given the ''considerable burden implications and the fact that the proposed rule does not provide compelling justification.'' These respondents stated that withdrawing the rule would ''avoid causing confusion and redundancy.'' The respondents noted that the requirements of the Privacy Act have been in place for 35 years and stated that the Councils did not explain why the Government believes ''that additional protections are now needed.''

Response: There are a number of applicable authorities, beyond the Privacy Act, that address the responsibility for Federal agencies to ensure that Government and contractor personnel are instructed on compliance requirements with the laws, rules, and guidance pertaining to handling and safeguarding PII. This rule establishes minimum requirements consistent with those authorities to ensure consistency across the Government.

Further, the increasing portability of data and various instances of loss or potential disclosure of protected information have resulted in greater scrutiny regarding the Government's information collection practices and information security management.

2. Applicability to Commercial Item Contracts

Comment: Several respondents expressed concern with the applicability to commercial item contracts. The respondents considered that excluding commercial item contracts from the privacy training requirement failed to take into account the Government's increased use of FAR part 12 purchases; that training on the improper release of Privacy Act information should not exempt FAR part 12 contracts; and, overall, the decision to exempt commercial item contracts would not serve the Government's best interests. One respondent had a different perspective on the proposed rule, and complimented the FAR Council for exempting commercial item contracts from the privacy training requirement. However, the respondent noted that this policy was not reflected in the proposed rule's clause or clause prescription. This respondent also recommended that all subcontracts for commercial items be exempted from the privacy training requirement.

Response: The final rule clarifies that the privacy training requirement applies to contracts and subcontracts for commercial items when they involve access to a system of records. Exempting commercial item contracts and subcontracts would exclude a significant portion of Government contracts that involve the design, development, operation, or maintenance of a system of records and would therefore diminish the effectiveness of the rule.

3. Training

Comment: Respondents had multiple concerns related to the content of the required training, such as whether the training would be best developed by the agency or by the contractor and which contractor employees should be required to take the training. Several respondents questioned the efficacy of having contractor employees who work under more than one agency's contracts potentially taking multiple courses. Other respondents questioned who would decide if the training would be provided by the agency or by the contractor, *e.g.,* could the contractor decide to forego an agency course in favor of its own course? One respondent recommended that training include instruction on the Privacy Act's transparency requirements. Another respondent questioned how agencies would be held responsible for providing the training in a timely manner. Other respondents questioned which

contractor employees should be required to complete the training, whether subcontractors would be required to take the training, and whether certain professional positions, such as psychologists, should be exempt from the training based on their professional training.

Response: The final rule allows the contractor flexibility to utilize privacy training from any source that meets the minimum content requirements, unless the agency specifies in the contract that only agency-provided training is acceptable (by using the clause with its Alternate I, as specified at FAR 24.302(b)). This guidance on flexibility is also provided directly in the clause at 52.224–3(c)(2). This is intended to minimize or eliminate duplicative or overlapping training. Initial training is required and annual training thereafter.

Finally, consistent with the revisions made to OMB Circular A–130, the requirements for privacy training at 24.301(b) and the clause at 52.224–3(c) are clarified to ensure privacy training is role-based, provides foundational as well as more advanced levels of training, and that measures are in place to test the knowledge level of users. At a minimum, privacy training shall cover—

- The provisions of the Privacy Act of 1974 (5 U.S.C. 552a), including penalties for violations of the Act;
- The appropriate handling and safeguarding of PII;
- The authorized and official use of a system of records or any other PII;
- Restrictions on the use of unauthorized equipment to create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise access, or store PII;
- The prohibition against the unauthorized use of a system of records or unauthorized disclosure, access, handling, or use of PII or systems of records; and
- Procedures to be followed in the event of a potential or confirmed breach of a system of records or unauthorized disclosure, access, handling, or use of PII.

4. Flowdown

Comment: A respondent noted that, where the prime contractor is covered by the rule, the training requirement will likely flow down to subcontractors and lower tier contractors. Accordingly, the respondent recommended that the mandatory provision at 52.224–3(d) include a provision that exempts from the mandatory flow down any subcontract(s) specific to commercial items.

Response: The requirements of this rule will flow down to all subcontractors involved with the handling and safeguarding of PII. These protections are necessary when the work requires contractor employees and subcontractor employees to have access to systems of records, handling PII, or the design, development, maintenance, or operation of a system of records on behalf of the Federal Government.

5. Definitions

Comment: A respondent recommended including definitions of ''restrictions,'' as used in FAR 24.301(c)(4) and Alternate I, and ''access,'' as used in FAR 24.301, 24.302, and the clause at 52.224–3.

Response: These are not unique words. Therefore, the Councils will use the standard dictionary definitions for these terms.

6. Accountability and Audit

Comment: One respondent recommended that, during an audit, the contractor must produce a list of the individuals who completed training, or have a copy of the employee's training certificate in the employee's personnel records.

Response: The final rule requires the contractor to maintain privacy training documentation and provide it upon request to the Government agency making the request. This may be requested, when necessary, to ensure effective management and oversight of this annual privacy training requirement.

7. Other Comments

Comment: One respondent recommended that FAR 24.302 be revised to clarify who is responsible for determining whether the Statement of Work involves a system of records. Another respondent recommended that, if a final rule were promulgated, it would be appropriate to recognize a specific certification.

Response: As with all clause prescriptions, the contracting officer will determine whether the clause applies. In addition, the FAR covers all options for meeting the training requirement.

Comment: Several respondents submitted editorial comments on the proposed rule. One respondent stated that there is no need to create a separate subpart within FAR part 24. In addition, this respondent provided suggestions on the proper format for citations within the FAR. Another respondent recommended additional coverage regarding the Government-provided training method and also recommended a revision to the last sentence in FAR 24.301(b). A third respondent recommended using the term ''personally identifiable'' in lieu of ''privacy.''

Response: The Councils determined that there is a need for a separate subpart 24.3 and have retained it in the final rule. The required training does not encompass solely the Privacy Act; it is only one of the areas listed that must be addressed as part of privacy training.

Other areas include—

- The appropriate handling and safeguarding of PII; the authorized and official use of systems of records or any other PII; restrictions on the use of unauthorized equipment to create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise access, or store PII; the prohibition against unauthorized access, handling, or use of PII or systems of records; and
- Procedures to be followed in the event of a suspected or confirmed breach of a system of records or an unauthorized disclosure, access, handling, or use of PII.

This subject matter does not fit within either of the existing subparts of FAR part 24, therefore, a separate subpart 24.3 is needed.

The remaining editorial comments have been considered for inclusion in FAR subpart 24.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule is applicable to contracts and subcontracts at or below the simplified acquisition threshold (SAT) and to contracts and subcontracts for commercial-items, including contracts and subcontracts for commercially available off-the-shelf (COTS) items. The statutory authority for this rule, the Privacy Act of 1974, 5 U.S.C. 552a, predates the exemptions in 41 U.S.C. 1905, 1906, and 1907, which stipulate that a provision of law enacted after October 13, 1994 shall not be made applicable to contracts or subcontracts, unless the FAR Council or the Administrator of the Office of Federal Procurement Policy makes a written determination that such exemption would not be in the best interests of the Federal Government.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory

approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a final regulatory flexibility analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The objective of the rule is to ensure that contractor employees complete initial and annual privacy training if the employees have access to a system of records, handle personally identifiable information (PII), or design, develop, maintain, or operate a system of records involving PII on behalf of the Government.

One public comment was received in response to the Initial Regulatory Flexibility Analysis, which was published in the **Federal Register** at 76 FR 63896 on October 14, 2011:

Comment: The Initial Regulatory Flexibility Analysis (IRFA), which addressed the impact of the rule on small entities, should assess the impact this rule may have on the research community's funding of sponsored research, as this group is likely to be adversely affected by the proposed rule, in the respondent's opinion.

Response: Research institutions are included in the Regulatory Flexibility Act's definition of a small entity and were thus given the same consideration in the IRFA analysis as other small entities. The analysis in this FRFA has been revised to incorporate commercial item contracts. Therefore, the impact on research institutions has been accommodated whether the institution was awarded a negotiated contract or a FAR part 12 commercial item contract. Because the FAR does not address grants or cooperative agreements, the FRFA does not include consideration of such agreements in the analysis. Research institutions, or any other small entities, will not bear any significant impact resulting from this rule, given that the requirements of the Privacy Act, including training on the Act's requirements, have been in place for over 40 years and this rule just establishes minimum requirements for Privacy Act training, to ensure consistency across the Government.

The rule requires all contractors with contracts that require employees to have access to PII to complete training that addresses the statutory requirements for protection of privacy, in accordance with the Privacy Act (5 U.S.C. 552a), and the handling and safeguarding of PII.

In the IRFA, it was estimated that approximately 1,483 small businesses would be impacted. However, because the final rule clarifies its applicability to commercial item contracts, the number of small entities previously estimated to be impacted by this rule has been revised as described in the following paragraphs:

Information obtained from the Federal Procurement Data System (FPDS) for fiscal year (FY) 2015 reveals that approximately 10,607 unique vendors received contracts that most likely entailed the design, development, maintenance or operation of a system of records; required access to a system of records; or handled PII from individuals, on behalf of the Government. The estimated number of subcontractors who likewise will be involved in these activities is 21,214, or double the amount of prime contractors. In all, the total number of contractors and subcontractors (including contracts and subcontracts for commercial items) that may be subject to the requirements of this rule is 31,821. Examination of FY 2015 FPDS data also reveals that approximately 61 percent of these contractors and subcontractors are small business entities. Based on this information, the following analysis was used to determine the number of small businesses that may be impacted by this rule:

- Small businesses that may receive contracts = (10,607 × .61): 6,470
- Small businesses that may receive subcontracts = (21,214 × .61): 12,941
- Total number of small businesses that may be impacted by rule: 19,411

There is minimal recordkeeping associated with this rule. Contractors will likely maintain employee training records for privacy training similar to how they maintain their employees' other training records. There are no required formats or templates for documentation, and documentation will be retained by the contractor in most cases. The Government will likely request a firm's training documentation only when necessary to ensure effective management and oversight.

The final rule addresses several steps to minimize the economic impact on small entities, most notably by clarifying responsibilities and streamlining the options for providing privacy training. This final rule also removes from the clause consideration of agency-specific training elements, while retaining the required minimum training elements. Agency-specific training elements are provided in Alternate I of the clause.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The rule contains information collection requirements. OMB has cleared the information collection requirement under OMB Control Number 9000–0182, entitled Privacy Training, in the amount of 97,670 public burden hours.

Two respondents submitted comments in response to the initial notice published in the preamble of the **Federal Register** notice published at 76 FR 63896, on October 14, 2011. Both of the respondents submitted similar comments as follows:

Comment: The respondents stated that the public's Paperwork Reduction Act estimated annual reporting burden was understated. The respondents believed that (a) requiring contractors to conduct their own privacy training and (b) requiring re-training every year created a greater burden on contractors than what was shown in the proposed rule.

Response: The information collection requirement for this rule does not address the burden associated with conducting the initial or subsequent annual privacy training. Rather, it focuses solely on the obligation of Federal contractors to maintain documentation showing that the required privacy training was completed by the employee and, upon request, provide completion documentation to the contracting officer. In this regard, the same philosophy expressed in the preamble for the proposed rule holds true for the final rule as well, *i.e.,* the recordkeeping requirements are considered to be minor and a contracting officer will request documentation only when necessary to ensure effective management and oversight.

However, since the analysis used in the proposed rule did not consider contracts involving the acquisition of commercial items, the methodology used to derive the estimated public burden needed to be adjusted to encompass these contracts. In addition, the estimated public burden hours vary from the estimates in the notice published in the **Federal Register** at 79 FR 68249, on November 14, 2014, in order to reflect the use of FY 2015 data, rather than FY 2014 data.

List of Subjects in 48 CFR parts 1, 24, and 52

Government procurement.

Dated: December 9, 2016.

William Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 24, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 24, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 in the table following the introductory text, by adding in numerical sequence, FAR segments ''24.3'' and ''52.224–3'' and their corresponding OMB Control Number ''9000–0182''.

PART 24—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

■ 3. Amend section 24.101 by adding in alphabetical order the definition of ''personally identifiable information'' to read as follows:

24.101 Definitions.

* * * * *

Personally identifiable information means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual. (See Office of Management and Budget (OMB) Circular No. A–130, Managing Federal Information as a Strategic Resource).

* * * * *

■ 4. Add subpart 24.3 to read as follows:

Subpart 24.3—Privacy Training

Sec.
24.301 Privacy training.
24.302 Contract clause.

Subpart 24.3—Privacy Training

24.301 Privacy training.

(a) Contractors are responsible for ensuring that initial privacy training, and annual privacy training thereafter, is completed by contractor employees who—

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information on behalf of the agency; or

(3) Design, develop, maintain, or operate a system of records (see FAR subpart 24.1 and 39.105).

(b) Privacy training shall address the key elements necessary for ensuring the safeguarding of personally identifiable information or a system of records. The training shall be role-based, provide foundational as well as more advanced levels of training, and have measures in place to test the knowledge level of users. At a minimum, the privacy training shall cover—

(1) The provisions of the Privacy Act of 1974 (5 U.S.C. 552a), including penalties for violations of the Act;

(2) The appropriate handling and safeguarding of personally identifiable information;

(3) The authorized and official use of a system of records or any other personally identifiable information;

(4) The restriction on the use of unauthorized equipment to create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise access personally identifiable information;

(5) The prohibition against the unauthorized use of a system of records or unauthorized disclosure, access, handling, or use of personally identifiable information; and

(6) Procedures to be followed in the event of a suspected or confirmed breach of a system of records or unauthorized disclosure, access, handling, or use of personally identifiable information (see Office of Management and Budget guidance for Preparing for and Responding to a Breach of Personally Identifiable Information).

(c) The contractor may provide its own training or use the training of another agency unless the contracting agency specifies that only its agency-provided training is acceptable (see 24.302(b)).

(d) The contractor is required to maintain and, upon request, to provide documentation of completion of privacy training for all applicable employees.

(e) No contractor employee shall be permitted to have or retain access to a system of records, create, collect, use, process, store, maintain, disseminate, disclose, or dispose, or otherwise handle personally identifiable information, or design, develop, maintain, or operate a system of records, unless the employee has completed privacy training that, at a minimum, addresses the elements in paragraph (b) of this section.

24.302 Contract clause.

(a) The contracting officer shall insert the clause at FAR 52.224–3, Privacy Training, in solicitations and contracts when, on behalf of the agency, contractor employees will—

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information; or

(3) Design, develop, maintain, or operate a system of records.

(b) When an agency specifies that only its agency-provided training is acceptable, use the clause with its Alternate I.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend section 52.212–5 by—
■ a. Revising the date of the clause;
■ b. Redesignating paragraphs (b)(47) through (60) as paragraphs (b)(48) through (61), respectively;
■ c. Adding a new paragraph (b)(47);
■ d. Redesignating paragraphs (e)(1)(xix) through (xx) as paragraphs (e)(1)(xx) through (xxi), respectively;
■ e. Adding a new paragraph (e)(1)(xix);
■ (f.) Revising the date of Alternate II;
■ (1.) Redesignating paragraphs (e)(1)(ii)(S) and (T) as paragraphs (e)(1)(ii)(T) and (U), respectively; and
■ (2.) Adding a new paragraph (e)(1)(ii)(S).

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statues of Executive Orders—Commercial Items (JAN 2017)

* * * * *

(b) * * *

(47)(i) 52.224–3, Privacy Training (JAN 2017) (5 U.S.C. 552a).

(ii) Alternate I (JAN 2017) of 52.224–3.

* * * * *

(e)(1) * * *

(xix)(A) 52.224–3, Privacy Training (JAN 2017) (5 U.S.C. 552a).

(B) Alternate I (JAN 2017) of 52.224–3.

* * * * *

Alternate II (JAN 2017).

* * * * *

(e)(1) * * *

(ii) * * *

(S)(1) 52.224–3, Privacy Training (JAN 2017) (5 U.S.C. 552a).

(2) Alternate I (JAN 2017) of 52.224–3.

* * * * *

■ 6. Amend section 52.213–4 by—
■ a. Revising the date of the clause; and
■ b. Revising the date in paragraph (a)(2)(viii).

The revisions read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (JAN 2017)

* * * * *

(a) * * *

(2) * * *

(viii) 52.244–6, Subcontracts for Commercial Items (JAN 2017).

* * * * *

■ 7. Add section 52.224–3 to read as follows:

52.224–3 Privacy Training.

As prescribed in 24.302(a), insert the following clause:

Privacy Training (JAN 2017)

(a) *Definition.* As used in this clause, *personally identifiable information* means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual. (See Office of Management and Budget (OMB) Circular A–130, Managing Federal Information as a Strategic Resource).

(b) The Contractor shall ensure that initial privacy training, and annual privacy training thereafter, is completed by contractor employees who—

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information on behalf of an agency; or

(3) Design, develop, maintain, or operate a system of records (see also FAR subpart 24.1 and 39.105).

(c)(1) Privacy training shall address the key elements necessary for ensuring the safeguarding of personally identifiable information or a system of records. The training shall be role-based, provide foundational as well as more advanced levels of training, and have measures in place to test the knowledge level of users. At a minimum, the privacy training shall cover—

(i) The provisions of the Privacy Act of 1974 (5 U.S.C. 552a), including penalties for violations of the Act;

(ii) The appropriate handling and safeguarding of personally identifiable information;

(iii) The authorized and official use of a system of records or any other personally identifiable information;

(iv) The restriction on the use of unauthorized equipment to create, collect, use, process, store, maintain, disseminate, disclose, dispose or otherwise access personally identifiable information;

(v) The prohibition against the unauthorized use of a system of records or unauthorized disclosure, access, handling, or use of personally identifiable information; and

(vi) The procedures to be followed in the event of a suspected or confirmed breach of a system of records or the unauthorized disclosure, access, handling, or use of personally identifiable information (see OMB guidance for Preparing for and Responding to a Breach of Personally Identifiable Information).

(2) Completion of an agency-developed or agency-conducted training course shall be deemed to satisfy these elements.

(d) The Contractor shall maintain and, upon request, provide documentation of completion of privacy training to the Contracting Officer.

(e) The Contractor shall not allow any employee access to a system of records, or permit any employee to create, collect, use, process, store, maintain, disseminate, disclose, dispose or otherwise handle personally identifiable information, or to design, develop, maintain, or operate a system of records unless the employee has completed privacy training, as required by this clause.

(f) The substance of this clause, including this paragraph (f), shall be included in all subcontracts under this contract, when subcontractor employees will—

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information; or

(3) Design, develop, maintain, or operate a system of records.

(End of clause)

Alternate I (JAN 2017). As prescribed in 24.302(b), if the agency specifies that only its agency-provided training is acceptable, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The contracting agency will provide initial privacy training, and annual privacy training thereafter, to Contractor employees for the duration of this contract.

■ 8. Amend section 52.244–6 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (c)(1)(xv) through (xvii) as paragraphs (c)(1)(xvi) through (xviii), respectively; and

■ c. Adding a new paragraph (c)(1)(xv).

The revisions and additions read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (JAN 2017)

* * * * *

(c)(1) * * *

(xv)(A) 52.224–3, Privacy Training (JAN 2017) (5 U.S.C. 552a) if flow down is required in accordance with 52.224–3(f).

(B) Alternate I (JAN 2017) of 52.224–3, if flow down is required in accordance with 52.224–3(f) and the agency specifies that only its agency-provided training is acceptable).

* * * * *

[FR Doc. 2016–30213 Filed 12–19–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 19, 42, and 52

[FAC 2005–94; FAR Case 2014–004; Item II; Docket No. 2014–0004; Sequence No. 1]

RIN 9000–AM98

Federal Acquisition Regulations; Payment of Subcontractors

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Small Business Jobs Act of 2010. This statute requires contractors to notify the contracting officer, in writing, if the contractor pays a reduced price to a small business subcontractor or if the contractor's payment to a small business subcontractor is more than 90 days past due.

DATES: *Effective:* January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, at 202–501–1448 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–94, FAR Case 2014–004.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are issuing a final rule to implement section 1334 of the Small Business Jobs Act of 2010 (Pub. L. 111–240, 15 U.S.C. 637(d)(12)) and the Small Business Administration (SBA) final rule published in the **Federal Register** on July 16, 2013 at 78 FR 42391, which require prime contractors to self-report late or reduced payments to their small business subcontractors. The rule also requires contracting officers to record the identity of contractors with a history of late or reduced payments to small business subcontractors in the Federal Awardee Performance and Integrity System (FAPIIS). DoD, GSA, and NASA published a proposed rule in the **Federal Register** on January 20, 2016 at 81 FR 3087. Seven respondents

submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes From the Proposed Rule

1. A reporting window of 14 days is added to FAR clause 52.242–5, Payments to Small Business Contractors, for prime contractors to report to the contracting officer an untimely or reduced payment, as defined in the rule, made to their small business subcontractors.

2. The following examples of payment and nonpayment situations not considered to be unjustified are added at FAR 42.1502(g)(2)(ii):

- There is a contract dispute on performance.
- Partial payment is made for amounts not in dispute.
- A payment is reduced due to past overpayments.
- There is an administrative mistake.
- Late performance by the subcontractor leads to later payment by the prime contractor.

3. A reference to FAR clause 52.242–5 was added to paragraph (b) of the clause at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

B. Analysis of Public Comments

1. *Definitions.* Multiple respondents commented on the definitions included in the proposed rule.

a. Location of Definitions

Comment: One respondent requested the location of the definitions for ''reduced payment'' and ''untimely payment'' be moved to either FAR subpart 2.1 or included within a new definitions section in FAR subpart 42.15. The respondent also stated that the parenthetical ''see 19.701'' was contrary to FAR drafting conventions.

Response: The two definitions included in the rule are not used substantially throughout the FAR and have only an indirect connection to FAR part 42. Accordingly, the definitions are not added to either FAR part 2 or FAR part 42; they are instead retained in FAR part 19 and section 52.242–5 (as presented in the proposed rule). The reference in the proposed rule to FAR part 19 (''see 19.701'') does not run contrary to FAR drafting conventions; however, the language is changed to ''as defined in 19.701'' versus ''see 19.701.''

b. Revise Definitions

Comment: One respondent recommended that the definitions for ''reduced payment'' and ''untimely payment'' be revised to include information regarding the statutorily-mandated standards set forth in FAR 52.232–27(c) relating to payment of construction subcontractors and suppliers.

Response: The statutorily-mandated standards set forth in FAR 52.232–27(c) stand on their own, are not integral to the explanation or meaning of the terms ''reduced payment'' and ''untimely payment,'' and need not be repeated in their respective definitions.

Comment: A number of respondents recommended that the definitions of ''reduced payment'' and ''untimely payment'' be revised to reflect those instances where the subcontractor has not completed their obligations under the contract. One respondent stated that the SBA rule made this abundantly clear, that the prime contractor should be required to report only those events that arise when the small business subcontractor is otherwise entitled to full and prompt payment (as assessed by the prime contractor), but the prime contractor is unable or unwilling to make such payments. Another respondent stated that under both of these definitions, the determination of whether a prime contractor payment is either reduced or untimely ultimately hinges upon ''the terms and conditions of a subcontract.'' The terms and conditions concerning how much and when a subcontractor is paid under a subcontract can vary greatly between such contracts. Still, another respondent believed that the proposed rule should contain additional clarification that a payment should not be considered past due if the payment is delayed by the late performance of the subcontractor. According to the respondent, contractors often accept late performance of subcontracts and then accordingly pay later according to the payment terms of the subcontract, but do not necessarily modify the subcontract to reflect the later performance date. Another respondent believed that the proposed rule, as written, provides unclear guidance to contracting officers because the definition of ''unjustified reduced or untimely payments'' is vague, and asked the FAR Council to provide a more complete definition of what constitutes an unjustified payment. For example, the rule should clarify the impact of systems errors, third-party errors, or administrative errors. Still another respondent recommended that the Councils define ''unjustifiable'' late or reduced payments as a material breach of the terms and conditions of the subcontract and provide examples of what constitutes a material breach under Federal case law.

Response: The definitions of ''reduced payment'' and ''untimely payment'' are meant to convey a reasonable explanation and meaning of those terms. No additional language is necessary in the definition; however, the final rule at FAR 42.1502(g)(2)(ii) includes examples of payment and nonpayment situations that are not considered to be unjustified. Due to privity of contract it is generally not the contracting officer's responsibility to determine if a material breach of a subcontract has occurred.

2. *Existing statutory and regulatory requirements.*

Comment: One respondent stated that existing statutory and regulatory requirements governing prime contractor and subcontractor payments already satisfy the intent of this regulation.

Response: In accordance with section 1334 of the Small Business Jobs Act of 2010, the rule offers additional protections for the small business community in regard to payments from prime contractors and is required by statute. Accordingly, there is no reasonable basis for withdrawing the rule.

3. *Reporting requirements.*

Multiple respondents commented on the reporting requirements of the proposed rule.

Comment: One respondent asked if there was guidance on the time period for the prime contractor to report a late or reduced payment to the contracting officer.

Response: The final rule requires the prime contractor to report within 14 days any occurrences of untimely or reduced payments to their small business subcontractors.

Comment: Several respondents stated that a different methodology should be used to determine the number of occurrences of late or reduced payments that are reportable in the FAPIIS system. For example, one prime contractor makes 10,000 payments a year, but another makes 10. The history of unjustified payments should not be set at ''three'', but should be scalable, proportional to the number of payments made.

Response: The final rule is consistent with SBA's final rule published on July

16, 2013, which defines a history of unjustified untimely or reduced payments as three incidents within a 12-month period. This final rule clarifies at FAR 42.1502(g)(2)(ii) that the incidents are under a single contract.

4. *Subcontracting plan dollar threshold.*

Comment: One respondent commented the small business subcontracting plan threshold cited in the analysis for application of the rule was inconsistent (*e.g.,* $650,000 versus $700,000).

Response: Concur.

5. *Applicability (subcontractor tiers).*

Comment: One respondent asked if the proposed rule applied to subcontractor payments at all tiers.

Response: The rule applies to prime contractor payments made to first-tier small business subcontractors.

6. *Contracting officer's responsibilities.*

Several respondents commented on the additional contracting officer responsibilities and offered alternate procedures.

Comment: Two respondents requested that the agency counsel and not the contracting officer determine whether a late or reduced payment conforms to the terms and conditions of the contract.

Response: It is the contracting officer's responsibility to ensure compliance with the terms of the contract; however, per FAR 1.602–2(c), contracting officers can request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate, when making a determination regarding a late or reduced payment.

7. *Additional guidance to contracting officers.*

Comment: Two respondents stated the rule should provide more guidance to contracting officers in regards to issues that may arise when dealing with the reduced or late payments situation in contracts.

Response: This type of additional guidance would largely be non-regulatory, falling under agency procedures and training, which are outside the scope of this rule. As stated previously, per FAR 1.602–2(c), contracting officers can request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate, when making a determination regarding a late or reduced payment.

Comment: One respondent commented that adding additional responsibilities to the contracting officer while the Government is focused on ensuring the timely submittal of past performance evaluations will only lead to lesser quality evaluations.

Response: There is no basis for concluding that the requirements of this rule will impact the timely submittal of past performance evaluations.

8. *Government-caused delays.*

Comment: One respondent requested language to note situations in which the Government causes delays in subcontractor payments by changing the scope of the contract, by making late payments to the prime contractor, etc.

Response: The FAR already contains adequate policy on Government-caused delays and changes to contract terms and conditions. In addition, as stated previously, the final rule includes the specific examples of payment and nonpayment situations that are not considered to be unjustified.

9. *Penalties.*

Comment: One respondent asked what penalties prime contractors will face for failing to self-report instances of non-compliance.

Response: Government penalties are beyond the scope of this rule. However, the requirements of this rule (in addition to other Government rights and remedies) permit the contracting officer to issue an adverse past performance assessment for noncompliance with FAR 52.219–9(a)(15), based upon individual circumstances.

10. *Incentivizing prime contractor compliance.*

Comment: One respondent commented that prime contractors should be incentivized to make reduced payments to small business subcontractors, rather than withhold payments when a dispute arises between the prime contractor and small business subcontractor. Unlike a late payment, the proposed rule does not expressly grant a 90-day window in which to resolve a reduced payment that may arise for a legitimate reason (*i.e.,* substandard performance or nonconforming parts).

According to the respondent, because the rule does not address when a prime contractor must report a reduced payment to the contracting officer, one might interpret the rule to require an immediate report by the prime contractor to the contracting officer upon making a reduced payment.

However, requiring the prime contractor to report a reduced payment immediately creates a disincentive for prime contractors to make a reduced rather than late payment, as the obligation to report a late payment does not arise for a minimum of 90 days past the original due date.

Response: Reduced payments as a result of a dispute on performance between a prime contractor and a small business contractor would not fall within the definition of ''reduced payment.'' However, the rule does contain a reporting window of 14 days for prime contractors to report to the contracting officer untimely or reduced payments, as defined in the rule, made to their small business subcontractors. This 14-day reporting timeline was added to the rule as a result of public comments. Moreover, the rule does not prohibit prime contractors from making reduced payments to their small business subcontractors.

11. *Commercial items and commercially available off-the-shelf items.*

Comment: Several respondents commented that the FAR Council should reconsider the application of this rule to commercial and COTS item providers. One respondent commented that given the Government's stated preference for ''commercial plans'' in FAR 52.219–9(g) for commercial item contractors (including commercially available off-the-shelf (COTS) contractors), it is likely that most commercial item and COTS contractors have commercial subcontracting plans. These commercial plans apply to the contractor's entire commercial organization, which in many cases, includes only a minimal amount of sales to the Federal Government. These commercial plans apply to virtually every subcontractor or supplier from which a contractor purchases supplies or services, whether or not those supplies or services are used in the performance of government contracts. Another respondent commented that over the last decade, the procurement community has seen the erosion of commercial item contracting (in accordance with 41 U.S.C. 1906) and the benefits attendant thereto, as well as layering onto the commercial item contracting process Government unique requirements that have increased costs and raised barriers to entry into the Federal marketplace. Another respondent stated that applying the rule to commercial and COTS item providers would not be in the best interests of the Government, and would run contrary to ongoing attempts by Government policy makers to streamline the acquisition process for the acquisition of commercial and COTS items to reduce the number of unique government rules applicable to large and small businesses providing commercial and COTS supplies and services, and to introduce more commercial innovation and

technology into the federal business market.

Response: The FAR Council has determined that the rule should, as a matter of policy, apply to contracts for the acquisition of commercial items and COTS items. See section III of this preamble.

Comment: One respondent commented that FAR clause 52.242–5 was not added to the list of clauses in FAR 52.212–5 regarding commercial items.

Response: The final rule adds FAR clause 52.242–5 to the list of clauses in FAR 52.212–5 regarding application to commercial items.

12. *Public burden.*

Comment: Two respondents stated that the Councils had underestimated the public burden in regards to the proposed rule. One respondent commented that the FAR Council has greatly underestimated the implementation burden on commercial item and COTS item contractors, especially considering the broad definition of ''subcontractor'' that applies to the proposed rule. The other respondent believed that the estimate of reporting time of only two hours per respondent is grossly underestimated. This negligible amount of time assumes that all contractors can easily identify from their payment systems which subcontractors are small businesses. The respondent believed that this is often not the case, and that the small business size status of a subcontractor may be unknown to the contractor's other accounting systems. The other respondent commented that since the Small Business Jobs Act of 2010 does not specifically require that the subcontractor payment clause apply to commercial contracts, the respondent recommended that the FAR Council seek additional information about the burden on contractors before a determination is made to apply the payment of subcontractor requirements to commercial item acquisitions. The respondent did not find that the availability of limited information indicated that the burden may not be significant, as described in the proposed rule. Rather, initial feedback from contractors suggested that the burdens associated with reporting under the rule will have a significant impact.

Response: The respondents do not offer data with which to support changing the current estimated public burden hours. However, since this is a new rule without an empirical frame of reference, the public reporting burden is reviewed every three years and can be adjusted as necessary.

13. *Convene industry working group.*

Comment: One respondent commented that the FAR Council should convene an industry working group in order to gain a better understanding of some of the more nuanced aspects of the subcontractor payment requirement.

Response: The Councils do not concur that such a working group is necessary at this time.

C. Other Changes

The following changes were made, not as a result of public comments:

1. FAR 1.106 was amended to add the OMB Control Number associated with FAR clause 52.242–5.

2. Minor editorial changes were made for grammatical reasons or to conform to FAR drafting conventions.

III. Applicability to Contracts for Commercial Items and Commercially Available Off-the-Shelf Items

The Federal Acquisition Regulatory (FAR) Council has made the following determinations with respect to the rule's application of Section 1334 of the Small Business Jobs Act of 2010, to contracts for the acquisition of commercial items and contracts for the acquisition of commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of commercial items.

The purpose of this rule is to implement section 1334 of the Small Business Jobs Act of 2010. Section 1334 requires prime contractors to self-report late or reduced payments to their small business subcontractors. The rule also requires contracting officers to record the identity of contractors with a history of late or reduced payments to small business subcontractors in the Federal Awardee Performance and Integrity System (FAPIIS).

The statutory requirements are reflected in the Small Business Administration's (SBA's) final rule published at 78 FR 42391 on July 16, 2013, which did not exempt acquisitions of commercial items.

The law is silent on the applicability of these requirements to acquisitions of commercial items and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1906 and its application to acquisitions of commercial items. Therefore, it does not apply to acquisitions of commercial items unless the FAR Council makes a written determination as provided in 41 U.S.C. 1906.

The law furthers the administration's goal of supporting small business and advances the interests of small business subcontractors by discouraging reduced or untimely payments to small business subcontractors. Exclusion of acquisitions for commercial items from these requirements will limit the full implementation of these subcontracting-related objectives. Further, the primary FAR clauses implementing Federal procurement policies governing subcontracting with small business, FAR 52.219–8, Utilization of Small Business Concerns, and 52.219–9, Small Business Subcontracting Plan, are currently prescribed for use in solicitations for commercial items. Exclusion of acquisitions for commercial items from these requirements would create confusion among contractors and the Federal contracting workforce. Moreover, the rule may also increase the timeliness of payments to small business subcontractors.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to the acquisition of commercial items.

B. Applicability of Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.,* 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that would not be in the best interest of the Federal Government to exempt contracts

for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of COTS items.

The purpose of this rule is to implement section 1334 of the Small Business Jobs Act of 2010. Section 1334 requires prime contractors to self-report late or reduced payments to their small business subcontractors. The rule also requires contracting officers to record the identity of contractors with a history of late or reduced payments to small business subcontractors in FAPIIS.

These statutory requirements are reflected in the SBA final rule published at 78 FR 42391 on July 16, 2013, which did not exempt acquisitions of COTS items.

The law is silent on the applicability of these requirements to acquisitions of COTS items and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1907 and its application to acquisitions of COTS items. Therefore, it does not apply to acquisitions of COTS items unless the Administrator for Federal Procurement Policy makes a written determination as provided in 41 U.S.C. 1907.

The law furthers the Administration's goal of supporting small business and advances the interests of small business subcontractors by discouraging reduced or untimely payments to small business subcontractors. Exclusion of a large segment of Federal contracting, such as acquisitions for COTS items, will limit the full implementation of these subcontracting-related objectives. Further, the primary FAR clauses implementing Federal procurement policies governing subcontracting with small business, FAR 52.219–8, Utilization of Small Business Concerns, and 52.219–9, Small Business Subcontracting Plan, are currently prescribed for use in solicitations for COTS items. Exclusion of acquisitions for COTS items from these requirements would create confusion among contractors and the Federal contracting workforce. Moreover, the rule may also increase the timeliness of payments to small business subcontractors.

For these reasons, it is in the best interest of the Federal Government to apply the subcontracting requirements to the acquisition of COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a final regulatory flexibility analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

Section 1334 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) and the Small Business Administration's final rule at 78 FR 42391, Small Business Subcontracting, published July 16, 2013, require that the prime contractor self-report when the prime contractor makes reduced or untimely payments to small business subcontractors. Section 1334 also requires the contracting officer to record the identity of contractors with a history of unjustified reduced or untimely payments in the Federal Awardee Performance and Integrity System (FAPIIS).

This final rule implements the self-reporting requirements of section 1334 by requiring contracting officers to include FAR clause 52.242–5, Payments to Small Business Subcontractors, in all solicitations and contracts containing the clause at 52.219–9, Small Business Subcontracting Plan. The new FAR clause requires prime contractors to notify the contracting officer of reduced or untimely payments to small business subcontractors.

The rule also amends FAR 42.1503(h) to require contracting officers to report to FAPIIS a contractor that has a history of three or more reduced or untimely payments to small business subcontractors within a 12-month period under a single contract that are unjustified. FAR 42.1503, Table 42–2 is also amended to include unjustified reduced or untimely payments to small business subcontractors as part of the definition of ratings for the ''small business subcontracting'' past performance evaluation factors.

There were no public comments received on the initial regulatory flexibility analysis.

The final rule applies to payments made to small businesses that are first-tier subcontractors to prime government contractors. There will be no burden on small businesses, as small businesses do not have subcontracting plans. This regulation will benefit small business subcontractors by encouraging large business prime contractors to pay small business subcontractors in a timely manner and the agreed upon contractual price.

This rule imposes new recordkeeping and reporting requirements and contains information collection requirements. Small businesses are not required to report under this information collection because it only applies to prime contractors whose contracts contain the clause 52.219–9, Small Business Subcontracting Plan, which is not applicable to small businesses.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000–0196, titled: ''Payments to Small Business Subcontractors.''

List of Subjects in 48 CFR Parts 1, 19, 42, and 52.

Government procurement.

Dated: December 9, 2016.

William F. Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 1, 19, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 19, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 by adding to the table, in numerical sequence, FAR segment ''52.242–5'' and its corresponding OMB Control No. ''9000–0196''.

PART 19—SMALL BUSINESS PROGRAMS

■ 3. Amend section 19.701 by adding, in alphabetical order, the definitions of ''Reduced payment'' and ''Untimely payment'' to read as follows:

19.701 Definitions.

* * * * *

Reduced Payment means a payment that is for less than the amount agreed upon in a subcontract in accordance

with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

* * * * *

Untimely Payment means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract for supplies and services for which the Government has paid the prime contractor.

■ 4. Amend section 19.704 by—

■ a. Removing from paragraph (a)(13) ''completion; and'' and adding ''completion;'' in its place;

■ b. Removing from paragraph (a)(14) ''subcontractor.'' and adding ''subcontractor; and'' in its place; and

■ c. Adding paragraph (a)(15).

The addition reads as follows:

19.704 Subcontracting plan requirements.

(a) * * *

(15) Assurances that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the subcontract, and notify the contracting officer if the offeror pays a reduced or an untimely payment to a small business subcontractor (see 52.242–5).

* * * * *

19.705–4 [Amended]

■ 5. Amend section 19.705–4 by removing from paragraphs (b) and (c) the number ''14'' and adding ''15'' in both places.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 6. Amend section 42.1502 by revising paragraph (g) to read as follows:

42.1502 Policy.

* * * * *

(g) Past performance evaluations shall include an assessment of the contractor's—

(1) Performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219–9, Small Business Subcontracting Plan; and

(2) Reduced or untimely payments (as defined in 19.701), made to small business subcontractors, determined by the contracting officer to be unjustified. The contracting officer shall—

(i) Consider and evaluate a contractor's written explanation for a reduced or an untimely payment when determining whether the reduced or untimely payment is justified; and

(ii) Determine that a history of unjustified reduced or untimely payments has occurred when the contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12-month period (see 42.1503(h)(1)(vi) and the evaluation ratings in Table 42–2). The following payment or nonpayment situations are not considered to be unjustified:

(A) There is a contract dispute on performance.

(B) A partial payment is made for amounts not in dispute.

(C) A payment is reduced due to past overpayments.

(D) There is an administrative mistake.

(E) Late performance by the subcontractor leads to later payment by the prime contractor.

* * * * *

■ 7. Amend section 42.1503 by—

■ a. Revising paragraphs (b)(2)(v) and (b)(2)(vi);

■ b. Revising paragraph (h)(1) introductory text;

■ c. Revising paragraphs (h)(1)(iv) and (h)(1)(v);

■ d. Adding paragraph (h)(1)(vi); and

■ e. Revising Table 42–2.

The revisions and addition read as follows:

42.1503 Procedures.

* * * * *

(b)(1) * * *

(2) * * *

(v) Small business subcontracting, including reduced or untimely payments to small business subcontractors when 19.702(a) requires a subcontracting plan (as applicable, see Table 42–2).

(vi) Other (as applicable) (*e.g.,* trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost or pricing data, terminations, suspension and debarments).

* * * * *

(h) * * *

(1) Agencies shall ensure information is accurately reported in the FAPIIS module of CPARS within 3 calendar days after a contracting officer—

* * * * *

(iv) Makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience;

(v) Receives a final determination after an administrative proceeding, in accordance with 22.1704(d)(1), that substantiates an allegation of a violation of the trafficking in persons prohibitions in 22.1703(a) and 52.222–50(b); or

(vi) Determines that a contractor has a history of three or more unjustified reduced or untimely payments to small business subcontractors under a single contract within a 12-month period (see 42.1502(g)(2)).

* * * * *

TABLE 42–2—EVALUATION RATINGS DEFINITIONS

[For the small business subcontracting evaluation factor, when 52.219–9 is used]

Rating	Definition	Note
(a) Exceptional	Exceeded all statutory goals or goals as negotiated. Had exceptional success with initiatives to assist, promote, and utilize small business (SB), small disadvantaged business (SDB), women-owned small business (WOSB), HUBZone small business, veteran-owned small business (VOSB) and service disabled veteran owned small business (SDVOSB). Complied with FAR 52.219–8, Utilization of Small Business Concerns. Exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Went above and beyond the required elements of the subcontracting plan and other small business requirements of the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify an Exceptional rating, identify multiple significant events and state how they were a benefit to small business utilization. A singular benefit, however, could be of such magnitude that it constitutes an Exceptional rating. Small businesses should be given meaningful and innovative work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. Also, there should have been no significant weaknesses identified
(b) Very Good	Met all of the statutory goals or goals as negotiated. Had significant success with initiatives to assist, promote and utilize SB, SDB, WOSB, HUBZone, VOSB, and SDVOSB. Complied with FAR 52.219–8, Utilization of Small Business Concerns. Met or exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Endeavored to go above and beyond the required elements of the subcontracting plan. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify a Very Good rating, identify a significant event and state how it was a benefit to small business utilization. Small businesses should be given meaningful and innovative opportunities to participate as subcontractors for work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. There should be no significant weaknesses identified
(c) Satisfactory	Demonstrated a good faith effort to meet all of the negotiated subcontracting goals in the various socio-economic categories for the current period. Complied with FAR 52.219–8, Utilization of Small Business Concerns. Met any other small business participation requirements included in the contract/order. Fulfilled the requirements of the subcontracting plan included in the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor has addressed or taken corrective action. There should have been no significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order
(d) Marginal	Deficient in meeting key subcontracting plan elements. Deficient in complying with FAR 52.219–8, Utilization of Small Business Concerns, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Failed to satisfy one or more requirements of a corrective action plan currently in place; however, does show an interest in bringing performance to a satisfactory level and has demonstrated a commitment to apply the necessary resources to do so. Required a corrective action plan. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify a Marginal rating, identify a significant event that the contractor had trouble overcoming and how it impacted small business utilization. A Marginal rating should be supported by referencing the actions taken by the Government that notified the contractor of the contractual deficiency.

TABLE 42–2—EVALUATION RATINGS DEFINITIONS—Continued

[For the small business subcontracting evaluation factor, when 52.219–9 is used]

Rating	Definition	Note
(e) Unsatisfactory	Noncompliant with FAR 52.219–8 and 52.219–9, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Showed little interest in bringing performance to a satisfactory level or is generally uncooperative. Required a corrective action plan. Had a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify an Unsatisfactory rating, identify multiple significant events that the contractor had trouble overcoming and state how it impacted small business utilization. A singular problem, however, could be of such serious magnitude that it alone constitutes an Unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the actions taken by the Government to notify the contractor of the deficiencies. When an Unsatisfactory rating is justified, the contracting officer must consider whether the contractor made a good faith effort to comply with the requirements of the subcontracting plan required by FAR 52.219–9 and follow the procedures outlined in FAR 52.219–16, Liquidated Damages-Subcontracting Plan.

■ 8. Add section 42.1504 to read as follows:

42.1504 Contract clause.

Insert the clause at 52.242–5, Payments to Small Business Subcontractors, in all solicitations and contracts containing the clause at 52.219–9, Small Business Subcontracting Plan.

PART 52—SOLICITATION AND PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 52.212–5 by—
■ a. Revising the date of the clause;
■ b. Revising the introductory text of paragraph (b)(17)(i);
■ c. Redesignating paragraph (b)(60) as (b)(61); and
■ d. Adding a new paragraph (b)(60).

The revisions and addition read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (JAN 2017)

(b) * * *

__(17)(i) 52.219–9, Small Business Subcontracting Plan (JAN 2017) (15 U.S.C. 637(d)(4)).

* * * * *

__(60) 52.242–5, Payments to Small Business Subcontractors (JAN 2017)(15 U.S.C. 637(d)(12)).

* * * * *

■ 10. Amend section 52.219–9 by—
■ a. Revising the date of the clause;
■ b. Adding in paragraph (b), in alphabetical order, the definitions of ''Reduced payment'' and ''Untimely payment'';
■ c. Adding paragraph (d)(15);
■ d. In *Alternate III*—
■ 1. Revising the date of the Alternate; and
■ 2. Removing from the introductory paragraph of Alternate III ''clause;'' and adding ''clause:'' in its place; and
■ e. In *Alternate IV*—
■ 1. Revising the date of the Alternate; and
■ 2. Adding paragraph (d)(15).

The revisions and additions read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (JAN 2017)

(b) * * *

* * * * *

Reduced payment means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

* * * * *

Untimely payment means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract for supplies and services for which the Government has paid the prime contractor.

(d) * * *

(15) Assurances that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the underlying subcontract, and notify the contracting officer when the prime contractor makes either a reduced or an untimely payment to a small business subcontractor (see 52.242–5).

* * * * *

Alternate III (JAN 2017). * * *

* * * * *

Alternate IV (JAN 2017). * * *

(d) * * *

(15) Assurances that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the underlying subcontract, and notify the contracting officer when the prime contractor makes either a reduced or an untimely payment to a small business subcontractor (see 52.242–5).

■ 11. Add section 52.242–5 to read as follows:

52.242–5 Payments to Small Business Subcontractors.

As prescribed in 42.1504, insert the following clause:

Payments to Small Business Subcontractors (JAN 2017)

(a) *Definitions.* As used in this clause—

Reduced payment means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

Untimely payment means a payment that is more than 90 days past due under the terms and conditions of a subcontract, for supplies and services for which the Government has paid the prime contractor.

(b) *Notice.* The Contractor shall notify the Contracting Officer, in writing, not later than 14 days after—

(1) A small business subcontractor was entitled to payment under the terms and conditions of the subcontract; and

(2) The Contractor—

(i) Made a reduced or untimely payment to the small business subcontractor; or

(ii) Failed to make a payment, which is now untimely.

(c) *Content of notice.* The Contractor shall include the reason(s) for making the reduced or untimely payment in any notice required under paragraph (b) of this clause.

(End of clause)

[FR Doc. 2016–30221 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2016–0051, Sequence No. 8]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–93; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2005–94, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–94, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov.*

DATES: December 20, 2016.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2005–94 and the FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755.

RULES LISTED IN FAC 2005–94

Item	Subject	FAR Case	Analyst
*I	Privacy Training	2010–013	Gray.
*II	Payment of Subcontractors	2014–004	Glover.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2005–94 amends the FAR as follows:

Item I—Privacy Training (FAR Case 2010–013)

This final rule amends the Federal Acquisition Regulation to clarify the training requirements for contractors whose employees will have access to a system of records on individuals or handle personally identifiable information. These training requirements are consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and OMB Circular A–130, Managing Federal Information as a Strategic Resource. Prime contractors are required to flow down these requirements to all applicable subcontracts.

Item II—Payment of Subcontractors (FAR Case 2014–004)

This final rule amends the Federal Acquisition Regulation (FAR) to implement section 1334 of the Small Business Jobs Act of 2010 and the Small Business Administration's (SBA) final rule, published July 16, 2013. If a contract requires a subcontracting plan, the prime contractor must notify the contracting officer in writing if the prime contractor pays a reduced payment to a small business subcontractor, or an untimely payment if the payment to a small business subcontractor is more than 90 days past due for supplies or services for which the Government has paid the contractor. The contractor is also to include the reason for the reduction in payment or failure to pay. A contracting officer will then use his or her best judgment in determining whether the reduced or untimely payments were justified. The contracting officer must record the identity of a prime contractor with a history of three or more unjustified reduced or untimely payments to subcontractors within a 12-month period under a single contract, in the Federal Awardee Performance and Integrity Information System (FAPIIS). This regulation will benefit small business subcontractors by encouraging large business prime contractors to pay small business subcontractors in a timely manner and at the agreed upon contractual price.

Dated: December 9, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2016–30222 Filed 12–19–16; 8:45 am]

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Part VII

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 433

Administration for Children and Families

45 CFR Parts 301, 302, 303, et al.

Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 433

[CMS–2343–F]

RIN 0938–AR92

Administration for Children and Families

45 CFR Parts 301, 302, 303, 304, 305, 307, 308, and 309

RIN 0970–AC50

Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs

AGENCY: Office of Child Support Enforcement (OCSE), Administration for Children and Families (ACF) and the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This rule is intended to carry out the President's directives in *Executive Order 13563: Improving Regulation and Regulatory Review.* The final rule will make Child Support Enforcement program operations and enforcement procedures more flexible, more effective, and more efficient by recognizing the strength of existing State enforcement programs, advancements in technology that can enable improved collection rates, and the move toward electronic communication and document management. This final rule will improve and simplify program operations, and remove outmoded limitations to program innovations to better serve families. In addition, the final rule clarifies and corrects technical provisions in existing regulations. The rule makes significant changes to the regulations on case closure, child support guidelines, and medical support enforcement. It will improve child support collection rates because support orders will reflect the noncustodial parent's ability to pay support, and more noncustodial parents will support their children.

DATES: This final rule is effective on January 19, 2017. States may comply any time after the effective date, but before the final compliance date, **except for the amendment to § 433.152, which is effective on January 20, 2017.** The compliance dates, or the dates that States must comply with the final rule, vary for the various sections of the Federal regulations. The reasons for delaying compliance dates include State legislative changes, system modifications, avoiding the need for a special guidelines commission review, etc.

The compliance date, or the date by which the States must follow the rule, will be February 21, 2017 except, as noted below:

- *Guidelines for setting child support orders* [§ 302.56(a)–(g)], *Establishment of support obligations* [§ 303.4], and *Review and adjustment of child support orders* [§ 303.8(c) and (d)]: The compliance date is 1 year after completion of the first quadrennial review of the State's guidelines that commences more than 1 year after publication of the final rule.
- The requirements for reviewing guidelines for setting child support awards [§ 302.56(h)]: The compliance date is for the first quadrennial review of the guidelines commencing after the State's guidelines have initially been revised under this final rule.
- Continuation of service for IV–E cases [§ 302.33(a)(4)], Location of noncustodial parents in IV–D cases [§ 303.3], Mandatory notice under Review and adjustment of child support orders [§ 303.8(b)(7)(ii)], Mandatory provisions of *Case closure criteria* [§ 303.11(c) and (d)], and *Functional requirements for computerized support enforcement systems in operation by October 1, 2000* [§ 307.11(c)(3)(i) and (ii)]: The compliance date is 1 year from date of publication of the final rule, or December 20, 2017. However, if State law changes are needed, then the compliance date will be the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the final rule.
- Optional provisions (such as Paternity-only Limited Service [§ 302.33(a)(6)], *Case closure criteria* [§ 303.11(b)], *Review and adjustment of child support orders* [§ *303.8*(b)(2)], *Availability and rate of Federal financial participation* [§ 304.20], and Topic 2 Revisions): There is no specific compliance date for optional provisions.
- *Payments to the family* [§ 302.38], *Enforcement of support obligations* [§ *303.6(c)(*4)], and *Securing and enforcing medical support obligations* [§ 303.31]: If State law revisions are needed, the compliance date is the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the regulation. If State law revisions are not needed, the compliance date is 60 days after publication of the final rule.
- *Collection and disbursement of support payments by the IV–D agency* [§ 302.32], *Required State laws* [§ 302.70], *Procedures for income withholding* [§ 303.100], *Expenditures for which Federal financial participation is not available* [§ 304.23], and Topic 3 revisions: The compliance date is the same as the effective date for the regulation since these revisions reflect existing requirements.

FOR FURTHER INFORMATION CONTACT: The OCSE Division of Policy and Training at *OCSE.DPT@acf.hhs.gov.* Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. eastern time.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

This final rule is published under the authority granted to the Secretary of the Department of Health and Human Services by section 1102 of the Social Security Act (Act), 42 U.S.C. 1302. Section 1102 of the Act authorizes the Secretary to publish regulations, not inconsistent with the Act, which may be necessary for the efficient administration of the functions for which the Secretary is responsible under the Act. Additionally, the Secretary has authority under section 452(a)(1) of the Act to ''establish such standards for State programs for locating noncustodial parents, establishing paternity, and obtaining child support . . . as he[she] determines to be necessary to assure that such programs will be effective.'' Rules promulgated under section 452(a)(1) must meet two conditions. First, the Secretary's designee must find that the rule meets one of the statutory objectives of ''locating noncustodial parents, establishing paternity, and obtaining child support.'' Second, the Secretary's designee must determine that the rule is necessary to ''assure that such programs will be effective.''

Section 454(13) requires a State plan to ''provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments and provide that information requests by parents who are residents of other States be treated with the same priority as requests by parents who are residents of the State submitting the plan.''

This final rule is published in accordance with the following sections of the Act: Section 451—Appropriation;

section 452—Duties of the Secretary; section 453—Federal parent locator service; section 454—State plan for child and spousal support; section 454A—Automated data processing; section 454B—Collection and disbursement of support payments; section 455—Payments to States; section 456—Support obligations; section 457—Distribution of collected support; section 458—Incentive payments to States; section 459—Consent by the United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations; section 459A—International support enforcement; section 460—Civil actions to enforce support obligations; section 464—Collection of past-due support from Federal tax refunds; section 466—Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement; and section 467—State guidelines for child support awards.

II. Background

The Child Support Enforcement program was established to hold noncustodial parents accountable for providing financial support for their children. Child support payments play an important role in reducing child poverty, lifting approximately one million people out of poverty each year. In 2014, the Child Support Enforcement program collected $28.2 billion in child support payments for the families in State and Tribal caseloads. During this same period, 85 percent of the cases had child support orders, and nearly 71 percent of cases with support orders had at least some payments during the year. For current support, 64 percent of current collections are collected on time every month.

This final rule makes changes to strengthen the Child Support Enforcement program and update current practices in order to increase regular, on-time payments to all families, increase the number of noncustodial parents working and supporting their children, and reduce the accumulation of unpaid child support arrears. These changes remove regulatory barriers to cost-effective approaches for improving enforcement consistent with the current knowledge and practices in the field, and informed by many successful state-led innovations. In addition, given that almost three-fourths of child support payments are collected by employers through income withholding, this rule standardizes and streamlines payment processing so that employers are not unduly burdened by this otherwise highly effective support enforcement tool. The rule also removes outdated barriers to electronic communication and document management, updating existing child support regulations, which frequently limit methods of storing or communicating information to a written or paper format. Finally, the rule updates the program to reflect the recent Supreme Court decision in *Turner* v. *Rogers,* 564 U.S. ____, 131 S Ct. 2507 (2011).

Executive Order 13563 directs agencies to increase retrospective analysis of existing rules to determine whether they should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives.[1] In response to *Executive Order 13563,* OCSE conducted a comprehensive review of existing regulations to identify ways to improve program flexibility, efficiency, and responsiveness; promote technological and programmatic innovation; and update outmoded ways of doing business. Some of these regulations had not been updated in a generation. Regulatory improvements include: (1) Procedures to promote program flexibility, efficiency, and modernization; (2) updates to account for advances in technology; and (3) technical corrections.

This final rule recognizes and incorporates policies and practices that reflect the progress and positive results from successful program implementation by States and Tribes.

The section-by-section discussion below provides greater detail on the provisions of the rule. All references to regulations are related to 45 CFR Chapter III, except as specified in sections relating to the CMS regulations (42 CFR part 433). In general, this final rule only affects regulations governing State IV–D programs, and does not impact Tribal IV–D program rules under 45 CFR part 309, except for some minor technical changes.

III. Summary Descriptions of the Regulatory Provisions

The following is a summary of the regulatory provisions included in the final rule and how these provisions differ from what was initially included in the Notice of Proposed Rulemaking (NPRM). The NPRM was published in the **Federal Register** on November 17, 2014 (79 FR 68548 through 68587). The comment period ended January 16, 2015. We received more than 2,000 sets of public comments. Although the NPRM was strongly supported, we received numerous comments on specific provisions. We made a number of adjustments to the final rule in response to those comments.

This final rule includes (1) procedures to promote program flexibility, efficiency, and modernization; (2) updates to account for advances in technology; and (3) technical corrections. The following is a discussion of all the regulatory provisions included in this rule. Please note the provisions are discussed in order by category. We present the revisions in these three categories to assist the reader in understanding the major concepts and rationale for the changes.

Topic 1: Procedures To Promote Program Flexibility, Efficiency, and Modernization (§§ 302.32; 302.33; 302.38; 302.56; 302.70; 303.3; 303.4; 303.6; 303.8; 303.11 (Including revisions to 42 CFR 433.152); 303.31; 303.72; 303.100; 304.20; 304.23; and 307.11)

Section 302.32—Collection and Disbursement of Support Payments by the IV–D Agency

Section 302.32 mirrors Federal law which requires State Disbursement Units (SDUs) to collect and disburse child support payments in accordance with support orders in IV–D cases. Additionally, SDUs must collect and disburse child support payments in non-IV–D cases in which the support order was initially issued on or after January 1, 1994, and the income of the noncustodial parent is subject to withholding in accordance with section 466(a)(8)(B) of the Act. The provision also specifies timeframes for the disbursement of support payments.

Paragraph (a) describes the basic IV–D State plan requirement that each State must establish and operate an SDU for the collection and disbursement of child support payments.

Paragraphs (a)(1) and (2) identify the types of child support cases for which support payments must be collected and disbursed through the SDU. Paragraph (a)(1) specifies that support payments under support orders in all cases under the State IV–D plan must be collected and disbursed through the SDU. Paragraph (a)(2) requires that support payments under support orders in all cases not being enforced under the State IV–D plan (non-IV–D cases) in which the support order is initially issued in the State on or after January 1, 1994, and

[1] Available at: *http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.* Also, the OMB Memorandum related to Executive Order 13563 is available at: *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.*

in which the income of the noncustodial parent is subject to withholding in accordance with section 466(a)(8)(B) of the Act must be collected and disbursed through the SDU.

Paragraph (b) is introductory language preceding timeframes for disbursement of various types of child support collections. Paragraph (b)(1) requires that in intergovernmental IV–D cases, child support collected on behalf of the initiating agency must be forwarded to the initiating agency within 2 business days of the date of receipt by the SDU in the responding State. The provision also includes an updated reference to the intergovernmental child support regulations at § 303.7(d)(6)(v) of this chapter. In response to comments regarding paragraph (b)(1), in the final rule we changed the term interstate to intergovernmental. We also used the term initiating agency instead of initiating State, recognizing that intergovernmental IV–D cases may be initiated by Tribal or foreign child support programs and not only States.

Section 302.33—Services to Individuals Not Receiving Title IV–A Assistance

Section 302.33(a)(4) requires that whenever a family is no longer eligible for State's Title IV–A and Medicaid assistance, the IV–D agency must notify the family, within 5 working days of the notification of ineligibility, that IV–D services will be continued unless the family notifies the IV–D agency that it no longer wants services but instead wants to close the case. This notice must inform the family of the benefits and consequences of continuing to receive IV–D services, including the available services and the State's fees, cost recovery, and distribution policies. This notification requirement also applies when a child is no longer eligible for IV–E foster care, but only in those cases that the IV–D agency determines that such services and notice would be appropriate.

Under § 302.33(a)(6), the State has the option of providing limited services for paternity-only services in intrastate cases to any applicant who requests such services. In response to comments, we narrowed the scope of limited services to paternity-only intrastate cases, instead of allowing a wide range of limited services. Although several commenters expressed support for increasing the flexibility of services offered to applicants, the revisions are based on other comments expressing concerns about the difficulty and cost for States to implement a menu of limited services in the context of intergovernmental enforcement. Some commenters also expressed concerns about how limited enforcement services options might impact Federal reporting and the performance measures used for incentive payments.

In the preamble to the NPRM, OCSE specifically requested feedback from commenters regarding whether there are additional domestic violence safeguards that should be put in place with respect to limited services. Some commenters emphasized the need for domestic violence safeguards in this area. In response to these commenters, we added language to the final rule requiring States to include domestic violence safeguards when establishing and using paternity-only limited services procedures.

Section 302.38—Payments to the Family

Section 302.38 reinforces the requirements found in section 454(11)(B) of the Act. The provision in the rule requires that a State's IV–D plan ''shall provide that any payment required to be made under §§ 302.32 and 302.51 to a family will be made directly to the resident parent, legal guardian, caretaker relative having custody of or responsibility for the child or children, conservator representing the custodial parent and child directly with a legal and fiduciary duty, or alternate caretaker designated in a record by the custodial parent. An alternate caretaker is a nonrelative caretaker who is designated in a record by the custodial parent to take care of the children for a temporary time period. Based on comments received, we added ''judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child'' and ''alternate caretaker designated in a record by the custodial parent'' to the list of individuals to whom payments can be made. We also clarified what is meant by an alternate caretaker.

Section 302.56—Guidelines for Setting Child Support Orders

Section 302.56(a) requires each State to establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support order amounts within 1 year after completion of the State's next quadrennial review of its child support guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan. Considering public comments requesting additional time to implement revised guidelines, we added ''that commences more than 1 year after publication of the final rule'' to provide more time to do research and prepare for those States that have a quadrennial review that would initiate shortly after the issuance of this final rule.

Section 302.56(b) requires the State to have procedures for making guidelines available to all persons in the State. Based on comments, we removed the phrase ''whose duty it is to set child support award amounts'' at the end of the sentence.

The introductory paragraph for section 302.56(c) indicates the minimum requirements for child support guidelines. Paragraph (c)(1) indicates that child support guidelines must provide the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay that: (i) Takes into consideration all earnings and income of the noncustodial parent (and at the State's discretion, the custodial parent); (ii) takes into consideration the basic subsistence needs of the noncustodial parent (and at the State's discretion, the custodial parent and children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State; and (iii) if imputation of income is authorized, takes into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.

Responding to comments, we made major revisions in paragraph (c)(1). We moved the phrase ''and other evidence of ability to pay'' from paragraph (c)(4) to paragraph (c)(1) based on comments to require child support guidelines to provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay. This provision codifies the basic guidelines standard for setting order amounts, reflecting OCSE's longstanding interpretation of statutory guidelines requirements (See AT–93–04 and PIQ–00–03).[2]

[2] AT–93–04, available at *http://www.acf.hhs.gov/programs/css/resource/presumptive-guidelines-establishment-support-unreimbursed-assistance* and PIQ–00–03, available at: *http://www.acf.hhs.gov/programs/css/resource/state-iv-d-program-flexibility-low-income-obligors.*

In paragraph (c)(1)(i), based on comments, we retained ''all income and earnings'' and did not change ''all'' to ''actual'' income and earnings as we had proposed in the NPRM. Based on comments, we also added ''(and at the State's discretion, the custodial parent).''

Based on comments, we made the following revisions in paragraph (c)(1). We revised proposed paragraph (c)(4) and redesignated it as (c)(1)(ii). We added ''basic'' before subsistence needs to clarify scope. We also added ''(and at the State's discretion, the custodial parent and children),'' giving States the option of considering the custodial parent's and children's basic subsistence needs in addition to the subsistence needs of the noncustodial parent. We also granted more flexibility to States in how they will consider basic subsistence needs by adding ''who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State.'' We also removed language from the NPRM that the guidelines ''provide that any amount ordered for support be based upon available data related to the parent's actual earnings, income, assets, or other evidence of ability to pay, such as testimony that income or assets are not consistent with a noncustodial parent's current standard of living.'' We also added paragraph (c)(1)(iii) related to imputed income.

We redesignated proposed paragraph (c)(3) as (c)(2). This provision requires that State child support guidelines address how the parents will provide for the child's health care needs through private or public health care coverage and/or through cash medical support. To conform to other medical support revisions in this final rule, we replaced ''health insurance coverage'' in the NPRM with ''private or public health care coverage.'' Based on comments, we also removed ''in accordance with § 303.31 of this chapter'' that was in the NPRM because § 303.31 only pertains to IV–D cases and this provision of the rule applies to both IV–D and non-IV–D cases.

OCSE redesignated proposed paragraph (c)(5) as paragraph (c)(3) in the final rule. This paragraph prohibits the treatment of incarceration as ''voluntary unemployment'' when establishing or modifying support orders because State policies that treat incarceration as voluntary unemployment effectively block application of the Federal review and adjustment law in section 466(a)(10) of the Act. This section of the Act requires review, and if appropriate, adjustment of an order upward or downward upon a showing of a substantial change in circumstances.

This rule redesignated proposed paragraph (c)(2) as (c)(4), which requires that the guidelines be based on specific descriptive and numeric criteria and result in a computation of the support obligation. Paragraph (d) requires States to include a copy of the guidelines in the State plan. Paragraph (e) requires that each State review, and revise its guidelines, if appropriate, at least once every 4 years to ensure that their application results in the determination of appropriate child support order amounts. Responding to comments, we added a sentence that requires each State to publish on the Internet and make accessible to the public all reports of the child support guidelines reviewing body, the membership of the reviewing body, the effective date of the guidelines, and the date of the next quadrennial review.

Paragraph (f) requires States to provide for a rebuttable presumption, in any judicial or administrative proceeding for the establishment and modification of a child support order, that the amount of the order which would result from the application of the child support guidelines established under paragraph (a) is the correct amount of child support to be ordered. We made a minor technical revision to both paragraphs (f) and (g) to specify that these paragraphs apply to the establishment and modification of a child support order.

Under paragraph (g) in this rule, a written or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the child support guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the child support guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the child support order varies from the guidelines.

In response to comments, we deleted proposed paragraph (h), which would have allowed States to recognize parenting time provisions in child support orders pursuant to State guidelines or when both parents have agreed to the parenting time provisions.

In the final rule, we redesignated proposed paragraph (i) as paragraph (h) and subdivided this paragraph into paragraphs (h)(1) through (h)(3) to make it easier to read. Paragraph (h)(1) requires, as part of the review of a State's child support guidelines required under paragraph (e) of this section, that a State must consider economic data on the cost of raising children, labor market data (such as unemployment rates, employment rates, hours worked, and earnings) by occupation and skill-level for the State and local job markets, the impact of guideline policies and amounts on custodial and noncustodial parents who have family incomes below 200 percent of the Federal poverty level, and factors that influence employment rates among noncustodial parents and compliance with current support orders. Based on comments, we added all of the factors to the existing requirement to consider the economic data on the cost of raising children.

Paragraph (h)(2) requires the State to analyze case data, gathered through sampling or other methods, on the application of and deviations from the child support guidelines, as well as the rates of default and imputed child support orders and orders determined using the low-income adjustment required under paragraph (c)(1)(ii) of this section. The analysis must also include a comparison of payments on child support orders by case characteristics, including whether the order was entered by default, based on imputed income, or determined using the low-income adjustment required under paragraph (c)(1)(ii). The analysis of the data must be used in the State's review of the child support guidelines to ensure that deviations from the guidelines are limited and guideline amounts are appropriate based on criteria established by the State under paragraph (g). Based on comments, we added ''as well as the rates of default and imputed child support orders and orders determined using the low-income adjustment required under paragraph (c)(1)(ii) of this section.'' We also added ''and guideline amounts are appropriate based on criteria established by the State under paragraph (g).''

Considering public comments, we added the provisions in paragraph (h)(3) that the State's review of the child support guidelines must provide a meaningful opportunity for public input, including input from low-income custodial and noncustodial parents and their representatives. The State must also obtain the views and advice of the State child support agency funded under title IV–D.

Finally, OCSE made a technical change in the title and throughout this

section to replace ''award'' with ''order.''

Section 302.70—Required State Laws

Section 302.70(d)(2) provides the basis for granting an exemption from any of the State law requirements discussed in paragraph (a) of this section and extends the exemption period from 3 to 5 years.

In this section, OCSE maintains the authority to review and to revoke a State's exemption at any time [paragraphs (d)(2) and (3)]. States may also request an extension of an exemption 90 days prior to the end of the exemption period [paragraph (d)(4)].

Section 302.76—Job Services

This proposed provision received overwhelming support from states, Members of Congress, and the public, but it also was opposed by some Members of Congress who did not think the provision should be included in the final rule. While we appreciate the support the commenters expressed, we think allowing for federal IV–D reimbursement for job services needs further study and would be ripe for implementation at a later time. Therefore, we are not proceeding with finalizing the proposed provisions at §§ 302.76, 303.6(c)(5), and 304.20(b)(viii).

Section 303.3—Location of Noncustodial Parents in IV–D Cases

Section 303.3 requires IV–D agencies to attempt to locate all noncustodial parents or sources of income and/or assets where that information is necessary. Paragraph (b)(1) requires States to use appropriate location sources such as the Federal PLS; interstate location networks; local officials and employees administering public assistance, general assistance, medical assistance, Supplemental Nutrition Assistance Program (SNAP), and social services (whether such individuals are employed by the State or a political subdivision); relatives and friends of the noncustodial parent; current or past employers; electronic communications and Internet service providers; utility companies; the U.S. Postal Service; financial institutions; unions; corrections institutions; fraternal organizations; police, parole, and probation records if appropriate; and State agencies and departments, as authorized by State law, including those departments which maintain records of public assistance, wages and employment, unemployment insurance, income taxation, driver's licenses, vehicle registration, and criminal records and other sources.

In response to comments, we made the following technical revisions to the list of locate sources in paragraph (b)(1): Changing ''food stamps'' to Supplemental Nutrition Assistance Program (SNAP); adding ''utility companies;'' changing ''the local telephone company'' to ''electronic communications and Internet service providers ;'' and changing ''financial references'' to ''financial institutions.''

Section 303.4—Establishment of Support Obligations

The NPRM did not include any revisions to § 303.4; however, because we had numerous comments related to the general applicability of State guidelines, we moved the requirements specifically related to State IV–D agencies to § 303.4. We also had many comments related to the IV–D agency responsibilities in determining the noncustodial parent's income and imputation of income when establishing child support orders. Following this line of comments, we made revisions to § 303.4 that require State IV–D agencies to implement and use procedures in IV–D cases related to applying the guidelines regulation. To address several comments received in response to proposed changes to § 302.56 regarding establishment of support orders and imputation of income, we revised this section to address requirements for the State IV–D agencies when establishing support orders in IV–D cases that would not be applicable to non-IV–D cases.

In § 303.4(b), States are required to use appropriate State statutes, procedures, and legal processes in establishing and modifying support obligation in accordance with § 302.56 of this chapter. We added ''procedures,'' as well as ''and modifying,'' to the former paragraph. We also replaced ''pursuant to'' with ''in accordance with'' in this same paragraph.

We also added paragraphs (b)(1) through (b)(4) to provide additional requirements that State IV–D agencies must meet in establishing and modifying support obligations. Paragraph (b)(1) requires States to take reasonable steps to develop a sufficient factual basis for the support obligation, through such means as investigations, case conferencing, interviews with both parties, appear and disclose procedures, parent questionnaires, testimony, and electronic data sources. Paragraph (b)(2) requires States to gather information regarding the earnings and income of the noncustodial parent and, when earning and income information is unavailable in a case, gather available information about the specific circumstances of the noncustodial parent, including such factors as listed under § 302.56(c)(iii).

Additionally, paragraph (b)(3) requires basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income is not available or insufficient to use as the measure of the noncustodial parent's ability to pay, then the support obligation or recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed under § 302.56(c)(iii).

Finally, paragraph (b)(4) requires documenting the factual basis for the support obligation or the recommended support obligation in the case record.

§ 303.6—Enforcement of Support Obligations

In the final rule, we amended § 303.6(c)(4) to require States to establish guidelines for the use of civil contempt citations in IV–D cases. The guidelines must include requirements that the IV–D agency must screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order. The IV–D agency must also provide the court with such information regarding the noncustodial parent's ability to pay, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions. Finally, the IV–D agency must provide clear notice to the noncustodial parent that ability to pay constitutes the critical question in the civil contempt action.

We amended § 303.6 to remove ''and'' at the end of paragraph (c)(3) and redesignated paragraph (c)(4) as paragraph (c)(5). We made significant revisions to the NPRM for the final rule based on comments. As a result of comments, we revised the proposed new paragraph (c)(4) to require that State IV–D agencies must establish guidelines for the use of civil contempt citations in IV–D cases.

Based on these comments, we deleted the entire proposed paragraph (c)(4) that would have required procedures that would ensure that enforcement activity in civil contempt proceedings takes into consideration the subsistence needs of the noncustodial parent, and ensure that a purge amount the noncustodial parent must pay in order to avoid incarceration takes into consideration actual earnings and income and the subsistence needs of the noncustodial parent. We also

deleted that a purge amount must be based upon a written evidentiary finding that the noncustodial parent has the actual means to pay the amount from his or her current income or assets.

Instead we added that IV–D agency must provide the court with such information regarding the noncustodial parent's ability to pay, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions. Finally, the IV–D agency must provide clear notice to the noncustodial parent that ability to pay constitutes the critical question in the civil contempt action. The Response to Comments section for *Civil Contempt Proceedings [§ 303.6(c)(4)]* provides further details on the reasons for these revisions.

Section 303.8—Review and Adjustment of Child Support Orders

We redesignated former § 303.8(b)(2) through (5) as (b)(3) through (6). A new paragraph (b)(2) allows the IV–D agency to elect in its State plan the option to initiate the review of a child support order, after learning that a noncustodial parent will be incarcerated for more than 180 calendar days, without the need for a specific request, and upon notice to both parents, review and, if appropriate, adjust the order, in accordance with paragraph (b)(1)(i) of this section. Based on comments, we revised the proposed regulatory language ''after being notified'' to ''after learning'' and increased the number of days from 90 to 180 days. We also added the word ''calendar'' after ''180'' to distinguish between calendar and business days.

In addition, we redesignated former paragraph (b)(6) which requires notice ''not less than once every three years,'' to paragraphs (b)(7) and (b)(7)(i). We added a new paragraph (b)(7)(ii) that indicates if a State has not elected to initiate review without the need for a specific request under paragraph (b)(2) of this section, within 15 business days of when the IV–D agency learns that the noncustodial parent will be incarcerated for more than 180 calendar days, the IV–D agency must send a notice to both parents informing them of the right to request a review and, if appropriate, adjust the order. The notice must specify, at minimum, the place and manner in which the parents must make the request for review.

Based on comments, we revised the proposed language in paragraph (b)(2) to: Add that the IV–D agency must send the notice within 15 business days of learning that the noncustodial parent will be incarcerated, add an incarceration timeframe of more than 180 calendar days to be consistent with paragraph (b)(2); and replace the phrase ''upon request'' with ''if appropriate.'' We also revised the proposed provision to use the phrase ''both parents'' instead of ''incarcerated noncustodial parent and the custodial parent'' for consistency with paragraphs (b)(7)(i) and (ii). In response to comments, we added a sentence at the end of paragraph (b)(7)(ii), based on comments, that recognizes existing comparable State law or rule that modifies child support obligations upon incarceration of the noncustodial parent.

Based on comments, we added a sentence to paragraph (c) to address incarceration as a significant change in circumstance when determining the standard for adequate grounds for petitioning review and adjustment of a child support order.

Finally, OCSE amends § 303.8(d) to make conforming changes with our revisions in § 303.31 to remove a previous requirement that, for purposes of review or adjustment of a child support order, a child's eligibility for Medicaid could not be considered sufficient to meet the child's health care needs. The final rule indicates that the need to provide for the child's health care needs in an order, through health insurance or other means, must be an adequate basis under State law to initiate an adjustment of an order, regardless of whether an adjustment in the amount of child support is necessary.

Section 303.11—Case Closure Criteria

Section 303.11(b) adds language to clarify that a IV–D agency is not required to close a case that is otherwise eligible to be closed under that section. Case closure regulations in paragraph (b) are designed to give a State the option to close cases, if certain conditions are met, and to provide a State flexibility to manage its caseload. If a State elects to close a case under one of these criteria, the State must maintain supporting documentation for its decision in the case record.

Paragraph (b)(1) indicates that a case may be closed when there is no longer a current support order and arrearages are under $500 or unenforceable under State law. New paragraph (b)(2) adds a case closure criterion to permit a State to close a case where there is no current support order and all arrearages are owed to the State.

Paragraph (b)(3) adds a criterion to allow the IV–D agency to close an arrearages-only case against a noncustodial parent who is entering or has entered long-term care placement, and whose children have reached the age of majority if the noncustodial parent has no income or assets available above the subsistence level that could be levied or attached for support.

Paragraph (b)(4) permits closure of a case when the noncustodial parent or alleged father is deceased and no further action, including a levy against the estate, can be taken. Paragraph (b)(5) adds a criterion to allow a State to close a case when the noncustodial parent is either living with the minor children as the primary caregiver or is a part of an intact two-parent household, and the IV–D agency has determined that services either are not appropriate or are no longer appropriate. We added ''or no longer appropriate'' to the proposed language as a technical revision.

Paragraph (b)(6) indicates that a case may be closed when paternity cannot be established because: (i) The child is at least 18 years old and an action to establish paternity is barred by a statute of limitations that meets the requirements of § 302.70(a)(5) of this chapter; (ii) a genetic test or a court or an administrative process has excluded the alleged father and no other alleged father can be identified; (iii) in accordance with § 303.5(b), the IV–D agency has determined that it would not be in the best interests of the child to establish paternity in a case involving incest or rape, or in any case where legal proceedings for adoption are pending; or (iv) the identity of the biological father is unknown and cannot be identified after diligent efforts, including at least one interview by the IV–D agency with the recipient of services. Minor technical changes were made to this paragraph.

Paragraph (b)(7) allows case closure when the noncustodial parent's location is unknown, and the State has made diligent efforts using multiple sources, in accordance with § 303.3, all of which have been unsuccessful, to locate the noncustodial parent: Over a 2-year period when there is sufficient information to initiate an automated locate effort; over a 6-month period when there is not sufficient information to initiate an automated locate effort; or after a 1-year period when there is sufficient information to initiate an automated locate effort, but locate interfaces are unable to verify a Social Security Number.

Paragraph (b)(8) states that case closure is permitted when a IV–D agency has determined that throughout the duration of the child's minority (or after the child has reached the age of majority), the noncustodial parent cannot pay support and shows no

evidence of support potential because the parent has been institutionalized in a psychiatric facility, is incarcerated, or has a medically-verified total and permanent disability. The State must also determine that the noncustodial parent has no income or assets available above the subsistence level that could be levied or attached for support. Based on comments, we deleted from the NPRM ''or has had multiple referrals for services by the State over a 5-year period which have been unsuccessful.''

Section 303.11(b)(9) adds a new case closure criterion to permit a State to close a case when a noncustodial parent's sole income is (i) from Supplemental Security Income (SSI) payments, or (ii) from both SSI payments and Social Security Disability Insurance (SSDI) benefits under title II of the Act. In paragraph (b)(9)(ii), we added ''payments'' after ''SSI'' and, in response to comments, clarified that SSDI is the Title II benefit. Also, in paragraph (b)(9)(iii), we deleted the phrase ''or other needs-based benefits'' because these benefits may have limited duration and do not reflect a determination of an inability to work. In the absence of a disability that impairs the ability to work, the ability of the noncustodial parent to work and earn income may also fluctuate with time. Thus, it is important for the child support agencies to take efforts on these cases to remove the barriers to nonpayment and build the capacity of the noncustodial parents to pay by using tools such as referring noncustodial parents for employment services provided by another State program or community-based organization.

Paragraph (b)(10) allows case closure when the noncustodial parent is a citizen of, and lives in, a foreign country, does not work for the Federal government or a company with headquarters or offices in the United States, and has no reachable domestic income or assets; and there is no Federal or State reciprocity with the country. The final rule makes a technical change in this paragraph to clarify that reciprocity with a country could be through either a Federal or State treaty or reciprocal agreement. We added ''treaty or'' to the proposed language as a technical change.

Paragraph (b)(11) permits case closure if the IV–D agency has provided location-only services as requested under § 302.35(c)(3) of this chapter.

Paragraph (b)(12) indicates that a case may be closed where the non-IV–A recipient of services requests closure and there is no assignment to the State of medical support under 42 CFR 433.146 or of arrearages which accrued under a support order. Paragraph (b)(13) adds a criterion to allow the State to close a non-IV–A case after completion of a paternity-only limited service under § 302.33(a)(6) without providing the notice in accordance with § 303.11(d)(4).

Paragraph (b)(14) states that case closure is allowed if there has been a finding by the IV–D agency, or at the option of the State, by the responsible State agency of good cause or other exceptions to cooperation with the IV–D agency and the State or local assistance program, such as IV–A, IV–E, SNAP, and Medicaid, which has determined that support enforcement may not proceed without risk of harm to the child or caretaker relative. We added ''IV–D agency, or at the option of the State, by the'' as a technical change because this tracks the language of the statute. In response to comments, we also added SNAP to the list of assistance programs referenced in this paragraph.

Paragraph (b)(15) allows case closure in a non-IV–A case receiving services under § 302.33(a)(1)(i) or (iii) of this chapter, or under § 302.33(a)(1)(ii) when cooperation with the IV–D agency is not required of the recipient of services, when the IV–D agency is unable to contact the recipient of services despite a good faith effort to contact the recipient through at least two different methods.

Paragraph (b)(16) also permits closure when the IV–D agency documents the circumstances of the recipient's noncooperation and an action by the recipient is essential for the next step in providing IV–D services in a non-IV–A case receiving services under § 302.33(a)(1)(i) or (iii) of this chapter, or under § 302.33(a)(1)(ii) when cooperation with the IV–D agency is not required of the recipient of services.

Paragraphs (b)(17) through (b)(19) identify the case closure criteria when the responding State IV–D agency may close a case. Paragraph (b)(17) allows the responding agency to close a case when it documents failure by the initiating agency to take an action that is essential for the next step in providing services. We revised ''IV–D'' agency from the NPRM to ''responding'' agency to make the language more consistent with paragraphs (b)(18) and (b)(19). We also made a small editorial change for plain English to this paragraph.

Paragraph (b)(18) also allows the responding IV–D agency to close a case when the initiating agency has notified the responding State that the initiating State has closed its case under § 303.7(c)(11).

Paragraph (b)(19) indicates that the responding State may close a case if the initiating agency has notified the responding State that its intergovernmental services are no longer needed.

Paragraph (b)(20) adds a new criterion to provide a State with flexibility to close a case referred inappropriately by the IV–A, IV–E, SNAP, and Medicaid programs. In response to comments, SNAP is added to the list of referring agencies.

Paragraph (b)(21) adds a criterion to permit a State flexibility to close a case if the State has transferred it to a Tribal IV–D agency, regardless of whether there is a State assignment of arrears, based on the following procedures. First, before transferring the case to a Tribal IV–D agency and closing the State's case, either the recipient of services requested the State to transfer its case and close the State's case or the IV–D agency notified the recipient of its intent to transfer the case to the Tribal IV–D agency and the recipient did not respond to the notice within 60 calendar days of the date of the notice. Next, the State IV–D agency completely and fully transferred and closed the case. Third, the State IV–D agency notified the recipient that the case has been transferred to the Tribal IV–D agency and closed. Finally, paragraph (b)(21)(iv) indicates that if the Tribal IV–D agency has a State-Tribal agreement approved by OCSE to transfer and close case, this agreement must include a provision for obtaining the consent from the recipient of services to transfer and close the case.

Responding to comments, we added ''including a case with arrears assigned to the State'' to the introductory sentence of paragraph (b)(21). We also clarified that the case transfer process includes transfer and closure. As a technical change, we added ''State'' before IV–D agency throughout this paragraph to clarify which IV–D agency had the responsibility. In response to comments, the rule added paragraph (b)(21)(iv) related to allowing a permissible case transfer in accordance with an OCSE-approved State-Tribal agreement that includes consent from the recipient of services.

Paragraph (c) adds a criterion to require a State IV–D agency to close a Medicaid reimbursement referral based solely upon health care services provided through an Indian Health Service Program, including through the Purchased/Referred Care program. Unlike the case closure criteria under paragraph (b), which are permissive, the case closure criterion under paragraph (c) is mandatory. In the final rule, we

replaced ''contract health services'' with ''the Purchased/Referred Care program'' because the Indian Health Service (IHS) program was formally renamed.

In this joint rule, we also amend 42 CFR 433.152(b)(1), consistent with IHS policy, to require that State Medicaid agencies not refer cases for medical support enforcement services when the Medicaid referral is based solely upon health care services, including the Purchased/Referred Care program, provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12) to a child who is eligible for health care services from the IHS. This policy remedies the current inequity of holding noncustodial parents personally liable for services provided through the Indian Health Programs to IHS-eligible families that qualify for Medicaid. The revision to 42 CFR 433.152(b)(1) also eliminates reference to 45 CFR part 306, which was repealed in 1996.

In the final rule, paragraphs (d)(1) through (3) had minor stylistic edits from the NPRM. Paragraph (d)(1) requires that a State must notify the recipient of services in writing 60 calendar days prior to closing a case of the State's intent to close the case meeting the criteria in paragraphs (b)(1) through (10) and (b)(15) through (16) of this section. Paragraph (d)(2) adds provisions that in an intergovernmental case meeting the criteria for closure under paragraph (b)(17), the responding State must notify the initiating agency 60 calendar days prior to closing the case of the State's intent to close the case.

Paragraph (d)(3) states that the case must be kept open if the recipient of services or the initiating agency supplies information, in response to the notice provided under paragraph (d)(1) or (2), which could lead to paternity or support being established or an order being enforced, or, in the instance of paragraph (b)(15) of this section, if contact is reestablished with the recipient of services.

Based on comments, we removed proposed paragraphs (d)(4) and (5) regarding the notice requirements for inappropriate referrals under paragraphs (b)(20) and (c).

Section 303.11(d)(4), which was proposed as (d)(6) in the NPRM, requires that for a case to be closed in accordance with paragraph (b)(13), the State must notify the recipient of services, in writing, 60 calendar days prior to closure of the case of the State's intent to close the case. This paragraph also specifies the notice content and lists steps the recipient must take if the recipient reapplies for child support services. Responding to comments, we revised the proposed language to require the notice prior to closure rather than after the limited services case has been closed. We also removed references to proposed paragraph (d)(5) and changed the number of days to 60 calendar days from 30 calendar days.

Section 303.11(d)(5) permits a former recipient of services to re-open a closed IV–D case by reapplying for IV–D services.

Finally, paragraph (e) requires a IV–D agency to retain all records for cases closed for a minimum of 3 years.

Section 303.31—Securing and Enforcing Medical Support Obligations

In this final rule OCSE amends § 303.31 to provide a State with flexibility to permit parents to meet their medical support obligations by providing health care coverage or payments for medical expenses that are reasonable in cost and best meet the health care needs of the child. In paragraph (a)(2), we clarify that health care coverage includes public and private insurance.

In paragraph (a)(3), we delete the requirement that the cost of health insurance be measured based on the marginal cost of adding the child to the policy. Therefore, this change gives a State additional flexibility to define reasonable medical support obligations.

Next, § 303.31(b) requires the State IV–D agency to petition the court or administrative authority to include health care coverage that is accessible to the parent and can be obtained for the child at a reasonable cost. OCSE removes the limitation in paragraphs (b)(1) and (2), (3)(i), and (4) restricting this to private health insurance to allow a State to take advantage of both private and public health care coverage options to meet children's health care needs, and emphasize the role of State child support guidelines in setting child support orders that address how parents will share the costs associated with covering their child. We also made an editorial change in paragraph (b)(1)(ii).

Section 303.72—Requests for Collection of Past-Due Support by Federal Tax Refund Offset

To be consistent with Department of Treasury regulations at 31 CFR 285.3(c)(6), the rule amends § 303.72(d)(1) to require the initiating State to notify other States only if it receives an offset amount. This change amends the former § 303.72(d)(1) by eliminating the phrase, ''when it submits an interstate case for offset.''

Section 303.100—Procedures for Income Withholding

We are adding a new paragraph (h) in section 303.100(e) to require use of the Office of Management and Budget (OMB) approved form to implement withholding for all child support orders regardless of whether the case is IV–D or non-IV–D. Section 303.100(e) clarifies that ''the required OMB-approved Income Withholding for Support form'' must be used when sending notice to employers to initiate income withholding for child support. Finally, the rule adds a new paragraph (i), which explicitly states that income withholding payments on non-IV–D cases must be directed through the State Disbursement Unit.

Section 304.20—Availability and Rate of Federal Financial Participation

In the final rule, we are amending § 304.20 to increase the flexibility of State IV–D agencies to receive Federal reimbursement for cost-effective practices that increase the effectiveness of standard enforcement activities. We amend § 304.20(a)(1) to clarify that Federal financial participation (FFP) is available for expenditures for child support services and activities that are necessary and reasonable to carry out the State title IV–D plan. This change reflects 45 CFR part 75, ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,'' subpart E—Cost Principles, which all State child support agencies must use in determining the allowable costs of work performed under Federal grants.

In paragraph (b), we added the phrase ''including but not limited to'' to make clear that FFP is available for, but not limited to, the activities listed in the regulation, consistent with OMB cost principles that allow for expenditures that are necessary and reasonable and can be attributed to the child support enforcement program.

Paragraphs (b)(1)(viii) and (ix) address the establishment of agreements with other agencies administering the titles IV–D, IV–E, XIX (Medicaid), and XXI (Children's Health Insurance Program (CHIP)) programs, to recognize activities related to cross-program coordination, client referrals, and data sharing when authorized by law. The provisions also include minor technical changes and specify the criteria States may include in these agreements. In paragraphs (b)(1)(viii)(A) and (b)(1)(ix)(A), we are adding ''and from'' before IV–D agency to provide States more flexibility to refer a case to and from the IV–D agency

when working with these Federal programs.

For agreements with IV–A and IV–E agencies under paragraph (b)(1)(viii), we added paragraphs (b)(1)(viii)(D) and (E) to the list of criteria to include procedures to coordinate services and agreements to exchange data as authorized by law, respectively. The rule also adds these two new criteria under paragraph (b)(1)(ix) for agreements with State agencies administering Medicaid or CHIP programs as paragraphs (b)(1)(ix)(B) and (C).

In response to comments, under paragraph (b)(1)(ix), we added ''appropriate'' before criteria to provide States greater flexibility in which criteria or activities to include in their agreements with Medicaid or CHIP agencies. Also based on comments, we retained the provision regarding the transfer of assigned medical support collections to the Medicaid agency now at paragraph (b)(1)(ix)(D), and formerly at paragraph (b)(1)(ix)(C).

Section 304.20(b)(2) clarifies that FFP is available for services and activities for the establishment of paternity including, but not limited to the specific activities listed in paragraph (b)(2). The rule adds educational and outreach activities to § 304.20(b)(2)(vii) to explain that FFP is available for IV–D agencies to educate the public and to develop and disseminate information on voluntary paternity establishment.

In accordance with the requirement in section 454(23) of the Act to regularly and frequently publicize the availability of child support enforcement services, including voluntary paternity services, paragraph (b)(3) clarifies that FFP is available for services and activities for the establishment and enforcement of support obligations including, but not limited to the specific activities listed in paragraph (b)(3). The rule adds allowable services and activities under paragraph (b)(3) related to the establishment and enforcement of support obligations. A new paragraph (b)(3)(v) allows FFP for bus fare or other minor transportation expenses to allow participation by parents in child support proceedings and related activities such as genetic testing appointments. We redesignated the former § 304.20(b)(3)(v) as § 304.20(b)(3)(vii).

In addition, new paragraph (b)(3)(vi) recognizes that FFP is available to increase *pro se* access to adjudicative and alternative dispute resolution processes in IV–D cases related to the provision of child support services. We added a clarification in the final rule that this paragraph only applies when the expenses are related to the provision of child support services.

In response to comments, we deleted the proposed paragraph (b)(3)(vii), which would have specifically allowed States to claim FFP for ''*de minimis*'' costs for including parenting time provisions in child support orders. (For further details, see Comment/Response 9 in § 304.20.)

We also made minor editorial changes in paragraph (b)(5)(v) by deleting '';'' and adding ''.'' at the end of the paragraph, and in paragraphs (b)(9) and proposed (b)(11) by deleting ''; and'' and adding ''.'' at the end of the sentence.

Finally, we added a new paragraph (b)(12) to allow FFP for the educational and outreach activities intended to inform the public, parents and family members, and young people who are not yet parents about the Child Support Enforcement program, responsible parenting and co-parenting, family budgeting, and other financial consequences of raising children when the parents are not married to each other.

Section 304.23—Expenditures for Which Federal Financial Participation Is Not Available

Section 304.23(a) through (c) of the rule indicates that Federal financial participation at the applicable matching rate is not available for: (a) Activities related to administering titles I, IV–A, IV–B, IV–E, X, XIV, XVI, XIX, XX, or XXI of the Act or 7 U.S.C. Chapter 51; (b) purchased support enforcement services which are not secured in accordance with § 304.22; and (c) construction and major renovations.

For § 304.23(d), we added ''State and county employees and court personnel'' as a technical clarification that Federal financial participation is not available for the education and training of personnel except direct costs of short-term training provided to IV–D agency staff in accordance with § 304.20(b)(2)(vii) and § 304.21. This provision does not apply to other types of education and training activities (such as those provided to parents that are addressed in other rules) in this part. We also made a minor editorial change from the proposed language.

The final rule also clarifies that FFP is not available for any expenditures which have been reimbursed by fees collected as required by this chapter (§ 304.23(e)); any costs of those caseworkers described in § 303.20(e) of this chapter (§ 304.23(f)); any expenditures made to carry out an agreement under § 303.15 of this chapter (§ 304.23(g)); and the costs of counsel for indigent defendants in IV–D actions (§ 304.23(h)).

Paragraph (i) indicates that FFP is prohibited for any expenditures for the jailing of parents in child support enforcement cases. In the NPRM, OCSE inadvertently removed this restriction; however, we are correcting this error in the final rule. As a result, proposed paragraph (i), which addresses that costs of *guardians ad litem* are prohibited in IV–D actions, was redesignated as paragraph (j).

Section 307.11—Functional Requirements for Computerized Support Enforcement Systems in Operation by October 1, 2000

In the final rule, we amend § 307.11(c)(3)(i) to include provisions requiring States to build automatic processes designed to preclude garnishing financial accounts of noncustodial parents who are recipients of Supplemental Security Income (SSI) payments or individuals concurrently receiving both SSI and Social Security Disability Insurance (SSDI) benefits under title II of the Act. We also amended § 307.11(c)(3)(ii) to provide that funds must be returned to a noncustodial parent's financial account, within 5 business days after the agency determines that SSI payments or concurrent SSI payments and SSDI benefits under title II of the Act, have been inappropriately garnished. Responding to comments, we increased the timeframe from 2 days in the NPRM to 5 business days.

Topic 2: Updates To Account for Advances in Technology (§§ 301.1, 301.13, 302.33, 302.34, 302.50, 302.65, 302.70, 302.85, 303.2, 303.5, 303.11, 303.31, 304.21, 304.40, 305.64, 305.66, and 307.5)

In this final rule, the revisions remove barriers to using electronic communication and document management. Throughout the regulation, where appropriate, we removed the words ''written'' and ''in writing'' and insert ''record'' or ''in a record.'' These simple changes will allow OCSE, States, and others the flexibility to use cost-saving and efficient technologies, such as email or electronic document storage, wherever possible. The revisions to the regulation do not require a State to use electronic records for the specified purpose, but instead provide a State with the option to use electronic records, in accordance with State laws and procedures.

The definition of ''record'' used in this final regulation is taken from the Uniform Interstate Family Support Act (UIFSA) 2008, section 102(20). The

UIFSA drafters adopted the definition from another uniform law, the Uniform Electronic Transactions Act (1999). '''Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.'' The Uniform Electronic Transactions Act describes this definition further:

> This is a standard definition designed to embrace all means of communicating or storing information except human memory. It includes any method for storing or communicating information, including ''writings.'' A record need not be indestructible or permanent, but the term does not include oral or other communications which are not stored or preserved by some means. Information that has not been retained other than through human memory does not qualify as a record. As in the case of the terms ''writing'' or ''written,'' the term ''record'' does not establish the purposes, permitted uses or legal effect which a record may have under any particular provision of substantive law.[3]

Substituting the phrase ''in a record'' for ''in writing'' allows more flexibility for electronic options by preventing a record from being automatically denied legal effect or enforceability just because it is in an electronic format. In addition, the use of the word ''record'' is designed to be technologically neutral; the word equates an electronic signature with a hand signature and an electronic document (whether scanned or created electronically) with a paper document. It neither means that electronic documents or electronic signatures will be required, nor will it affect any Federal requirements for what documents must contain to be valid or enforceable, such as a signature.

We are aware that not everyone has access to the latest technology. For that reason, wherever individual members of the public are involved, we generally are not removing requirements that the information is provided in a written, paper format [*i.e.,* pre-offset notices to obligors for Federal tax refund offset (§ 303.72(e)(1)]. In addition, we are not changing regulatory language where written formats are required by statute.

Section 301.1—General Definitions

This final rule amends the definition of ''Procedures'' in § 301.1 by changing the phrase ''written set of instructions'' to ''instructions in a record.'' This will allow instructions set forth under the State's child support plan to be made in an electronic form that is retrievable and perceivable within the meaning of the Uniform Electronic Transactions Act, and is not limited to a written format.

In addition, we are inserting the definition for the term ''record'' in this section. The use of the term ''record'' is broader than the term ''written'' and encompasses different ways of storing information, including, for example, in a written or an electronic document.

Section 301.13—Approval of State Plans and Amendments

In the first sentence of the introductory paragraph of § 301.13, we replace the words ''written documents'' with the word ''records.'' The intent of this change is to allow for electronic submission, transmission, and storage of the State child support plan. When a State submits a new State child support plan or plan amendment(s) electronically, it must ensure electronic signature(s) accompany the document(s).

In paragraphs (e) and (f) of this section, ''Prompt approval of the State plan'' and ''Prompt approval of plan amendments,'' respectively, we change the words ''a written agreement'' in both provisions to ''an agreement, which is reflected in a record.'' These changes will enable OCSE regional program offices to secure from IV–D agencies agreements to extend an approval deadline for either a State plan or State plan amendment(s) in an electronic record format. In addition, we are making a technical change to paragraph (f) to change ''Regional Commissioner'' to ''Regional Office'' for consistency with other references to the ''Regional Office'' in this section.

Section 302.33—Services to Individuals Not Receiving Title IV–A Assistance

In § 302.33(d)(2), we change the phrase ''written methodology'' to ''methodology, which is reflected in a record.'' This change will afford a State record-keeping flexibility in maintaining the methodology developed for recovering standardized costs.

Section 302.34—Cooperative Arrangements

The first sentence under § 302.34 requires a State to enter into written agreements for cooperative arrangements under § 303.107 with appropriate courts, law enforcement officials, Indian tribes, or tribal organizations. The rule edits the phrase ''written agreements'' to read ''agreements, which are reflected in a record.'' This will ensure that any cooperative arrangements entered into by the IV–D agency can be maintained in a manner that is not limited to a written format. This amendment does not change any of the requirements for the document to be legally effective or enforceable, such as a signature.

Section 302.50—Assignment of Rights to Support

In this final rule, we replace the word ''writing'' with the term ''a record'' in § 302.50(b)(2) so the State has greater flexibility in determining the format of the obligation amount, when there is no court or administrative order, and such amount is based on other legal process established under State law in accordance with State guidelines procedures.

Section 302.65—Withholding of Unemployment Compensation

This rule amends § 302.65(b) by changing the phrase ''a written agreement'' to ''an agreement, which is reflected in a record.'' Additionally, in paragraph (c)(3), we replaced the words ''written criteria'' with ''criteria, which are reflected in a record.'' These changes will establish that the agreements States develop with State workforce agencies (SWAs) and the criteria for selecting cases in which to pursue withholding of unemployment compensation are not limited to written agreements or written criteria. Again, these amendments do not impact any of the requirements for the documents to be legally effective or enforceable, such as a signature.

Section 302.70—Required State Laws

Section 302.70(a)(5) describes the procedures for paternity establishment. In the final rule, paragraph (a)(5)(v) discusses requirements for objecting to genetic testing results and states that if no objection is made, a report of the test results, which is reflected in a record, is admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. We are changing the phrase ''a written report of the test results'' to ''a report of the test results, which is reflected in a record'' to provide greater flexibility and efficiency in admitting evidence of paternity. Please note that in this same paragraph, we are not eliminating the phrase ''in writing'' in the requirement regarding the notice to parents about the consequences of acknowledging paternity, paragraph (a)(5)(iii), and the requirement that any objection to genetic testing results must be made in writing within a specified number of days before any hearing at which such results may be introduced into evidence, paragraph (a)(5)(v). In these instances, the phrase ''in writing'' is statutorily prescribed, according to

[3] See comments to the Uniform Electronic Transactions Act (1999), section 2, Definitions, available at: *http://www.uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act* (quoting ABA Report on Use of the Term ''Record,'' October 1, 1996).

sections 466(a)(5)(C)(i) and 466(a)(5)(F)(ii) of the Act, respectively.

Section 302.85—Mandatory Computerized Support Enforcement System

This section describes the basis for OCSE to grant State waivers in regard to the mandatory computerized support enforcement system. Section 302.85(b)(2)(ii) requires the State to provide assurances, which are reflected in a record, that steps will be taken to otherwise improve the State's IV–D program. This change provides a State the option of communicating with OCSE electronically, rather than only in writing, when providing the required assurances under this provision.

Section 303.2—Establishment of Cases and Maintenance of Case Records

In this rule, § 303.2(a)(2), requires the State IV–D agency to send an application to an individual within no more than 5 working days of a request received by telephone or in a record. We are replacing the phrase ''a written or telephone request'' with ''a request received by telephone or in a record,'' in order to allow for any requests for applications that are received by telephone or transmitted electronically, for example, by email or text message. In response to comments, we also changed the word ''made'' to ''received'' to clarify when the 5 working day timeframe begins.

Under paragraph (a)(3), the rule changes the requirements for applications for IV–D services, to define an application as a record provided by the State which is signed, electronically or otherwise, by the individual applying for IV–D services. We are lifting the restriction that applications only be in a written or paper format, as well as allowing for electronic signature, by inserting the phrase ''electronically or otherwise'' after the word ''signature.'' The acceptance of electronic signature is in accordance with PIQ 09–02,[4] which allows States to use electronic signatures on applications, as long as it is allowable under State law. As noted in PIQ 09–02, the appropriateness of the use of electronic signatures must be carefully determined by States. In making this determination, States should consider the reliability of electronic signature technology and the risk of fraud and abuse, among other factors.

[4] PIQ–09–02 is available at: *http://www.acf.hhs.gov/programs/css/resource/use-of-electronic-signatures-on-applications-for-iv-d-services.*

Section 303.5—Establishment of Paternity

Section 303.5(g)(6) requires the State to provide training, guidance, and instructions, which are reflected in a record, regarding voluntary acknowledgment of paternity to hospitals, birth record agencies, and other entities that participate in the State's voluntary acknowledgment program. The rule changes the phrase ''written instructions'' to ''instructions, which are reflected in a record'' to allow a State the flexibility to provide program instructions in electronic formats, in addition to, or in place of, written instructions.

Section 303.11—Case Closure Criteria

Paragraph (d) describes the requirements for case closure notification and case reopening. Paragraph (d)(1) indicates that for cases meeting the case closure requirements in paragraphs (b)(1) through (10) and (b)(15) and (16) of this section, the State must notify service recipients in writing 60 calendar days prior to closure of the cases of the State's intent to close a case.

In order to allow for greater efficiency and flexibility, paragraph (d)(2) allows electronic notification in the instance of intergovernmental IV–D case closure when the responding agency is communicating with the initiating agency.

Paragraph (b)(4) states that for cases to be closed in accordance with paragraph (b)(13), the State must notify the recipient of services, in writing, 60 calendar days prior to closure of the case of the State's intent to close the case. In response to comments, we added the phrase ''in writing'' to clarify how the notices should be sent to the recipient.

We are not changing the State's ''written'' notification requirements to the recipients of services because of our general approach not to remove requirements to provide formal notices for all applicants and recipients of services in writing. However, as discussed in response to comments under § 303.11, *Case Closure Criteria* section in Topic I of this rule, we added paragraph (d)(6) for notices required under paragraphs (d)(1) and (4), if the recipient of services specifically authorizes consent for electronic notifications, the IV–D agency may elect to notify the recipient of services electronically of the State's intent to close the case. The IV–D agency is required to maintain documentation of the recipient's consent in the case record.

Section 303.31—Securing and Enforcing Medical Support Obligations

We amend the introductory language in § 303.31(b)(3) by changing the phrase ''written criteria'' to ''criteria, which are reflected in a record,'' so that criteria established to identify cases where there is a high potential for obtaining medical support can be either in an electronic or written format.

Section 304.21—Federal Financial Participation in the Costs of Cooperative Arrangements With Courts and Law Enforcement Officials

This rule amends paragraph (a) of § 304.21 by changing the words ''written agreement'' to ''agreement, which is reflected in a record,'' to provide flexibility in the format of the agreements between a State and courts or law enforcement officials.

Section 304.40—Repayment of Federal Funds by Installments

Section 304.40(a)(2) requires a State to notify the OCSE Regional Office in a record of its intent to make installment repayments. We are changing the phrase ''in writing'' to ''in a record'' to give a State the option of notifying the Regional Office electronically of its intent to repay Federal funds in installments.

Section 305.64—Audit Procedures and State Comments

In § 305.64(c), we removed the phrase ''by certified mail'' from the second sentence of this paragraph since OCSE currently sends these reports electronically and by overnight mail. In this same paragraph, we change ''written comments'' to ''comments, which are reflected in a record,'' allowing IV–D agencies to submit comments on an interim audit report in an electronic format, if appropriate.

Section 305.66—Notice, Corrective Action Year, and Imposition of Penalty

Paragraph § 305.66(a) replaces ''in writing'' with ''in a record'' so that OCSE can notify the State that it is subject to a penalty in an electronic format, not just in a written format.

Section 307.5—Mandatory Computerized Support Enforcement Systems

The rule amends paragraph (c)(3) of § 307.5 by changing ''written assurance'' to ''assurance, which is reflected in a record,'' so that a State can provide assurance in an electronic format, if it so chooses.

Topic 3: Technical Corrections (§§ 301.15; 302.14; 302.15; 302.32; 302.34; 302.65; 302.70; 302.85; 303.3; 303.7; 303.11; 304.10; 304.12; 304.20; 304.21; 304.23; 304.25; 304.26; 305.35; 305.36; 305.63; 308.2; 309.85; 309.115; 309.130; 309.145; and 309.160)

We made a number of technical corrections that update, clarify, revise, or delete former regulations to ensure that the child support enforcement regulations are accurate, aligned, and up-to-date. In the NPRM, we proposed to update or replace obsolete references to administrative regulations by replacing 45 CFR part 74 with 45 CFR part 92 throughout the child support regulations. However, an Interim Final Rule effective December 26, 2014 (79 FR 75871),[5] issued jointly by OMB, HHS, and a number of Federal agencies, implements for all Federal award-making agencies the final guidance ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards'' (Uniform Guidance) published by the Office of Management and Budget (OMB) on December 26, 2013. The Interim Final Rule is necessary in order to incorporate the Uniform Guidance into regulation at 45 CFR 75 and thus bring into effect the Uniform Guidance as required by OMB. The Uniform Guidance in part 75 supersedes and streamlines requirements from several OMB circulars, including OMB Circulars A–87 and A–133 and applies to all HHS grantees, including State and Tribal child support programs funded under title IV–D of the Act.

Additionally, HHS issued an Interim Final Rule, effective January 20, 2016 (81 FR 3004),[6] that contains technical amendments to HHS regulations regarding the Uniform Guidance. The regulatory content updates cross-references within HHS regulations to replace part 74 with part 75.

Therefore, it is no longer necessary to make the proposed revisions and we will delete these proposed revisions in the final rule, except as otherwise noted.

Section 301.15—Grants

This rule renames paragraph (a) as *Financial reporting forms* and deletes paragraph (a)(3). We are replacing paragraph (a)(1) *Time and place* and paragraph (a)(2) *Description of forms* with the title and description of Form OCSE–396 and Form OCSE–34, respectively. In response to comments, we eliminated the ''A'' from the forms OCSE–396A and Form OCSE–34A to reflect the current title of these forms.

We are also renaming paragraph (b) *Review* as *Submission, review, and approval* and adding under paragraph (b) the following paragraphs: (b)(1) *Manner of submission;* (b)(2) *Schedule of submission;* and (b)(3) *Review and approval.* To provide a State more time to submit its financial reports, we are modifying the *Schedule of submission* paragraph to require the financial forms be submitted no later than 45 days following the end of each fiscal quarter. Further revisions in this paragraph reflect the current operating procedures and processes that are currently in place.

Additionally, we are revising paragraph (c) *Grant award* by deleting its former language and replacing it with three paragraphs (c)(1) *Award documents;* (c)(2) *Award calculatio*n; and (c)(3) *Access to funds.*

Finally, we are also deleting paragraphs (d) *Letter of credit payment system* and redesignating paragraph (e) *General administrative requirements* as paragraph (d) and revising this paragraph to add a reference to part 95 of this title, establishing general administrative requirements for grant programs, moving ''with the following exceptions'' to the end of the paragraph, and adding paragraph levels: (1) 45 CFR 75.306, *Cost sharing or matching;* and (2) 45 CFR 75.341, *Financial reporting.*

In the NPRM, we had incorrectly added reference to parts 74 and 95 as exceptions. In this rule, we are correcting this paragraph by adding the reference to part 95 in paragraph (d) and indicating that this part establishes general administrative requirements for grants. We also moved the phrase ''with the following exceptions'' to the end of the paragraph to make it easier to understand.

In paragraph (d), as discussed in the introductory paragraph of Topic 3 in this section, the rule deletes the proposed revision in the NPRM to reference part 92. However, we are updating the Interim Final Rule technical corrections discussed in the introductory paragraph of Topic 3 to add paragraph levels for the regulatory cites that are excluded. Specifically, we added ''(1)'' before 45 CFR 75.306, and added '','' before the title, *Cost sharing or matching* and added ''(2)'' before 45 CFR 75.341 and added '','' before the title, *Financial reporting.*

Section 302.14—Fiscal Policies and Accountability

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are updating the reference in § 302.14 from 45 CFR 75 to 45 CFR 75.361 through 75.370 to specifically address the retention and custodial requirements for the fiscal records.

Section 302.15—Reports and Maintenance of Records

For clarity, we are redesignating the undesignated concluding paragraph of this section as § 302.15(a)(8). In paragraph (a)(8), as discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are updating the reference in paragraph (8) from 45 CFR 75 to 45 CFR 75.361 through 45 CFR 75.370 to specifically address the retention and custodial requirements of the records.

Section 302.32—Collection and Disbursement of Support Payments by the IV–D Agency

In this final rule, we remove the outdated timeframes in the introductory paragraph. We also revise paragraph (b) to replace ''State Disbursement Unit (SDU)'' with ''SDU'' because the term was defined in paragraph (a). In response to comments, we replaced ''interstate'' with ''intergovernmental'' and ''initiating State'' with ''initiating agency.'' Finally, we replace an incorrect cross-reference in paragraph (b)(1) from § 303.7(c)(7)(iv) to § 303.7(d)(6)(v).

Section 302.34—Cooperative Arrangements

In the final rule we are clarifying that the term law enforcement officials includes ''district attorneys, attorneys general, and similar public attorneys and prosecutors,'' and adding ''corrections officials'' to the list of entities with which a State may enter into agreements for cooperative arrangements.

Section 302.65— Withholding of Unemployment Compensation

We replace the term ''State employment security agency'' with ''State workforce agency,'' and the term ''SESA'' with ''SWA'' throughout this regulation for consistency with the terminology used by the Department of Labor.

[5] The Uniform Guidance interim final rule is available at: *http://www.gpo.gov/fdsys/pkg/FR-2014-12-19/pdf/2014-28697.pdf.*

[6] The Uniform Guidance HHS technical corrections are available at: *https://www.gpo.gov/fdsys/pkg/FR-2016-01-20/pdf/2015-32101.pdf.*

Section 302.70—Required State Laws

We are making a technical correction in paragraph (a)(8) by revising the cross-reference to § 303.100(g).

Section 302.85—Mandatory Computerized Support Enforcement System

We are making a technical correction in paragraph (a)(1) by removing an out-of-date address. To be more user-friendly, we are indicating that the guide is available on the OCSE Web site.

Section 303.3—Location of Noncustodial Parents in IV–D Cases

In paragraph (b)(5), we are replacing the term ''State employment security'' with ''State workforce'' for consistency with revisions made elsewhere in the final rule.

Section 303.7—Provision of Services in Intergovernmental IV–D Cases

Under this rule, as discussed under Topic 1, we renumber paragraphs in § 303.11 and update the cross references in paragraph (d)(10).

Additionally, we add paragraph (f), ''Imposition and reporting of annual $25 fee in interstate cases,'' to provide that the title IV–D agency in the initiating State must impose and report the annual $25 fee in accordance with § 302.33(e). This provision was added in the final rule related to the Deficit Reduction Act of 2005 (73 FR 74898, dated December 9, 2008), but it had been inadvertently omitted in the final intergovernmental child support regulation, published in the **Federal Register** on July 2, 2010 and effective on January 3, 2011.

Finally, we are making a conforming technical change to add § 302.38 to the list of regulatory sections cited related to the initiating State IV–D responsibilities to distribute and disburse any support collections received. This technical change was not proposed in the NPRM, but was recommended by a commenter.

Section 303.11—Case Closure

We are making several technical changes to § 303.11, in addition to the numerous changes discussed under topics 1 and 2 of the final rule. In redesignated paragraphs (b)(4) and (b)(6)(ii), formerly paragraphs (b)(2) and (b)(3)(ii), respectively, we replace the outdated term ''putative father'' with the term ''alleged father.'' We also remove the word ''or'' at the end of the sentence in paragraph (b)(6)(ii) and add the word ''or'' to the end of the new paragraph (b)(6)(iii). Finally, in paragraph (e) we are updating our reference to 45 CFR 75.361.

As discussed earlier in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are updating the reference in paragraph (e) from 45 CFR 75 to 45 CFR 75.361 to specifically address the 3-year retention requirements for records.

Section 304.10—General Administrative Requirements

We are adding after 45 CFR 75.306 '', Cost sharing or matching'' and after 45 CFR 75.341 '', Financial reporting''.

As discussed earlier in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are adding the titles for clarity for 45 CFR 75.306 through 75.341.

Section 304.12—Incentive Payments

In the final rule, we delete outdated paragraphs 304.12(c)(4) and (5) as they applied to fiscal years 1985, 1986, and 1987.

Section 304.20—Availability and Rate of Federal Financial Participation

In § 304.20(b)(1)(iii), we revised the language to allow FFP for the establishment of all necessary agreements with other Federal, State, and local agencies or private providers to carry out Child Support Enforcement program activities in accordance with Procurement Standards. Additionally, we deleted paragraphs (c) and (d), which apply to fiscal years 1997 and 1998.

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected.

Section 304.21—Federal Financial Participation in the Costs of Cooperative Arrangements With Courts and Law Enforcement Officials

We are clarifying in paragraph (a) that the term law enforcement officials includes ''corrections officials'' to be consistent with § 302.34.

Section 304.21(a)(1) lists activities for which FFP at the applicable matching rate is available in the costs of cooperative agreements with appropriate courts and law enforcement officials. We modified this section to include a reference to § 304.20(b)(11), regarding medical support activities.

In response to comments, we further revised § 304.21(a)(1) to cross reference § 304.20(b)(12) which allows FFP for education and outreach activities provided by the courts and law enforcement officials through cooperative agreements.

Section 304.23—Expenditures for Which Federal Financial Participation Is Not Available

Section 304.23(a) lists various programs for which FFP is not available for administering these programs. We add the following Social Security Act programs to the list: Title IV–B, the Child Welfare Program; Title IV–E, the Foster Care Program; and Title XXI, the Children's Health Insurance Program (CHIP). We also add SNAP, which is administered under 7 U.S.C. Chapter 51.

In addition, we delete § 304.23(g) of the former rule because it is outdated. Paragraph (h) is redesignated as (g).

Section 304.25—Treatment of Expenditures; Due Date

In § 304.25(b), we lengthen the timeframe from 30 to 45 days after the end of the quarter for States to submit quarterly statements of expenditures under § 301.15.

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected.

Section 304.26—Determination of Federal Share of Collections

In this rule, § 304.26(a)(1) clarifies that the Federal medical assistance percentage rate is 75 percent for the distribution of retained IV–A collection. This paragraph also adds that the Federal medical assistance percentage rate is 55 percent for the distribution of retained IV–E Foster Care Program collections for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa and 70 percent of retained IV–E collections for the District of Columbia. We also delete paragraphs (b) and (c) of the former rule related to incentive and hold harmless payments to be made from the Federal share of collections because this requirement is outdated.

Section 305.35—Reinvestment

Section 305.35 requires State IV–D agencies to reinvest the amount of Federal incentive payments received into their child support programs. We are making several technical changes to this section.

To clarify the potential consequences of a State not maintaining the baseline expenditure level, we are amending paragraph (d) by adding a sentence to

the end of the paragraph to read: ''Non-compliance will result in disallowances of incentive amounts equal to the amount of funds supplanted.''

We redesignated paragraph (e) as paragraph (f) and added a new paragraph (e) to clarify how the State Current Spending Level should be calculated. Using the Form OCSE–396, ''Child Support Enforcement Program Financial Report,'' the State Current Spending Level will be calculated by determining the State Share of Total Expenditures Claimed for all four quarters of the fiscal year minus State Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments for all four quarters of the fiscal year, plus the Federal Parent Locator Service (FPLS) fees for all four quarters of the fiscal year.

The equation for calculating the State Share of Total Expenditures Claimed is: Total Expenditures Claimed for the Current Quarter and the Prior Quarter Adjustments minus the Federal Share of Total Expenditures Claimed for the Current Quarter and Prior Quarter Adjustments. Using the Form OCSE–396, this equation can also be translated as: State Share of Expenditure = Line 7 (Columns A + C) − Line 7 (Columns B + D) for all four quarters of the fiscal year.

The equation for calculating the State Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments is: IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments for the Current Quarter and the Prior Quarter Adjustments minus the Federal Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments for the Current Quarter and Prior Quarter Adjustments. Using the Form OCSE–396, this equation can also be translated as: State Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments = Line 1a (Columns A + C) − Line 1a (Columns B + D) for all four quarters of the fiscal year.

The Fees for the Use of the FPLS can be computed by adding the FPLS fees claimed on the Form OCSE–396 for all four quarters of the fiscal year. Using the Form OCSE–396, this equation can also be translated as: Fees for the Use of the FPLS = Line 10 (Columns B) for all four quarters of the fiscal year.

Section 305.36—Incentive Phase-In

While we did not propose changes to this section in the NPRM, in response to comments, we deleted this section in the final rule since it is outdated.

Section 305.63—Standards for Determining Substantial Compliance with IV–D Requirements

Section 305.63(d) erroneously cross references paragraph (b). We replace that cross reference with a reference to paragraph (c).

Section 308.2—Required Program Compliance Criteria

The term ''State employment security agency'' is removed wherever it appeared and is replaced by ''State workforce agency.'' In addition, in subparagraph (c)(3)(i), we capitalize Department of Motor Vehicles and use the section symbol for consistency.

Section 309.85—What records must a Tribe or Tribal organization agree to maintain in a Tribal IV–D Plan?

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected.

Section 309.115—What procedures governing the distribution of child support must a Tribe or Tribal organization include in a Tribal IV–D Plan?

We are making two technical changes, not originally proposed in the NPRM, by fixing the reference in paragraph (b)(2) from ''§ 9.120'' to ''§ 309.120'' and in paragraph (c)(2) from ''303.52'' to ''302.52.''

Section 309.130—How will Tribal IV–D programs be funded and what forms are required?

We update § 309.130(b)(3) to reference Standard Form (SF) 425, ''Federal Financial Report,'' which is the new OMB approved form. In response to comments, in paragraph (b)(4), we eliminated the ''A'' from Form OCSE–34A to reflect the current title of the form. Additionally, in paragraph (b)(4), to be consistent with revision to § 301.15(b)(2), we revise the submission requirements for the OCSE–34, ''Quarterly Report of Collections,'' including extending the due date from 30 to 45 days from the end of the fiscal quarter.

In paragraphs (d)(3) and (h), as discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected.

Section 309.145—What costs are allowable for Tribal IV–D programs carried out under 309.65(a) of this part?

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, because this paragraph addresses the Procurement Standards, for clarity we are updating our reference from 45 CFR 75 to specify 45 CFR 75.326 through 75.340.

Section 309.160—How will OCSE determine if Tribal IV–D program funds are appropriately expended?

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are updating the reference to the audit requirements by adding '', *Subpart F—Audit Requirements* under'' after 45 CFR part 75.

IV. Response to Comments

We received 2,077 sets of comments from States, Tribes, and other interested individuals. We posted 2,017 sets of comments on *www.regulations.gov;* 60 sets of comments were not posted because they were either not related to the NPRM or contained personally identifiable information.

Using a text analytic software technology, we were able to detect duplicate and near duplicate documents. Of the 2,077 set of comments, we identified 1,679 sets of comments that were received from either mass-mail campaigns (when commenters provided the same or similar responses from the members of the same organization) or were duplicate responses (when the same commenter submitted the same response more than once).

The comments we received were from the following groups:

- 34 State child support agencies;
- 10 Tribes or Tribal organizations
- 9 National or State child support organizations;
- 6 judicial district offices;
- 5 counties/local child support offices;
- 2 judicial organizations;
- 2 prosecuting attorney office or organization;
- 50 organizations such as community-based, fatherhood, research, domestic violence, access to justice, parent, re-entry, court reform, and employment services organizations; and
- Remaining comments from private citizens representing custodial and

noncustodial parents, former child support workers, attorneys, a retired judge, etc.

Although we had a range of comments on specific provisions, the NPRM was strongly supported by State agencies, court associations, advocacy groups, parent groups, and researchers, and reflected broad consensus in the field. In drafting the final rule, we closely reviewed the comments and made a number of adjustments to the final rule in response to comments.

DATES:

1. Comment: While many commenters appreciated OCSE's suggestion that the proposed effective date for *Guidelines for setting child support awards* (§ 302.56) coincides with the next quadrennial review, States whose quadrennial review will commence shortly after the rule is finalized will need time to conduct further analysis and research on implementation issues and potential system changes. They recommended an additional extension of one year. In other words, the guideline changes would be required to be in effect within one year after completion of the first quadrennial review of its guidelines that commences more than one year after the adoption of the final rule.

Response: We agree with this suggestion and have made this change in the compliance date for § 302.56.

2. Comment: Some commenters expressed concerns regarding the length of time needed to implement the revisions in the final rule. A few commenters thought that one year would be adequate, while others believed that a 2-year effective date would be more reasonable period because of the significant changes in State law and policy, as well as numerous system changes will be needed. A few commenters believed that more than 2 years would be necessary to implement some of the revisions.

Response: While we understand the complexity of implementing several of the revisions in the final rule, there are some revisions that can be implemented immediately upon issuance of this final rule. Also, many of the revisions are optional requirements, so the compliance dates can vary State by State as the child support agencies elects to implement the optional rules, or allow Federal financial participation (FFP) for additional allowable expenditures. As a result, we are varying the compliance dates for the various Federal requirements. Generally, the compliance date for the final rule will be within 60 days after publication. However, if State law revisions are needed, the compliance date will be the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the final rule.

In response to comments, the final rule also revises the effective date for *Establishment of support obligations* (§ 303.4) and *Review and adjustment of support order* (§ 303.8) to allow States adequate time to incorporate the new rule requirements into the State's guidelines and order enforcement and modification procedures. For implementing the revisions under § 302.56(a) through (g), § 303.4, and § 303.8, the compliance date will be one year after completion of the first quadrennial review of its guidelines that commences more than one year after the adoption of the final rule.

3. Comment: A few commenters thought they would need more than one year to implement the *Case Closure* (§ 303.11) because they need time to make legislative changes, substantial programming enhancements, and policy changes.

Response: Because many of the changes for Case Closure are optional requirements, we have made the compliance date 60 days after enactment of the final rule. For the mandatory changes required under § 303.11(c) and (d), we have extended the compliance date for these provisions to be one year from date of issuance of the final rule. However, if State law changes are needed, then the compliance date will be the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the final rule.

4. Comment: Several commenters requested that if States will no longer be held harmless from complying with the 2008 medical support final rules upon issuance of the final rule, the effective date for § 303.31 should take this into consideration.

Response: For the medical support provisions under § 303.31, the compliance date for the new § 303.31 provisions will be 60 days from the date of the final rule unless statutory changes are required. If State law revisions are needed, the compliance date is the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the regulation. We believe that this is sufficient time for the States to implement the new revisions in § 303.31. Upon issuance of this rule, OCSE will work with States in developing guidance related to the new rule requirements and AT–10–02.

Topic 1: Procedures To Promote Program Flexibility, Efficiency, and Modernization (§§ 302.32; 302.33; 302.38; 302.56; 302.70; 303.3; 303.4; 303.6; 303.8; 303.11 (Including Revisions to 42 CFR 433.152); 303.31; 303.72; 303.100; 304.20; 304.23; and 307.11)

Section 302.32—Collection and Disbursement of Support Payments by the IV–D Agency

1. Comment: A few commenters suggested that the ongoing issues and concerns raised by employers should be addressed through guidance and outreach to specific States rather than a proposed regulation, given that only a few States are noncompliant. Another commenter suggested that States and OCSE make additional efforts to educate parents, family law lawyers, and judges about the State Disbursement Unit (SDU) law.

Response: Although this requirement has been a Federal law for almost two decades, issues persist. OCSE's Employer Services team has provided extensive technical assistance related to persistent noncompliance issues. Additionally, OCSE regularly holds employer symposia to bring together child support professionals and employers to identify issues of mutual concerns and work on ways to resolve these issues. In addition to providing continued outreach, technical assistance, and policy guidance to all stakeholders, we find it is necessary to regulate this requirement.

2. Comment: One commenter suggested that SDUs be required to continue processing spousal support payments after their associated child support payments are released. The commenter indicated that under current practice, spousal payments are paid through the SDU when they are included with child support payments. Once the child support payment ends, the SDU ceases processing the spousal support payments. Having the SDU continue to process such spousal payments will ensure that there is no disruption in payments to the custodial parent. Another commenter requested that the final rule clarify that an Income Withholding Order (IWO) and/or payment through the SDU for maintenance-only cases is not allowed.

Response: In accordance with PIQ–11–01,[7] if the child support portion of a support order that includes spousal

[7] PIQ–11–01 is available at: *http://www.acf.hhs.gov/programs/css/resource/spousal-support-only-cases.*

support ends, the IV–D case may continue to qualify for collection services at State option. If a State chooses to continue IV–D collection services for the spousal support portion of the support order, it may continue to collect spousal support through the income withholding process with receipt and disbursement of support collections through the SDU. However, we want to clarify that FFP for enforcement of spousal support-only cases beyond collection and disbursement of payments is not eligible for FFP under title IV–D.

Additionally, in accordance with § 303.72(a)(3)(i), past-due spousal support is only eligible for Federal tax refund offset in cases where the parent is living with the child and the spousal support and child support obligations are included in the same support order. OCSE Action Transmittal (AT) 10–04 [8] also indicates that past-due spousal support-only cases certified for any of the Federal collection and enforcement programs (*i.e.,* Federal tax refund and administrative offset, passport denial, multistate financial institution data match, and insurance match) are only eligible when the parent is living with the child.

For reporting purposes on the OCSE–157, *Child Support Enforcement Annual Data Report,* once the child is emancipated or otherwise no longer involved, the State has the option of whether or not to continue to collect spousal support through the income withholding process with receipt and disbursement of support collections for these spousal support only cases. States that opt to continue to collect spousal support through income withholding must report the income withholding collections received and disbursed on these spousal support-only cases for all lines that apply.

3. Comment: One commenter suggested that OCSE mandate that non-IV–D families that seek to have child support payments processed through the SDU must sign up for limited payment processing-only services. This would enable States to assist these families and provide authorization for States to work the cases. In addition, this would strengthen the IV–D program overall by offering a broader service, collecting more support, and assisting more families in the way they request.

Response: The final rule only allows the States the option to provide paternity-only limited services, and we decided not to include an option in this rule for families to sign up for limited payment processing-only services at this time due to complex administrative issues related to interstate cases.

4. Comment: One commenter indicated that while IV–D programs, SDUs, and employers should not pass off their responsibilities for having order and location information by relying on parents for the information, they should be able to ask parents for information as a last resort.

Response: There is no prohibition against a IV–D program asking parents for information to ensure the prompt disbursement of support payments.

5. Comment: One commenter requested that OCSE revisit OCSE–PIQ–10–01 [9] to allow Federal financial participation (FFP) for non-employer-processed payments on non-IV–D orders. The commenter believed that expanding the IV–D program to process other non-IV–D payments, not just income withholding cases, would be more efficient because the IV–D program would not have to obtain payment records from counties when a case moves from non-IV–D to IV–D status. In addition, directing the obligor to make payments to one location would likely lead to greater compliance with the order.

Response: OCSE appreciates this comment; however, under 45 CFR 304.20(b), FFP is limited to services and activities under the approved title IV–D State plan which are determined by the Secretary to be necessary expenditures properly attributable to the IV–D program.

6. *Comment:* One commenter suggested that § 302.32(b)(1) be changed to replace ''interstate'' with ''intergovernmental'' and ''State'' with ''agency.''

Response: OCSE agrees, with the first suggested change, and revised § 302.32(b)(1) by replacing the word ''interstate'' with the word ''intergovernmental.'' Additionally, we have revised the term initiating State to initiating agency, since intergovernmental IV–D cases may be initiated by Tribal or foreign child support programs. However, we retained the phrase ''responding State,'' since only States are required to meet the 2 day timeframe for forwarding collections under paragraph (b)(1).

7. *Comment:* One commenter asked about the IV–D procedure when the support payment has insufficient identifying information resulting in an undistributed and often unidentified collection until the case information is provided. Another commenter's State does not have a working interface with the court system, and wanted to know how the State can process payments if they do not have a copy of the order. An additional commenter indicated that direct referrals of non-IV–D child support orders to the IV–D agency would result in a large number of orders that cannot be registered until further identifying information is received from the parties or their attorneys.

Response: We acknowledge that States sometimes need to hold support payments until they receive the needed case information. We encourage States to work with courts and attorneys to develop processes that ensure that complete case information is received expeditiously and support payments can be disbursed within statutory timeframes.

In addition, sometimes it may be necessary to perform routine location services if the non-IV–D custodial parent has an invalid address and undistributable payments. As indicated in PIQ–10–01,[10] Question and response 9, FFP is available for location services in non-IV–D cases only if location services are used to locate the custodial parent for disbursement of a collection. FFP is not available for non-IV–D cases if location services are used to establish and/or enforce a support order.

Section 454B(b) of the Act requires that the ''State disbursement unit shall use automated procedures, electronic processes, and computer-driven technology . . . for the collection and disbursement of support payments. . . .'' This includes the use of automated location services to locate the custodial parent for prompt disbursement of support payments. IV–D agencies are not responsible for providing other services or taking enforcement actions in non-IV–D cases. In some instances, the State may have to go back to the party and request the information the State needs to disburse the support payments.

8. *Comment:* One commenter asked if one-time costs incurred by the courts to permit the electronic exchange of non-IV–D information with the State case registry (*e.g.,* through portal or interface) would be eligible for FFP.

Response: Yes, FFP is available for the courts to provide information to the

[8] AT–10–04 is available at: *http://www.acf.hhs.gov/programs/css/resource/collection-and-enforcement-of-past-due-child-support-obligations.*

[9] PIQ–10–01 is available at: *http://www.acf.hhs.gov/programs/css/resource/federal-financial-participation-and-non-iv-d-activities.*

[10] PIQ–10–01 is available at: *http://www.acf.hhs.gov/programs/css/resource/federal-financial-participation-and-non-iv-d-activities.*

SDU. OCSE-Action Transmittal (AT) 97–13 [11] indicates that:

> FFP . . . is available for the cost of establishing an automated interface with the non-IV–D systems to transmit data to the State CSE automated system. . . . The costs associated with establishing and maintaining the State Case Registry and the SDU, including the costs of maintaining non-IV–D support order records in the State case registry and necessary identification and [support] payment information in the State Disbursement Unit, are eligible for reimbursement at the applicable rate of FFP. FFP is available for the cost of converting non-IV–D case information (not payment records) necessary to process collections required to be paid through the SDU.

9. *Comment:* Two commenters asked if this provision will apply to all child support payments.

Response: This provision applies to child support payments in all IV–D cases and in non-IV–D cases in which the support order is initially issued in the State on or after January 1, 1994, and in which the income of the noncustodial parent is subject to withholding in accordance with sections 454B, 454(27), and 466(a)(8)(B) of the Act.

10. *Comment:* One commenter asked who is responsible for obtaining information on non-IV–D cases in a purely private matter.

Response: It is the State's responsibility to secure the information needed to disburse support payments in non-IV–D cases.

11. *Comment:* One commenter requested clarification about the term ''maintenance.'' The commenter suggested that it should be very broad to include all actions and information gathering to ensure compliance.

Response: The NPRM indicates that FFP is generally available for the submission and maintenance of data in the State Case Registry (SCR) with respect to non-IV–D support orders established or modified on or after October 1, 1998. Maintenance in this context refers to updating the support order information in the SCR as needed.

PIQ–10–01 states that FFP is available for the costs of entering into the SCR the data elements listed in the regulations under § 307.11(e)(3) and (f)(1). Specifically, § 307.11(e)(3) specifies the following data elements for each participant in the case: Name, social security number, date of birth, case identification number, other uniform identification number, data elements required under paragraph (f)(1) of this section necessary for the operation of the Federal case registry, issuing State of an order, and any other information that the Secretary may require. Section 307.11(f)(1) indicates the additional elements required for the Federal Case Registry, which include the following data elements: State Federal Information Processing Standard (FIPS) code and optionally county code; State case identification number; State member identification number; case type (IV–D, non-IV–D); social security number and any necessary alternative social security number; name including first, middle, and last name and any alternative name; sex (optional); date of birth; participant type (custodial party, noncustodial parent, putative father, child); family violence indicator (domestic violence or child abuse); indication of an order; locate request type (optional); locate source (optional); and any other information that the Secretary may require.

FFP is available for the State child support agency to update address changes as reported by the non-IV–D custodial parent and noncustodial parent to ensure prompt disbursement of support payments.

12. *Comment:* One commenter stated that this provision does not address Tribal use of their own income withholding form, as Tribal entities without a IV–D program do not currently use the OMB-approved *Income Withholding for Support* form, and Tribal employers do not consistently honor the Federal form.

Response: While the Uniform Interstate Family Support Act (UIFSA) compels an employer subject to State jurisdiction to honor an income withholding order sent directly from another State or an Indian Tribe, Tribes are not subject to UIFSA. However, the Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. 1738B, requires Tribes to enforce child support orders made by a court or administrative agency that had appropriate jurisdiction and afforded the parties a reasonable opportunity to be heard. This would include enforcement of orders providing for income withholding.

The regulation at § 309.110(d) of this chapter states that the income withholding must be carried out in compliance with the procedural due process requirements established by the Tribe or Tribal organization. Accordingly, Tribes may conduct preliminary reviews of foreign orders to ensure that the court or administrative authority properly entered the order, but such processing of orders must be done expeditiously to ensure that orders are promptly served on employers within the Tribe's jurisdiction in accordance with the regulations at § 309.110(n). In accordance with § 309.110(j), the only basis for contesting a withholding order is a mistake of fact, which means an error in the amount of current or overdue support or in the identity of the alleged noncustodial parent.

While the regulations do not require Tribes to have laws and procedures which mandate that employers subject to the Tribe's jurisdiction must honor direct income withholding orders from another State or Tribe, a Tribe may choose to permit direct withholding as a matter of administrative efficiency or comity between the Tribe and other Tribes and States.

As indicated in PIQT–05–04,[12] Tribes that do not receive funding to operate IV–D programs are not required to use or recognize the OMB-approved *Income Withholding for Support* form. However, the Tribal child support regulation at § 309.110(l) requires Tribes that receive Federal funding to operate IV–D programs to use and recognize the OMB-approved form.

13. Comment: One commenter was concerned that the proposed provision does not sufficiently incorporate Tribal IV–D programs into the calculus. While a case and its corresponding child support order that was entered in the State courts may be a non-IV–D case for the State, this same case may be a IV–D case in the Tribal IV–D caseload. The Tribal IV–D agency may have served the employer with an income withholding for support order and directed the employer to send payments to the Tribe. The commenter suggested that the rule be broadened to acknowledge the appropriateness of employers sending payments to Tribal IV–D agencies or Tribal SDUs; otherwise State IV–D agencies may resist transferring such cases and/or support orders to Tribal IV–D agencies.

Response: This issue arises when a Tribe is enforcing an underlying State child support order. In those instances, the IWO issued by the Tribe often incorrectly indicates that remittance should be made to the Tribe instead of to the SDU of the order-issuing State, in accordance with § 309.115(d). The instructions for the OMB-approved IWO form, however, may cause confusion by referring generically to the ''order.'' The instructions read: ''Payments are forwarded to the SDU in each State, unless the order was issued by a Tribal CSE agency. If the order was issued by a Tribal CSE agency, the employer/income withholder must follow the

[11] AT–97–13 is available at: *http://www.acf.hhs.gov/programs/css/resource/collection-and-disbursement-of-support-payments.*

[12] PIQT–05–04 is available at: *http://www.acf.hhs.gov/programs/css/resource/state-iv-d-agencies-use-of-federal-income-withholding-form.*

remittance instructions on the form.'' The term ''order'' in these instructions refers to the underlying State support order and not the tribal IWO. Tribes have interpreted these instructions, however, as meaning that payment is to be remitted to the Tribe.

Because the IWO is an OMB-approved form, OCSE will consider reviewing these issues further and clarifying the form and instructions to the form in future revisions. In addition, we will continue to provide technical assistance to Tribes so that the remittance section of the IWO form is completed correctly and in accordance with existing regulations.

14. Comment: One commenter stated that the proposal to require States to distribute non-IV–D payments the same as IV–D payments fails to address the impact of this policy on the Federal performance measures by which the States derive incentive payments. The commenter noted that this requirement diverts State resources to process and collect non-IV–D payments that do not affect the State's overall performance, and detracts from work on IV–D cases.

Response: The requirement for SDUs to process non-IV–D income withholding collections is required by title IV–D of the Act as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. In addition, the performance incentive measures were mandated by the Child Support Performance and Incentive Act of 1998. Since the definition of the performance measures are a statutory requirement, OCSE does not have authority to revise how these measures are calculated.

15. Comment: One commenter noted that in his State, the county clerks are allowed to implement and manage their own case management and e-filing systems. There is neither statewide authority nor any law that creates a centralized authority that could mandate that a particular system or system requirements are put in place for implementing this requirement. Because of this, there is no standard process to digitally and automatically transmit case information on non-IV–D domestic cases to the IV–D agency. Another commenter asserted that, in her State, local child support agencies are not privy to information on the establishment of non-IV–D court orders and such information is not entered into the State's automated child support enforcement system.

Response: The requirement that support payments made through income withholding on non-IV–D cases be processed through the SDU has been in place for over 20 years. It is important that States work with courts to set up processes that are efficient and that States follow Federal income withholding and SDU requirements. Over the years OCSE has provided technical assistance to States and will continue to do so upon request.

Section 302.33—Services to Individuals Not Receiving Title IV–A Assistance Former Child Welfare Recipients: § 302.33(a)(4)

1. Comment: One commenter urged OCSE to clarify that, when a State has opted to implement the limited services option authorized in § 302.33(a)(6), the notice to former recipients of State assistance under § 302.33(a)(4) shall include information about the family's option of seeking limited services rather than the binary option of continuing full services or closing the case.

Response: In the final rule, paternity establishment is the only limited service available to individuals receiving child support services. States may include this option in their notice, but it is not required.

2. Comment: One commenter stated that further language may be needed to determine if this flexibility applies to both Federal and State foster care scenarios. In addition, the commenter noted that closing foster care cases with arrears owed to the State may result in unintended negative consequences if the cases are later reopened with arrears balances and interest still owing (if applicable).

Response: The Federal government does not have authority to regulate the State-funded foster care program (other than to define child support family distribution requirements under section 457 of the Act.) Therefore, this regulation applies to federally-funded foster care cases. However, States have discretion to apply this language to State-funded foster care cases as well. If there is no longer a current support order and arrearages are under $500 or unenforceable under State law, the State may close the case pursuant to 45 CFR 303.11(b)(1). If there is no longer a current support order and all arrearages in the case are assigned to the State, the case may be closed pursuant to 45 CFR 303.11(b)(2). Additionally, for arrears assigned to the State, the State has the authority to compromise the arrearages. It is the State, and not the Federal government, that has the authority to compromise the arrearages since the State has the financial interest in the money.

3. Comment: One commenter asked if the State is still required to collect assigned child support when a child is no longer eligible for IV–E foster care services and the IV–D agency determines closure is appropriate. The commenter indicated that it would reduce strain on a newly reunified family if the State could stop collecting the assigned arrears.

Response: In this situation, the case has been referred by the IV–E agency and can be closed in accordance with § 303.11(b)(20) if the IV–D agency determines that it is inappropriate to continue to enforce the order.

4. Comment: According to one commenter, the wording of the provision suggests that if both the custodial parent and the noncustodial parent owe arrears to the State foster care agency pursuant to a valid support order, and then the child is returned to the custodial parent's home, enforcement would discontinue against the custodial parent, but not the noncustodial parent.

Response: In this scenario, there are two orders, one for the custodial parent, who was referred to the IV–D agency when the child was removed from the home, and one for the noncustodial parent. For the custodial parent that was referred and to whom the child is being returned, the IV–D agency can close the case pursuant to § 303.11(b)(20) of this chapter once the parent resumes custody of the child. For the noncustodial parent, the case should remain open if there is an order for current support and arrearages.

5. Comment: One commenter asked that consideration also be given to allowing States to close cases instead of continuing services to former Medicaid-only cases in which the IV–D agency determines that continued services would be inappropriate.

Response: OCSE appreciates this comment; however, we need to gather additional information before proposing this change.

6. Comment: One commenter recommended that OCSE clarify how States determine whether child support services continue to be appropriate for the family once the child is no longer eligible for foster care. Specifically, the commenter suggested additional language that would permit States to establish in regulation, rule, or procedure a category of cases that, based on criteria chosen by the IV–D agency, would not be appropriate for continued services.

Response: States have discretion to establish criteria for determining when continued services and notice are not appropriate.

Limited Services: § 302.33(a)(6)

1. Comment: We received a substantial amount of feedback

regarding the concept of limited services. Most of the commenters expressed support for offering limited services to applicants. A number of commenters indicated that allowing parents to have more ability to select the services they need would make the child support program more family-friendly and increase program efficiency. In particular, commenters identified the need to offer paternity establishment as a limited service. However, commenters also raised various implementation concerns about limited services, including challenges in the context of intergovernmental cases, the range and types of limited services options offered, the need for domestic violence safeguards, system programming needs, and reporting and performance issues. With regard to offering limited services in interstate cases, commenters raised issues such as difficulty in tracking which limited services are offered by each State and the ability of a responding State to accommodate an intergovernmental limited services request. Some commenters were also confused regarding which types of limited enforcement services would be offered and how competing limited enforcement services requests between parties would be handled.

Response: We are persuaded that the potential intergovernmental challenges involved with implementing a menu of limited enforcement services warrants rolling back the scope of the option proposed in the NPRM. We decided to move forward by only giving States the option to offer paternity establishment as a limited service in an intrastate case. In response to these and other concerns addressed above by commenters, we amended § 302.33(a)(6). This paragraph indicates that the State may elect in its State plan to allow an individual under paragraph (a)(1)(i) of this section who files an application to request paternity-only limited services in an intrastate case. If the State chooses this option, the State must define how this process will be implemented and must establish and use procedures, including domestic violence safeguards, which are reflected in a record, that specify when paternity-only limited services will be available. An application will be considered full-service unless the parent specifically applies for paternity-only limited services in accordance with the State's procedures. If one parent specifically requests paternity-only limited services and the other parent in the State requests full services, the case will automatically receive full services. The State will be required to charge the application and service fees required under paragraphs (c) and (e) of this section for paternity-only limited services cases, and may recover costs in accordance with paragraph (d) of this section if the State has chosen this option in its State plan. The State must provide the applicant an application form with information on the availability of paternity-only limited services, consequences of selecting this limited service, and an explanation that the case will be closed when the limited service is completed.

2. Comment: Commenters raised concerns regarding what would happen if an applicant in an intrastate case applied for and was receiving limited services and one of the parties later moved out of state and that State did not include the option to provide limited services in its State plan.

Response: As noted above, in response to comments we narrowed the scope of limited services to paternity establishment services only and only in intrastate cases. Therefore, if, during the course of providing paternity-only limited services, one of the parties moves out of state, the State may pursue paternity establishment using long-arm [13] procedures. If this is not appropriate, then the State should contact the applicant to determine whether to pursue a full-services intergovernmental case.

3. Comment: One commenter noted that the language in paragraph (a)(6) reads as if the option of limited services is available only to nonpublic assistance recipients, *i.e.,* those eligible under paragraph (a)(1)(i). The commenter asked for clarification regarding whether the intent of this language is to disallow the option of limited services to former Medicaid, former TANF, and/or former IV–E foster care recipients.

Response: After reviewing the regulatory text, we think that it is clear that the intent of this provision to allow those individuals under § 302.33(a)(1)(i) who file an application for IV–D services to request and receive paternity-only limited services. Further, paternity-only limited services are restricted to intrastate cases only. An individual who has been receiving IV–D services and is no longer eligible for assistance under title IV–A, IV–E foster care, or Medicaid programs and has not had paternity established while his/her case was open under paragraphs (a)(1)(ii) or (iii), may choose to close his/her existing case once he/she is no longer receiving public assistance and may submit a new application under paragraph (a)(1)(i) for paternity-only limited services, along with any applicable fees.

4. Comment: A few commenters opposed the inclusion of paternity-only limited services in the provision because applicants may simply request closure of their case with the State child support agency after genetic testing results are provided. Another commenter felt that paternity-only services should not be offered because, if a support order is not obtained, we are neglecting one of the key tenants of our mission statement to obtain meaningful support for the child. This commenter also noted that establishing the support order at the time paternity is determined will likely result in more accurate income information and less default orders, as initial cooperation has already been gained from the noncustodial parent.

Response: We disagree with the comments that paternity-only services should not be offered because of the possibility of case closure. While some State child support agencies may currently have policies that allow applicants to request closure of their case after obtaining genetic testing results, other State child support agencies' policies do not allow the applicants to request closure of their cases until after an order for paternity and support has been legally established or determination made that paternity cannot be established. The addition of this rule provides all States with the authority to allow either the custodial or the noncustodial parent to request paternity-only services without also requiring the establishment of an order for support, thus giving States increased flexibility to be responsive to a family's specific circumstances.

We also disagree with the notion that paternity-only services should not be offered in cases where there is to be no support order established. While we acknowledge that establishing a child support order at the time paternity is determined may result in more accurate income information and less default orders, provided that there is continued cooperation from the noncustodial parent, there are benefits to paternity determination even if a support order is not established. A key component of encouraging responsible parenting is accomplished through the establishment of paternity for a child. Whether or not an unwed biological father is currently living with the biological mother and children in an intact household, he has no legal standing as the children's father unless paternity is legally established.

[13] Long-arm'' refers to State laws that allow the State to exercise personal jurisdiction over an out-of-state defendant in situations when the defendant has had sufficient minimum contacts with the State.

Establishing paternity also serves to clarify the birth record of the child and establishes possible eligibility for dependents' benefits—all without subjecting the intact family unit to an unwanted and unnecessary order for child support.

5. Comment: In regard to the requirement under paragraph (a)(6) that a case will automatically receive full services in the event that one parent specifically requests paternity-only limited services and the other parent requests full services, one commenter asked who, in this instance, would be the applicant and who could close the case or request a change in services. Another commenter asked whether a new case would be opened when a request is made to change from limited services to full services, or if the existing case would instead be modified.

Response: If a State chooses to offer a paternity-only limited services option, the State must define how this process will be implemented. The State must establish and follow policy and procedures regarding appropriate case management protocol when applications from both parties are received with differing requests for services or when a case is moving from paternity-only limited services to a full services case.

6. Comment: Several commenters requested clarification regarding how an application for full services should be handled when received after a case was previously opened for limited services only. Questions were posed such as: Would a new application be required? Would an additional full application fee be required or would it be a reduced fee for the subsequent application? Does this decision change if it is the same parent now requesting full services versus if it is the other parent making the subsequent request?

Response: As we indicated above in the discussion of how States should handle competing applications received from both parties in a case, it is up to each State child support agency to determine specific paternity-only limited services policy and procedures. Although a full new application may not be necessary, States are encouraged to require some type of written documentation (for example, an addendum to the original application) when a subsequent request is made to change a case previously opened for paternity-only limited services to a full-services case.

7. Comment: One commenter voiced concern that the changing of an applicant's limited services selection may cause disruption in the streamlined delivery of services, causing delays and increased staff time. For example, if paternity-only limited services were requested and the applicant later requests full services before the paternity establishment process has been completed, the State child support agency would be required to amend, re-serve, and refile the summons and complaint to include the establishment of child support. Several commenters expressed concern over potential system programming difficulty and costs associated with offering limited services, stating that system changes may be problematic for State child support agencies with older systems and may require longer than one year to complete. Finally, one commenter noted that, as current statutes and procedures are designed around a full-service approach to establishment and enforcement, it will be necessary for States to review their current laws to determine if a limited services option can be provided within existing judicial framework or whether statutory changes may be required to accommodate a limited services option.

Response: If a State chooses to offer paternity-only limited services as an option, that State has the ability to make provisions in its policies and procedures regarding how to address changes that applicants make in service selections. Additionally, if a State chooses to offer this option, the State has flexibility in how and when to implement the changes. In this rule, OCSE has not mandated if, how, or when States should upgrade the functionality of their automated child support enforcement systems to accommodate a paternity-only limited services option. As indicated in the preamble to the NPRM, as States modernize their statewide automated systems, it will be easier to implement and manage paternity-only limited services in their caseloads, and at the same time will provide States additional flexibility to offer child support services that meet the needs of modern families. Finally, as State child support programs continue to evolve to provide services that are tailored to meet the needs of modern families, OCSE will continue to provide outreach and technical assistance on an individual basis to States needing support with the passage and implementation of necessary statutory changes.

8. *Comment:* One commenter was concerned that if a father applies for paternity-only limited services and the mother does not want to cooperate, there would be nothing further a State could do to compel her to comply and thus the State could never close the case since the paternity-only limited service will not have been completed.

Response: We disagree. It is common practice for State child support agencies to file a judicial motion requesting the court's assistance when a custodial parent refuses to cooperate with the paternity establishment process. A court order requiring the custodial parent to cooperate with genetic testing may then be issued, and contempt of court sanctions are possible if the custodial parent continues to be noncompliant. However, prior to taking the above actions, we encourage State child support agencies to work with custodial parents to explain the benefits of having paternity established for their children, unless there is good cause for refusal to cooperate, such as domestic violence, as discussed later in this section (see Comment/Response 12).

9. Comment: One commenter suggested that a pamphlet or some other document accompany child support applications to provide information on the paternity-only limited services option. The commenter felt that providing this information on a separate but accompanying document would be more effective than if it were to appear in the application itself.

Response: States electing to provide paternity-only services are required under § 302.33(a)(6) to provide applicants with information on the availability of paternity-only limited services, the consequences of selecting this limited service, and an explanation that the case will be closed when the limited service is completed. Providing information on the application about paternity-only limited services is necessary to document that the applicant has obtained this information and requested this service. However, a State may supplement the information on the application with a brochure, pamphlet, or any other type of document that the applicant could maintain if the State believes that this is a better way to convey the information.

10. Comment: One State inquired whether Federal financial participation (FFP) will be available for States to make the necessary system changes to support the implementation of limited services.

Response: Yes. As outlined in 45 CFR 307.35, FFP at the applicable matching rate is available for computerized support enforcement system expenditures related to, among other things, system enhancements related to the establishment of paternity. Section 304.20 of this final rule also clarifies that FFP is available for necessary and reasonable expenditures properly

attributed to the Child Support Enforcement program for services and activities to carry out the title IV–D State plan, including obtaining child support, locating noncustodial parents, and establishing paternity.

11. Comment: There were a number of comments from States expressing concern over how limited services would affect reporting requirements and performance measures. More specifically, questions were raised regarding how paternity-only cases may impact the order establishment performance measure and whether paternity-only cases will be excluded from the case count for the total number of ''Cases Open at the End of the Fiscal Year'' denominator for that measure.

Response: We recognize that reporting changes on the OCSE–157 report may be necessary to accommodate the addition of a paternity-only limited services option so that these cases do not negatively impact the support order establishment performance measure. OCSE will work to implement the necessary changes to the form after this rule is published as final.

12. Comment: Several commenters expressed the need for sound domestic violence safeguards when offering limited services. One commenter specifically suggested that language be added to the regulation requiring the inclusion of domestic violence safeguards when States establish procedures for paternity-only limited services. One commenter raised the possibility that a parent could be pressured or coerced by the other parent into pursuing paternity-only limited services but no support order so that there would be no responsibility for supporting the child. Another commenter felt that offering paternity-only limited services may be a barrier that keeps a custodial parent and child in an abusive relationship, requiring the custodial parent to take some later affirmative step in requesting and obtaining a support order and thus potentially provoking his or her abuser. Other commenters recommended that OCSE work with domestic violence experts to develop procedures and training resources, and that State child support agencies be required to assess domestic violence status multiple times throughout the life of a case versus the current practice, which typically occurs only at the beginning of a case. A few commenters recommended practices that child support workers could take to mitigate potential domestic violence issues. One commenter asked whether there are good cause procedures that would be applicable in nonpublic assistance cases. For example, if a noncustodial parent requests paternity-only services but the custodial parent does not wish to comply due to domestic violence concerns, and it is a nonpublic assistance case, would the State child support agency then be responsible for determining if the paternity-only limited service should be denied?

Response: OCSE appreciates commenters' concern for the safety of domestic violence victims. We encourage States to consider developing domestic violence safeguards throughout every step in case processing. In response to these specific comments, we amended the final regulation at § 302.33(a)(6) to require that States include domestic violence safeguards when establishing and using limited services processes and procedures. As discussed in the preamble to the NPRM, OCSE is acutely aware of the risk of domestic violence in the general operation of the child support program and, in particular, as it relates to this limited services provision. Supporting families who have experienced domestic violence is essential to a successful child support program. All State child support agencies are required, under § 303.21(e), to establish domestic violence safeguards pertaining to the disclosure of information and these procedures must be followed for paternity-only limited services cases, as well. In addition, IM–14–03 [14] provides an array of resources and tools child support programs can use to help victims safely and confidentially obtain child support services. It includes training tools for child support professionals, emphasizes the critical role of confidentiality, and describes existing domestic violence resources for parents, child support professionals, and the courts. The IM also outlines the importance of, and opportunities for, collaboration with domestic violence programs and coalitions as a means to improve the safe, efficient delivery of child support services. Child support establishment and enforcement can heighten the risk of domestic violence.[15] OCSE coordinates closely with ACF's Family and Youth Services Bureau (FYSB) to support implementation of recognized domestic violence protocols in child support programs and to conduct training and technical assistance. OCSE is committed to continuing to work with FYSB, States, and advocates to ensure that best practices are in place to safeguard the families we serve.

By identifying and responding effectively to domestic violence, providing safe opportunities to disclose domestic violence, and developing safe and confidential responses to domestic violence, child support programs can put the safety of families and program staff at the forefront of child support work. There are a number of points of heightened domestic violence risks during the establishment and enforcement process, and States should be providing domestic violence safeguards throughout the process. We encourage States to work with their local domestic violence programs and coalitions to establish appropriate safeguards. It is the responsibility of each State to ensure that their domestic violence provisions are adequate for both paternity-only limited services and full services application requests.

Historically, the custodial parent has typically been the applicant for State child support services. However, in providing an avenue for fathers to establish paternity for their child, we recognize that the potential exists for a noncustodial father to apply for paternity-only limited services without the cooperation or consent of the custodial parent mother due to domestic violence concerns. Clearly, it is never OCSE's intent to create a dangerous situation for a parent who is a victim of domestic violence. Although Federal law is silent on this specific scenario, there is nothing in Federal statute or regulation that would preclude States from developing additional policies and procedures to address the safety needs of custodial parents in non-public assistance cases who are found to have good cause for refusing to cooperate with the State child support agency in establishing paternity, or for whom the State child support agency determines it is against the best interest of the child to pursue paternity issues. Under section 454(29) of the Act, it is up to each State to define the criteria for ''good cause'' and to choose which

[14] Available at: *http://www.acf.hhs.gov/programs/css/resource/ocse-domestic-violence-awareness-month.*

[15] Pearson, Jessica and Esther Ann Griswold, ''Child Support Policies and Domestic Violence,'' *Public Welfare,* (Winter 1997), preview available at: *https://www.questia.com/magazine/1G1-19354300/child-support-policies-and-domestic-violence;* and Pearson, Jessica and Esther Ann Griswold, *Child Support Policies And Domestic Violence: A Preliminary Look at Client Experiences with Good Cause Exemptions to Child Support Cooperation Requirements,* prepared under a grant from the Federal Office of Child Support Enforcement (Grant No. 90–FF–0027) to the Colorado Department of Human Services for the Model Office Project, Center for Policy Research, January 1997, available at: *https://childsupport.state.co.us/siteuser/do/vfs/Read?file=/cm:Publications/cm:Reports/cm:Model_x0020_Office_x0020_Project_x0020_Grant/cm:Child_x0020_support_x0020_policies_x0020_and_x0020_dv.pdf.*

agency will determine if the good cause exception is warranted. Section 303.11(b)(14) provides that a good cause determination can be made by either the IV–A, IV–D, IV–E, Medicaid or SNAP agency. Section 305.2(a)(1) reiterates this, declaring that the count of children in establishing paternity performance levels shall not include ''. . . any child whose parent is found to have good cause for refusing to cooperate with the State agency in establishing paternity, or for whom the State agency determines it is against the best interest of the child to pursue paternity issues.'' Lastly, § 302.31(b) and (c) mandate that the State child support agency suspend all activities to establish paternity or secure support until notified of a final determination by the appropriate agency, and will not undertake to establish paternity or secure support in any case for which it receives notice that there has been a finding of good cause unless there has been a determination that support enforcement may safely proceed without the participation of the caretaker or other relative.

Section 302.38—Payments to the Family

1. Comment: One commenter stated that by preventing assignments to attorneys, we could limit custodial parents' ability to find legal representation. Another commenter stated that the NPRM as written appears to prohibit the disbursement of payments to anyone other than the payee. Several commenters suggested that the provision be changed so that disbursements to a third party, such as a private attorney or conservator representing custodial parents in child support collection actions or relatives or guardians, are authorized at the request of the custodial parent. Another commenter stated that States should retain the right to send payments to a conservator or private attorney representing the custodial parent and child with a legal fiduciary duty to act in the child's best interest.

Response: OCSE agrees that States should retain the right to send payments to a judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child; however, we do not view private attorneys in this same category, particularly when collecting fees. Based on the American Bar Association Model Code of Professional Responsibility, many States disfavor contingency fees in child support cases because they would reduce support to the child and could adversely affect family relationship.

We have revised § 302.38 to expand the list of entities to whom child support payments under §§ 302.32 and 302.51 can be made. The provision now requires that a State's IV–D plan ''shall provide that any payment required to be made under §§ 302.32 and 302.51 to a family will be made directly to the resident parent, legal guardian, caretaker relative having custody of or responsibility for the child or children, judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child, or alternate caretaker designated in a record by the custodial parent. An alternate caretaker is a nonrelative caretaker who is designated in a record by the custodial parent to take care of the children for a temporary time period.

2. Comment: One commenter believed that private attorneys should be in the same category as a collection agency.

Response: We agree. Therefore, this rule does not authorize payments to be made directly to a private attorney or a private collection agency.

3. Comment: Several commenters recommended that we modernize the rule to refer to caretaker rather than relative caretaker to accommodate nonrelative caretakers and guardians. In addition, the commenters recommended expanding the definition of ''to a family'' because custodial parents may need the ability to designate an alternate recipient in situations where doing so may benefit the family, which is common. Another commenter asked if OCSE meant to disallow situations in which the mother requests payments be directed to caretakers who are not relatives and not legal guardians.

Response: OCSE agrees and updated the language in § 302.38 to include an alternate caretaker designated in a record by the custodial parent in those circumstances when the parent does not obtain a formal court order to change custody, for example, before going into the hospital or jail, or being deployed. An alternate caretaker is a nonrelative caretaker who is designated in a record by the custodial parent to take care of the children for a temporary time period.

4. Comment: One commenter asked that we clarify that payments must be made to the resident parent, legal guardian, or caretaker relative who is the petitioner or named custodial parent obligee in the petition for support and the support order. According to the commenters, this would ensure that the proposed revision to § 302.38 is not read as authority for State IV–D agencies to unilaterally amend the obligee in a child support case when custody changes.

Response: This provision only addresses a IV–D agency's requirements when disbursing child support payments. Section 302.38 does not authorize child support agencies to unilaterally change a child support order when custody changes. State laws govern such changes.

5. Comment: Two commenters suggested changing the language to specifically prohibit disbursements to private collection agencies if that is the sole intent.

Response: Section 454(11)(A) and (B) of the Act clearly provides that a State plan for child support must provide that amounts collected as support shall be distributed as provided in section 457; and provide that any payment required to be made under section 456 or 457 to a family shall be made to the resident parent, legal guardian, or caretaker relative having custody of or responsibility for the child or children. The intent of this rule is to disburse child support payments directly to families.

Our intent is not to regulate private collection agencies, but rather to ensure that child support programs are not facilitating, and the taxpayer is not subsidizing, potentially inappropriate business practices of some private collection agencies not under contract to States. In addition, the ethics codes of most state bar associations prohibit private attorneys from taking fees from current child support, and several prohibit fees from arrears on public policy grounds. In order to provide protections for families and fulfill the intent of the original child support legislation and subsequent amendments, § 302.38 requires that child support payments owed and payable to families be disbursed directly to families.

6. Comment: One commenter suggested changing case closure provisions to authorize case closure if the IV–D applicant contracts with a private collection agency or there is no longer a resident parent, legal guardian, or caretaker to whom the IV–D agency can disburse payments.

Response: We do not agree that the case closure provisions should be changed to authorize case closure if the IV–D applicant contracts with a private collection agency because there is no prohibition against a custodial parent contracting with a private collection agency. If there is no longer a resident parent, legal guardian, or caretaker relative having custody of or responsibility for the child or children, judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child, or alternate caretaker designated in a record by the custodial parent to whom the IV–D agency can disburse payments, the State

may close the case if it meets any of the case closure criteria in § 303.11(b).

7. Comment: Two commenters suggested that OCSE encourage States to help custodial parents obtain bank accounts so they can avoid predatory fees from check-cashing businesses and not lose considerable shares of their payments to fees.

Response: We support States' issuance of debit cards, which will help custodial parents avoid predatory fees from check-cashing businesses. We encourage States to provide training or technical assistance to custodial and noncustodial parents to improve financial literacy, financial management, and financial responsibility.

8. Comment: One commenter suggested OCSE should clarify that IV–D agencies are not responsible to confirm that payments deposited directly to bank accounts are bank accounts under the control of the parent or caretaker. If the parent enrolls in direct deposit, the IV–D agency permits it without further confirmation.

Response: Child support agencies are not required to confirm that the bank accounts, to which the State sends payments, are under the control of the parent or caretaker. We are not making this a new requirement. However, States are required to establish a mechanism to identify payments through the SDU that are going to private collection agencies. See Comments/Responses 15 and 16.

9. Comment: One commenter suggested that the rule requires States to presume that the TANF recipient is the legal guardian in such instances.

Response: We disagree. The State determines whether the TANF recipient is the legal guardian.

10. Comment: Several commenters were concerned with the use of the term ''directly'' and felt it may cause issues with the arrangements that families have in order to care for their children. Some commenters feel that the proposed regulation omits other, less formal, requests from custodial parents to disburse funds to a relative or family friend with whom the child may be living on a temporary basis. Several commenters recommended that OCSE not use the term ''directly.''

Response: We have expanded the list of entities to whom child support payments under §§ 302.32 and 302.51 can be made to allow for alternate caretakers designated in writing or in a record by custodial parents.

11. Comment: One commenter suggested that a clear definition of the term ''private collection agency'' should be provided by OCSE for purposes of uniformity.

Response: OCSE notes that the Department of Treasury defines a private collection agency as a private sector company specializing in the collection of delinquent debt. A private collection agency will attempt to find and contact a debtor by searching various databases, making telephone calls, and sending collection letters. Once the debtor is located and contacted, the private collection agency will encourage the debtor to satisfy the debt.[16]

12. Comment: One commenter asked that OCSE address the treatment of interstate/Uniform Interstate Family Support Act (UIFSA) cases where money is sent to the initiating State's SDU and international cases, which may order support payment directly to the child and/or to other caretaker situations.

Response: In interstate cases, § 303.7(d)(6)(v) requires the responding State IV–D agency to collect and forward child support payments to the location specified by the initiating agency. The initiating State IV–D agency must specify its SDU as the location for receiving payments in intergovernmental cases in accordance with section 454B of the Act and § 303.7(d)(6)(v) and is responsible for distributing and disbursing child support payments in accordance with § 303.7(c)(10) and as directed in § 302.38 in the same manner it handles intrastate cases.

Similarly, in an international case where the State is enforcing and collecting child support payments (in accordance with section 454(32) and 459A of the Act) as the responding State IV–D agency, the payment processing requirements in § 303.7(d)(6)(v) apply. State IV–D agencies, as responding agencies in international child support cases, are required to forward child support payments ''to the location specified by the initiating agency.'' The term ''initiating agency'' is defined in § 301.1 to include an agency of a country that is either a foreign reciprocating country or a country with which the State has entered into a reciprocal arrangement and in which an individual has applied for or is receiving child support enforcement services. In international cases, the Central Authority or its designee in the foreign country will identify where payments should be sent, for example, to the Central Authority, court, custodial parent, caretaker, emancipated child, etc. In these cases, the responding State IV–D agency satisfies title IV–D requirements by collecting and forwarding collections as directed by the Central Authority in the foreign country in accordance with § 303.7(d)(6)(v).

13. Comment: The commenter asked that OCSE clarify if this provision only applies to IV–D agencies and if it applies to child support payments that are subject to income withholding, not subject to income withholding, or both.

Response: This provision applies to all payments that flow through the SDU.

14. Comment: One commenter asked how States should handle existing cases that have been set up to send payments to the private collection agencies. For example, should States now ignore the contracts and alternate payee forms submitted by the collection agencies and send any collections directly to the custodial parent? Another commenter asked if States will be obligated to notify obligees that the IV–D agency will no longer disburse his/her payments to a private collection agency as the obligee previously. One commenter indicated that requiring disbursement directly to a family is contrary to existing contracts that custodial parents have signed with private collection agencies.

Response: It is not the responsibility of the child support agency to enforce private contracts. Private contracts are between the parent and the private entity. State child support agencies should notify obligees that the agency will no longer disburse child support collections to private collection agencies. However, the custodial parent can negotiate with private collection agencies, as this provision only deals with the child support agency's disbursement of child support collections. Once the SDU disburses the child support collections to the obligee, the obligee still has the ability to pay the private collection agency's fees for contractual services.

15. Comment: One commenter asked for detail on how local child support agencies might identify cases in which the payment is being disbursed to a private collection agency and how they would identify the collection agency.

Response: Each State will be required to set up its own mechanisms to identify cases in which the payment is being disbursed to a private collection agency and to identify the collection agency.

16. Comment: One commenter expressed concern that it will be difficult for States to ensure that payments are made directly to the family for non-IV–D SDU cases.

Response: States are required to ensure that payments are made directly to the family for all non-IV–D

[16] Further information is available at: *https://www.fiscal.treasury.gov/fsservices/gov/debtColl/dms/xservg/pca/debt_pca.htm.*

collections being disbursed by the SDU. States should put the necessary policies and procedures in place to ensure that this provision is followed in all applicable cases. States need to develop procedures to obtain information from the custodial parents to ensure that payments for non-IV–D cases are sent directly to the family.

17. Comment: A few commenters opposed the provision, indicating that they had personal experience working with private collection agencies, and proposed that custodial parents should be able to choose where their child support payments are disbursed. One commenter indicated that some States have laws that allow a private collection agency to contract directly with a custodial parent.

Response: This provision does not prohibit custodial parents from entering into agreements with private collection agencies. As noted above, the rule does not prevent companies from charging and collecting fees for services rendered. Parents may pay private collection agencies directly for provided services once they receive disbursement of their child support payments.

Section 302.56—Guidelines for Setting Child Support Orders

General Comments

1. Comment: Several commenters requested public hearings around the country on the proposed changes to the child support guidelines so noncustodial parents could get their chance to tell OCSE what they think.

Response: While the Administrative Procedures Act provides agencies with discretion on whether to hold public hearings, OCSE determined that the opportunity to submit written comments during the comment period provided effective opportunity for public input. Therefore, OCSE did not hold hearings on the NPRM. We received over 2,000 sets of comments from State and county agencies, child support organizations, court associations, advocacy groups, parent groups, researchers, noncustodial parents, and custodial parents, which we carefully considered in developing this final rule.

2. Comment: Several commenters suggested that at high incomes, there should be a fixed dollar cap on child support orders. Their rationale for the dollar cap is that it would reduce conflict, reduce the need to hire lawyers and other professionals, and ultimately increase resources available for the children. Also, they indicated that many studies show that reasonable amounts of child support are more likely to be paid regularly and the amount of unpaid arrearages will be substantially reduced. Another commenter suggested that the maximum amount of the support obligation should be no more than 20 percent of the obligor's income.

Response: We do not agree that the Federal government should set a cap (either a fixed dollar amount or a maximum percentage rate) on child support payments. States determine the numeric criteria included in their guidelines.

3. Comment: A few commenters proposed that guidelines should call for prompt modification of existing child support orders upon filing of a complaint for modification, if there has been a significant change of circumstances. They thought that ''significant change of circumstances'' should be defined to include a change in the income and earnings of either parent of 5 percent or more.

Response: The commenters are correct that Federal statute, section 466(a)(10) of the Act, requires review and, if appropriate, adjustment of a child support order upon request of either parent if there is a substantial change of circumstances. However, the NPRM did not propose a change to the existing provision in § 303.8(c) that the ''State may establish a reasonable quantitative standard based upon either a fixed dollar amount or percentage, or both. . . .'' OCSE already has established timeframes for review and adjustment in § 303.8(e), which indicates that within 180 calendar days of receiving a request for a review or locating the non-requesting parent, whichever occurs later, a State must conduct a review of the child support order and adjust the order upward or downward, upon a showing that there has been a substantial change of circumstances, in accordance with this section. We encourage States to streamline their procedures in order to promptly modify child support orders upward or downward when there are significant changes of circumstances.

4. Comment: Several commenters proposed that guidelines should terminate child support at age 19 or upon graduation from secondary school, whichever occurs earlier. One commenter added that one exception should be if the child who is the subject of the order has special medical or educational needs. The commenter also thought that State statutes providing for the support of older children of intact marriages should be applied identically to parents who are not married. One commenter further explained that married parents are under no legal obligation in most States to support their children beyond age 19, except in extraordinary circumstances. This commenter questioned why any State has an interest in mandating support for children of divorced and separated parents up to age 23, but not for those of married parents; the commenter found such requirements discriminatory on their face. The commenter also stated that when he last checked, 33 States terminate the child support obligation upon the child's attaining age 19.

Response: While we understand the commenters' point, States have discretion and flexibility in defining the age of emancipation for child support orders. In accordance with the Child Support Enforcement Amendments of 1984, Congress has mandated that States must have procedures that permit the establishment of the paternity of any child at any time prior to such child's 18th birthday. However, it is a matter to be determined by the State in accordance with State law.

Compliance Date [§ 302.56(a)]

1. Comment: While many commenters appreciated that OCSE's proposed revision in § 302.56(a) coincided with the next quadrennial review, for States whose quadrennial reviews commence shortly after the rule is finalized, the commenters indicated that they needed additional time to conduct further analysis and research on implementation issues and potential system changes. They recommended an additional extension of 1 year. In other words, the guideline changes would be required to be in effect within 1 year after completion of the first quadrennial review of its guidelines that commences more than 1 year after the publication of the final rule.

Response: We agree with this suggestion and have made this change in § 302.56(a). We understand that States will need additional time to do research and prepare for the quadrennial review based on the revisions in the final rule. Therefore, we are revising the language in paragraph (a) to indicate that within 1 year after completion of the State's next quadrennial review of its child support guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan, the State must establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support order amounts within the State that meet the requirements in this section.

2. Comment: A few commenters recommended a faster implementation date than what was proposed in the

NPRM. They recommended that the new revisions be effective ''within 1 year after publication of the final rule.''

Response: As a result of the final rule, States must review, and if necessary, revise their guidelines. A 1-year implementation date would be unrealistic since it would be a time-consuming and costly process for States to review their guidelines outside of the required 4-year review cycle. We believe that the revisions will require the States to do extensive research and analysis of case data, economic factors, and other factors in developing guidelines that meet the revised Federal requirements.

3. Comment: A few other commenters recommended that States would need two quadrennial reviews to implement the final rule. They thought that one quadrennial review period was not sufficient time to obtain new data, complete new economic studies based on that data, build new guidelines tables, and enact the required legislation to approve the new tables.

Response: A two-quadrennial review period, or 8 years, is an unreasonable length of time to delay implementation of these new revisions. States should implement the guidelines, review and adjustment, and civil contempt provisions within a reasonable period of time to ensure that child support orders do not exceed a noncustodial parent's ability to pay. Most commenters either agreed that conforming guidelines during the next quadrennial review was sufficient time, or commented that the implementation period should be shorter.

Availability of the Guidelines [§ 302.56(b)]

1. Comment: We had many commenters suggest that the guidelines be made available to all persons in the State who request them, rather than only to the persons in the State whose duty it is to set child support award amounts. They thought that the guidelines are a matter of enormous public and individual import and therefore must be freely available to all who request them.

Response: We agree that child support guidelines should be readily available to all persons in the State through such means as posting on their Web sites, child support brochures, or some other method for disseminating educational materials. In fact, most States already make their guidelines available on their Web sites. We also agree that principles of government transparency would indicate that the guidelines should be available to the general public since the guidelines impact citizen rights and responsibilities. As a result, we have removed the phrase ''whose duty it is to set child support award amounts'' from the end of the sentence in § 302.56(b).

Ability To Pay [§ 302.56(c)(1)]

1. Comment: Many commenters agreed that guidelines should result in child support orders based on the noncustodial parent's ability to pay. One commenter indicated that setting right-sized orders is as much an art as it is a science. Each State has its own set of constituencies and circumstances that influence how guidelines are set. The commenters also thought that the court should have the ability to look at all factors, including the lifestyle of the noncustodial parent, testimony provided in court, previous work history, education and training, and any information provided by the custodial parent. They thought the proposed regulation limited the discretion of the court, and could have a negative impact on the program.

Response: The ''ability to pay'' standard for setting orders has been Federal policy for almost 25 years,[17] and many existing State guidelines explicitly incorporate the ''ability to pay'' standard. Consistent with comments, we have redrafted the rule to codify this standard. We also added language that States consider the noncustodial parent's specific circumstances in making an ability to pay determination when evidence of income is limited, and added language more clearly articulating the basis upon which States may use imputed income to calculate an order. These revisions are discussed in more detail below.

Over time, we have observed a trend among some States to reduce their case investigation efforts and to impose high standard minimum orders without developing any evidence or factual basis for the child support ordered amount. Our rule is designed to address the concern that in some jurisdictions, orders for the lowest income noncustodial parents are not set based upon a factual inquiry into the noncustodial parent's income and ability to pay, but instead are routinely set based upon a standardized amount well above the means of those parents to pay it. The Federal child support guidelines statute requires guidelines that result in ''appropriate child support award'' and is based on the fundamental principle that each child support order should take into consideration the noncustodial parent's ability to pay.[18] Therefore, we have codified this longstanding policy guidance as the leading guidelines principle in § 302.56(c)(1).

Research suggests that setting an accurate child support order based upon the noncustodial parent's ability to pay improves the chances that the noncustodial parent will continue to pay over time.[19] Compliance with support orders is strongly linked to actual income and ability to pay.[20] Many low-income noncustodial parents do not meet their child support obligations because they do not earn enough to pay what is ordered.[21] Orders set beyond a noncustodial parents' ability to pay can result in a number of deleterious effects, including unmanageable debt, reduced low-wage employment, increased underground activities, crime, incarceration, recidivism, and reduced contact with their children.[22] Research consistently finds that orders set too high are associated with less consistent payments, lower compliance, and increased child support debt.[23] In fact,

[17] AT–93–04, available at: *http://www.acf.hhs.gov/programs/css/resource/presumptive-guidelines-establishment-support-unreimbursed-assistance* and PIQ–00–03, available at: *http://www.acf.hhs.gov/programs/css/resource/state-iv-d-program-flexibility-low-income-obligors.*

[18] Section 467(a) of the Social Security Act, 42 U.S.C. 667(a).

[19] HHS Office of Inspector General, *The Establishment of Child Support Orders for Low-Income Non-custodial Parents,* OEI–05–99–00390, (2000), available at: *http://oig.hhs.gov/oei/reports/oei-05-99-00390.pdf.*

[20] Meyer, Daniel, R. Yoonsook Ha, and Mei-Chen Hu, ''Do High Child Support Orders Discourage Child Support Payments?'' *Social Service Review,* (2008), 82(1): 93–118; Huang, Chien-Chung, Ronald B. Mincy, and Irwin Garfinkel, ''Child Support Obligations and Low-Income Fathers'' *Journal of Marriage and Family,* (2005), 67(5): 1213–1225.

[21] Kathryn Edin and Timothy J. Nelson, *Doing the Best I Can: Fatherhood in the Inner City,* University of California Press, (2013); Pearson, Jessica, Nancy Thoennes, Lanae Davis, Jane C. Venohr, David A. Price, and Tracy Griffith, 2003, *OCSE responsible fatherhood programs: Client characteristics and program outcomes,* available at: *http://www.frpn.org/file/61/download?token=CNMvAIQn.*

[22] Pamela Holcomb, Kathryn Edin, Jeffrey Max, Alford Young, Jr., Angela Valdovinos D'Angelo, Daniel Friend, Elizabeth Clary, Waldo E. Johnson, Jr. (2015), *In Their Own Voices: The Hopes and Struggles of Responsible Fatherhood Program Participants in the Parents and Children Together Evaluation.* Report submitted to the Office of Planning, Research, and Evaluation. OPRE Report #2015–67 available at: *http://www.acf.hhs.gov/programs/opre/resource/in-their-voices-hopes-struggles-responsible-fatherhood-parents-children-evaluation;* and Maureen Waller and Robert Plotnick. (2001). ''Effective child support policy for low-income families: Evidence from street level research'' *Journal of Policy Analysis and Management* 20(1): 89–110.

[23] Meyer, Daniel, R. Yoonsook Ha, and Mei-Chen Hu (2008) ''Do High Child Support Orders Discourage Child Support Payments?'' *Social Service Review,* 82(1): 93–118; Huang, Chien-Chung, Ronald B. Mincy, and Irwin Garfinkel. (2005) ''Child Support Obligations and Low-Income Fathers'' *Journal of Marriage and Family,* 67(5): 1213–1225; Carl Formoso, *Determining the Composition and Collectibility of Child Support*

studies find that orders set above 15 to 20 percent of a noncustodial parent's income increases the likelihood that the noncustodial parent will pay less support and pay less consistently, resulting in increased arrears.[24] The conclusion from this research is that families do not benefit from orders that noncustodial parents cannot comply with because of their limited income. High orders do not translate to higher payments when the noncustodial parent has limited income.[25]

The final rule added paragraph (c)(1) to provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay. Paragraph (c)(1)(iii) requires consideration of the specific circumstances of the noncustodial parent when imputing income. This will be discussed in further detail later in this section.

2. Comment: One commenter recommended that a sentence be added to the regulation stating that the receipt of Supplemental Security Income (SSI) or combined SSI and Social Security Disability Income (SSDI) benefits establishes a *prima facie* case that the individual does not have the ability to pay child support unless the presumption of insufficient means and inability to work is successfully rebutted by submission of opposing evidence.

Response: When the noncustodial parent is receiving SSI or concurrent SSI and SSDI benefits, the State has flexibility on whether and how to address the receipt of such benefits in its guidelines. We encourage States to consider receipt of SSI and concurrent SSDI benefits as a part of the circumstances in the case that they will consider in ensuring that support orders are based on ''ability to pay.'' In order to receive these benefits, an individual must have a significant disability that prevents or limits work, and in the case of SSI (including concurrent receipt), eligibility is also based on an individual's basic needs. Regardless of whether the State considers SSI and concurrent SSDI benefits as income for purposes of order establishment, it may not garnish these benefits in accordance with § 307.11.

All Income [§ 302.56(c)(1)(i)]

1. Comment: Several commenters were opposed to our proposed revisions in § 302.56(c)(1), which has been redesignated as paragraph (c)(1)(i) because they questioned the difference between ''actual'' earnings and income and ''all'' earnings and income. They thought that ''actual'' income was too restrictive. They were concerned that the NPRM would introduce uncertainty into State guidelines definitions of ''income'' if the provision requiring ''all income'' to be considered were eliminated. One commenter asked whether replacing the term ''all'' with the term ''actual'' prevented States from considering depreciation as an adjustment to a parent's income. The commenter thought that the revision would make it difficult to determine the income of contractors and the self-employed. Other commenters thought that our proposed revision only allowed consideration of the use of the noncustodial parent's ''actual'' income in calculating child support obligations, in other words, the State could never use imputed income, but would be limited to actual income in every factual situation, despite evidence of ability to pay.

Response: Based on the comments that we received on proposed paragraph (c)(1), redesignated as paragraph (c)(1)(i), we did not make the proposed revision, but instead codified the longstanding guidelines standard that orders be based upon ''earnings, income, and other evidence of ability to pay.'' We also retained the provision in the former rule to require consideration of ''all earnings and income'' in paragraph (c)(1). To be clear, the guidelines must provide that orders must be based upon evidence of the noncustodial parent's earnings and income and other evidence of ability to pay in the specific case. In addition, the guidelines must provide that if income is imputed, the amount must reflect the specific circumstances of the noncustodial parent to the extent known, and may not order a standard amount imposed in lieu of fact-gathering in the specific case. The expectation is that in IV–D cases, the IV–D agency will investigate each case sufficiently to base orders on evidence of the noncustodial parent's ability to pay. Orders issued in IV–D cases should not reflect a lower threshold of evidence than applied in private cases represented by legal counsel.

2. Comment: One commenter requested clarification regarding what constitutes ''actual'' earnings and income in the proposed paragraph (c)(1). For example, would it be permissible under the proposed regulatory revisions for a noncustodial parent to allocate a greater percentage of his/her earnings as voluntary contributions to a deferred compensation plan and thereby minimize ''actual'' earnings? Many commenters suggested that the Federal government define income as the Federal Adjusted Gross Income, while others suggested that we consider the household income of the custodial parent. Other commenters suggested that Smith-Ostler orders [26] be eliminated or better reflect the tax consequences of the payor. One commenter also suggested that the noncustodial parent's ability to pay be calculated after mandatory deductions, such as taxes. Another commenter was concerned about how actual earnings and income would be determined and what benefits, resources, and sources of income would be considered for the purpose of this provision.

Response: In response to comments, the final rule requires States to consider all earnings and income for the noncustodial parent under paragraph (c)(1)(i), subject to the requirement that orders be based on earnings, income, and other evidence of ability to pay. We are establishing only minimum components for child support guidelines. States have the discretion and responsibility to define earnings and income, for example in the manner proposed by commenters, since they are in a better position to evaluate the economic factors within their States and

Arrearages: Final Report, Volume 1: The Longitudinal Analysis, Washington State Division of Child Support (2003), available at: *https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/cvol1prn.pdf;* Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?* Orange County, CA Department of Child Support Services, (2011), available at: *http://ywcss.com/sites/default/files/pdf-resource/how_do_child_support_orders_affect_payments_and_compliance.pdf.*

[24] HHS Office of Inspector General, *The Establishment of Child Support Orders for Low-Income Non-custodial Parents,* OEI–05–99–00390, (2000), available at: *http://oig.hhs.gov/oei/reports/oei-05–99–00390.pdf;* Carl Formoso, *Determining the Composition and Collectibility of Child Support Arrearages: Final Report, Volume 1: The Longitudinal Analysis,* Washington State Division of Child Support (2003), available at: *https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/cvol1prn.pdf;* and Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?* Orange County, CA Department of Child Support Services, (2011), available at: *http://ywcss.com/sites/default/files/pdf-resource/how_do_child_support_orders_affect_payments_and_compliance.pdf.*

[25] National Women's Law Center and the Center on Fathers, Families, and Public Policy, *Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers, and Children* (2002), available at: *http://www.nwlc.org/sites/default/files/pdfs/CommonGroundDollarsandSense.pdf.*

[26] Sometimes one or both parents have income that varies, fluctuates, or is otherwise unpredictable. When calculating child support, the court often uses a ''Smith-Ostler order'' to account for commissions, bonuses, or overtime income. In these cases, the court will set an amount for child support and issue a Smith-Ostler order to account for overtime and bonus income. The Smith-Ostler order will set a fixed percentage of all bonus income to be paid as additional child support.

have broad discretion to set guidelines policies.

3. *Comment:* One commenter suggested that guidelines be required to take into consideration the assets of the noncustodial parent, in addition to earnings and income.

Response: We have decided to retain the former language in the rule that ''all'' earnings and income be taken into consideration in § 302.56(c)(1)(i). This language has been extensively interpreted and applied in every State for over two decades. Retaining the term ''all income'' allows States to consider depreciation, deferred income, or other financial mechanisms used by self-employed noncustodial parents to adjust their actual income. In addition, we added ''assets'' to the list of specific circumstances in paragraph (c)(1)(iii) that the State must consider when the State guidelines authorize imputation of income. States have discretion to determine whether to add assets or define which assets should be considered in their child support guidelines as a basis for determining child support amounts.

4. *Comment:* Many commenters proposed that actual income and earnings should be considered for both parents. In support, they pointed out that the 1988 Advisory Panel on Child Support Guidelines (on which the original § 302.56 language was based) recommended that: ''Both parents should share legal responsibility for support of their children, with the economic responsibility divided between the parents in proportion to their income.'' This recommendation was never incorporated into the Federal regulations at § 302.56. The commenters believed that now was the time to include a requirement to consider the income and earnings of both parents.

Response: We agree that both noncustodial and custodial parents have a responsibility to support their children. However, the NPRM did not propose that States revise this aspect of their child support guidelines, which impacts the particular guidelines model a State has adopted. Some States do not explicitly take the custodial parent's income into account in the guidelines model they have adopted. The NPRM did not address State guidelines models. Therefore, the adoption of a guidelines model continues to be a matter of State determination.

However, in § 302.56(c)(1)(i) through (iii), we have added a parenthetical to indicate that at the State's discretion, the State may consider the circumstances of the custodial parent if it is required or applicable in their guidelines computation. We encourage States that use the income shares model for guidelines, which considers the custodial parent's earnings and income, to also consider it for applying § 302.56(c)(1)(i) through (iii).

5. Comment: One commenter indicated that we should require States to have laws that require the parties (who have the best access to their own income information) to provide financial data so as to ensure accurate and appropriate orders.

Response: We have revised § 303.4, *Establishment of support obligations,* to require State IV–D agencies to investigate earnings and income information through a variety of sources, for example, by expanding data sources and implementing the use of parent questionnaires, ''appear and disclose'' procedures, and case conferencing. Often, better investigations would enable States to obtain more accurate information needed in establishing and modifying child support orders. We know that many States already have procedures in place to obtain financial information from the parents. In fact, in cases where the noncustodial parent does not receive a salary or wages, income, assets, and standard of living information can often be obtained directly through contact with both parents. State law may require the parties to provide this information to the child support agency.

6. *Comment:* One commenter stated that instead of changing the laws on how courts establish child support, the National Directory of New Hires (NDNH) should provide more timely and accurate information. The commenter recommended its expansion to include data on Form 1099 payments as well as assets and income sources. The commenter also stressed the need for States to enforce laws requiring the timely and complete reporting of information to the State Directory of New Hires (SDNH). The commenter noted that consistent receipt of this information would assist IV–D agencies in establishing support based on ''actual'' income.

Response: We appreciate the suggested improvements; however, expanding the NDNH to include Form 1099 payments requires statutory changes by Congress. Regarding the SDNH, section 453A of the Social Security Act authorizes States to impose civil money penalties on noncomplying employers. Specifically, a State has the option to set a State civil money penalty which shall not exceed (1) $25 per failure to meet the requirements of this section with respect to a newly hired employee; or (2) $500 if, under State law, the failure is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report.

Subsistence Needs of the Noncustodial Parents [§ 302.56(c)(1)(ii)]

1. Comment: There were many suggestions related to the requirement that State guidelines ''[t]ake into consideration the noncustodial parent's subsistence needs'' in proposed § 302.56(c)(4), which was redesignated as (c)(1)(ii) in the final rule. Many commenters requested more guidance on subsistence needs or wanted OCSE to develop an operational definition. Others asked what the State should do when the noncustodial parent is making less than the subsistence needs. Many commenters thought that the States need discretion to carefully weigh and balance the considerations of low-income obligors and the needs of the children and the custodial parents' households. Other commenters requested that OCSE also consider the subsistence needs of the custodial parent. Some were opposed to the proposed revision because they did not think that Federal regulations were necessary since many States already have low-income formulas. However, many more commenters indicated that we need stronger protections to recognize the subsistence needs of very poor noncustodial parents.

Response: We considered these comments in revising the NPRM. In the final rule in paragraph (c)(1)(ii), we require that child support guidelines must ''[t]ake into consideration the basic subsistence needs of the noncustodial parent (and at the State's discretion, the custodial parent and the children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State.'' A low-income adjustment is the amount of money a parent owing support needs to support him or herself at a minimum level. It is intended to ensure that a low-income parent can meet his or her own basic needs as well as permit continued employment. A low-income adjustment is a generic term. A self-support reserve is an example of a low-income adjustment that is commonly used by the States.

The revision allows States' flexibility to determine the best approach to adjusting their guidelines to take into consideration the basic subsistence needs of low-income noncustodial parents. All but five States have already incorporated such low-income adjustments such as self-support reserves into their child support

guidelines.[27] We encourage States to continue to review their policies affecting low-income parents during each quadrennial review to assure that the policies are working as intended.

Our goal is to establish and enforce orders that actually produce payments for children. Both parents are expected to put their children first and to take the necessary steps to support them. However, if the noncustodial parent cannot support his or her own basic subsistence needs, it is highly unlikely that an order that ignores the need for basic self-support will actually result in sustainable payments. One of the unintended, but pernicious, consequences of orders that are not based on ability to pay is that some noncustodial parents will exit low wage employment and either avoid the system entirely or turn to the drug trade or other illegal activities to pay support obligations and contempt purge payments.[28] It is not in children's best interests and counterproductive to have their parents engage in a cycle of nonpayment, illegal income generation, and incarceration.

2. Comment: A few commenters indicated that they thought State laws must be flexible enough to address both low-income situations and those situations where noncustodial parents use creative means to avoid their responsibility.

Response: We agree with these comments and have revised the child support guidelines requirements to more clearly reflect some of the commenters' concerns. The order establishment process must be able to hold noncustodial parents accountable when they have the means to pay support but attempt to withhold their resources from their children. The challenge is distinguishing between cases in which the noncustodial parent has the means to pay and those in which the noncustodial parent is unable to pay much. More contact with both parents and investigation into the facts will help the child support agency learn more about the noncustodial parent's specific circumstances. Custodial parents can be a particularly good source of information. Imputation should not serve as a substitute for fact-gathering.

3. Comment: Several commenters suggested that we define subsistence needs or low-income in this rule.

Response: OCSE does not agree with this suggestion. States should use their discretion and flexibility to define these terms based on the economic and demographic factors in their State.

Imputing Income [§ 302.56(c)(1)(iii)]

1. Comment: Many commenters agreed that child support guidelines should reflect the basic statutory principle that child support orders are based on the noncustodial parent's ability to pay. However, many commenters opposed this aspect of the NPRM because they believed we were eliminating the practice of imputing income to the noncustodial parent to establish orders. Although our NPRM preamble indicated otherwise, several commenters thought that imputed income would only be allowed when a noncustodial parent's standard of living was inconsistent with reported income. Commenters articulated three types of circumstances where they believed imputation is appropriate and grounded in case law: (1) When a parent is voluntarily unemployed, (2) when there is a discrepancy between reported earnings and standard of living, and (3) when the noncustodial parent defaults, refusing to show up or provide financial information to the child support agency. Some commenters thought that the courts should be able to evaluate the circumstances of the case when imputing income for the noncustodial parent.

One commenter referenced the National Child Support Enforcement Association policy statement, issued on January 30, 2013, that indicated: ''As a general rule, child support guidelines and orders should reflect actual income of parents and be changed proactively to ensure current support orders reflect current circumstances of the parents and to encourage regular child support payments.''

Response: There was considerable misunderstanding about the scope and intent on this aspect of the NPRM. Our intent was to require a stronger focus on fact-gathering and setting orders based on evidence of the noncustodial parent's actual income and ability to pay, rather than based on standard imputed (presumed)[29] amounts applied across the board. However, we also intended to recognize certain established grounds for imputation when evidentiary gaps exist, including voluntary unemployment and discrepancies between reported income and standard of living.

Considering commenters' concerns and suggested revisions, we made significant revisions in paragraph (c) to clearly articulate the longstanding requirement that State guidelines must provide that child support orders are based on the noncustodial parent's earnings, income, and other evidence of ability to pay. We have also added in paragraph (c)(1)(iii) providing that when imputation of income is authorized, the guidelines must take into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known.

Presently, some State guidelines allow income to be imputed without evidence that the noncustodial parent has or can earn a standard amount of income. Although the original use of imputation was to fill specific evidentiary gaps in a particular case, over time we have observed a trend among some States of reducing their case investigation efforts and imposing high standard minimum child support orders across-the-board in low-income IV–D cases, setting orders without any evidence of ability to pay.[30]

Many States do take steps to determine the factual circumstances in a particular case and build an

[27] Venohr, Jane, ''Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues,'' *Family Law Quarterly,* 47(3), Fall 2013, pages 327–352, available at: *http://static1.squarespace.com/static/5154a075e4b08f050dc20996/t/54e34dd2e4b04c0eab578456/1424182738603/3fall13_venohr.pdf.*

[28] Mincy, Ronald et al, *Failing Our Fathers: Confronting the Crisis of Economically Vulnerable Nonresident Fathers,* Oxford University Press, 2014; Kotloff, Lauren, J., *Leaving the Street: Young Fathers Move From Hustling to Legitimate Work,* Public/Private Ventures (2005), available at *https://hmrf.acf.hhs.gov/resources/fathers-at-work-initiative-reports/leaving-the-street-young-fathers-move-from-hustling-to-legitimate-work/;* and Rich, Lauren, M., ''Regular and Irregular Earnings of Unwed Fathers: Implications for Child Support Practices.'' *Children and Youth Services Review,* April–May 2001, 23(4⁄5): 353–376, which is available at: *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwiq2fW_i8nKAhXEtIMKHabpD5gQFggmMAE&url=http%3A%2F%2Fwww.sciencedirect.com%2Fscience%2Farticle%2Fpii%2FS0190740901001396%2Fpdf%3Fmd5%3D7f4e344844155112ff3e1b55528fbde6%26pid%3D1-s2.0-S0190740901001396-main.pdf&usg=AFQjCNHlcgoC8Zj_abOHen6w2LXDgEtMYA&sig2=LOBYbUWWp2UgHBqV5BD-Og&bvm=bv.112766941,d.dmo.*

[29] OCSE views presumed income and imputed income similarly since they are both based on fictional income. Therefore, we use these terms interchangeably.

[30] According to a report recently released by the National Center for State Courts on civil litigation generally (and not specifically child support litigation), recent studies have found widespread instances of judgments entered in high-volume, civil cases in which the defendant did not receive notice of the complaint or the plaintiff failed to demonstrate an adequate basis for relief sought. The report ''strongly endorsed'' by State chief justices, in July 2016, recommends that courts must implement systems to ensure that the entry of final judgments complies with basic procedural requirements for. . .sufficiency of documentation supporting the relief sought. For further information, see *Call to Action: Achieving Civil Justice for All,* Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee, pp. 33–34, available at: *https://www.ncsc.org/~/media/Microsites/Files/Civil-Justice/NCSC–CJI-Report-Web.ashx.*

evidentiary basis for the order, imputing income on a case-by-case basis when there is an evidentiary gap. However, some jurisdictions set high minimum orders across the board in low-income cases, regardless of available evidence of the noncustodial parent's specific circumstances. Others do so, except under a very narrow set of circumstances, for example, a demonstrated disability. In fact, some States impute standard amounts of income even when there is evidence of involuntary unemployment, part-time employment, and low earnings.

Overuse of imputed income frequently results in IV–D orders that are not based on a realistic or fair determination of ability to pay, leading to unpaid support, uncollectible debt, reduced work effort, and underground employment. Because such orders are not based on the noncustodial parent's ability to pay, as required by Federal guidelines law, they typically do not yield consistent payments to children.

While States have discretion to determine when imputation of income is appropriate and allowed, section 467 of the Act indicates that ''a written finding or specific finding that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.'' Thus, we encourage States to establish deviation criteria when to impute income and document the deviation in a finding on the record that is rebuttable. Many, but not all, States currently use deviation criteria and make a rebuttable finding on the record when they impute income as the basis for an order in a particular case. Fictional income should not be imputed simply because the noncustodial parent is low-income, but instead only used in limited circumstances when the facts of the case justify it.

We revised § 302.56(c)(1) to clarify that the child support guidelines established under paragraph (a) must provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay. The guidelines must take into consideration all earnings and income, the basic subsistence needs of the noncustodial parent who has a limited ability to pay, and if income is being imputed, the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.

This approach emphasizes the expectation that support orders will be based upon evidence to the extent available, while recognizing that in limited circumstances, income imputation allows the decision-maker to address evidentiary gaps and move forward to set an order. While we recognize that most State IV–D agencies have limited resources, case investigation to develop case-specific evidence is a basic program responsibility. The revised final rule is closely aligned with many of the comments we received. Imputed or default orders should occur only in limited circumstances.[31] We also revised paragraph (c)(1)(iii) to address concerns about the need for State guidelines to consider the specific circumstances of the noncustodial parent when imputing income.

2. Comment: Most commenters were concerned that the proposed revisions in § 302.56(c)(4), which has been redesignated and revised as paragraph (c)(1), related to exceptions to the ''actual'' income provisions were too vague, restrictive, and did not sufficiently provide for a broad range of circumstances where it may be appropriate to impute income, such as when the noncustodial parent is working in the underground economy or failing to provide sufficient evidence to the court. Many commenters were concerned that the NPRM curtailed the ability of States to impute income to ensure support for children. One commenter supported reducing the use of default orders; however, the commenter stated that default orders continue to be necessary when the noncustodial parent refuses to appear and participate, despite multiple opportunities provided by the court and the IV–D agency. Many commenters further indicated that while the NPRM did not expressly prohibit default orders, there appeared to be no ability within the framework of the rule to impute income based on other types of evidence—such as the noncustodial parent's past income, employment history, and/or employment available in the local community. They also read the NPRM to mean that if the IV–D agency could not obtain current income information or evidence of current lifestyle, then the NPRM would prohibit an entry of a support order altogether. These commenters stated that such a result could give parents with reported income an incentive to intentionally end employment after being notified of the support proceedings and refuse to appear in court in order to force a zero dollar order. They considered this a perverse incentive to avoid support that was not in the best interest of the child and the family. While many commenters were in favor of right-sized orders, they believed the proposed language was too limiting to allow setting a fair order in many circumstances.

Response: As we have previously discussed in response to comments, it was not OCSE's intention in the NPRM to limit imputation of income only to situations where there is evidence that the noncustodial parent's standard of living is inconsistent with reported income. The State has the discretion to determine when it is appropriate to impute income consistent with guidelines requirements. Therefore, we revised the proposed language in § 302.56(c)(1) to clearly indicate that a child support order must be based on the noncustodial parent's ability to pay using evidence of the parent's earnings, income, and other evidence of ability to pay whenever available. We have also added § 302.56(c)(1)(iii) to indicate that if imputation is authorized in the State's guidelines, the State's guidelines must require the State to consider evidence of the noncustodial parent's specific circumstances in determining the amount of income that may be imputed, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors.

If the State IV–D agency has no evidence of earnings and income or insufficient evidence to use as the measure of the noncustodial parent's ability to pay, then we have added in § 303.4(b)(3) that the State's IV–D agency's recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in § 302.56(c)(1)(iii). It is the IV–

[31] The National Child Support Enforcement Association policy statement, *Setting Current Support Based on Ability to Pay,* dated January 30, 2013, is available at: *http://www.ncsea.org/documents/Ability_to_Pay-final.pdf.*

D agency's responsibility to conduct an investigation, including contact with the custodial parent to seek information. At a minimum, child support agencies generally will know the noncustodial parent's address.

Imputed or default orders based on income imputation are disfavored and should only occur on a limited basis. Imputation does not by any means ensure support payments for children. In fact, an order based upon imputed income that is beyond the noncustodial parent's ability to pay typically results in more unpaid support and other unintended consequences that do not benefit children.[32] It is critical for the integrity of the order-setting process that IV–D agencies put resources into case-specific investigations and contacting both parents in order to gather information regarding earnings, income, or other specific circumstances of the noncustodial parent when evidence of earnings and income is nonexistent or insufficient.

3. Comment: One commenter supported imputing income, when appropriate in an individual case, if there was evidence showing that either parent was employed voluntarily less than 30 hours of week. Moreover, if the noncustodial parent was gainfully employed for at least 30 hours per week, this commenter believed that no income should be imputed to the noncustodial parent if the custodial parent was working voluntarily less than 30 hours per week. Finally, the commenter believed that exceptions should be allowable if the custodial parent had children with special medical or educational needs or children less than 2 years of age.

Response: We do not agree that these specific suggestions should be incorporated into Federal rules. The commenter suggests a generic ''30 hour'' rule imposed without a case-by-case review of the specific circumstances of the noncustodial parent, evidence of the voluntariness of unemployment or underemployment, and a case-specific determination of the noncustodial parent's ability to pay. Also, as discussed previously, States may determine when imputation of income is allowed, so long as the resulting order considers the factors listed in § 302.56(c)(iii) and reflects a noncustodial parent's ability to pay it.

4. Comment: One commenter was opposed to the proposed § 302.56(c)(4), which has been redesignated and revised as paragraph (c)(1), because the language would apply to both IV–D and non-IV–D cases, resulting in imposing substantial revisions on the private bar and judiciary without justification. Another commenter, noting that guidelines are used not only by the IV–D agency, but also by the entire private bar and *pro se* litigants, was concerned that most private attorneys would not have access to income reports for the parents. Another commenter indicated that many of the proposed requirements contained in the NPRM would not receive full support by non-IV–D representatives, particularly where the new requirements would have the effect of reducing and/or limiting the flexibility of attorneys, parties, and the judicial authority in non-IV–D matters. As an example, the commenter stated that imposing limitations on imputing income would affect all family cases and could be seen as a restriction on judicial authority. Finally, another commenter believed that child support guidelines have historically been a State issue with much flexibility, as the guidelines impact both IV–D and non-IV–D cases.

Response: The final rule amends existing OCSE regulations implementing Federal statutory requirements. State child support guidelines were adopted pursuant to a title IV–D State plan requirement and a condition of Federal funding, and specific guidelines requirements derive from Federal law. Our rule is modeled on the best practices currently implemented in a number of States to improve order accuracy and basic fairness, and is based on OCSE's authority to set standards to establish requirements for effective program operation under section 452(a)(1) and State plan provision that the State will comply with such requirements and standards under section 454(13) of the Act. In promulgating these rules, our primary concern is that in some jurisdictions, orders are not based on a factual determination of a particular noncustodial parent's ability to pay, but instead are based upon on standardized amounts that are routinely imputed to indigent, typically unrepresented, noncustodial parents.[33] Imputed income is fictional income, and without an evidentiary foundation of ability to pay, orders cannot be considered fair and accurate.

Compared to IV–D cases, private cases are more likely to involve legal counsel, and result in child support orders based on actual income. When imputed income is used in private cases, it typically is used in the way originally intended—to fill evidentiary gaps in specific cases to support a reasonable inference of the noncustodial parent's ability to pay in situations of voluntary unemployment or discrepancies in reported income and standard of living. We point out that private litigants are expected to support their position with evidence. The majority of the NPRM comments, including comments from courts and attorneys, support the direction of our rules.

To address the concerns related to the general applicability of State guidelines, we moved the requirements specifically related to State IV–D agencies under § 303.4, *Establishment of support obligations,* and those requirements related to all cases in the State under § 302.56, *Guidelines for setting child support orders.* Although the NPRM did not include any revisions to § 303.4, we received numerous comments on IV–D agency responsibilities in determining the noncustodial parent's income and imputation of income when establishing child support orders pursuant to § 303.4. Based on these comments, we made revisions to § 303.4 that result in a more narrow application of the regulation. We revised § 303.4(b) to require IV–D agencies to use appropriate State statutes, procedures, and legal processes in establishing the child support obligation and assist the decision-maker in accordance with § 302.56 of this chapter, which must include, at a minimum:

(1) Taking reasonable steps to develop a sufficient factual basis for the support obligation, through such means as investigations, case conferencing, interviews with both parties, appear and

[32] Cammet, Ann, ''Deadbeats, Deadbrokes, and Prisoners,'' *Georgetown Journal on Poverty Law & Policy,* 18(2): 127–168, Spring, 2011, which is available at: *http://ywcss.com/sites/default/files/u258/deadbeats_deadbrokers_and_prisoners_university_of_las_vegas.pdf;* Brito, Tonya, ''Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families, *The Journal of Gender, Race & Justice,* 15:617–673, Spring 2012, which is available at: *http://racism.org/index.php?option=com_content&view=article&id=1514:fathersbehind bars&catid=53&Itemid=176&showall=1&limitstart=;* and HHS Office of Inspector General, *The Establishment of Child Support Orders for Low-Income Non-custodial Parents,* OEI–05–99–00390, (2000), available at: *http://oig.hhs.gov/oei/reports/oei-05-99-00390.pdf.*

[33] Elaine Sorensen, Liliana Sousa, and Simon Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation* (2007), available at: *https://aspe.hhs.gov/basic-report/assessing-child-support-arrears-nine-large-states-and-nation;* Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?* Orange County, CA Department of Child Support Services, (2011), available at: *http://ywcss.com/sites/default/files/pdf-resource/how_do_child_support_orders_affect_payments_and_compliance.pdf;* and Passarella, Letitia Logan and Catherine E. Born, *Imputed Income Among Noncustodial Parents: Characteristics and Payment Outcomes,* University of Maryland School of Social Work (2014), available at: *http://www.familywelfare.umaryland.edu/cscaseloadspecialreports.htm.*

disclose procedures, parent questionnaires, testimony, and electronic data sources;

(2) Gathering information regarding the earnings and income of the noncustodial parent and, when earnings and income information is unavailable or insufficient in a case, gathering available information about the specific circumstances of the noncustodial parent, including such factors as those listed under § 302.56(c)(iii);

(3) Basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If earnings and income are unavailable or insufficient to use as the measure of the noncustodial parent's ability to pay, then the recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in § 302.56(c)(iii); and

(4) Documenting the factual basis for the support obligation or recommended support obligation in the case record.

IV–D agencies have a basic responsibility to take all necessary steps to investigate the case and provide the court or administrative authority information relating to the income, earnings, and other specific circumstances of the noncustodial parent so that the decision-maker has an evidentiary foundation for establishing an order amount based on the noncustodial parent's ability to pay. These required steps merely specify the standard case review procedures that many States currently use to investigate and obtain income information for the parties.

Since the beginning of the program, we have provided FFP to IV–D agencies undertaking investigation activities involving the development of evidence, and, when appropriate, bringing court actions for the establishment and enforcement of support obligations (§ 304.20(b)(3)(i)), and determining the amount of the child support obligation including developing the information needed for a financial assessment (§ 304.20(b)(3)(ii)). However, over time, and as resources have become more constrained, we have found that some jurisdictions no longer put resources into case investigation, and instead rely on standard presumptions and fictional income to set orders.

It is critical that a IV–D agency conducts investigative work prior to sending a case to the court since child support agencies have many tools available to gather the information. There are many procedural techniques and practices that help facilitate establishing an appropriate child support order.[34] Many States have implemented early intervention, parental engagement, and information-gathering techniques, and we encourage all States to implement these successful practices.

The final rule revises regulations governing the State's guidelines to focus on the fundamental principle that child support obligations are based on the noncustodial parent's ability to pay. This principle should be applied to both IV–D and non-IV–D cases in accordance with the Federal guidelines statute. The revisions have been addressed throughout this section.

5. Comment: One commenter supported requiring States to consult and use all data sources available to determine income, such as quarterly wage and new hire data before imputing income (such as imputing a full-time minimum wage salary). Commenters also suggested that States be required to have a methodology for imputing income and to record how and why imputation was done, similar to the requirement that there be a finding when an order deviates from the guideline amount. In this way, imputation would not be prohibited, but would further OCSE's goal to discourage routine use of imputation without sufficient investigation or consideration of the facts in a particular case.

Response: As discussed previously, the final rule at § 302.56(g) reflects these comments by providing a framework for determining the amount of imputed income. A written or specific finding on the record that application of the guidelines would result in an inappropriate or unjust order is required to rebut the presumption that the application of the guidelines results in the correct child support amount. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification as to why the order varies from the guidelines. Therefore, support obligations can deviate from guidelines, but the decision-maker must state the reasons, on the record, that justify the deviation and consider the factors listed in § 302.56(c)(1)(iii). Several States treat income imputation as a deviation from the guidelines, with a finding on the record.

6. Comment: One commenter thought that there was conflict between the proposed § 302.56(c)(1) requiring that orders be based on actual income and proposed paragraph (c)(4) requiring that any support ordered amounts be based on available data related to earnings, income, assets, or such testimony that income or assets are not consistent with the noncustodial parent's current standard of living. This commenter interpreted proposed paragraph (c)(1) as based on ''actual'' income only, while proposed paragraph (c)(4) appeared to provide for income imputation if evidence of ability to pay existed. The commenter noted that the actual income requirement could be used to argue against income imputation in cases where the parent was capable of earning income but was voluntarily unemployed or underemployed or where there was no evidence of income because the parent worked in the underground economy. The commenter explained that economists estimate that the underground economy amounts to $2 trillion. This volume and type of income should not be overlooked in the guidelines calculation. The commenter further indicated that evidence from a study conducted by Mincy and Sorensen (1998) found that 34 to 41 percent of young noncustodial fathers are not paying child support, but are actually able to pay.[35]

Response: As we discussed under Comment/Response 1 in this subsection, States have discretion to determine the criteria on when to deviate from guidelines. Therefore, we have revised proposed paragraph § 302.56(c)(4), which is redesignated as paragraphs § 302.56(c)(1)(ii) and (iii).

It is important to note that the referenced study examined all young noncustodial fathers, not those with a child support order, and is based on data that are over 25 years old and reflect very different economic conditions than exist today. Studies that examine noncustodial parents with an obligation to pay find much lower percentages of obligors who do not pay and have an ability to pay.[36]

7. Comment: One commenter indicated that about half of the States have guidelines that provide for a floor when imputing income (*e.g.,* income realized from full-time employment at

[34] *Setting Appropriate Child Support Orders: Practical Techniques Used in Child Support Agencies and Judicial Systems in 14 States,* Subcommittee Report, National Judicial-Child Support Task Force, Avoiding Inappropriate Orders Subcommittee, August 2007.

[35] Mincy, Ronald and Elaine J. Sorensen, ''Deadbeat and Turnips in Child Support Reform,'' *Journal of Policy Analysis and Management,* Vol. 17, No. 1 (Winter 1998), pp. 44–51.

[36] Elaine Sorensen, Liliana Sousa, and Simon Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation* (2007), available at: *http://aspe.hhs.gov/basic-report/assessing-child-support-arrears-nine-large-states-and-nation.*

minimum wage). This commenter was concerned about the presumption that a parent, at a minimum, is capable of working full-time (or nearly full-time in some States) at the minimum wage while many low-income parents cannot get a job or retain steady employment to realize full-time employment. Therefore, the commenter recommended that we ''prohibit the presumption of a minimum amount of income to a parent in excess of the parent's actual or potential income as verified or ascertained using state-determined evidence of income that must include income data from automated sources available to the IV–D agency in a IV–D case unless evidence is presented that the parent is voluntarily unemployed or underemployed and has the capacity to earn the minimum amount of income presumed or more.''

Response: We considered this suggestion and revised the final rule to clarify that child support orders must be based on the noncustodial parent's earnings, income, and other evidence of ability to pay in § 302.56(c)(1). We revised the rule to indicate that if income is imputed, the guidelines must provide that the order must be set based on a consideration of the specific circumstances of the noncustodial parent.

Section 303.4(b)(3) requires that if information about earnings and income are not available, the amount of income imputed to the noncustodial parent must be based on factors listed in 302.56(c)(1)(iii).

8. Comment: One commenter indicated that OCSE should avoid using the term ''data'' when referring to ''income data'' since this is not a term common to private family law attorneys. The Merriam-Webster dictionary defines data as ''that is produced or stored by a computer.'' However, the most common sources of income verification in non-IV–D cases are tax returns and paystubs. According to the commenter, it is arguable whether these sources are stored in a computer.

Response: In the final rule, we avoided using the term ''data'' when referring to income and earnings.

9. Comment: One commenter stated that in most family law cases, courts are requiring evidence beyond the testimony of the custodial parent before it will impute income to a noncustodial parent and are demanding documentary evidence of the noncustodial parent's income or assets. The commenter believed that these requirements disadvantage low-income litigants who do not have the means to prove that a noncustodial parent has unreported employment (*i.e.,* ''working under the table'') or is voluntarily participating in an underground economy. In these instances, the commenter noted, it is the child who is deprived of his or her basic subsistence because the noncustodial parent refuses to seek or obtain employment where his or her actual income and resources can be ascertained.

Response: Taking this comment into consideration, we have revised the § 303.4 regulatory text, as discussed in Comment/Response 5 in this subsection, to require the IV–D agency to take appropriate steps in building the documentary evidence related to the case so that this evidence can be used by the courts or administrative authorities in establishing or modifying child support obligations based on the noncustodial parent's ability to pay.

10. Comment: Several commenters had concerns about the proposed language in § 302.56(c)(4) related to ''testimony that income or assets are not consistent with a noncustodial parent's current standard of living.'' One commenter asked us to define ''testimony'' for those agencies that use an administrative process rather than a judicial process to establish and modify orders. This commenter thought that the proposal would create a substantial burden of proof for child support agencies. A few commenters thought using the term ''testimony'' implied that if States wanted to impute income, they would have to take cases to court if they could not locate any financial history for the noncustodial parent. The commenters thought this would place an additional burden on the court system and cause delays in getting cases processed. For States that use an administrative process, commenters stated that the requirement would cause delays in case processing as well as place additional burdens on attorneys and judges. One commenter asked how agencies would set child support orders in default cases when there is neither evidence nor testimony from any source with regard to parents' subsistence needs or actual income. The commenter noted that a significant number of child support orders for very low-income families are set by default, and felt that Federal regulations should provide guidance to States for those situations. Several commenters suggested using the term ''documentary evidence'' rather than ''testimony.''

Response: The use of ''testimony'' in the NPRM was intended to illustrate one form of evidence, not to limit evidence to testimony. We agree that most evidence will be documentary. In setting orders, States always have at least one piece of information about a noncustodial parent—they know where the noncustodial parent lives. Residence can provide some insight about the noncustodial parent's standard of living. In revising our proposed language for § 302.56 and § 303.4(b), we have used terms that are appropriate for both judicial and administrative processes.

11. Comment: Several commenters expressed concerns that substantially limiting the use of imputed income in guideline calculations would cause delays in the establishment and modification of child support orders.

Response: In redrafting the guidelines provision, we looked to comments, existing State guidelines, and State best practices related to investigation and order-setting. We agree that the final rule may result in increased time to establish and modify a child support order, but it will also result in more orders that are legitimately based on a noncustodial parent's ability to pay, as required by Federal child support guidelines law and policy. Support orders based on ability to pay should result in better compliance rates and higher collections rates, saving time and resources required to enforce orders and resulting in actual payments to more children. One State told OCSE that by doing more investigative work to develop the evidence, it has experienced less conflict between the parents, fewer requests for hearings, and less time spent on enforcement. As a result, staff has more time to develop the documentary evidence needed to establish a child support order based on the noncustodial parent's ability to pay.

12. Comment: Some commenters maintained that imputed income should only be used as a last resort, when evidence suggests that the noncustodial parent is voluntarily unemployed or underemployed, or when the noncustodial parent's reported income or assets is inconsistent with the parent's standard of living. One commenter specifically noted that imputing income to a low-income, noncustodial parent who is acting in good faith often leads to a child support order that is based on unrealistic expectations and exceeds the noncustodial parent's ability to pay. This commenter further requested that the State guidelines give courts and administrative agencies the flexibility to use reliable, circumstantial evidence to establish and modify child support orders when traditional income information is not available and the noncustodial parent is acting in bad faith. The commenter stated this type of evidence does not lead to orders based on assumptions, but rather to orders grounded on reasonable inference given

the evidence presented. This commenter believed that there should be no automatic use of minimum wage or any other standardized metric to impute income.

Response: We agree that imputed income should only be used as a last resort, and that States need to exercise discretion on a case-by-case basis in determining a low-income noncustodial parent's ability to pay when evidence of earnings and income is not available. We encourage States to take this into consideration in developing the criteria for determining when to impute income.

13. Comment: One commenter indicated that overuse of imputing income may be avoided by implementing other measures such as: Requiring that the support obligation not reduce the noncustodial parent's income below a subsistence level; requiring that all findings related to the calculation and imputation of income be based on the facts in the court record; requiring that all findings regarding the calculation or imputation of income be written and subject to appellate review; requiring that the court first consider all available direct evidence of income, earnings, assets or state what steps have been made to obtain such information before using direct or circumstantial proof of income or ability to earn; expanding the admissibility of income information from regular, reliable data sources (such as new hire and quarterly wage reports); and requiring mandatory financial disclosure in all cases with appropriate penalties for noncompliance.

Response: We have evaluated research and practice in this area and have incorporated measures into our regulations to increase investigation and establish evidence-based orders, rather than routinely applying presumptions and imputing income. While State laws establish the admissibility of evidence, this does not lessen the IV–D agency's responsibility to conduct further investigation when evidence of earnings and income is not available. We are also aware of several States that mandate financial disclosure by parents with appropriate penalties for noncompliance, a practice that is intended to increase accurate order-setting and decrease overuse of imputation.

14. Comment: One commenter suggested that in cases where the noncustodial parent has committed acts of domestic violence against the custodial parent or the children resulting in incarceration or the issuance of a protected order, the abuser should be subject to a support order that reflects income imputed to an abuser.

Response: Under the rule, the court or administrative authority has the discretion to consider the specific circumstances of the case. However, in doing so, it is important to be clear that establishing, modifying, or enforcing a child support order is not a form of punishment for incarcerated noncustodial parents. ''The child support system is not meant to serve a punitive purpose. Rather, the system is an economic one, designed to measure the relative contribution each parent should make—and is capable of making—to share fairly the economic burdens of child rearing.'' [37] Incarcerated parents have been sentenced for the crime they committed and are repaying their debt to society. Imputing income based upon the nature of the crime is considered an adverse collateral consequence of incarceration that imposes additional civil sanctions beyond the criminal sentence. Other examples of collateral consequences include denial of employment, housing, public benefits, student loans, and the right to vote. Such collateral consequences undermine successful reentry and rehabilitation. In 2011, the U.S. Attorney General wrote to every State Attorney General asking them to assess their State statutes and policies imposing collateral consequences to determine if any should be eliminated.[38]

15. Comment: One commenter thought that our proposed provision in § 302.56(c)(4) would restrict a State's ability to establish child support orders when the noncustodial parent chose to avoid the legal process. The commenter further explained that, based on his experience in local child support operations, this provision would seriously disadvantage a custodial parent in a case where the noncustodial parent, despite being afforded due process, refused to participate in the administrative or judicial process, including fully disclosing income.

Response: The final rule does not indicate when States are allowed to impute income; however, the final rule at § 302.56(c)(1)(iii) indicates that if imputation of income is allowed, the child support order should be based on the specific circumstances of the noncustodial parent.

16. Comment: One commenter stated that in one State, they assume that a noncustodial parent has an ability to pay unless there is information indicating otherwise, such as receipt of public assistance benefits, receipt of SSI payments, or a physician's statement indicating inability to work. The commenter stated that the proposed regulation would reverse this assumption and instead would presume that the noncustodial parent has no ability to pay unless data was available related to the parent's actual earnings, income, or assets, or if there was testimony that the noncustodial parent's income or assets were not consistent with the noncustodial parent's standard of living.

Response: The amount of child support ordered should be based on facts, not assumptions. However, when support orders are based on broad (or general) assumptions and do not have a factual basis, they often do not result in payments and the children do not benefit. Such assumptions can be rooted in a lack of awareness about the availability of jobs in low-income communities that are open to parents with limited education and job history. The rule explicitly requires States to consider these factors in determining the circumstances in which imputing income is appropriate. In particular, an incarceration record is an important consideration in determining whether it is reasonable to impute earnings from a full-time job, as incarceration often serves as a barrier to employment. One study showed that after release from jail, formerly incarcerated men were unemployed nine more weeks per year, their annual earnings were reduced by 40 percent, and hourly wages were 11 percent less than if they had never been incarcerated.[39]

Many States work diligently to develop a factual basis for orders. However, in some jurisdictions, a two-tiered system exists with better-off noncustodial parents receiving support orders based upon evidence and a determination of their individual income. Poor, low-skilled noncustodial parents, usually unrepresented by counsel, receive standard-issue support orders. Such orders lack a factual basis and are instead based upon fictional income, assumptions not grounded in reality, and beliefs that a full-time job is available to anyone who seeks it. Orders that routinely lack a factual basis and are based upon standard presumptions erode the sense of procedural fairness and the legitimacy of the orders, resulting in lower compliance. Thus, it is critically important that States take

[37] *Lambert* v. *Lambert,* Ind. Sup. Ct. (2007).

[38] White House Fact Sheet, *Enhancing the Fairness and Effectiveness of the Criminal Justice System* (July 14, 2015), available at: *https://www.whitehouse.gov/the-press-office/2015/07/14/fact-sheet-enhancing-fairness-and-effectiveness-criminal-justice-system.*

[39] The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility,* September 2010, available at: *http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.*

reasonable efforts to develop a sufficient factual basis for all cases by fully investigating their cases.

17. Comment: One commenter recommended that the NPRM be revised to allow States to use imputed income, such as State median wage, occupational wage rates, or other methods of imputation as defined by State law, as a last resort when the parent has not provided financial information and the agency cannot match to automated sources.

Response: Imputing standard amounts in default cases based upon State median wage or statewide occupational wage rates does not comply with this rule because it is unlikely to result in an order that a particular noncustodial parent has the ability to pay. When other information about the noncustodial parent's ability to pay is not available, information about residence will often provide the decision-maker with some basis for making this calculation. In addition, information provided by the custodial parent can provide the basis for a reasonable calculation, particularly in situations when the noncustodial parent fails to participate in the process. OCSE revised the final rule so that if there is no evidence or insufficient evidence of earnings and income, or it is inappropriate to use earnings and income as defined in § 302.56(c)(1), then the State's guidelines must provide that the State take into consideration the specific circumstances of the noncustodial parent as delineated in § 302.56(c)(iii) and impute income under criteria developed by the State based upon the noncustodial parent's ability to pay the amount.

18. Comment: One commenter asked if a person should be ordered to pay a minimum amount of support regardless of his or her circumstances to recognize the responsibility for the child's support, with less regard for the income capacity. The cases that the commenter noted included incarcerated individuals, minor parents, parents in drug or alcohol treatment programs, and others. The commenter further explained that while a strong argument can be made in these cases to set a minimum amount of support, setting a minimum order could be problematic. At one end is a token order ($1.00 per month); on the other hand is a true minimum order (such as $250 per month). This commenter suggested that these situations not be included in the ''imputation of income'' arguments as they are different. The commenter was hopeful that the final regulation would leave setting the amount of a minimum order to State or local discretion and policy.

Response: The foundation of Federal guidelines law and policy is the establishment of income-based orders. The rule is evidence-based and codifies longstanding Federal policy that orders must be based upon a determination of the noncustodial parent's ability to pay. High minimum orders that are issued across-the-board without regard to the noncustodial parent's ability to pay the amount do not comply with these regulations.

19. Comment: One commenter was concerned that the NPRM would unduly favor those obligors who attempt to avoid their obligations to their children by failing to respond or hiding assets, as well as favor incarcerated obligors simply because they are incarcerated.

Response: We do not agree. The final rule requires States to investigate, not make assumptions. The rule removes a collateral consequence of incarceration by requiring that orders for incarcerated parents be set based on the same standard as every other parent: Ability to pay. We believe our rule will bolster a sense of fair play and compliance, and increase the likelihood that formerly incarcerated parents will engage in legitimate work and support their children upon release.

20. Comment: One commenter indicated that the number of existing child support orders that are based on imputed income are evidence of child support agencies' and courts' difficulties with acknowledging the reality of chronic unemployment and adults with no or very low actual income.

Response: OCSE also has these concerns and therefore is regulating to ensure that child support guidelines are based on the noncustodial parent's ability to pay. Some States need to do a better job in gathering information about the noncustodial parent's actual income or income history and developing the circumstantial evidence that can be used by the courts or the administrative authority in setting the child support orders.

21. Comment: One commenter indicated that in IV–D cases when the noncustodial parent's income is unknown and the parent fails to provide information, one State's law currently requires child support to be based on ''presumed'' income. This is not ''actual income,'' but the State's law also requires that the order be set aside as soon as the noncustodial parent's actual income is determined. The commenter said that the NPRM references ''presumed'' income as a problem, but it is never a problem when the law is properly applied. Rather, according to the commenter, it is an efficient ''locate'' tool that encourages cooperation while not shifting unnecessary burden to the custodial parent.

Response: We understand there will be situations where income must be imputed, but this should only occur after investigative efforts by the IV–D agency staff. The problem is that some States do not impute income based on the specific circumstances of the noncustodial parent to fill evidentiary gaps—instead, imputation has become the standard practice of first resort in lieu of fact-gathering. While this State's law sets aside an order when the actual income is determined, we are concerned that unrealistic and high arrearages will accumulate, particularly in cases involving indigent, unrepresented noncustodial parents prior to the order being set aside. When an arrearage accumulates, it often results in a low compliance rate over the life of the child support order, which does not benefit the children and families. For this reason, States should impute income to set child support order amounts only in limited situations.

22. Comment: Some commenters indicated that in cases where there is domestic violence, it is particularly important that victims have access to the full range of tools courts use to argue for imputed earnings because in these cases, abusers often fail to comply with discovery, do not provide full disclosure to the courts, and otherwise engage in bad faith tactics designed to further harass the custodial parent. The commenters indicated they have found that in domestic violence cases, the courts routinely impute earnings in cases where the noncustodial parent is uncooperative for these reasons. Another commenter also discussed that the NPRM needs to provide judges more guidance on imputing income, especially in a case involving domestic violence when one parent refuses to comply with discovery, does not disclose income, or engages in bad faith tactics.

Response: Domestic violence is one of the specific circumstances of the noncustodial parent that the State should consider when developing and investigating the case prior to establishing a support obligation. In accordance with § 302.56(c), if the State is not able to obtain any income information for the noncustodial parent, and the parent has been uncooperative in the State's efforts, then the courts or administrative authority should attempt to analyze all the specific circumstances on which to base a child support obligation amount. If this information is

not available, the courts or administrative authority may impute income taking into consideration factors listed in § 302.56(c)(1)(iii) such as economic data related to the noncustodial parent's residence.

23. Comment: One commenter addressed the statewide standard that his State had used when imputing income. He commented that his State used to apply the Federal Minimum Basic Standard Adequate Care (MBSAC) to impute income. In 2003, that amount was an annual income of $26,400, yielding an order of $423. In today's dollars that would yield a presumptive order of $602 per month for one child. The State thought a responsible low-earnings noncustodial parent, upon learning of such a high ordered amount, would come forward for a modification. However, experience showed that the low-earnings noncustodial parents did not respond that way. Based on a recommendation of the Urban Institute in 2003, the State abandoned the MBSAC standard in favor of a full-time minimum wage imputation. However, according to the commenter, economic events since 2003 (a significant decrease in true full-time jobs) would argue in favor of further reduction of that recommendation.

Response: We agree that States need to evaluate the economic factors such as unemployment rates, prevalence of full-time job opportunities available to parents of similar skills and history, growth of part-time and contingent work. The job market for low-skilled men and women has changed since the 1990's, and incarceration policies have impacted the ability of many parents to find work. This is why we added a requirement that the guidelines committee must review these types of factors when reviewing their child support guidelines under § 302.56(h). Based on comments, we revised the final rule at § 302.56(c)(iii) to require that if a State imputes income to a noncustodial parent, the guidelines must take into consideration the specific circumstances of the noncustodial parent including factors listed in § 302.56(c)(1)(iii) even if only one source of information such as residence is available.

Health Care Needs [§ 302.56(c)(2)]

1. Comment: Several commenters recommended that in proposed § 302.56(c)(3), which has been redesignated as § 302.56(c)(2) in the final rule, we remove the phrase ''in accordance with § 303.31 of this chapter.'' They indicated that § 303.31 applies only to IV–D cases while the guidelines must apply to all child support cases, so the reference is inappropriate. Commenters also indicated that § 303.31 has not yet been revised to align with the provisions of the Affordable Care Act (ACA). Until this happens, and the related statutory provisions are revised, the current reference creates conflicts with ACA provisions.

Response: We agree that because the child support guidelines apply to all cases, the reference to § 303.31 should be removed since this section only applies to IV–D cases. Therefore, we made this revision in the final rule. Additionally, to conform to the changes we made in the final rule to align § 303.31 with the ACA, we made conforming changes in § 302.56(c)(2) to reference the health care needs through ''private or public health care coverage and/or cash medical support.''

Incarceration as Voluntary Unemployment [§ 302.56(c)(3)]

1. Comment: Over 600 commenters supported the proposed § 302.56(c)(5), which has been redesignated as § 302.56(c)(3), to prohibit the treatment of incarceration as ''voluntary unemployment.'' However, four commenters believed that such a limitation should not apply where the parent is incarcerated for a crime against the supported child or custodial parent. Some commenters also thought that this limitation should not apply where the parent has been incarcerated for intentional failure to pay child support. These commenters thought that strong public policy dictates against affording relief to an obligor who commits a violent crime against the custodial parent or child, or an obligor who has the means to pay child support but refuses to do so. The commenters urged OCSE to include these important exceptions in the final rule. One additional commenter indicated that support for a policy change in this area was based on the overwhelming consensus that this is the best practice for families and IV–D agencies, regardless of where they are located.

Response: We agree with the overwhelming majority of commenters, and do not make changes in response to the four commenters' suggestion for an exception based on the nature of the crime. Three-quarters of States have eliminated treatment of incarceration as voluntary unemployment in recent years.

As discussed in Comment/Response 13 in the *Imputing Income [§ 302.56(c)(1)(iii)]* subsection, establishing, modifying, or enforcing a child support order is not a form of punishment for incarcerated noncustodial parents,[40] and the collateral consequences of the treatment of incarceration as voluntary unemployment include uncollectible debt, reduced employment, and increased recidivism.

Per section 466(a)(10) of the Social Security Act, all parents facing a substantial change of circumstances such as a substantial drop in income, through a loss of employment or otherwise, are entitled to request a review, and if appropriate, adjustment of their support orders. Incarceration surely qualifies as a substantial change in circumstances, yet State laws and policies—rooted in 19th century jurisprudence—that treat incarceration as ''voluntary unemployment'' in effect block the application of the statutory review and adjustment provision. In most cases, this practice results in child support orders that are unrealistically high, which research indicates undermine stable employment and family relationships, encourage participation in the underground economy, and increase recidivism.[41]

Despite the significant research on the consequences of continuing the accrual of support when it is clear there is no ability to pay, one-quarter of States continue treating incarceration as ''voluntary unemployment.'' Failing to provide an opportunity for review and possible adjustment of a child support order when a parent is incarcerated does not mean that most noncustodial parents will have the ability to make payments to their children while in prison or after release.[42] Studies find that incarcerated parents leave prison with an average of $15,000 to $30,000 or more in unpaid child support, with no means to pay upon release.[43] Not

[40] *Lambert* v. *Lambert,* 861 NE. 2nd 1176 (Ind. 2007), available at: *http://www.ai.org/judiciary/opinions/pdf/02220701rts.pdf.*

[41] U.S. Department of Health and Human Services, Office of Child Support Enforcement, *Incarceration, reentry and Child Support Issues: National and State Research Overview* (2006), available at: *http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/incarceration_report.pdf.*

[42] Hager, Eli, ''For men in prison, child support debt becomes a crushing debt,'' *The Washington Post* and the Marshall Project, October 19, 2015, available at: *https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt.*

[43] See Esther Griswold and Jessica Pearson, ''Twelve Reasons for Collaboration Between Departments of Correction and Child Support Enforcement Agencies,'' *Corrections Today* (2003 which is available at: *http://www.thefreelibrary.com/Twelve+reasons+for+collaboration+between+departments+of+correction...-a0123688074;* Jessica Pearson, ''Building Debt While Doing Time: Child Support and Incarceration,'' *Judges' Journal* (2004), which is available at: *https://csgjusticecenter.org/courts/publications/building-debt-while-doing-time-child-support-and-incarceration-2/;* Nancy Thoennes,

considering incarceration as a substantial change of circumstances makes it less likely that noncustodial parents will work and pay support upon release and more likely that they will recidivate.[44] As a result, we have also revised § 303.8(c) to indicate that the reasonable quantitative standards that the State develops for review and adjustment must not treat incarceration as a legal bar for petitioning for and receiving an adjustment of an order.

2. Comment: Several commenters believed that the manner by which the child support system treats incarcerated obligors should be a State matter, not subject to any mandate. They stated that this is a significant public policy issue with considerable state-specific case law that is not appropriate for Federal regulation. Some commenters believed that reducing obligations was rewarding bad behavior, and it was not appropriate for the NPRM to attempt to override that State policy decision. In addition, they noted that the proposal would ultimately lead to a reduced child support obligation even if the reason for incarceration was willful failure to pay child support or some other heinous crime against the child. Other commenters believed that discretion in how to treat incarceration was at the core of judicial decision making, as reflected in the State's case law that almost uniformly affirms lower court rulings denying relief to the incarcerated obligor.

Response: All but 14 States have eliminated this policy.[45] In *Lambert* v. *Lambert,* the Indiana Supreme Court found that ''incarceration does not relieve parents of their child support obligations. On the other hand, in determining support orders, courts should not impute potential income to an imprisoned parent based on pre-incarceration wages or other employment related income, but should rather calculate support based on the actual income and assets available to the parent.'' [46] While some States have prior case law finding that incarceration should be considered voluntary unemployment, most States have updated case law, guidelines and court rules to allow for review of the specific facts of the case, and, if appropriate, adjustment of the order.

The rule does not provide special treatment for incarcerated parents. Rather, it requires application of Federal review and adjustment requirements, including that orders be reviewed and adjusted upward or downward in *all* cases upon a showing of any substantial change in circumstances, including a substantial change in circumstances due to unemployment or incarceration. Implementation of § 302.56(c)(3) will ensure that States consider incarceration as a substantial change of circumstances that warrants the child support order to be reviewed and, if appropriate, adjusted based on the noncustodial parent's ability to pay. If an incarcerated parent has income or assets, these can be taken into consideration in reviewing the order. However, States should not assume an ability to earn based on pre-imprisonment wages, particularly since incarceration typically results in a dramatic drop in income and ability to get a job upon release.

Moreover, once released, noncustodial parents tend to view the methods employed to collect support and arrearages as a disincentive to seek legitimate gainful employment. Research suggests that using maximum-level income withholding rates and other enforcement mechanisms tend to discourage employment, particularly among individuals in low socioeconomic communities.[47] When combined with the difficulty faced by formerly incarcerated parents in obtaining employment, there is a strong incentive to seek work in the ''underground economy'' where it is difficult for authorities and custodial parents to track earnings and collect payments.[48] Research demonstrates that when high support orders continue through a period of incarceration and thus build arrearages, the response by the released obligor is to find more methods of avoiding payment, including a return to crime. It is unrealistic to expect that most formerly incarcerated parents will be able to repay high arrearages upon release. To the extent that an order fails to take into account the real financial capacity of a jailed parent, the system fails the child by making it more likely that the child will be deprived of adequate support over the long term.

The child support system is not meant to serve a punitive purpose. Rather, the system is an economic one, designed to measure the relative contribution each parent should make—and is capable of making—to share fairly in the economic burdens of child rearing.[49] Considering the existing evidence, imposing high support payments on incarcerated parents serves as a punitive measure, becomes an additional collateral consequence of incarceration, and does not serve the best interests of the child by damaging the parent-child relationship and the prospect for consistent child support payments in the future.[50]

In 2005, the Council of State Governments, a nonpartisan association of all three branches of State government, issued the *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community,* which provided consensus-based recommendations to improve successful reentry of formerly incarcerated people into society. Many of these recommendations were subsequently incorporated into the

Child Support Profile: Massachusetts Incarcerated and Paroled Parents (2002), which is available at: *http://cntrpolres.qwestoffice.net/reports/profile%20of%20CS%20among%20incarcerated%20&%20paroled%20parents.pdf;* and Pamela Ovwigho, Correne Saunders, and Catherine Born. *The Intersection of Incarceration & Child support: A snapshot of Maryland's Caseload* (2005), which is available at: *http://www.familywelfare.umaryland.edu/reports1/incarceration.pdf.* See also Federal Interagency Reentry Council, *Reentry Myth Buster on Child Support* (2011), available at: *https://csgjusticecenter.org/documents/0000/1063/Reentry_Council_Mythbuster_Child_Support.pdf.*

[44] Pearson, Jessica, ''Building Debt While Doing Time: Child Support and Incarceration,'' *Judges' Journal* 43:1, Winter 2004, which is available at: *https://csdaca.org/wp-content/uploads/resources/1/Research/Arrears/BuildingDebt%20(2).pdf;* and Harris, Alexes, Heather Evans, and Katherine Beckett, ''Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States,'' *American Journal of Sociology,* 115:6, 1753–1799, May 2010, which is available at: *http://faculty.washington.edu/kbeckett/articles/AJS.pdf.*

[45] ''*Voluntary Unemployment,*'' *Imputed Income, and Modification Laws and Policies for Incarcerated Noncustodial Parents,* PAID—Child Support Fact Sheet #4 (companion piece), June 20, 2012, available at: *http://www.acf.hhs.gov/programs/css/resource/voluntary-unemployment-imputed-income-and-modification-laws-and-policies.*

[46] *Lambert* v. *Lambert,* 861 NE. 2nd 1176 (Ind. 2007), available at: *http://www.ai.org/judiciary/opinions/pdf/02220701rts.pdf.*

[47] Harry J. Holzer and Paul Offner, ''The Puzzle of Black Male Unemployment,'' *The Public Interest* (2004) Spring, 74–84, which is available at: *http://www.nationalaffairs.com/doclib/20080710_20041546thepuzzleofblackmaleunemploymentharryjholzer.pdf;* Harry J. Holzer, Paul Offner, and Elaine Sorensen, ''Declining Employment among Young Black Less-Educated Men: The Role of Incarceration and Child Support,'' *Journal of Policy Analysis and Management,* (2005) 24(2): 329–35, which is available at: *http://www.urban.org/research/publication/declining-employment-among-young-black-less-educated-men/view/full_report.*

[48] Council of State Governments, Report of the Re-Entry Policy Council: *Charting the Safe and Successful Return of Prisoners to the Community* (2005), Justice Center, available at: *https://csgjusticecenter.org/reentry/publications/the-report-of-the-re-entry-policy-council-charting-the-safe-and-successful-return-of-prisoners-to-the-community/.*

[49] *Lambert* v. *Lambert,* 861 NE. 2nd 1176 (Ind. 2007), available at: *http://www.ai.org/judiciary/opinions/pdf/02220701rts.pdf.*

[50] Cammett, Ann, ''Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents,'' *Georgetown Journal on Poverty Law & Policy,* 13:2, 312–339, Summer 2006, which is available at: *http://www.academia.edu/2582076/Expanding_Collateral_Sanctions_The_Hidden_Costs_of_Aggressive_Child_Support_Enforcement_Against_Incarcerated_Parents.*

Second Chance Act of 2007 (Pub. L. 110–199).[51] The report specifically identified child support obligations, especially arrearages, as a barrier to successful re-entry into society because they have a tendency to disrupt family reunification, parent-child contact, and the employment patterns of formerly incarcerated parents.[52]

Marginal Cost To Raise a Child/Adjustment for Parenting Time [§ 302.56(c)(4)]

1. Comment: Several commenters suggested that proposed § 302.56(c)(2), which was redesignated in the final rule as § 302.56(c)(4), should be revised to indicate that the guidelines should be ''based on the statewide median marginal cost for the average family to raise a first, second, or subsequent child, and result in a computation of a the support obligation that does not exceed such median marginal cost by more than 20%.'' One commenter specifically indicated that they recommended that child support orders be based on the marginal cost to raise a child rather than parental income. Many other commenters suggested more detailed revisions related to the marginal cost to raise children. Some commenters suggested that, as part of the review of a State's guidelines, a State must consider economic data on the marginal cost of raising children, and the child support orders resulting from the guidelines must approximate the obligor's specified share of such marginal costs. These commenters believed that the objective is to establish child support orders that approximate the true cost of supporting children, over and above what it costs the parents to support themselves. They noted that if the amount of support ordered is too low, the child suffers. However, they noted, child support orders that constitute a windfall to the receiving parent are a potent cause of bitter custody battles, resentment, and hostility that can last throughout the years of childhood. Moreover, according to the commenters, if the child support order is too high, there is a built-in incentive for the parent who expects to win custody to resist shared parenting.

Response: We do not agree with this suggestion. State child support guidelines are required to be based on the noncustodial parent's income, earnings, and other evidence of ability to pay. However, States have discretion and flexibility in defining the specific descriptive and numeric criteria used to compute the amount of the child support obligation. Once a parent's income is ascertained, the rule does not limit States' flexibility in defining the percentage or amount of income ordered to be paid as child support, so long as the resulting order takes into consideration the noncustodial parent's ability to pay it. State guidelines should not be based on the marginal cost of raising the child without taking into consideration the noncustodial parent's ability to pay. This rule only establishes minimum components for State child support guidelines consistent with Federal law, and does not impose more specific requirements, that are not inconsistent with Federal law and regulations.

2. Comment: Many commenters recommended that proposed § 302.56(c)(2), which has been redesignated in the final rule as § 302.56(c)(4), include adjustments for the amount of parenting time each parent is willing and able to provide.

Response: Currently, child support guidelines in 36 States provide for adjustments in the child support order for the amount of parenting time each parent has with the children. While we support this concept and recognize that in most State guidelines the consideration of parenting time is part of the support order establishment process, States are in the best position to determine how to consider parenting time in calculating the amount of the child support obligation since the child support guideline formula is at the discretion of the State.

Quadrennial Review [§ 302.56(e)]

1. Comment: While most commenters generally supported the requirement in § 302.56(e), that ''[t]he State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts,'' a few commenters thought that the reports from the quadrennial review, the effective date of the guidelines, and the date of the next review should be published on the internet and made accessible to the public. They also made recommendations regarding who should be on the reviewing body. They specifically recommended that the following language be added to this provision indicating that the State shall publish on the internet and make accessible to the public all reports of the reviewing body, the membership of the reviewing body, when the guidelines became effective, and the date of the next quadrennial review.

These commenters argued that child support guidelines are not a matter to be developed by a closed group. They viewed guidelines as a matter of immense public import with huge individual impact on millions of people. They recommended that the guideline committee include at least two members of the general public—one advocating for payors and one advocating for recipients. They believed that this was a first step towards bringing transparency to the creation of child support guidelines.

They further commented that no reasonable objection could be raised to this provision. Commenters also indicated that possible objections to including members of the general public might be that such people could lack knowledge of the intricacies of child support or the law, could advocate for narrow interests, or could be disruptive. Given that the two members of the public would undoubtedly be outnumbered by those who traditionally are called upon to write child support guidelines, fear that these members could control the outcome is unreasonable.

Response: OCSE agrees and we added at the end of § 302.56(e) the following: ''The State shall publish on the internet and make accessible to the public all reports of the reviewing body, the membership of the reviewing body, the effective date of the guidelines, and the date of the next quadrennial review.'' We also agree that the quadrennial review process/report should be public information that is shared.

Regarding the composition of the committee or body conducting the quadrennial review, we further agree that the quadrennial review should provide for a meaningful opportunity for participation by citizens and particularly low-income citizens, representing both custodial and noncustodial parents. The child support guidelines review body should also include participation by the child support agency. While we are not mandating the specific composition of the review body, we are requiring in § 302.56(h)(3) meaningful opportunity for public input, including input from low-income custodial and noncustodial parents and their representatives, and the views and advice of the State IV–D agency.

[51] The text of the Pub. L. 110–199 is available at: *https://www.congress.gov/110/plaws/publ199/PLAW-110publ199.pdf.*

[52] Council of State Governments, *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community,* Justice Center, 2005, available at: *http://www.csgjusticecenter.org/wp-content/uploads/2013/04/1694-11.pdf.*

Rebuttable Presumption [§ 302.56(f)]

1. Comment: Over 500 commenters from private citizens, most of them identical comments from mass mailings, proposed that we add language at the end of § 302.56(f) that indicates that the presumption can be rebutted successfully with genetic evidence that the obligor is not the biological parent of the child, and by the lack of written adoption records, in which case there will be no support obligation.

They commented that this addition is meant to update our support laws to reflect the power of modern genetics. They cited the directives in Executive Order 13563 as controlling. Section 5 of that Executive Order states:

> Sec. 5. *Science.* Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, ''Scientific Integrity'' (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

The President's 2009 Memorandum referenced therein, states:

> To the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking.[53]

The commenters further explained that DNA evidence is indisputable. They argued that it is time to update Federal regulations so that support obligations are not imposed on the wrong individuals.

Response: Many States have legal provisions related to parentage in addition to genetic evidence and evidence of adoption records. Given how rapidly the fields of genetic testing and assisted reproduction are changing, OCSE agrees that this area is an appropriate area to review. However, a full discussion of the issues is required and beyond the scope of this rule. It is our view that changes to existing Federal regulations to address this important area would call for a specific notice in the **Federal Register**, to allow for a public comment period.

Written Findings [§ 302.56(g)]

1. Comment: Some commenters recommended that we qualify in proposed § 302.56(g) that a written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State ''; but in no event shall the award exceed the limit specified in proposed paragraph (c)(2) unless the child has special needs as certified and quantified by a licensed medical doctor.''

Response: We did not make this specific revision to § 302.56(g) because the paragraph already requires that the criteria must take into consideration the best interest of the child. States have the flexibility and discretion to establish such criteria. Therefore, States may take into consideration a child with special needs as certified and quantified by a licensed medical doctor.

Parenting Time [Proposed § 302.56(h)]

1. Comment: The majority of commenters supported the proposed § 302.56(h), allowing States to recognize parenting time provisions when both parents have agreed to the parenting time provision or pursuant to State guidelines. Many commenters expressed support for improved coordination between child support and parenting time procedures, and were supportive of the proposed language. However, some commenters indicated confusion about the intended scope of the provision and raised a number of implementation questions. Some comments reflected a misunderstanding about the extent to which FFP would become available for parenting time activities and raised questions about cost allocation. Other commenters questioned the role of the child support program in creating, monitoring, and enforcing a parenting time order, and the legal relationship between child support payments and parenting time. Still other comments expressed concerns regarding the child support agency's lack of experience in handling complex family issues, such as domestic violence and encouraged us to take advantage of our parenting time pilot grant program to develop additional technical assistance resources. Commenters also sought clarity regarding the combination of child support and custody or visitation processes and monitoring compliance with parenting time orders. A number of State commenters suggested that a new rule was not necessary to affirm the general principle that States are not required to implement costly and complex cost allocation plans if such expenditures are *de minimis* and incidental to reimbursable child support program activities.

Response: While expressing support for the rule, the commenters sought clarification about the intent, scope, and implementation of the proposed provision. Our intention in proposing § 302.56(h) was not to open up child support funding for a new set of parenting time activities, which Congress must authorize, or to collapse separate child support and parenting time legal rights. Our intention was to acknowledge existing policies and practices in many States, and to provide a technical clarification that addressed audit and cost allocation questions arising from current practices in a number of States.

IV–D program costs related to parenting time arrangements must continue to be minimal and incidental to IV–D child support order establishment activities and not have any impact on the Federal budget. In light of the comments received on the proposed parenting time provisions and the unintended confusion regarding these proposals, OCSE determined that new rules are not necessary. Therefore, we deleted the proposed paragraph (h).

OCSE recognizes that the inclusion of an uncontested and agreed upon parenting time provision incidental to the establishment of a child support order aligns with Pub. L. 113–183, ''*Preventing Sex Trafficking and Strengthening Families Act.*'' [54] Section 303 of this recent law indicated that it is the sense of the Congress that ''(1) establishing parenting time arrangements when obtaining child support orders is an important goal which should be accompanied by strong family violence safeguards; and (2) States should use existing funding sources to support the establishment of parenting time arrangements, including child support incentives, Access and Visitation Grants, and Healthy Marriage Promotion and Responsible Fatherhood Grants.'' Any new costs related to parenting time provisions would require the State to identify and dedicate funds separate and apart from IV–D allowable expenditures consistent with HHS cost principles codified in 45 CFR part 75, subpart E.

Thirty-six States have adopted guidelines that recognize parenting time arrangements in establishing child support orders. In practical terms, parenting time is an important corollary to child support establishment because the child support agency, or finder of fact, needs information about the parenting time arrangements in order for the guideline amount to be effectively calculated. Other States have parenting time guidelines or have other procedures in place to coordinate child

[53] The President's 2009 Memorandum is available at: *https://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09.*

[54] Available at: *http://www.gpo.gov/fdsys/pkg/PLAW-113publ183/pdf/PLAW-113publ183.pdf.*

support and parenting time processes. These longstanding practices have not changed the fact that parenting time is a legally distinct and separate right from the child support obligation.

Including both the calculation of support and the amount of parenting time in the support order at the same time increases efficiency, and reduces the burden on parents of being involved in multiple administrative or judicial processes with no cost to the child support program.

We encourage States to continue to take steps to recognize parenting time provisions in child support orders when both parents have agreed to the parenting time provision or in accordance with the State guidelines when the costs are incidental to the child support proceeding and there is no cost to the child support program.

Child Support Guidelines Review/ Deviation Factors [§ 302.56(h)]

1. Comment: While most commenters supported that States should maintain flexibility in defining deviation factors, one commenter recommended that proposed § 302.56(i), which has been redesignated as § 302.56(h), further specify that deviation factors established by the State must be ''in the best interest of the child.''

Response: We do not agree. This section establishes steps a State must take when reviewing its child support guidelines. Section 302.56(h)(2) provides that deviation from the presumptive child support amount may be based on factors established by the State. It is appropriate for the State to have discretion to establish such factors.

Section 302.56(g) requires that a written finding or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. The requirement in § 302.56(g) relates to how the deviation may be applied on a case-by-case basis, including having a written finding or finding on the record justifying the deviation from the child support guidelines.

2. Comment: Many commenters suggested additional factors that the State must consider during its guideline review such as economic data on the marginal cost of raising children and an analysis of case data, by gender, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The commenters thought that an analysis of case data by gender must be used in the State's review of the guidelines to ensure that gender bias is declining steadily, and that deviations from the guidelines are limited. Although not specifically related to this paragraph, throughout the comments to the proposed guideline regulation, commenters expressed concerns that: Guidelines needed to consider economic data on local job markets, guidelines did not take into consideration low-income noncustodial parents, and the rate of default orders were increasing inappropriately.

Response: Considering all of the various concerns about how States were developing criteria for guidelines, we have revised proposed § 302.56(i), which has been redesignated as § 302.56(h), to add factors that the States must consider when reviewing their guidelines for the required quadrennial review. We added paragraph (h)(1) to require that the States consider economic data on the cost of raising children, labor market data (such as unemployment rates, employment rates, hours worked, and earnings) by occupation and skill-level for the State and local job markets, the impact of guideline policies and amounts on custodial and noncustodial parents who have family incomes below 200 percent of the Federal poverty level, and factors that influence employment rates among noncustodial parents and compliance with current child support orders.

We also added paragraph (h)(2) to require the States to analyze case data, gathered through sampling or other methods, on the application of and deviations from the child support guidelines, as well as the rates of default and imputed orders and orders determined using the low-income adjustment required under paragraph (c)(1)(ii). The analysis must also include a comparison of payments on child support orders by case characteristics, including whether the order was entered by default, based on imputed income, or determined using the low-income adjustment required under paragraph (c)(1)(ii). The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the child support guidelines are limited and guideline amounts are appropriate based on criteria established by the State under paragraph (g).

3. Comment: Several commenters questioned whether § 302.56(i), redesignated as § 302.56(h), was necessary. They thought that the proposed new sentence regarding deviations from child support guidelines appeared redundant with the reference to rebuttal criteria in paragraph (f). They suggested that the new language be deleted or clarified in the final rule.

Response: We carefully reviewed the language to ensure it was not redundant. Section 302.56(h) lists steps a State must take as part of its review of the State's guidelines. The analysis of the data must be used to ensure that deviations are limited and guideline amounts are appropriate based on criteria established by the State under paragraph (g). The compliance date is for the first quadrennial review of the guidelines commencing after the State's guidelines have initially been revised under this final rule. However, proposed § 302.56(g) requires a written finding or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the guidelines would be unjust or inappropriate in a particular case in order to rebut the presumption that the guideline amount is the correct amount of child support to be awarded.

Section 302.70—Required State Laws

1. Comment: Commenters overwhelmingly supported increasing the exemption period allowed under section 466(d) of the Act from 3 years to 5 years; however, one commenter suggested that consideration also be given to the development of an abridged submission process for renewals.

Response: OCSE appreciates the suggestion; however, submission of the required information is statutory. Section 466(d) states that if a State demonstrates to the satisfaction of the Secretary, through the presentation to the Secretary of such data pertaining to caseloads, processing times, administrative costs, and average support collections, and such other data or estimates as the Secretary may specify, that the enactment of any law or the use of any procedure or procedures required by or pursuant to this section will not increase the effectiveness and efficiency of the State child support enforcement program, the Secretary may exempt the State, subject to the Secretary's continuing review and to termination of the exemption should circumstances change, from the requirement to enact the law or use the procedure or procedures involved.

Section 302.76—Job Services

1. Comment: This proposed provision received overwhelming support from states, Members of Congress, and the public, but it also was opposed by some Members of Congress who did not think the provision should be included in the final rule. Many supportive commenters focused on ways to incorporate employment services for noncustodial parents within a broader workforce agenda. One commenter suggested that States that offer job services as part of their child support enforcement strategy should leverage funds to provide different, but complementary services while coordinating training costs with other Federal programs. Several commenters had questions about how States would coordinate with other Federal job services programs to ensure efficiency, reduce duplication, cover costs appropriately, and reduce administrative burden. One commenter suggested allowing braided funding for providing complementary services under different funding streams.

Response: While we appreciate the support that the commenters expressed, we think allowing for federal IV–D reimbursement for job services needs further study and would be ripe for implementation at a later time. Therefore, we are not proceeding with finalizing the proposed provisions at §§ 302.76, 303.6(c)(5), and 304.20(b)(viii). We encourage State IV–D agencies to leverage other resources —*e.g.,* job services provided under WIOA, TANF, and SNAP E&T—when developing strategies to improve consistent on-time payments of child support. In addition, states interested in providing job services not eligible for FFP continue to have the ability to submit a request for a waiver under section 1115 of the Act, or section 458A(f)(2) of the Act with respect to use of incentive funds.

Section 303.3—Location of Noncustodial Parents in IV–D Cases

1. Comment: While many commenters supported the proposed change to add ''corrections institutions'' to the list of locate sources, one commenter requested that OCSE specify ''Federal, State, and local'' correctional institutions and that automation be recommended where possible.

Response: We would like to clarify that that the term ''corrections officials'' refers to Federal, State, tribal, and local corrections officials. However, this clarification was not added to the regulatory text since this is dependent upon what sources are available to the State for locate purposes. Section 303.3(b)(1) does not address whether or not the sources should be automated; this is based on availability of databases in the State and whether the IV–D agency has access to them.

2. Comment: Another commenter suggested that we add ''utility companies'' to the list of locate sources. In addition, commenters recommended the following change in terminologies: ''food stamps'' to ''Supplemental Nutrition Assistance Program (SNAP)''; ''the local telephone company'' to ''electronic communications and internet service providers''; and change ''financial references'' to ''financial institutions.''

Response: We agree with the commenters' suggestions for technical revisions. Supplemental Nutrition Assistance Program (SNAP) is the official name of the food stamps program, and the two other revisions update classifications for communications and financial companies. In addition, we added utility companies to the list of locate sources since these companies have been valuable locate sources that many States use.

3. Comment: One commenter requested OCSE assist IV–D agencies in working with correctional institutions to identify incarcerated parents. Incarcerated parents may be hesitant to acknowledge that they have children or child support orders, possibly due to misinformation about child support shared among prisoners. Also, people are convicted and imprisoned under alias names. Because of these challenges, the commenter stated that State IV–D programs and correctional institutions need to understand and share each other's data if IV–D programs are to be successful in locating noncustodial parents in jails or prisons. Another commenter discussed the challenges in trying to obtain timely information from county jails.

Response: As a result of their efforts to collaborate, IV–D programs and correctional institutions often agree that they need to know more about the parents in each other's caseloads if both programs are to be successful in accomplishing their missions.[55] Section 453(e)(2) of the Act authorizes the Secretary of the Department of Health and Human Services to obtain information from Federal agencies including the Bureau of Prisons (BOP). OCSE currently has a match with BOP which covers 99 percent of the prison population. It includes 5,407 correctional facilities, including Federal, State, county, and other local prisons. The information is provided to States in the Social Security Administration (SSA) State Verification and Exchange System (SVES) match—they can receive the information on request and proactively. Our match, however, does not have all the data a direct interface could offer States. For example, we do not receive updates on the release date. The release date is very important to States—and updates are even more important because they monitor when the noncustodial parent is released. Release typically triggers order modifications and enforcement actions. We are going to explore the option to interface directly with the BOP and/or State facilities in order to obtain additional or updated information.

It is a system certification requirement to have automated interfaces with State sources, when appropriate, feasible, and cost effective, to obtain locate information, and this includes the Department of Corrections. We also encourage States to develop electronic interfaces with child support data being shared with Federal, State, Tribal, and local corrections institutions to maximize identification of incarcerated parents and program efficiency, and to establish practices for serving parents in correctional facilities. Identifying the fact of incarceration is important to set and keep support orders consistent with the parent's current ability to pay, avoid the accumulation of arrears, and increase the likelihood that support will be consistently paid after release.

4. Comment: Another commenter was concerned that the addition of corrections institutions to the list of required locate sources will require an agreement with the corrections institutions in addition to enhancements to the locate interfaces to match corrections information with State child support information within the statewide automated child support enforcement system. If implemented, an understanding of any local agreements local child support agencies may have with their local law enforcement

[55] Jessica Pearson and Esther Ann Griswold, ''Lessons from Four Projects Dealing with Incarceration and Child Support,'' *Corrections Today,* July 1, 2005, 67(4): 92–95, which is available at: *http://www.thefreelibrary.com/Lessons+from+four+projects+dealing+with+incarceration+and+child...-a0134293586;* U.S. Department of Health and Human Services, *Working with Incarcerated and Released Parents: Lessons from OCSE Grants and State Programs,* 2006, available at *www.acf.hhs.gov/programs/css/resource/working_with_incarcerated_resource_guide.pdf;* and Council of State Governments, *Report of the Re-entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community.* Justice Center, 2005, available at *https://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf.*

partners would be appreciated. Also, a few commenters indicated that this was a list of required locate sources.

Response: In this final rule, as we discussed above, we are encouraging States to include corrections institutions as a locate source, but we are not requiring it. This change is intended to encourage child support agencies to use available locate tools to identify incarcerated noncustodial parents and ensure that their orders are appropriate. Additionally, in § 302.34 in this final rule, we have also added ''corrections officials'' to the list of entities with which a State may enter into agreements for cooperative arrangements. This addition encourages child support agencies to collaborate with corrections institutions and community corrections officials (probation and parole agencies).

We do not consider the list of appropriate locate sources in § 303.3(b)(1) to be required locate sources, but rather an extensive nonexclusive list of sources that the State should consider using to locate noncustodial parents or their sources of income and/or assets when location is needed to take a necessary action. Additionally, after the State has determined what locate sources they have access to, the State will need to determine what locate sources should be used on a particular case. For example, some locate sources may not be able to be used if the noncustodial parent's social security number is unknown.

Section 303.6—Enforcement of Support Obligations

Civil Contempt Proceedings [§ 303.6(c)(4)]

1. Comment: Many commenters expressed concerns about our proposed revisions related to civil contempt. These commenters believed that the proposed requirements went beyond the *Turner* v. *Rogers* decision.[56] One commenter thought a regulation requiring that States must have procedures requiring that the courts take into consideration the subsistence needs of the noncustodial parent went beyond the *Turner* v. *Rogers* decision. Several commenters thought that the *Turner* decision merely requires a State either to provide legal counsel or alternative procedural safeguards. These commenters did not believe that any additional due process safeguards were required if counsel was being provided to the defendant.

Response: After careful consideration of the comments, we have decided to refocus the regulation on the criteria that IV–D agencies use to determine which cases to refer and how they prepare cases for a civil contempt proceeding. As the Federal agency responsible for funding and oversight of State IV–D programs, OCSE has an interest in ensuring the constitutional principles articulated in *Turner* are carried out in the child support program, that child support case outcomes are just and comport with due process, and that enforcement proceedings are cost-effective and in the best interest of the child. The *Turner* case provides OCSE and State child support programs with an opportunity to evaluate the appropriate use of civil contempt in today's IV–D child support program. As the U.S. Supreme Court stated in *Turner,* a noncustodial parent's ability to pay constitutes ''the critical question'' in a civil contempt case, whether the State provides legal counsel or alternative procedures designed to protect the indigent obligor's constitutional rights.[57] Contempt is an important tool for collection of child support when used in appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligation, but willfully fails to do so, and the purge amount or conditions are within the noncustodial parent's ability to pay or meet. The *Turner* opinion provides the child support program with a guide for conducting fundamentally fair and constitutionally acceptable proceedings. The revisions to § 303.6(c)(4) are designed to reduce the risk of erroneous deprivation of the noncustodial parent's liberty in IV–D cases, without imposing significant fiscal or administrative burden on the State. Accordingly, in response to comments, the final rule requires that State IV–D agency must maintain and use an effective system for enforcing the support obligation by establishing guidelines for the use of civil contempt citations in IV–D cases. The guidelines must include requirements that the IV–D agency: (i) Screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order; (ii) provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions; and (iii) provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action.

2. Comment: Some commenters felt that our proposed requirement related to civil contempt infringed on the inherent powers of the judiciary and would be unenforceable by the IV–D agency. Others commented that it was a violation of separation of powers. One commenter thought that the court should be the body to determine the requirements of *Turner* decision. Another commenter questioned our authority to regulate in this area.

Response: As discussed above, we have revised the proposed § 303.6(c)(4) to focus on IV–D agency decisions made at an earlier point in civil contempt proceedings. The revised § 303.6(c)(4) requires IV–D agencies to establish guidelines for the appropriate use of contempt in IV–D cases.

OCSE, IV–D agencies, and courts under cooperative agreements to carry out the IV–D program are required to ensure that noncustodial parents receive the due process protections required by the Constitution. The Federal government has a substantial interest in the effective and equitable operation of the child support program, including the use of contempt proceedings in the enforcement of IV–D cases. In addition, the Secretary of Health and Human Services has authority under section 452(a)(1) of the Act to ''establish such standards for locating noncustodial parents, establishing paternity, and obtaining child support . . . as he determines to be necessary to assure that such programs will be effective.'' Section 454(13) provides that ''the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity,

[56] 564 U.S._, 131 S Ct. 2507 (2011). The question in *Turner* was whether the due process clause of the Fourteenth Amendment of the U.S. Constitution requires States to provide legal counsel to an unrepresented indigent defendant person at a child support civil contempt hearing that could lead to incarceration in circumstances where neither the custodial parent nor the State was represented by legal counsel. The U.S. Supreme Court decision held that under those circumstances, the Fourteenth Amendment does not *automatically* require the States to provide counsel if the State has ''in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the court order.'' The Court found that the Petitioner's incarceration violated due process because he received neither counsel in the proceedings nor the benefit of adequate alternative procedures.

[57] See U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, Dear Colleague Letter, March 14, 2016, *https://www.justice.gov/crt/file/832461/download,* cited in OCSE Dear Colleague Letter, DCL–16–05, March 21, 2016, *http://www.acf.hhs.gov/programs/css/resource/justice-department-annnounces-resources-to-reform-practices.*

obtaining support orders, and collecting support payments.''

Research shows that routine use of civil contempt is counterproductive to the goals of the child support program.[58] All too often it results in the incarceration of noncustodial parents who are unable to pay to meet their purge requirements.[59] A study that examined the Milwaukee County Jail system found that 58 percent of the individuals incarcerated between 2005 and 2010 for criminal nonsupport of child support had no reported earnings in the unemployment insurance system and 75 percent were African-American.[60] This same study found that for those noncustodial parents with formal earnings, the average annual earnings were $4,396, and the average annual child support owed for all incarcerated noncustodial parents was $4,356.

Incarceration, in turn, means that the noncustodial parent loses whatever work he or she may have had, further reducing their ability to pay their child support. Once out, their ability to find work is negatively affected, resulting in some turning to the underground economy, which makes it even more difficult to collect child support.[61] One study found that incarceration results in 40 percent lower earnings upon release.[62] Moreover, contact between the parent and child is severed, which, generally, is detrimental to the child.[63] And the custodial family loses any other form of support that this parent provided.[64]

Most States use civil contempt as a last resort option, recognizing that routine use of this enforcement tool is not cost effective and can be counterproductive when the noncustodial parent is indigent.[65] Since the U.S. Supreme Court's decision in *Turner* v. *Rogers,* some States have gone further and implemented significant changes to their contempt process to further ensure that indigent noncustodial parents are not wrongly incarcerated for child support debt.[66] These changes include implementing case screening, new referral procedures, developing new information and forms, and requiring specific findings by the court on the present ability to pay the ordered purge amount to ensure accurate and defensible orders.[67]

Finally, the government's interests also favor additional procedural safeguards to ensure that only those parents with a present ability to pay are confined for civil contempt. While the State has a strong interest in enforcing child support orders, it secures no benefit from jailing a noncustodial parent who cannot discharge his obligation. The period of incarceration makes it less, rather than more, likely that such parent will be able to pay child support.[68] Meanwhile, the State incurs the substantial expense of confinement. While child-support recovery efforts once ''followed a business model predicated on enforcement'' that ''intervened only after debt, at times substantial, accumulated and often too late for collection to be successful, let alone of real value to the child,'' experience has shown that alternative methods—such as order modifications, increased contact with noncustodial parents, and use of ''automation to detect non-compliance as early as possible''—are more effective than routine enforcement through civil contempt.[69]

3. Comment: Several commenters expressed concerns that the proposed requirements related to civil contempt proceedings would reduce the efficiency and flexibility of the enforcement process through the courts. One commenter thought that the NPRM would weaken the enforcement remedy of contempt when used to enforce the obligation of contemnors who have an ability to arrange payments from assets held by others, even though the IV–D agency had been unable to affirmatively show the existence of income and assets. One commenter thought that the proposed requirements would be overly burdensome in civil contempt proceedings involving chronic nonpayers. Another commenter thought that the NPRM would result in increases in court and attorney time necessary to comply with all of the new requirements or would translate into less court resources available for other child support actions, such as establishment and modification actions.

Response: We do not agree with these comments. Based on comments, the revisions to § 303.6(c)(4) are designed to reduce the risk of an erroneous deprivation of liberty without imposing significant fiscal or administrative burden on the State.

Research shows that implementing constitutional due process safeguards, such as those delineated in the *Turner* decision, increases compliance with court orders by increasing litigants' perception of fair treatment.[70] Procedural fairness matters to litigants and influences their behavior. The safeguards included in *Turner* are designed to provide procedural fairness.

[58] See Elizabeth G. Patterson, *Civil Contempt & the Indigent Child Support Obligor: The Silent Return of Debtor's Prison,* 18 Cornell Journal of Law & Public Policy 95, 126 (2008) (*Civil Contempt*), available at: *http://www.lawschool.cornell.edu/research/jlpp/upload/patterson.pdf.*

[59] See Rebecca May & Marguerite Roulet, Ctr. for Family Policy & Practice, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices,* 40 (2005), which is available at: *http://www.cffpp.org/publications/LookAtArrests.pdf.*

[60] Cook, Steven, *Child Support Enforcement Use of Contempt and Criminal Nonsupport Charges in Wisconsin,* University of Wisconsin, Institute for Research on Poverty, 2015.

[61] The Pew Charitable trusts. *Collateral Costs: Incarceration's Effect on Economic Mobility,* September 2010, available at: *http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf;* and Judi Bartfeld & Daniel R. Meyer, *Child Support Compliance Among Discretionary and Nondiscretionary Obligors,* 77 Soc. Serv. Rev. 347, 364–65 (2003).

[62] The Pew Charitable trusts. *Collateral Costs: Incarceration's Effect on Economic Mobility,* September 2010, available at: *http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.*

[63] See Amanda Geller, Carey E. Cooper, Irwin Garfinkel, Ofira Schwartz-Soicher, and Ronald B. Mincy. ''Beyond Absenteeism: Father Incarceration and Child Development,'' *Demography* (2012) 49(1): 49–76.

[64] Jeremy Travis and Bruce Western, Eds, *The Growth of Incarceration in the United States: Exploring Causes and Consequences,* National Academy of Sciences, 2014.

[65] Carmen Solomon-Fears, Alison M. Smith, and Carla Berry, *Child Support Enforcement: Incarceration, As the Last Resort Penalty For Nonpayment of Support,* Congressional Research Service R42389, 2012, which is available at: *http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/R42389_gb.pdf.*

[66] Mary Pat Gallagher, ''Court Takes Steps To Protect Rights of Poor Child-Support Delinquents'' *New Jersey Law Journal,* 2014; Ethan C. McKinney, ''Contempt After Turner'' Presentation at 2014 Annual Conference, Eastern Regional Interstate Child Support Association, 2014, which is available at: *http://www.ericsa.org/2014-conference-agenda-handouts;* Pam Lowry, ''Rebalancing the Program Through Conversation with All Staff'' *Child Support Report* 34(10): 1 (October-November 2012), which is available at: *http://www.acf.hhs.gov/sites/default/files/programs/css/csr1211.pdf.*

[67] Pamela Lowry and Diane Potts, *Illinois Update on Using Civil Contempt to Collect Child Support;* Ethan C. McKinney (2014) ''Contempt After Turner'' Presentation at 2014 Annual Conference, Eastern Regional Interstate Child Support Association, which is available at: *http://www.ericsa.org/2014-conference-agenda-handouts.*

[68] See Elizabeth G. Patterson, *Civil Contempt & the Indigent Child Support Obligor: The Silent Return of Debtor's Prison,* 18 Cornell Journal of Law & Public Policy 95, 126 (2008) (*Civil Contempt*), available at: *http://www.lawschool.cornell.edu/research/jlpp/upload/patterson.pdf.*

[69] See National Child Support Enforcement, U.S. Dep't of Health & Human Services, *Strategic Plan: FY 2005–2009,* at 2, 10 (*Strategic Plan*), *http://www.acf.hhs.gov/programs/css/resource/national-child-support-enforcement-strategic-plan-fy2005-2009.*

[70] See Kevin Burke & Steve Leben's report ''Procedural Fairness: A Key Ingredient in Public Satisfaction,'' A White Paper of the American Judges Association, *Court Review* 44:1/2, available at: *http://www.proceduralfairness.org/~/media/Microsites/Files/procedural-fairness/Burke_Leben.ashx.*

In *Turner,* the Court noted ''the routine use of contempt for non-payment of child support is likely to be an ineffective strategy'' over the long-term.[71] Contempt actions are expensive and time consuming for courts, agencies, and parents, and do not typically result in ongoing support for children. One State finds that contempt is its least cost-effective enforcement tool, estimating that collections in contempt actions barely break even with the costs—for every dollar spent on contempt proceedings, the State collects $1.26.[72] Another State found that when it cut back on its routine use of contempt hearings and increased use of administrative locate and enforcement remedies, total collections increased.[73] Resources put into investigations, ''appear and disclose'' procedures, parent interviews, case conferencing, and expanded data sources are generally a more cost-effective use of Federal and State dollars than using contempt hearings in order to discover information.

States must provide adequate safeguards to ensure that the noncustodial parent has the ability to comply with the order. The revised language in paragraph (c)(4) sets out minimum requirements that IV–D agencies must meet when bringing a civil contempt action involving parties in a IV–D case and ensures that contempt is used in appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligation, but willfully fails to do so, and the purge amount or conditions are within the noncustodial parent's ability to pay or meet.

It is the responsibility of the IV–D agency to ensure that prior to filing for civil contempt that could result in incarceration, the IV–D agency has carefully reviewed each case to ascertain whether the facts would support a finding that the noncustodial parent has the ''actual and present'' ability to comply with the support order, and the requested purge amount or condition, and to bring those facts to the court's attention.[74] States must also provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the contempt action.

OCSE strongly encourages State child support agencies to consider some of the innovative alternatives to incarceration put into practice by a number of States and discussed in OCSE IM–12–01.[75] In addition, it is the noncustodial parent, not other relatives, friends, or the custodial parent, who is responsible for child support based upon his or her ability to pay it. A procedure that pressures family members and friends to pay in order to keep the noncustodial parent out of jail is inconsistent with constitutional principles, damaging to family relationships, and ultimately ineffective and counterproductive in obtaining ongoing support for children. As a practical matter, reliance on relatives and friends likely will not result in regular support payments for the families.

4. Comment: One commenter indicated that any reference in § 303.6 to the noncustodial parent's subsistence needs or actual earnings/income should be replaced with a reference to the noncustodial parent's ability to pay.

Response: In § 303.6(c)(4), we have revised the proposed language to delete reference to the noncustodial parent's subsistence needs as a separate determination, and instead reference to the noncustodial parent's ability to pay the child support order or ability to comply with the order. However, subsistence needs are an inherent factor in determining a noncustodial parent's ability to pay. Everyone, even noncustodial parents, have basic self-support needs, including food and shelter that cannot be ignored when determining ability to pay.

5. Comment: One commenter indicated that States do not file contempt proceedings as fishing expeditions, but rather file them solely to use the jail power to coerce compliance with a support order after the agency has exhausted administrative enforcement remedies and has screened the case for contempt. States often file contempt proceedings against noncustodial parents who hide income, are willing to lie in court, work at cash jobs, and have other ways to make themselves look unable to pay support. The commenter believed that our proposed requirements would actually serve to limit child support collections on the tough to collect cases.

Response: State practice related to contempt proceedings varies widely. We are encouraged that some States are already using administrative enforcement remedies and case screening prior to initiating civil contempt proceedings. Contempt actions should be used selectively in those cases when the facts warrant its use, not routinely, especially in nonpaying cases where the reason for nonpayment is low income. Contempt is an important tool for collection of child support when used in appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligation, but willfully fails to do so, and the purge amount or conditions are within the noncustodial parent's ability to pay or meet. However, routine contempt actions and the threat of jail are not a cost-effective way to conduct discovery. The *Turner* opinion provides the child support program with a guide for conducting fundamentally fair and constitutionally acceptable proceedings. The revisions to § 303.6(c)(4) are designed to reduce the risk of erroneous deprivation of the noncustodial parent's liberty in IV–D cases consistent with the *Turner* decision, without imposing significant fiscal or administrative burden on the State.

We agree that filing for contempt may be the right remedy in some difficult to collect cases—those where there is evidence that the noncustodial parent has the ability to pay, but chooses to ignore child support obligations. However, if a case is difficult to collect because the noncustodial parent lacks the ability to pay support, there are more effective and less costly tools that meet due process requirements. Sometimes, the IV–D agency does not have sufficient facts to determine the difference. We recognize that it is difficult to build a case. It is our position, however, that State IV–D agencies have the responsibility to investigate and screen the case for ability to pay before bringing a civil contempt action that can lead to jail. States need to develop and implement procedures and protocols for determining when it is effective to use contempt proceedings in IV–D cases. States need to ensure that the tools or mechanisms they use to enforce cases are cost-effective, productive, and in the best interest of the children.

6. Comment: Several commenters expressed concerns that the proposed provision related to civil contempt

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[71] *Turner,* 131 S. Ct. at 2516 (quoting Brief for United States as Amicus Curiae at 21–22, and n. 8), available at: *http://www.justice.gov/sites/default/files/osg/briefs/2010/01/01/2010-0010.mer.ami.pdf.*

[72] Ann Coffin, *Florida's Data Analytics: Compliance of Support Orders,* Presentation to the OCSE Strategic Planning Workgroup on Measuring Child Support Performance, 2014.

[73] Lowry, Pamela and Diane Potts, ''Illinois Update On Using Civil Contempt To Collect Child Support.''

[74] See U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, Dear Colleague Letter, March 14, 2016, *https://www.justice.gov/crt/file/832461/download,* cited in OCSE Dear Colleague Letter, DCL–16–05, March 21, 2016, *http://www.acf.hhs.gov/programs/css/resource/justice-department-annnounces-resources-to-reform-practices.*

[75] IM–12–01 is available at: *http://www.acf.hhs.gov/programs/css/resource/alternatives-to-incarceration.*

proceedings inappropriately shifts the burden of proof. They believed that the noncustodial parent would no longer have to prove his or her inability to pay; rather, the IV–D agency would have to prove the noncustodial parent's ability to pay. Another commenter thought that a rule shifting the burden to the IV–D agency to show evidence of ability to pay would necessitate more discovery that would increase the expense of and slow down the completion of IV–D enforcement judicial actions. This same commenter indicated that even if the noncustodial parent is an employee paid in a documented form, the State staff cannot use records of wages as documentary evidence due to limitations on the use of workforce wage records by State law.

Response: We appreciate the difficulty of discovering information regarding ability to pay in some cases. However, State practices related to the use of contempt actions vary widely. We point out that many States build cases by using sound investigative practices and making efforts to talk with both parents before scheduling court hearings. All States should maximize their use of automated data sources. Additionally, many States use clear, easy to read forms seeking financial information from the parents. Other States routinely interview the parents, either through phone contacts, case conferencing, or compelled ''appear and disclosure'' administrative procedures, all of which impose little expense on the State or burden on the proceedings, but would help increase the accuracy of the court's determination. These simple, minimally burdensome procedures would enable the IV–D agency to evaluate whether the noncustodial parent has the ability to comply with the support obligation.

The final rule does not address burden of proof. Rather, when the State considers bringing a civil contempt action in a IV–D case that can result in incarceration, often against an unrepresented, indigent noncustodial parent, the rule requires the IV–D agency to screen the case for ability to pay and, if proceeding with the contempt action, provide such evidence for the court to consider, in conjunction with any other evidence, in making a factual determination about the noncustodial parent's ability to pay child support.[76]

7. Comment: One commenter thought that the proposed amendment related to civil contempt was irreconcilable with the intent and other terms of § 303.6, which provides State agencies with authority to take certain enforcement actions. The commenter believed that the proposed amendment unduly restricts judicial enforcement actions in civil contempt cases and requested OCSE to strike the proposed provision.

Response: As we indicated in AT–12–01,[77] the Federal government has ''an interest in ensuring the constitutional principles articulated in *Turner* are carried out in the child support program, that child support case outcomes are just and comport with due process, and that enforcement proceedings are cost-effective and in the best interest of the children.'' Civil contempt is different from other enforcement actions. It can lead to a loss of liberty through incarceration. Due process safeguards related to contempt actions are particularly important when the noncustodial parent is unrepresented, and has limited income and education. Too often, civil contempt proceedings are brought in some jurisdictions to enforce an underlying support order based on fictitious income that has been imputed to the noncustodial parent. Additionally, since the noncustodial parents often face attorneys in court, it is especially important that the State ensures that appropriate procedural safeguards are provided in IV–D cases enforced through contempt proceedings. Our objective is to prevent a cascade of legal consequences that begins with an order based on imputed income and ends in nonpayment and incarceration. For some defendants, what is missing at critical points in the process is evidence of ability to pay. Given the importance of the interest at stake in civil contempt proceedings, it is especially important that IV–D case procedures promote a fair hearing and accurate determination supported by the facts with respect to the key question in the case, ability to pay, such that any confinement imposed on a noncustodial parent is remedial rather than punitive.

8. Comment: One commenter suggested the following revision to our NPRM: ''Have procedures ensuring that civil contempt proceedings are initiated after considering the noncustodial parent's ability to earn income and that parent's subsistence needs, if known. IV–D agencies shall provide the court with information regarding the noncustodial parent's ability to comply when requesting a finding of contempt and a purge amount.''

Response: We agree. The revision to proposed § 303.6(c)(4) reflects this suggestion but we deleted the reference to the noncustodial parent's subsistence needs as a separate determination from ability to pay.

9. Comment: One commenter questioned how to proceed in a case where there is no evidence that the defendant has the ability to pay either the ordered amount or the purge amount. Another commenter asked how the State IV–D agency will initiate a civil contempt if it has no earnings information on the noncustodial parent.

Response: If the noncustodial parent has no earnings or there is no evidence that the noncustodial parent has the ability to pay, the IV–D agency should not initiate civil contempt proceedings, but should investigate further, consider whether the support obligation should be modified, and refer the parent to employment or other services when available. See also the response to Comment 6 above regarding State strategies and practices for the appropriate use of contempt in IV–D cases.

10. Comment: What is the process by which a noncustodial parent would be ordered to participate in an ''alternative to incarceration'' program if his lack of actual income precludes the possibility of incarceration for contempt?

Response: The language of the rule includes the clause ''ability to pay or otherwise comply with the order.'' If the order requires the noncustodial parent to participate in services, and the court finds based on the evidence, after notice and other safeguards, that the noncustodial parent is able to comply with the order, the requirements of the rule have been met. Several child support agency programs have implemented proactive and early intervention practices to address the underlying reasons for unpaid child support and avoid the need for civil contempt proceedings leading to jail time. In OCSE IM–12–01,[78] we describe promising and evidence-based practices to help States increase reliable child support payments, improve access to justice to parents without attorneys, and reduce the need for jail time. Incarceration may be appropriate in those cases where noncustodial parents have the means to support their

[76] See U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, Dear Colleague Letter, March 14, 2016, *https://www.justice.gov/crt/file/832461/download,* cited in OCSE Dear Colleague Letter, DCL–16–05, March 21, 2016, *http://www.acf.hhs.gov/programs/css/resource/justice-department-annnounces-resources-to-reform-practices.*

[77] AT–12–01 is available at: *http://www.acf.hhs.gov/programs/css/resource/turner-v-rogers-guidance.*

[78] OCSE–IM–12–01 is available at: *http://www.acf.hhs.gov/programs/css/resource/alternatives-to-incarceration.*

children but willfully evade their parental responsibilities by hiding income and assets. However, several innovative strategies can reduce the need for routine civil contempt proceedings in cases involving low-income noncustodial parents, increase ongoing collections, and reduce costs to the public. Research suggests that such practices can actually improve compliance with child support orders, increasing both the amount of child support collected and the consistency of payment.[79] These practices include early engagement and efforts to contact and talk with both parents, increasing investigative and locate efforts, and setting accurate orders based upon the noncustodial parent's actual income,[80] improving review and adjustment processes,[81] developing debt management programs,[82] implementing work-oriented programs for unemployed noncustodial parents who are behind in their child support,[83] working with fatherhood and other community based programs as intermediaries, and encouraging mediation and case conferencing to resolve issues that interfere with consistent child support payments.[84]

[79] See Jessica Pearson, Nancy Thoennes, and Lanae Davis, *Early Intervention in Child Support.* Center for Policy Research, 2007, which is available at: *http://www.centerforpolicyresearch.org/Publications/tabid/233/Default.aspx.*

[80] Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?,* Orange County Child Support Services, 2011, which is available at: *http://www.wuss.org/proceedings12/37.pdf..*

[81] U.S. Department of Health and Human Services, *Using Automated Data Systems To Establish and Modify Child Support Orders,* November 2006, which is available at: *http://www.acf.hhs.gov/sites/default/files/ocse/dcl_07_32a.pdf.*

[82] Carolyn Heinrich, Brett Burkhardt, and Hilary Shager, *Reducing Child Support Debt and Its Consequences: Can Forgiveness Benefit All?,* Journal of Policy Analysis and Management, 30(4); 755–774, 2011, which is available at: *https://www.lafollette.wisc.edu/images/publications/workingpapers/heinrich2010–018.pdf.*

[83] Daniel Schroeder and Nicholas Doughty, *Texas Non-Custodial Parent Choices: Program Impact Analysis,* Ray Marshall Center for the Study of Human Resources, Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin, 2009, which is available at: *https://www.utexas.edu/research/cshr/pubs/pdf/NCP_Choices_Final_Sep_03_2009.pdf.* Also see Kye Lippold and Elaine Sorensen's report, *Strengthening Families Through Stronger Fathers: Final Impact Report for the Pilot Employment Programs,* Urban Institute, 2011, which is available at: *http://www.urban.org/research/publication/strengthening-families-through-stronger-fathers-final-impact-report-pilot-employment-programs/view/full_report.*

[84] Elaine Sorensen and Tess Tannehil, *Preventing Child Support Arrears in Texas by Improving Front-end Processes,* Urban Institute, 2006, which is available at: *http://www.urban.org/research/publication/preventing-child-support-arrears-texas-improving-front-end-processes/view/full_report.*

Purge Amounts: [§ 303.6(c)(4)]

1. Comment: One commenter thought that requiring purges be based on an evidentiary finding is unnecessary, beyond the scope of *Turner,* and has an unintended effect of delaying the efficiency of an expedited child support proceeding. Two other commenters thought that the proposed purge language was too restrictive and added unnecessary complexity to a fairly simple process.

Response: Although we have revised § 303.6(c)(4) significantly based on our consideration of the comments related to civil contempt, we do not necessarily agree with the interpretation of *Turner* presented in some of these comments. At issue are safeguards of obligors' constitutionally-protected liberty and property interests. We are requiring that State IV–D agencies provide the court with available information, which may assist the court in making a factual determination regarding the obligor's ability to pay the purge amount or comply with the purge conditions. As noted in *Turner,* under established Supreme Court principles, ''[a] court may not impose punishment in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.'' [85] The Court found that the noncustodial parent's ability to pay constitutes ''the critical question in the case.'' The revisions to § 303.6(c)(4) require the IV–D agency to assist the court by providing such information, thereby reducing the risk of erroneous deprivation of the noncustodial parent's liberty in IV–D cases, without imposing significant fiscal or administrative burden on the State.

2. Comment: Several commenters stated that the court makes the determination of what amount a noncustodial parent must pay to avoid incarceration. They indicated that the IV–D agency cannot control what the court ultimately sets as the amount. Two commenters believed that the proposed requirement related to a purge amount usurped the court's authority and discretion.

Response: We expect that State courts will adhere with the constitutional due process principles. However, in most States, it is the IV–D agency or the court, through cooperative agreement with the IV–D agency that initiates contempt actions in IV–D cases. Before filing a contempt action, the IV–D agency has a responsibility to the parties and to the court to screen the IV–D case for ability to pay, and if proceeding with the contempt action, provide the court with such evidence. In addition, the IV–D agency may be able to contribute to judicial educational efforts to foster awareness of the need to set purge amounts based on ability to pay and enter an express finding that the noncustodial parent has the ability to pay the purge amount or comply with the purge conditions, consistent with the *Turner* decision.

3. Comment: Several commenters stated that they thought purge amounts should not be based on actual income. One commenter thought that the proposed language related to purge amounts disregarded the many cases in which the noncustodial parent is voluntarily unemployed and is being provided living expenses by another person; the commenter thought the language should focus on ''all available income'' instead of ''actual income.'' Another commenter indicated that the proposed provision could consistently hamper a judge's ability to enforce child support orders intended to benefit children. One commenter thought that requiring IV–D agencies to consider actual earnings prior to filing a contempt motion or recommending a purge amount limited agencies' options, especially in regards to parents who work in the underground economy or refuse to work. This commenter also thought that although a nonmonetary purge condition requiring participation in a job search or other similar activity was certainly appropriate in a situation when there is significant question as to a noncustodial parent's ability to comply with a financial purge, but the availability of a monetary purge remained essential for individuals who will only take support obligations seriously when a monetary purge is set and their freedom is at risk.

Response: We have revised the proposed language. The revised rule focuses on ensuring that the State IV–D agency establishes guidelines for the appropriate use of contempt in IV–D cases to ensure that constitutional procedural safeguards are provided in all IV–D cases by requiring that such guidelines include that the State screens the case for information regarding the obligor's ability to pay or otherwise comply with the order. The State must also provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, to assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with any other purge conditions that may be set by the court. The State child support agency could provide the

[85] *Turner,* 131 S. Ct. at 2516 (quoting *Hicks* v. *Feiock,* 485 U. S. 624, 638, n. 9).

court with financial information received from financial forms sent to both parents, automated quarterly wage information from the National Directory of New Hires, as well as other relevant information that the State has ascertained through testimony, case conferencing, and investigations. Alternatively, the State could recommend to the court alternative purge conditions, such as conducting a job search, obtaining counseling for substance abuse, or obtaining job training.[86] The State must also ensure that the noncustodial parent is provided clear notice that his or her ability to pay constitutes the critical question in the contempt action.

4. Comment: A few commenters suggested alternative language proposals to what we had in the NPRM. One commenter suggested that: ''A purge amount must be based upon a court finding that the noncustodial parent has the actual means to pay the amount.'' Another suggested revision included: ''A purge amount must be based upon a written evidentiary finding that the noncustodial parent has the actual means to pay the amount from his or her current income or assets, including but not limited to any hidden income or assets of the noncustodial parent, or upon a written evidentiary finding that the noncustodial parent has failed to make reasonable and diligent efforts to seek employment.''

Response: OCSE has considered all of the suggested revisions. We have incorporated into the revised language a requirement that the purge amount be based upon the defendant's ''ability to pay,'' consistent with the principles articulated in the *Turner* decision. We have also incorporated that information about the circumstances of the cases be provided to the courts based on the State IV–D efforts related to screening the case. For specifics related to the revised language, please see Comment/Response 3 in this section.

Section 303.8—Review and Adjustment of Child Support Orders

1. Comment: A few commenters stated that if incarceration is recognized as a change in circumstance, then the changes to § 303.8 are not necessary because current Federal law and regulation allow States to conduct accelerated reviews in circumstances that are identified by States as the most beneficial.

Response: The revisions in this section are necessary to require all States to either implement § 303.8(b)(2) or (b)(7)(ii) and provide more specificity regarding review and adjustment and incarceration. Section 303.8(b)(2) allows States to elect in their State plan, the option to initiate review and adjustment, without the need for a specific request, after learning that the noncustodial parent is incarcerated for more than 180 calendar days. We encourage States to implement this proactive approach to ensure that orders are based on the noncustodial parent's ability to pay during his or her incarceration. A number of States, including Arizona, California, Michigan, Vermont, and the District of Columbia have enacted State laws that permit their child support agency to initiate review and adjustment upon notification that the noncustodial parent has been incarcerated.[87] Additionally, if a State does not elect in its State plan to implement paragraph (b)(2) of this section, then we are requiring the State, under paragraph (b)(7)(ii), within 15 business days of when the IV–D agency learns that a noncustodial parent will be incarcerated for more than 180 calendar days, to send a notice to both parents informing them of the right to request the State to review and, if appropriate, adjust the order, consistent with this section.

Further, we agree that incarceration is a factor in determining a substantial change in circumstance. As such, we have revised § 303.8(c) to indicate that: (c) . . . [s]uch reasonable quantitative standard must not exclude incarceration as a basis for determining whether an inconsistency between the existing child support order amount and the amount of support determined as a result of a review is adequate grounds for petitioning for adjustment of the order.

2. Comment: A few commenters noted that section 466(10) of the Social Security Act (the Act) refers to periodic reviews and establishes a minimum 3-year review cycle ''or such shorter cycles as the State may determine'' which empowers the States, not OCSE, to create exceptions to the 3-year review process.

Response: The Secretary of Health and Human Services has authority under section 452(a)(1) of the Act to ''establish such standards for locating noncustodial parents, establishing paternity, and obtaining child support . . . as he determines to be necessary to assure that such programs will be effective.'' Section 454(13) provides that ''the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments.''

3. Comment: A few commenters asked that we clarify the term ''incarceration'' and specify if it includes individuals who are sentenced, pending trial, on parole, or in a supervised release program (*e.g.,* half-way house).

Response: Black's Law Dictionary defines ''incarcerated'' as confined in a jail or penitentiary. Therefore, the review and adjustment notification requirements do not include noncustodial parents who are on parole or in a supervised release program. If the individual has been sentenced, the State may take steps to implement the notification requirement if the noncustodial parent will be incarcerated for more than 180 calendar days.

4. Comment: Many commenters had concerns that the proposed 90-day timeframe was too short and did not allow enough time to review and modify an order. Commenters requested the timeframe be increased to at least 6 months.

Response: Consistent with comments, we have extended the timeframe to 6 months. The current timeframe for review and adjustment, in § 303.8(e), allows 180 calendar days to conduct the review and, if appropriate, adjust the support order; therefore, in the final rule, we have increased the incarceration timeframe to 180 calendar days in § 303.8(b)(2) and added it to paragraph (b)(7)(ii) to align with the current review and adjustment timeframe.

5. Comment: A few commenters requested that the provision specify a timeframe when the child support agency has to initiate the review and adjustment process after learning of the incarceration.

Response: We agree that a timeframe may advance the review and modification of the child support order process. Therefore, we revised proposed § 303.8(b)(7)(ii) to include a timeframe of 15 business days to initiate the review and adjustment process after

[86] In *Bearden* v. *Georgia,* 461 U.S. 660 (1983), the U.S. Supreme Court held that a State determines a fine or restitution to be an appropriate penalty, it may not thereafter imprison a person solely because he lacked the resources to pay for it, but should instead consider alternative measures.

[87] In 2012, Vermont enacted Senate Bill 203 that allows the child support program to file a motion to modify child support if a party is incarcerated from more than 90 days. For information about the other jurisdictions, see Department of Health and Human Services, Office of Child Support Enforcement, ''*Voluntary Unemployment,*'' *Imputed Income, and Modification Laws and Policies for Incarcerated Noncustodial Parents* (2012), Project to Avoid Increasing Delinquencies—Child Support Fact Sheet, available at: *http://www.acf.hhs.gov/sites/default/files/ocse/paid_no4_companion.pdf.*

learning that the noncustodial parent is incarcerated.

6. Comment: One commenter indicated that the proposed § 303.8(b)(7)(ii) requires the State to send notice of the parents' right to review their order when the IV–D agency learns of the noncustodial parent's incarceration without any minimum time period. For instance, the State could learn of the noncustodial parent's incarceration on day 88 of a 90-day sentence and, under the NPRM, the IV–D agency would need to send notice to both parties even though the potential reason for the modification ends 2 days later. According to the commenter, the provision should include a minimum time period before the IV–D agency is required to give notice of the right to review and any timeframe should begin only after the State learns of the incarceration. Regardless of the length of incarceration, it only matters how much time remains once the State learns of the incarceration, since the modification can only apply going forward.

Response: The timeframe ''more than 180 calendar days'' in both § 303.8(b)(2) and (b)(7)(ii) is applicable based on the date the IV–D agency learns the noncustodial parent is incarcerated. For instance, if the State learns of the noncustodial parent's incarceration on day 8 of a 200-day sentence, then this provision would apply since the noncustodial parent still has 192 days remaining in his or her sentence. However, if the State learns of the noncustodial parent's incarceration on day 178 of an 180-day sentence, then this provision would not apply because the State could not reasonably complete a review and adjustment process before the parent's release.

7. Comment: A few commenters suggested the requirement to automatically review and adjust orders, or automatically notify noncustodial parents of their right to request a review, be expanded to apply to disabled noncustodial parents receiving SSI, military service members, and disabled veterans, in addition to incarcerated noncustodial parents.

Response: The review and adjustment statute at section 466(a)(10)(B) of the Act requires States to review and, if appropriate, adjust orders following a request by either parent based upon a substantial change in circumstances—whether due to unemployment, disability, military service, or incarceration. However, provisions in § 303.8(b)(2) and (b)(7)(ii) that specifically address automatic review and adjustment, or automatic notification of the right to a review and adjustment specifically for incarcerated parents because few incarcerated parents currently request for their child support orders to be reviewed and modified. Because incarcerated parents are involuntarily confined, unlike the other groups of parents mentioned in the comments, their access to the internet or cell phones often is restricted due to security concerns. They may not have access to legal counsel or other community-based resources that could provide timely information.[88] In many prisons, incarcerated parents do not know their rights to request review and adjustment of their orders and cannot easily contact the child support office. Consequently, their opportunity to seek information and request a review in time to prevent the accumulation of unmanageable debts often is limited or non-existent.[89]

Research finds that many incarcerated parents do not understand the child support system and do not know their rights.[90] Most incarcerated people prior to incarceration lack a high-school diploma and are functionally illiterate.[91] It is important that noncustodial parents know about their right to request a review and adjustment early in their prison term because of the direct relationship among unmanageable child support debt, unemployment, nonpayment, and recidivism. Because of this, many State child support programs have implemented outreach strategies designed to educate incarcerated parents of their rights to request reviews of their support orders.

At the same time, the rule does not preclude States from using automatic review and adjustment, or automatic notices regarding the right to request a review and adjustment, in other situations, such as for disabled noncustodial parents receiving SSI, military service members, and disabled veterans who experience a substantial change in circumstances.

8. Comment: Several commenters indicated that changes to State statutes, administrative rules, and court rules will be required to be in compliance with this provision. Specifically, one commenter suggested OCSE align § 302.56, *Guidelines for setting child support orders* and this section.

Response: We agree that §§ 302.56 and 303.8 are closely related and both sections may require State statutes, administrative rules, and court rules changes; therefore, we are delaying the date by which the States must be in compliance with changes to these sections. The compliance date for these provisions will be within 1 year after completion of the State's next quadrennial review of its guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan.

9. Comment: Multiple commenters believed the provision should exclude persons incarcerated as a result of nonpayment of child support, a crime committed against any child, or a crime committed against a party in the child support case.

Response: We do not agree. As discussed in Comment/Response 14 in § 302.56(d)—*Imputing Income* subsection, the child support program is not an extension of the criminal justice system. Establishing, modifying, or enforcing a child support order is not a form of punishment for incarcerated noncustodial parents. Parents have a statutory right to request a review and adjustment of their orders based on a substantial change of circumstances.

10. Comment: Several commenters noted there is no corresponding requirement in § 303.8 to notify the parties of the right to request a review when the obligor has been released from incarceration.

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[88] ''Computer use for/by inmates,'' *Corrections Compendium 34 (2): 24–31,* Summer 2009 *http://www.thefreelibrary.com/Computer+use+for%2fby+inmates.-a0208273651.*

[89] Gorgol, Laura E., and Brian A. Sponsler, Ed.D., *Unlocking Potential: Results of a National Survey of Postsecondary Education in State Prisons,* Institute for Higher Education Policy, May 2011, available at: *http://www.ihep.org/research/publications/unlocking-potential-results-national-survey-postsecondary-education-state;* U.S. Department of Health and Human Services, *Working with Incarcerated and Released Parents: Lessons from OCSE Grants and State Programs,* 2006, available at: *www.acf.hhs.gov/programs/css/resource/working_with_incarcerated_resource_guide.pdf;* and Council of State Governments, *Report of the Re-entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community,* Justice Center, 2005, available at *https://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf.*

[90] Jessica Pearson and Esther Ann Griswold, ''Lessons from Four Projects Dealing with Incarceration and Child Support,'' *Corrections Today,* July 1, 2005, 67(4): 92–95, which is available at: *http://www.thefreelibrary.com/Lessons+from+four+projects+dealing+with+incarceration+and+child...-a0134293586* and Council of State Governments, *Report of the Re-entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community,* Justice Center, 2005, available at *https://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf.*

[91] Harlow, Caroline Wolf Ph.D., *Bureau of Justice Statistics Special Report: Education and Correctional Populations,* U.S. Department of Justice (September 2003), available at: *https://www.bjs.gov/content/pub/pdf/ecp.pdf;* and *Literacy Behind Prisoner Walls,* National Center for Education Statistics, U.S. Department of Education, Office of Educational Research and Improvement (1994), available at: *http://nces.ed.gov/pubs94/94102.pdf.*

Response: States have the flexibility to develop procedures for shorter cycles to review and adjust, if appropriate, the child support order, including notice to the parties upon release from incarceration. We strongly encourage States to review child support orders after the noncustodial parent is released to determine whether the parent has been able to obtain employment and to set the orders based on the noncustodial parent's ability to pay. States should not automatically reinstate the order established prior to incarceration because it may no longer be based on the noncustodial parent's ability to pay, especially if the noncustodial parent is not able to find a job or find a job similar to pre-incarceration employment. A recent study found that incarceration results in 40 percent lower earnings upon release.[92] Instead, the order should be reviewed and adjusted according to the State's guidelines under § 302.56.

11. Comment: A few commenters expressed concern that learning of noncustodial parents' incarceration or locating noncustodial parents in correctional facilities would require some sort of interface with Federal, State, local, and private prisons.[93] According to the commenters, the new requirements also presume that there would be some sort of Federal match with Federal prisons. A few commenters also asked whether they had to actively seek out incarcerated noncustodial parents for review and adjustment and send notifications as required in paragraph (b)(7)(ii), as this may be difficult since inmates move to different facilities throughout their incarceration.

Response: We encourage, but are not requiring, States to actively establish and maintain partnerships with Federal, State, local, and private prisons to conduct matches to locate, as well as to educate incarcerated parents about the child support program. As discussed in more detail in Comment/Response 3 in § 303.3—*Location of Noncustodial Parents in IV–D Cases,* currently, section 453(e)(2) of the Act authorizes the Secretary of the Department of Health and Human Services to obtain information from Federal agencies including the Bureau of Prisons (BOP). However, this match does not provide States with needed information regarding release dates. We are going to explore the option to interface directly with the BOP and/or State facilities in order to obtain additional or updated information. We encourage States to develop electronic interfaces with corrections institutions to maximize identification of incarcerated parents and program efficiency.

12. Comment: A commenter stated that ''upon request'' in proposed § 303.8(b)(7)(ii) is unnecessary because it implies that a party must request an adjustment following completion of the review.

Response: We agree and have replaced ''upon request'' with ''if appropriate.'' This revision aligns paragraph (b)(7)(ii) with the language in paragraph (b)(2).

13. Comment: One commenter indicated that, under one State's law, arrears that accrued during incarceration are modified as needed after the parent is released.

Response: Section 466(a)(9)(c) of the Act prohibits retroactive modification of child support orders except that such procedures may permit modification with respect to any period when there is a petition pending for modification, but only from the date that notice of such petition has been given to the parties. In situations where a parent requests a review and adjustment of the order, States may modify, if appropriate, the order back to the date the request is made to avoid the accumulation of arrearages. States need to ensure that their State laws are consistent with the provisions of the Act.

14. Comment: A commenter requested that OCSE provide guidance on whether a State that is taking steps under § 303.11(b)(8) to close a case due to the incarceration status of the noncustodial parent should first modify the child support obligation.

Response: Closing a case does not affect the legality of the underlying child support order and the order, including any payment or installment of support such as payment on arrearages due under the order, remains in effect and legally binding. Therefore, based on the reasons that a case is being closed, it may be appropriate in a specific case for the IV–D agency to take steps to review and adjust an order, if appropriate, prior to closing the child support case. See Comment/Response 5 in § 303.11, *Case Closure Criteria.*

15. Comment: A couple of commenters stated that it is too time consuming and costly to close a case under § 303.11(b)(8) and then initiate a new case once a parent is released.

Response: The review and adjustment revisions under § 303.8 are not intended to encourage States to close cases when the noncustodial parent is incarcerated and reopen them when parents are out of prison. Rather, the provisions pertain to child support order review and adjustment when the noncustodial parent is incarcerated and based on the parent's ability to pay. Cases should not be closed under § 303.11(b)(8) when the noncustodial parent is incarcerated and then reopened when the noncustodial parent is released. A case can only be closed under § 303.11(b)(8) if the noncustodial parent is incarcerated throughout the duration of the child's minority (or after the child has reached the age of majority) and there is no income or assets available above the subsistence level that could be levied or attached. If the noncustodial parent is incarcerated for only a limited period of time, the case should not be closed. States can only close cases in accordance with the criteria under § 303.11(b) and (c).

16. Comment: Multiple commenters feel there should still be a burden of proof and believe that just because the noncustodial parent is incarcerated does not mean that the noncustodial parent has no resources. The parent's ability to pay may change multiple times while incarcerated, for example, when the parent is on work release.

Response: Some States automatically reduce a support order when a parent is incarcerated, while other States consider incarceration as one factor in determining whether to adjust a support order.[94] States should apply their child support guidelines, based on the noncustodial parent's ability to pay, and determine whether the parent has income or assets available that could be levied or attached for support, whether or not a parent is incarcerated.

17. Comment: A few commenters noted that if the notification in § 303.8(b)(7)(ii) is separate and distinct from the 3-year review, this will require a system change and incur costs.

Response: We agree this will require a State to make a minor system change; these costs were considered in the development of this rule.

18. Comment: Several commenters indicated that the requirement in § 303.8(b)(7)(ii) is redundant since their existing State statute, administrative rules, and court rules allow for the

[92] The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility,* September 2010, available at: *http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.*

[93] Private prison or for-profit prison is a place in which individuals are physically confined or incarcerated by a third party that is contracted by a government agency.

[94] Jennifer L. Noyes, Maria Cancian, and Laura Cuesta, Holding Child Support Orders of Incarcerated Payers in Abeyance: Final Evaluation Report, *2012, available at: http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task1_CS2009-11-MPP-Report.pdf;* in addition, see related PowerPoint presentation available at *http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task1-CS2009-11-MPP-PPT.pdf*

modification of a child support obligation upon incarceration by operation of law.

Response: We agree. Therefore, we added a sentence to the end of § 303.8(b)(7)(ii) to acknowledge that neither the notice nor a review is required under this paragraph if the State has a comparable State law or rule that modifies a child support obligation upon incarceration by operation of State law.

19. Comment: One commenter expressed concern with the NPRM at § 303.8(d) indicating a need for a threshold for when to review and adjust an order for health care needs similar to those used by States to require a review and adjustment for the child support awards. Without these thresholds, the commenter suggests that State child support agencies will face heavy workloads to modify these orders.

Response: OCSE has historically left the particular criteria for support order modifications up to States and their child support guidelines. However, when an order lacks a medical support provision, the situation warrants immediate attention for modification to remedy the medical support issue. By removing the sentence in § 303.8(d) which previously required States to review and adjust support orders to address health care coverage for child(ren) eligible for or receiving Medicaid benefits, we are making the requirement for review and adjustment less restrictive.

20. Comment: Several commenters indicated that the proposed revision in § 303.8(d) will require significant legislative, guidelines, and policy changes which will impact on its ability to implement this revision.

Response: We understand the commenters concerns that this will require changes. Therefore, we have made the effective dates for this section the same as the dates for *Guidelines for setting child support awards.* For further details see Comment/Response 2 in the *Dates* section.

21. Comment: Some commenters expressed their dissatisfaction with the deletion of the last sentence in § 303.8(d) feeling that it was an inadequate approach to aligning child support regulations fully with the Affordable Care Act.

Response: OCSE recognizes the tensions between the Social Security Act and provisions in the ACA when it comes to medical support. We aligned our regulatory requirements as closely as possible with the ACA within existing authority. In this particular section, we simply removed the last sentence in paragraph (d), which conflicted with the ACA notion of what constitutes medical coverage and to conform to our revisions in § 303.31. The final regulations allow States more flexibility to coordinate medical support practices with the requirements of the ACA.

22. Comment: One State expressed the need for clarification on whether the proposed changes require the State to modify the language in an order to indicate that Medicaid coverage was sufficient for meeting the child's medical needs.

Response: Eliminating the provision that indicates that Medicaid cannot be considered sufficient does not necessarily mean that Medicaid must be considered sufficient in every case. There are circumstances in which Medicaid coverage may not be sufficient to meet a child's full needs. Therefore, OCSE has chosen not to prescribe how State child support agencies address medical support provisions in their orders. However, OCSE encourages States to consider adopting a broad medical support provision that encompasses all of the medical coverage options available to families under the ACA.

23. Comment: One State concluded their comment by requesting OCSE wait to modify medical support regulations until the time that the Social Security Act is consistent with the ACA.

Response: While we understand the frustration in the child support community regarding the inconsistencies between the ACA and the Social Security Act regarding medical enforcement, we have tried to align our regulations as much as possible with the new policy environment under the ACA, consistent with title IV–D. However, sections 452(f) and 466(a)(19) of the Social Security Act require specific medical support activities to be performed by State child support agencies.

24. Comment: One commenter opposed the proposed changes to the regulations in § 303.8(d) citing that private insurance should be enforced when it becomes available to an obligated parent and the child(ren) is(are) receiving public forms of coverage like Medicaid.

Response: See Comment/Response 2 in § 303.31, *Securing and Enforcing Medical Support Obligations* of this final rule.

Section 303.11—Case Closure Criteria (Including 45 CFR 433.152(b)(1))

1. Comment: Several commenters indicated their preference for keeping case closure optional, especially for a State that recoups assigned arrears. Some commenters expressed concerns about how the greater flexibility to close cases would impact intergovernmental consistency and program performance. A few commenters recommended making case closure mandatory or requiring States to have a process for examining their cases to determine if they meet one of the case closure criteria and then consider closing them.

Response: The goal of the case closure regulation is not to mandate that cases be closed, but rather to clarify conditions under which States may close cases. The changes to the case closure regulation allows a State to direct resources to cases where collections are possible and to ensure that families have more control over whether to receive child support services. A decision to close a case is linked with notice to the recipient of services of the intent to close the case and an opportunity to respond with information or a request that the case be kept open.

OCSE has determined that this final rule strikes the appropriate balance between providing States with additional flexibility in closing cases that are unlikely to result in successful child support actions and ensuring families receive effective child support enforcement services. We do not agree with the commenters' concerns that the expanded case closure criteria will put some States at a competitive disadvantage. States make many decisions that affect their performance rates. For example, one State might charge interest and another might not or one State might adopt family-first distributions and another might not. The decision to close or not close cases with assigned arrears is at the State's discretion. As we indicated in the NPRM, the National Council of Child Support Directors provided OCSE with recommendations for improving the effectiveness and efficiency of the case closure criteria, ensuring that resources are directed to working cases and that children receive services whenever there is any reasonable likelihood for collections in the future. Since case closure is permissive, a State has the discretion to develop a process for examining its cases to determine whether case closure is warranted.

2. Comment: One commenter recommended that OCSE limit case closure to intrastate cases and a decision by the UIFSA initiating State. Another commenter indicated that the responding State should not enforce an intergovernmental case that the initiating State would close if it were an intrastate case.

Response: A State has the authority to determine when and whether to close its cases, both intrastate and intergovernmental cases, under § 303.11. The responding State may not unilaterally or automatically close its responding case. Rather, the initiating State makes the case management decisions on its own cases, including its initiating intergovernmental cases. A responding State may only close a case under the following circumstances: If it can document noncooperation by the initiating agency, and provides proper notice to the initiating agency per paragraph (b)(17); if it is notified that the initiating State has closed its case per paragraph (b)(18); or if it is notified that the initiating agency no longer needs its services per paragraph (b)(19).

3. Comment: A few commenters recommended adding a closure criterion for when a State no longer has legal jurisdiction in a case.

Response: We disagree with this suggestion because the State must keep the case open to provide IV–D services, such as to disburse child support payments when the custodial parent resides in the State.

4. Comment: One commenter recommended deleting the proposed requirement to maintain supporting documentation in the case record per § 303.11(b) and allowing a State the flexibility to maintain information as it determines appropriate.

Response: OCSE disagrees with this recommendation. The requirement to keep supporting documentation on the case closure decision in a case record is necessary because it documents whether the case has been closed appropriately and is evaluated as part of the State's annual self-assessment reviews.

5. Comment: A commenter requested clarification on whether § 303.11(b)(2) applies to a case in which the recipient of services does not want the State to collect recipient-owed arrears and there are state-owed arrearages. Another commenter requested clarification on using this provision when it conflicts with State law on collecting state-owed arrears. Another commenter requested guidance on how to address custodial parent-owed arrears (*i.e.,* unassigned debt) and noncooperation with the State IV–D agency. Another commenter disagreed that the State IV–D agency needs approval from TANF or IV–E to close the case that has an assignment owed to them.

Response: The State cannot use § 303.11(b)(2) to close a case that has arrearages owed to the State and the recipient of services (*i.e.,* assigned and unassigned debt). If the arrearages are under $500 and there is no longer a current support order, the State may close the case in accordance with paragraph (b)(1). Unassigned debt is settled only at the discretion of the custodial parent by a specific agreement of the parties. Without this agreement, the State cannot compromise or remove unassigned debt owed to the custodial parent. When the recipient of services no longer wants IV–D services, the State may close the case if it meets one of the case closure criteria under § 303.11. Case closure does not affect the legality of the underlying order. The child support order, including any payment or installment of support such as arrearages due under the order, remains in effect and legally binding after a case is closed. Since the case closure criterion is optional, States always have the discretion to keep cases open when there is an assignment or arrears owed to the State. The decision of whether to close a case belongs to the State IV–D agency.

6. Comment: Several commenters recommended that OCSE describe the difference between case closure and order modification, and encourage States to modify orders to zero before closure pursuant to §§ 303.11(b)(5), (8), and (9) to avoid the accrual of arrearages if the case is reopened.

Response: These case closure provisions provide States with the flexibility to close uncollectible cases and to direct resources for cases where collections are possible. When appropriate and after determining whether the custodial parent wants to continue the case, the State should consider reviewing and, if appropriate under §§ 303.8 and 302.56, adjusting the order to stop the accrual of uncollectible debt before closing the case under the appropriate case closure criterion. Although the IV–D case is closed and no longer receiving IV–D services, the custodial parent may still pursue enforcement of the support obligation separately.

7. Comment: Several commenters requested that OCSE define certain terms used in §§ 303.11(b)(3) and (b)(8) and describe the required documentation to justify closure. One commenter requested clarification on how States should determine the cost of the care facility and whether to factor that cost and the receipt of SSA into the subsistence level under § 303.11(b)(3). The same commenter also questioned whether the State should investigate or consider the possibility of retirement plans or financial institution assets and how to treat combined income (*e.g.,* partial disability, VA disability). Another commenter questioned whether § 303.11(b)(3) included aging noncustodial parents requiring minimal services such as meal preparation or housekeeping. Another commenter questioned whether the provision for senior citizens might create a special right for a specific group of noncustodial parents.

Response: OCSE does not plan to define subsistence level, home health care, or residential facility in the rule. States have the flexibility and discretion to define these terms. However, please note that we reference ''subsistence level'' in § 303.11 in a consistent manner. As we indicated in PIQ–08–02,[95] States have the discretion to determine the appropriate methods for verifying whether a case meets the conditions for case closure. States should use basic audit standards to determine how to document that a case meets the criteria for closure. If a State finds that the noncustodial parent has income or assets which may be levied or attached for support, then the case must remain open. We disagree with the comment that a case closure provision that targets low-income residents of long-term care provides them with a special right. There have been reported instances of old child support debt, carried well after the children have become adults and sometimes parents themselves, posing a barrier for aging parents to obtain assisted housing, basic income, and health care. We believe enforcement efforts against these noncustodial parents, who have no income or assets available above the subsistence level that could be levied or attached for support, are not only ineffective, but are also an inefficient way to expend child support resources. Case closure is permissive and the decision should be done on a case-by-case basis.

8. Comment: One commenter suggested § 303.11(b)(3) be expanded to include additional programs that serve individuals with significant and long-term disabilities and limited income or employment prospects, such as noncustodial parents who are receiving Adult Protective Services.

Response: We are not expanding § 303.11(b)(3) to include additional programs because there are other case closure criteria, such as paragraph (b)(8) that allows cases to be closed when the noncustodial parent has a medically-verified total and permanent disability that will occur throughout the duration of the child's minority (or after the child has reached the age of majority) if there

[95] PIQ–08–02 is available at: *http://www.acf.hhs.gov/programs/css/resource/noncustodial-receiving-ssi-benefits-and-unable-to-pay-child-support.*

is no income or assets available that could be levied or attached for support, or paragraph (a)(9) relating to when the noncustodial parent's income is from SSI payments or from concurrent SSI payments and SSDI benefits.

9. Comment: One commenter questioned whether an intact two-parent family referred in § 303.11(b)(5) includes a family that receives TANF or that has one parent in prison. Another commenter recommended deleting the phrase ''intact two-parent'' since ''primary caregiver'' was sufficient.

Response: There is no child support eligibility when the family is intact, whether or not the parent is temporarily physically away from the family, for example, when one of the parents has found work in another State. When the State IV–D agency receives a referral involving an intact two-parent family, the State may close the case based on the criterion under § 303.11(b)(20). We do not agree with the recommendation to delete ''intact two-parent'' household because we believe that it addresses the situation when the custodial and noncustodial parent continue to function as an intact family or reconciles, whereas the primary caregiver addresses the situation when the noncustodial parent becomes the custodial parent.

10. Comment: One commenter questioned whether a State could close a case in accordance with § 303.11(b)(5) when there is a current support obligation or arrearage due. Another commenter requested clarification on how a State should address a case where the custodial parent in an intact two-parent family wants to keep the case open.

Response: A State may close a case under § 303.11(b)(5) when there is current support and/or an arrearage due. However, when the recipient of services wants to continue receiving IV–D services, the case must remain open.

11. Comment: One commenter questioned whether legal or physical custody was sufficient to determine that the noncustodial parent is the primary caregiver, particularly for audit purposes.

Response: A State has the discretion to determine the circumstances in which a case meets the conditions for closure in accordance with § 303.11.

12. Comment: Many commenters questioned whether States had the discretion to add more restrictive language to the case closure criteria, such as no payments received in the previous six months. A few commenters requested clarification on whether States have the flexibility to use longer periods for locating noncustodial parents than the times specified in § 303.11(b)(7).

Response: Yes, States have such flexibility. As we stated in OCSE AT–99–04 [96] and AT–89–15,[97] there is nothing to prohibit a State from establishing criteria that make it harder to close a case than those established under § 303.11. For example, a State may specify a timeframe in which no payments are received before closing a case to ensure that all viable cases remain open. The State also has flexibility to use longer periods for locating noncustodial parents than the times specified in § 303.11(b)(7). The case closure provision sets the minimum criteria for determining when a case is eligible for closure.

13. Comment: One commenter requested clarification about verifying the Social Security Number (SSN) per § 303.11(b)(7)(iii) and handling new leads that do not result in locating the noncustodial parent.

Response: Although the State has sufficient information to initiate an automated locate effort, locate interfaces (*e.g.,* Federal Parent Locator Service (FPLS) and Enumeration and Verification System (EVS)) may not be able to confirm or correct the SSN-name combination for the person sent. As we stated in the Case Closure Criteria Final Rule, 64 FR 11814, March 10, 1999, Comment/Response 5,[98] States are required to comply with Federal locate requirements in § 303.3 and make a serious and meaningful attempt to identify the biological father (or any individual sought by the IV–D agency). If the State has made a diligent effort using multiple sources in accordance with § 303.3, all of which have been unsuccessful to locate the noncustodial parent, then the State may close the case in accordance with § 303.11(b)(7).

14. Comment: Because the case closure provision § 303.11(b)(7) shortens the length of time for locate attempts, one commenter recommended expanding locate resources to include verification of Individual Tax Identification Numbers (ITINs), driver's licenses, or other unique identifiers.

Response: An analysis is currently underway to assess whether private sources can identify locate information and/or individuals with ITINs and locate information associated with ITINs. Additionally, OCSE is evaluating the possibility of using ITINs to obtain locate information from current FPLS locate sources, such as Multistate Financial Institution Data Match (MSFIDM).

15. Comment: One commenter recommended removing the language ''child has reached the age of majority'' in § 303.11(b)(8) and replacing it with ''after support is no longer due.'' Many commenters requested clarification regarding what OCSE meant by multiple referrals for services. One commenter thought that this criterion was too ambiguous. One commenter opposed adding multiple referrals for service as a case closure criterion and another commenter recommended removing the requirement for multiple referrals for services.

Response: OCSE disagrees with the first suggestion regarding the child reaching the age of majority since the language as written conveys the intent of the provision under § 303.11(b)(8). However, because of the confusion and opposition regarding the multiple referral case closure criterion, we have removed this from the proposed criterion in paragraph (b)(8).

16. Comment: Several commenters requested clarification regarding the documentation needed to justify case closure based on disability in accordance with § 303.11(b)(8).

Response: In OCSE PIQ–08–02,[99] we indicate that States have the discretion to determine what circumstances can result in a ''medically verified total and permanent disability'' in accordance with § 303.11(b)(8). States also have the discretion to determine appropriate methods of medically verifying that a disability is total and permanent. Refer to PIQ–04–03 [100] for information regarding how States may access Health Insurance Portability and Accountability Act (HIPAA) privacy-protected information when the agency has issued a National Medical Support Notice. The State can also request the noncustodial parent to obtain his or her medical records in accordance with 45 CFR 164.524(b).

17. Comment: One commenter recommended that OCSE create a separate case closure criterion for incarceration and requested clarification about how to treat partial disability.

[96] AT–99–04 is available at: *http://www.acf.hhs.gov/programs/css/resource/final-rule-case-closure-criteria-45-cfr-part-303.*

[97] AT–89–15 is available at: *http://www.acf.hhs.gov/programs/css/resource/standards-for-program-operations.*

[98] This is available at: *http://www.acf.hhs.gov/programs/css/resource/final-rule-case-closure-criteria-45-cfr-part-303.*

[99] PIQ–08–02 is available at: *http://www.acf.hhs.gov/programs/css/resource/noncustodial-receiving-ssi-benefits-and-unable-to-pay-child-support.*

[100] PIQ–04–03 is available at: *http://www.acf.hhs.gov/programs/css/resource/medical-support-enforcement-under-iv-d-program-phi-hipaa.*

Response: We disagree with creating a separate case closure criterion for incarceration. We note that incarceration has been included as a criterion with psychiatric institutionalization and medically-verified total and permanent disability since the promulgation of the Federal case closure regulation on August 4, 1989. A State may not close a case under § 303.11(b)(8) based on the noncustodial parent's partial disability. The State should determine whether such a case meets another case closure criteria under § 303.11.

18. Comment: One commenter recommended removing the language ''needs-based'' and replacing it with ''means-tested'' in § 303.11(b)(9)(iii). Another commenter requested clarification on using the receipt of needs-based benefits as the basis for case closure, asking whether such benefits pertain to federally-funded programs, TANF, or time-limited benefits.

Response: Both ''needs-based benefits'' and ''means-tested benefits'' are the same. However, upon further consideration, we deleted ''needs-based benefits'' because these benefits are often time-limited and are not permanent. In the absence of a disability that impairs the ability to work, the ability of a parent to work and earn income may also fluctuate with time. Therefore, it is important for the child support agencies to take efforts on these cases to remove the barriers to nonpayment and build the capacity of the noncustodial parents to pay by using tools such as referring noncustodial parents to employment services provided by another State program or community-based organization.

19. Comment: Several commenters indicated that title II benefits are subject to income withholding and recommend that receipt of such benefits not be the basis for closing cases.

Response: There is a misunderstanding regarding how we are addressing title II benefits in this criterion. Title II benefits, such as Social Security Disability Insurance (SSDI) benefits, are considered remuneration from employment (based on how many work credits the person has earned during his or her time in the workforce), and therefore, the benefits may be garnished for child support directly from the Federal payor as authorized under section 459(h)(1)(A)(ii)(I) of the Social Security Act (see DCL–13–06; PIQ–09–01; DCL–00–103).[101] However, the case closure criterion at § 303.11(b)(9)(ii) only addresses a noncustodial parent who is receiving concurrent Supplemental Security Income (SSI) and SSDI benefits under title II of the Act, which means the disabled noncustodial parent qualifies for means-tested SSI benefits on the basis of his or her income and assets, but also qualifies for SSDI benefits. In that case, the Social Security Administration pays a combination of benefits up to the SSI benefit level. Concurrent benefits are means-tested on the same basis as SSI benefits. In other words, a concurrent SSI and SSDI beneficiary has no more income, and is no better off, than a beneficiary receiving SSI alone. A beneficiary of concurrent benefits has equally low income and an equal inability to pay support as an SSI recipient. Given that a noncustodial parent who is eligible for concurrent benefits meets SSI means-tested criteria and receives the same benefit amount as an SSI beneficiary, it is appropriate to close these cases on the same basis as an SSI case. Under § 303.11(b)(9)(ii), States have the flexibility to close such cases. As a result of comments, we added in paragraph (b)(9)(ii) the phrase ''Social Security Disability Insurance (SSDI)'' before benefits under title II. For further explanation regarding these concurrent benefits, please see Comment/Response 3 in § 307.11, *Functional Requirements for Computerized Support Enforcement Systems in Operation by October 1, 2000.*

20. Comment: One commenter suggested that OCSE instruct the Social Security Administration (SSA) not to honor Income Withholding Orders (IWOs) against SSI benefits, similar to how the VA will not honor IWOs against service-connected disability benefits.

Response: SSA does not implement IWOs for individuals who are receiving SSI benefits.

21. Comment: One commenter questioned whether a State is permitted to close a case under § 303.11(b)(9) without establishing a child support order when the noncustodial parent is receiving SSI.

Response: Yes, the case may be closed. If the noncustodial parent's only income is SSI, the State may close the case under paragraph (b)(9) without establishing a support order because SSI is not subject to garnishment. Additionally, the State can close a case at any time that it meets a case closure criterion regardless of where the case is in the child support process.

However, this does not preclude a State from establishing a $0 support order (based on inability to pay), which could be modified later if the noncustodial parent went off SSI and began work or inherited assets. If States choose to establish an order prior to closing a case under § 303.4, States should use caution about establishing an order based on imputed income or a minimum ordered amount (other than $0) because the child support order, including any payment or installment of support such as arrearages due under the order, remains in effect and legally binding after a case is closed. In these cases, we are allowing States to close cases when the noncustodial parent's income is SSI because SSI is not subject to garnishment.

22. Comment: Many commenters recommended sending closure notices under § 303.11(d)(6) in a limited services case to the recipient before the limited service case closes, not after. They stated that the earlier notice would be more effective and less burdensome on both the recipient and the IV–D agency, would allow the recipient to contact the IV–D agency should he/she have any questions or disagree with case closure, and would make it easier to address any issues prior to case closure.

Response: We are persuaded that giving advance notice of case closure when a limited service under § 302.33(a)(6) has been completed will eliminate potential confusion or case closure issues and will maintain uniformity with existing case closure processes that require a 60 calendar day advance notice. Therefore, the final rule at § 303.11(d)(4) requires that for cases closed under paragraph (b)(13) of this section, the IV–D agency must send a written notice to the recipient of services 60 days prior to closure of the case of the State's intent to close the case.

23. Comment: Some commenters asked for clarification regarding when a paternity-only limited services case is considered completed and can be closed under § 303.11(b)(13). They asked whether the case would be considered completed after an Acknowledgment of Paternity has been signed, after genetic testing has been completed and results obtained, after a court order establishing paternity has been entered, or after a birth certificate has been amended to reflect the new legal father.

Response: We acknowledge that there may be varying opinions on when paternity-only services should be

[101] DCL–13–06 is available at: *http://www.acf.hhs.gov/programs/css/resource/garnishment-of-supplemental-security-income-benefits;* PIQ–09–01 is available at: *http://www.acf.hhs.gov/programs/css/resource/garnishment-of-federal-payments-for-child-support-obligations;* DCL–00–103 is available at: *http://www.acf.hhs.gov/programs/css/resource/attachment-of-social-security-benefits.*

considered completed and the limited services case closed. We therefore recommend that States make this determination individually according to when paternity is legally determined under applicable State law.

24. Comment: One commenter was concerned that if a parent refuses to cooperate with genetic testing in a paternity-only limited services case, States will not have the ability to close that case under § 303.11(b)(13) because the limited service will never be completed.

Response: IV–D agencies typically have methods of recourse when a parent refuses to cooperate with genetic testing. This usually involves a court's ordering the parent to submit to genetic testing; if the parent remains uncooperative, the parent may be found in contempt of that court order. Additionally, we encourage States to screen for domestic violence before initiating a paternity testing enforcement action. OCSE defers to States' existing legal process and operating procedures to address this situation.

25. Comment: One State commented that system changes to implement a new limited services closure code per § 303.11(b)(13) would be cost prohibitive.

Response: As discussed in this final rule, paternity-only limited service is optional.

26. Comment: Two commenters questioned the removal of SNAP from the list of assistance programs described in § 303.11(b)(14) and recommended OCSE include it in the provision.

Response: We concur with these comments and have added SNAP to the list of assistance programs referenced in both paragraphs (b)(14) and (20).

27. Comment: One commenter questioned whether § 303.11(b)(15) applies to cases when payments are being disbursed on an unpinned debit card and the funds have not been spent.

Response: Yes. Although many State child support programs distribute payments through debit cards, it remains extremely important for the recipient of services to keep the State informed of his or her current mailing address to ensure that the case can be processed effectively. When the State disburses payments on an unpinned debit card and is unable to contact the custodial parent, the State should make a good faith effort to contact the recipient of services through at least two different methods to ensure that the child support payments are properly disbursed and received by the family. If the criteria under § 303.11(b)(15) are met, the State may close the case.

28. Comment: A few commenters expressed concerns about the requirement for two different methods of communication and recommended that OCSE require only one method of communication under § 303.11(b)(15).

Response: We disagree with this recommendation. With today's technology, there are many different options to notify clients, such as first-class mail, electronic mail, text messaging, and telephone calls. The best notice to recipients of IV–D services is information provided through multiple methods. For example, a voice message and a text message count as two different methods of communication. However, we understand the difficulty in meeting the requirement to use two different methods of communication when the State child support agency has incomplete, inaccurate, or outdated contact information for the recipient of services. When the State only has an outdated or inaccurate address, the State IV–D agency should send the case closure notice to the last known address (see OCSE AT–93–03 and AT–99–04).[102] Additionally, under § 303.6(d)(6) with the specific consent of the recipient of services, States are permitted to use electronic means to send case closure notices.

29. Comment: One commenter questioned whether § 303.11(b)(20) only applied to the assistance programs described in the provision. Two commenters requested guidance for determining an inappropriate referral and additional examples.

Response: Section 303.11(b)(20) is not limited to the assistance programs listed as examples. In addition to IV–A, IV–E, SNAP, and Medicaid, the State has the flexibility to close a case referred from other means-tested assistance programs if the IV–D agency deems it inappropriate to establish, enforce, or continue to enforce a child support order in the case and the custodial parent has not applied for IV–D services. Section 454(4)(A) of the Act requires State IV–D agencies to provide services as appropriate. A State should determine whether child support enforcement services are appropriate in a referred case, as it would with any other case. This provision provides States with the flexibility to close inappropriate referrals on a case-by-case basis. Case closure is permissive. Our understanding is that inappropriate referrals are limited in number. An example of an inappropriate TANF, Medicaid, etc. referral is one involving an intact family where there is no parent living apart or a widowed custodial parent.

30. Comment: One commenter suggested OCSE include language to indicate that a IV–A agency should not consider case closure under § 303.11(b)(20) as noncooperation by the recipient of services.

Response: As indicated in the NPRM, the State IV–D agency should communicate with the IV–A agency to ensure that the decision to close the IV–D case will not be viewed by the IV–A agency as noncooperation by the recipient of services.

31. Comment: Several commenters indicated that the proposed § 303.11(b)(21) was too restrictive, based on outdated guidance (*e.g.,* PIQT–05–01), and hindered the case transfer processes established through existing State-Tribal agreements. One commenter suggested expanding the provision to including case transfer processes developed under OCSE approved State-Tribal agreements.

Response: OCSE acknowledges the concerns expressed in these comments. We developed the guidance in PIQT–05–01[103] in the early stages of the Tribal IV–D program. The final rule builds upon and revises this guidance to increase the flexibility for the transfer and closure of cases between State and Tribal IV–D programs. However, we retain the consent requirement of the recipient of services. The recipient of services must provide his or her consent to transfer and close the case because, as both a member of the Tribe and a resident of the State, the recipient has the right to determine the agency that provides the IV–D services. However, based on comments, we have added § 303.11(b)(21)(iv) to address State-Tribal agreements regarding the transfer and closure of cases. OCSE must review and approve these State-Tribal agreements and they must include consent from the recipient of services to transfer the case. The agreements should also address enforcement of state-owed arrears, repayment agreements, and arrears adjustment and compromise when applicable. Any State debt owed under the preexisting order remains in effect and legally binding. Once the case is transferred and closed, Tribal IV–D programs must extend the full range of services under their IV–D plan as required by § 309.120(a). As such, a Tribe must enforce any state-owed debt

[102] AT–93–03 is available at: *http://www.acf.hhs.gov/programs/css/resource/clarification-of-case-closure-criteria;* AT–99–04 is available at: *http://www.acf.hhs.gov/programs/css/resource/final-rule-case-closure-criteria-45-cfr-part-303.*

[103] PIQT–05–01 is available at: *http://www.acf.hhs.gov/programs/css/resource/transfer-of-cases-to-tribal-iv-d-agencies-case-closure-criteria.*

when there is not an agreement to permit the Tribe to compromise any state-assigned arrearages.

32. Comment: Several commenters described the problems with or importance of requiring consent from the recipient of service to transfer of the case to the Tribe. Other commenters questioned the exclusion of consent from the other party involved in the IV–D case and suggested removing the consent requirement under § 303.11(b)(21).

Response: Under section 454(4) of the Act, the IV–D agency is required to provide services related to the establishment of paternity or the establishment, modification, or enforcement of child support obligations when (1) an individual applies for, and receives, certain forms of public assistance (TANF, IV–E foster care, medical assistance under Title XIX, and when cooperation with IV–D is required of a SNAP recipient), unless good cause or another exception to cooperation with IV–D exists; or (2) an individual files an application for IV–D services. Once a IV–D case is established, the recipient of services is the individual who either received the aforementioned form of public assistance or applied for IV–D services. As a tribal member and State resident, the recipient of services has the right to decide whether to continue receiving services from the State or to begin receiving services from the Tribal IV–D agency. Therefore, the State IV–D agency must obtain the recipient of services' consent before transferring the recipient's case to a Tribal IV–D agency and then closing the State case. There is no requirement that the other party or parent also consent to the transfer and closure of the case when requested by the recipient of services.

33. Comment: One commenter questioned whether § 303.11(b)(21) would resolve all of the issues regarding when a State IV–D agency should transfer versus refer a case to a Tribal IV–D agency. Another commenter requested OCSE to define the process for transferring cases from a State IV–D agency to a Tribal IV–D agency.

Response: OCSE encourages State and Tribal IV–D agencies to work together to resolve the various issues around transferring or referring cases that involve Tribal members, particularly when there are arrears owed to the State, and to develop specific procedures for transferring cases based on the case closure requirements found in the regulations at § 303.11. When there are arrears owed to the State, a State IV–D agency may decide to only refer the case to a Tribal IV–D agency for assistance in securing current support and arrears owed to the family and/or arrears owed to the State. In this circumstance, the State and Tribe would each have an intergovernmental case involving the same participants. When the recipient of services requests that his or her case be transferred to a Tribal IV–D agency and there are State-owed arrears, the State should inform the recipient of the State's discretion to transfer or refer the case when there is a State assignment and of the State's decision. However, if the recipient of services requests that the case be transferred to a Tribal IV–D agency and there are no State arrears, then the State must transfer the case to the Tribe.

34. Comment: Several commenters described the problems regarding the notice requirements of § 303.11(b)(21). Some recommended a shorter timeframe for the recipient of services to respond and elimination of the second notice that indicates closure under § 303.11(b)(21)(B).

Response: Notices act as important safeguards that keep the recipient of services informed of case closure actions. They provide the opportunity for the recipient to respond with information and to request that the case be kept open or, after the case is closed, to reopen the case. The 60-calendar day timeframe is consistent with the notice response timeframe that has been required under Federal case closure regulations since the original final rule was promulgated on August 4, 1989. The 60-calendar day timeframe has worked well for over 26 years and it would not be appropriate to change it at this time. However, a State IV–D agency may send the final notice of transfer and closure when, or immediately before, it closes the case, as long as the 60-day timeframe for a response has been met. The final notice should provide the contact information of the Tribal IV–D agency receiving the case.

35. Comment: A few commenters described issues related to Public Law 280 and the transfer of legal jurisdiction between State and Tribal courts. They requested the case closure regulation address these jurisdictional issues.

Response: It is inappropriate to address in the Federal case closure regulation the complex issues around jurisdiction and Public Law 280. State and Tribal IV–D programs are in the best position to address and resolve these issues in their State-Tribal agreements.

36. Comment: One commenter questioned whether a State IV–D agency could still provide Federal Tax Refund Offset services on a case that has been transferred to a Tribal IV–D agency and closed by the State IV–D agency.

Response: It is OCSE's position that transfer of a case to a Tribal IV–D agency and closure of that case by the State does not preclude the State from submitting that case for Federal Tax Refund Offset when a Tribal IV–D agency submits the case under a State-Tribal agreement for Federal Tax Refund Offset in accordance with OCSE PIQT–07–02.[104]

37. Comment: One commenter indicated that § 303.11(b)(21) does not specify that a State IV–D agency may transfer a case to a Tribal IV–D agency regardless of whether there are arrears owed to the State.

Response: Section 303.11(b)(21) has been revised to explicitly allow the State IV–D agency to transfer cases that have arrears owed to the State. The State has the discretion to transfer the case to the Tribal IV–D agency when there are state-owed arrears. When such cases are transferred, the Tribe must extend the full range of services under its IV–D plan as required by § 309.120(a) and enforce the state-assigned arrearages.

38. Comment: One commenter urged OCSE not to use the word ''transfer'' since a case cannot be considered transferred until the original State no longer has an open case.

Response: This suggestion was not incorporated into the regulation. However, § 303.11(b)(21) has been revised to include, where appropriate, the word ''close'' to explicitly indicate the closure of the case with the State. This revision makes it clear that case transfer involves transferring the case to the Tribal IV–D agency and then closing the case with the State.

39. Comment: One commenter asked whether § 303.11(c) prohibits a State IV–D agency from providing full services, including medical support, to an Indian Health Service (IHS) Medicaid recipient who requests a full service IV–D case.

Response: Based on the revisions to the Centers for Medicare and Medicaid Services (CMS) regulations, which are also in this final rule, State IV–D agencies should no longer be sent referrals for these cases. Indians may receive health care services without charge from the IHS. To receive State IV–D services, an IHS eligible recipient would need to apply for IV–D services. However, no medical support enforcement services need to be provided to the extent that the individual is receiving all needed care through the IHS. At the time of application, if the State is aware that the applicant is a Medicaid recipient, then

[104] PIQT–07–02 is available at: *http://www.acf.hhs.gov/programs/css/resource/state-automated-systems-costs-service-agreements.*

the State should not charge an application fee per § 302.33(a)(2). The provision of § 303.11(c) would not apply for the custodial parent with IHS-eligible children who applies directly with the State child support agency to receive all child support services.

40. Comment: One commenter suggested that OCSE revise the language in § 303.11(c)(2) to read, ''The IV–D case was opened as a non-IV–A Medicaid referral. . . .'' This would ensure consistency with the case-type language in § 302.33(a)(1)(ii). Additionally, the same commenter questioned the value added by the following language in the same paragraph and suggested removing it, ''. . . health care services, including the Purchased/Referred Care program, provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12))''.

Response: OCSE does not agree with these suggestions to revise the regulatory text. The regulatory text makes it clear that this case closure provision is related to Medicaid referrals based solely upon health care services provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12), including through the Purchased/Referred Care program. However, we would like to clarify that this case type is consistent with the case type language in § 302.33(a)(1)(ii). OCSE retained the language in this paragraph to ensure consistency between the language in § 303.11(c)(2) and the revised Medicaid regulations at 42 CFR 433.152(b)(1)(i).

41. Comment: One commenter suggested that OCSE change the mandatory closure criterion in § 303.11(c) to an optional closure criterion.

Response: We disagree with this suggestion. Section 303.11(c) describes the circumstances under which a State IV–D agency must close a case. This provision makes it clear that State IV–D agencies should not seek medical support when the child is eligible for health care services from IHS and the case is a Medicaid referral based solely upon such health services. In order to better serve Indian families, § 303.11(c) requires a State IV–D agency to close a Medicaid reimbursement referral based solely upon health care services provided through an Indian Health Program, including through the Purchased/Referred Care program.

The IHS is responsible for providing health care to American Indians and Alaska Natives under the Snyder Act. See 25 U.S.C. Section 13 (providing that the Bureau of Indian Affairs (BIA) will expend funds as appropriated for, among other things, the ''conservation of health'' of Indians); and 42 U.S.C. Section 2001(a) (transferring the responsibility for Indian health care from BIA to IHS). The IHS provides such care directly through Federal facilities and clinics, and also contracts and compacts with Indian tribes and tribal organizations to provide care pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93–638 (25 U.S.C. 450 *et seq.*). In addition, the Snyder Act authorizes IHS to pay for medical care provided to IHS beneficiaries by other public and private providers as the Purchased/Referred Care program. The term ''Indian Health Program,'' defined at 25 U.S.C. 1603(12), encompasses the different ways health care is provided to American Indians and Alaska Natives.

In light of the IHS's policy, OCSE and CMS require that State Medicaid agencies not refer such cases and that IV–D agencies that receive Medicaid reimbursement referrals based solely on health care services, including the Purchased/Referred Care program, provided to IHS-eligible children through an Indian Health Program, be required to close such cases, as these cases will have been inappropriately referred. Pursuant to IHS' policy and CMS' policy, there would be no medical child support reimbursement obligation to pursue against any custodial or noncustodial parents, and any recovery from insurance policies would be outside the scope of the State IV–D agencies' authority. It is our understanding that such Medicaid referrals are common. This child support case closure rule makes it clear that State IV–D agencies should not seek medical child support based on such Medicaid referrals.

42. Comment: One commenter asked whether the proposed revision to 42 CFR 433.152(b)(2) requires the Medicaid agency to reimburse 100 percent of State- or county-funded title IV–D expenditures that are not reimbursable by OCSE and are not necessary for the collection of amounts for the Medicaid program.

Response: The proposed changes to 42 CFR 433.152(b)(2) do not change current regulatory requirements for the Medicaid agency regarding reimbursement of the IV–D agency.

43. Comment: One commenter indicated that it was unclear what the following language in 42 CFR 433.152(b)(1)(i) (and repeated in § 303.11) means: Medicaid referral is based solely upon health care services, including contract health services, provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12).

Response: CMS regulation 42 CFR 433(b)(1)(i) refers to Medicaid referrals from an Indian Health Program, such as programs operated by the Indian Health Service (IHS) or Tribes and Tribal organizations under Public Law 93–638 (Indian Self-Determination and Education Assistance Act). In that instance, the child would need to be eligible for Medicaid and services from IHS. Medicaid referrals would include referrals made under the IHS/Tribal Purchased/Referred Care program, formerly known as Contract Health Services.[105]

44. Comment: One commenter asked whether there are any issues that need to be addressed in the current Medicaid assignment language at 42 CFR 433.145 since there is a prohibition of referral of certain cases.

Response: At this time, the assignment of rights to benefits requirements in 42 CFR 433.145 is not impacted by the language in § 433.152(b)(1)(i). A State plan must still meet all the requirements outlined in § 433.145.

45. Comment: One commenter asked whether the placement of the prohibition of Medicaid referrals in IHS cases in the ''requirements for cooperative agreements for third party collections'' section (45 CFR 433.152) is appropriate.

Response: Yes, the prohibition against referring a medical support enforcement case when the Medicaid referral is based on services received from an Indian Health Program (§ 433.152(b)(1)(i)) is appropriately placed in § 433.152 because the prohibition directly relates to agreements with title IV–D agencies and third-party collections, such as Indian Health Programs.

46. Comment: All of the comments received on the notification requirements under the proposed §§ 303.11(d)(4) through (d)(6) were either opposed to or expressed concerns regarding the pre- and post-closure notices to the referring agency and the closure notice to the recipient of services. The commenters indicated that they were unnecessary and an inefficient use of limited State resources.

Response: We concur with these recommendations and have removed notification requirements in the proposed §§ 303.11(d)(4) and (d)(5). Additionally, the case closure

[105] For more information about the relationship between IHS and Medicaid, please visit *go.cms.gov/AIAN* or *https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/index.html.*

requirement in proposed paragraph (d)(6), redesignated as paragraph (d)(4) was retained, but the notice requirement of proposed paragraph (d)(5) was removed. However, if the number of inappropriate referrals begins to increase, the State IV–D agency should work with the referring agency, discuss referral policies, and revise such policies as needed to avoid inappropriate referrals.

47. Comment: One commenter suggested that the notice requirement under proposed § 303.11(d)(6), redesignated as § 303.11(d)(4), include location-only cases closed under § 303.11(b)(11) because such cases could be considered a limited service.

Response: We disagree with this recommendation and have determined that such a change is not warranted. Location-only cases are often used when the initiating State is attempting to verify whether or not the noncustodial parent is living in another State. Often States receiving these requests do not actually open a case, but only use their automated locate sources to determine whether the noncustodial parent lives, works, or has assets in their State.

48. Comment: One commenter indicated that it was unclear what ''recipient'' is referenced in the proposed § 303.11(d)(6).

Response: The rule revised the language in § 303.11(d)(6), redesignated as § 303.11(d)(4), to clarify the reference to the recipient of services.

49. Comment: One commenter suggested that the closure notice for the proposed § 303.11(d)(6), redesignated as § 303.11(d)(4), be simple, indicating the case has been closed and the recipient of services should go online or contact the State agency for an application or additional information.

Response: We disagree with this suggestion because it does not provide the recipient of services with information regarding reapplication for services and the consequences of receiving IV–D services, such as any State fees for services, cost recovery, and distribution policies. One of the basic responsibilities of a child support agency is to provide timely, accurate, and understandable notice to parents about their child support cases.

50. Comment: One commenter suggested that OCSE consider adding language to the proposed § 303.11(d)(7), redesignated as § 303.11(d)(5), to allow the other parent, as well as the former recipient of services, to request reopening the IV–D case.

Response: We disagree with this suggestion. In this circumstance, the other parent has the option to submit an application to receive IV–D services at any time.

51. Comment: In response to our request for comments in the NPRM regarding whether a recipient of services should be provided the option to request case closure notices in a record, such as emails, text messaging, or voice mail, some commenters requested the ability to notify the recipient of services by mail or electronic means if the recipient of services has authorized electronic notifications. We received no comments in opposition.

Response: In the final rule, for notices under § 303.11(d)(1) and (4), the State must notify the recipient of services, in writing, 60 calendar days prior to closure of the case of the State's intent to close the case. However, as discussed under § 303.11 in Topic 2 of the preamble, we considered the commenters' request and added paragraph (d)(6), which will permit States to issue case closure notifications electronically for the above-mentioned notices if the recipient of services specifically authorizes consent to electronic notifications. The State must keep documentation of the recipient's consent in the case record.

While an electronic case closure notice may be an appropriate, and even the preferred, method of notification for many custodial parents, it may not be an effective means to notify some parents. Many parents in the child support caseload have limited incomes. They may not have convenient access to a computer, the internet, or mobile communication. We revised § 303.11(d)(6) to reflect this flexibility in issuing electronic notifications.

Section 303.31—Securing and Enforcing Medical Support Obligations

1. Comment: One commenter expressed their understanding that the proposed revisions in § 303.31 eliminate the need for Medicaid referrals to the IV–D program.

Response: We disagree. OCSE's policy surrounding Medicaid referrals has remained consistent over the years: there is no requirement for State Medicaid agencies to refer all Medicaid cases to the State IV–D agency.[106] State child support and Medicaid agencies will need to continue to work together to refer appropriate cases from Medicaid to the child support agency for child support services.

2. Comment: While the majority of comments supported our revisions, many commenters noted an apparent discrepancy between language used in the preamble about State flexibility and options concerning the proposed definition of health insurance in § 303.31(a)(2) and the definition language in the regulation. Many of these comments concluded that their reading of both the preamble language and the NPRM suggested that including public health options, such as Medicaid, was optional for States in their efforts to meet the health care needs of children. One commenter specifically recommended that the regulatory text be revised to indicate that it was a State option to consider public coverage as health insurance.

Response: We want to clarify that States do not have an option in distinguishing between private and public forms of health care coverage. Instead of defining ''health insurance'' as we did in the NPRM, we are defining ''health care coverage'' since this is the terminology used in the Social Security Act at sections 452(f) and 466(a)(19). The language in the final rule at § 303.31(a)(2) includes in the definition of ''health care coverage'' both public and private forms of health care coverage either of which is sufficient for meeting health care standards. This approach is consistent with national health care policies as outlined in the ACA. By including public coverage such as Medicaid, CHIP, and other State health programs as part of medical support, this will provide States greater flexibility to ensure that medical support is being provided for all children.

3. Comment: Several States commented about their perceived inconsistency between the five percent reasonable cost standard traditionally used in child support compared to the eight percent affordable standard in the ACA. Most of these commenters suggested that § 303.31(a)(3) be consistent by amending the five percent standard to eight percent.

Response: We disagree that the regulation needs to be changed. The existing language in the regulation at § 303.31(a)(3) allows States to adopt the five percent standard or ''a reasonable alternative income-based numeric standard'' defined by the State. We encourage States to examine the difference between the reasonable cost standard used in the child support regulations and the affordability measure used in the ACA. Both the percentage and the base are different.

[106] See OCSE–IM–14–01, available at: *http://www.acf.hhs.gov/programs/css/resource/medicaid-referrals-to-the-iv-d-agency;* OCSE–IM–08–03, available at: *http://www.acf.hhs.gov/programs/css/resource/guidance-on-referral-of-medicaid-cases-to-title-iv-d-child-support;* and OCSE–AT–10–10, available at: *http://www.acf.hhs.gov/programs/css/resource/cse-flexibility-to-improve-interoperability-with-medicaid-chip.*

States are encouraged to consider ways to align these two standards to avoid confusion among families. For example, a State could choose to define reasonable cost as 8 percent of a parent's modified adjusted gross income (MAGI) under paragraph(a)(3) to align the two standards. The existing language in the regulation allows States to make these conforming changes to their medical support policies.

4. Comment: One State asked us to clarify how to proceed in situations where private insurance is available at a reasonable cost, but is not accessible to the child.

Response: The final regulations at 303.31(b) stipulate that health care coverage must be both reasonable in cost and accessible to the child. This paragraph further requires the petition to address both the reasonable cost and accessibility standards. If these standards are not met, the ordered parent will not likely meet the requirements of the order. The child support agency should encourage the parent to seek affordable health care coverage options through the Health Insurance Marketplace in the child's State of residence. States are also encouraged to consider how their cash medical support policies might address the health care needs of children in these types of situations.

5. Comment: Several commenters expressed the need for OCSE to further regulate medical provisions in § 303.31(b)(1)(ii) regarding how to allocate medical costs between the parents.

Response: We do not agree that additional regulations are needed regarding the allocation of medical costs. While the commenters' suggestion may work for some States, OCSE has always allowed for States to have flexibility in how they address the allocation of medical support since this is often related to the State's guidelines. However, we have made an editorial revision in § 303.31(b)(1)(ii) to remove ''Determine how to'' from the regulatory language so that the regulatory provision better reflects OCSE policy.

6. *Comment:* We received several comments regarding the applicability of cash medical support in § 303.31(b)(2) given the passage of the ACA.

Response: Section 466(a)(19)(A) of the Act establishes medical support requirements including that ''all support orders enforced pursuant to this part shall include a provision for medical support for the child to be provided by either or both parents . . .'' This section of the child support rule implements IV–D agency responsibility when health care coverage, including both public health care coverage and private health insurance as defined in § 303.31(a)(2) and described in § 303.31(b)(1) is not available. However, States have flexibility in defining when cash medical support or the cost of health care coverage is considered reasonable in cost under paragraph (a)(3). Some States may choose not to use the five percent of the noncustodial parent's gross income. States may elect to develop a reasonable alternative income-based numeric standard defined in its State law, regulations, or court rule having the force of law or State child support guidelines adopted under § 302.56(c). If they elect this option, they may be able to better align its standard with the ACA.

7. Comment: One comment suggested that proposed § 303.31(b)(3) should be eliminated because paragraph (b)(1) requires these provisions in all new and modified orders.

Response: While we agree that § 303.31(b)(1) requires the health care provision be included in all orders, we recognize the reality that it may not happen in all situations. When those situations arise, paragraph (b)(3) provides the foundation to require States to modify those orders to include the appropriate health care provision.

8. Comment: Some commenters suggested that the proposed definition for health insurance to include public options poses some questions on how courts order health insurance coverage. These comments asked for clarification if courts would be required to compel parents to enroll children in public forms of health care or enter a finding that the children are covered by public form of coverage.

Response: How States choose to address health care provisions in orders will vary from State to State. OCSE has recommended that States implement broadly-defined medical support language in child support orders to maximize the health care options available to parents, children, and families.

9. Comment: Several commenters discussed the issue of data sharing. Some of these commenters requested the promotion of data sharing between IV–D and Medicaid, CHIP, Indian Health Service, and the Federal/State marketplaces. Some noted the need for the exchanges to modify the application process to gather more information regarding the absent parent.

Response: OCSE is aware of the need for improved data sharing between and among the aforementioned programs. We are working to improve data sharing between State child support agencies, CMS, State Medicaid agencies, CHIP, and other stakeholder partners. While currently States have the authority to share information with State Medicaid and CHIP agencies to assist them in carrying out their responsibilities and for determining eligibility for program benefits, we currently do not have authority for data sharing with the Federal/State marketplaces and the Indian Health Service. This will require some legislative revisions.

10. Comment: We received numerous inquiries regarding whether the final passage of this rule affects OCSE's decision to hold States harmless as outlined in OCSE AT–10–02.

Response: Upon issuance of this rule, OCSE will work with States in developing guidance related to AT–10–02.[107]

11. Comment: Several States expressed clarification on whether IV–D agencies would be responsible for issuing a National Medical Support Notice (NMSN) in situations where a child was receiving Medicaid, and the obligated parent has private insurance available to them. Some commenters expressed a workload concern if States were required to issue the NMSN every time private insurance may become available—sometimes for short periods of time—to either of the parents.

Response: The NMSN is an enforcement tool. The child support agency is only required to serve an NMSN on an employer where it is clear that there is no health coverage being provided for the child(ren) and employer-offered health insurance has been ordered. Under § 303.32(b), States are not required to use the NMSN when the child(ren) is covered by a public health care option and there is a court or administrative order that stipulates alternate health care coverage to employer-based coverage. Through our revised definition of health care coverage, if the child is covered through Medicaid, CHIP, or other State coverage plan, then public forms of coverage are an allowable form of health care coverage. Additionally, since the implementation of the ACA, health coverage includes health insurance policies offered through the Federal or State marketplaces that meet the standards for providing essential health benefits. We encourage States to include a provision in child support orders that medical support for the child(ren) be provided by either or both parents, without specifying the source of the coverage. In these situations, the child

[107] AT–10–02 is available at: *http://www.acf.hhs.gov/programs/css/resource/holding-states-harmless-for-failure-to-comply-medical-support-final-rule.*

support agency would have to assess if it is appropriate to send a NMSN notice if employer-based health insurance becomes available.

Although this is not a requirement, nothing within the final rule precludes a State from petitioning for employer-related insurance to be included in the order in accordance with the State's guidelines if it is in the best interest of the child, in cases where the child is receiving public coverage and the employer-related insurance becomes available at a reasonable cost, is accessible to the family, and the parent has the ability to pay. We encourage States to develop medical support policies that fully consider the wide array of health care options that most benefit children and families.

12. Comment: Some comments suggested that the ACA eliminates the need for medical enforcement in the child support program. These commenters requested that child support no longer carry out these functions.

Response: The ACA neither mandates coverage nor requires that the IRS enforce mandatory coverage even for families that have coverage available to them at a reasonable cost. Individuals and families that have health care coverage available at a reasonable cost may choose not to obtain coverage and instead pay the applicable tax penalty. Title IV–D, on the other hand, requires that all child support orders include a provision for medical support for the child(ren), whether through public or private health care coverage available at a reasonable cost, or cash medical support.

13. Comment: Many commenters expressed frustration that the proposed regulations in the NPRM do not align with the requirements of the ACA.

Response: Again, OCSE recognizes tensions between the Social Security Act and provisions in the ACA when it comes to medical support. We have aligned our regulatory requirements as closely as possible with the ACA; however, we acknowledge the need for further statutory and regulatory work to bring these policies together. Until this occurs, this final rule allows States more flexibility to coordinate medical support practices with the requirements of the ACA. In addition, the Administration's FY 2017 Budget proposes a set of changes to help improve coordination between the ACA and medical support.

14. Comment: The NPRM requested specific comments regarding the State child support program's role in carrying out its medical support statutory responsibilities, including the roles of cost allocation between parents and enrolling children in coverage.

Response: We received numerous comments regarding the issue of child support involvement in medical support activities—many of which were discussed in previous comments in the preamble (for example, see Comment/Response 12 above). In addition, we received four specific comments opposing the idea that child support becomes involved with referring children and families for health care coverage. OCSE encourages States to review their medical support activities to find ways to improve health care coverage among children and families. OCSE–PIQ–12–02 provides information on how child support agencies can collaborate with other programs to achieve these goals.[108]

Section 303.72—Requests for Collection of Past-Due Support by Federal Tax Refund Offset

1. Comment: One commenter stated the proposed change did not go far enough because this regulation should specify which State in an interstate case should submit the case for Federal tax refund offset.

Response: Section 303.7(c)(8) establishes requirements for Federal tax refund offset, including identification of the State that must submit a case for such offset. Specifically, ''[t]he initiating State IV–D agency must: . . . Submit all past-due support owed in IV–D cases that meet the certification requirements under § 303.72 of this part for Federal tax refund offset.''

Section 303.100—Procedures for Income Withholding

1. Comment: Nearly all State commenters supported the proposed regulatory changes regarding mandatory use of the OMB-approved *Income Withholding for Support* (IWO) form. While these commenters favored changes addressing the inconsistent use of the OMB-approved IWO form and the transmission of payments on non-IV–D orders to the appropriate State Disbursement Unit (SDU), they pointed out that Federal law already requires use of the OMB-approved form.

Response: While we acknowledge that the use of the OMB-approved form is already required by Federal law and previously issued policy and guidance, continued concerns expressed to OCSE by employers necessitated further clarification in the regulations. States are required to have laws to ensure compliance with the mandated use of the OMB-approved IWO form for both IV–D and non-IV–D orders. Some States work with their State courts' administrative offices, and state bar associations to provide the approved IWO form for use by the judiciary and private attorneys. These States also request that other versions of withholding orders be removed from Web sites and other distribution methods. We encourage all States to collaborate with their judicial branch, state bar associations, chambers of commerce, and Tribal Child Support programs to ensure that all users and employer recipients of the form are aware of the requirements regarding use of the OMB-approved IWO form in all income withholding orders issued to employers.

2. Comment: Several commenters questioned what method of enforcement could be used when private attorneys or courts do not comply with the regulation, and whether employers should be allowed to reject an incorrect IWO.

Response: We direct the commenters to the *Income Withholding for Support—Instructions* document, available at *http://www.acf.hhs.gov/sites/default/files/ocse/omb_0970_0154_instructions.pdf,* as well as the *Income Withholding for Support* form, available at *http://www.acf.hhs.gov/sites/default/files/ocse/omb_0970_0154.pdf.* Both of these documents contain language stating that the IWO must be regular on its face, meaning that any reasonable person would think the IWO is valid.

The instructions for the IWO form clarify this term by saying that an IWO is regular on its face when:

- It is payable to the State disbursement unit;
- A copy of the underlying child support order containing an income withholding clause is included, if the IWO is sent by anyone other than a State/Tribal IV–D agency or a court;
- The amount to withhold is a dollar amount;
- The text of the form has not been changed and invalid information has not been entered;
- The order of the text on the OMB-approved IWO form has not been changed, and
- OMB 0970–0154 is listed on the form; and
- It contains all of the necessary information to process the IWO.

The instructions further provide that the employer must reject the IWO and return it to the sender if, among other things, the sender has not used the OMB-approved form, the IWO is altered

[108] PIQ–12–02 is available at: *http://www.acf.hhs.gov/programs/css/resource/partnering-with-other-programs-and-activities.*

or incomplete, or the IWO instructs the employer to send a payment to an entity other than the State's SDU (for example, to the custodial party, the court, or an attorney). Employers are valuable and essential partners to the child support program. OCSE appreciates the challenges employers face when receiving IWOs that do not comply with the regulation or IWO instructions and will continue to provide assistance to States and employers in ensuring compliance with this rule.

3. Comment: One commenter asked that we clarify to States and employers that using the IWO form in a nontraditional manner in order to accommodate a State's own process that requires withholding beyond the monthly child support amount in the underlying order from obligors with bi-weekly payroll schedules may result in the IWO being rejected by employers.

Response: We understand the commenter's concern regarding this practice. However, we disagree that using the IWO form in this manner is a basis for rejection of the IWO. OCSE is working with States to ensure income withholding and distribution practices comply with Federal requirements.

4. Comment: A few commenters requested the inclusion of language in § 303.100(e) and (h) to clarify that the requirements listed apply to all income withholding situations and that the use of the OMB-approved form applies only to withholding to enforce IV–D and non-IV–D child support orders but does not apply to any other type of withholding.

Response: We agree with these commenters and affirm that the requirements listed apply to all IV–D and non-IV–D income withholding orders, and that the use of the OMB-approved form applies only to IV–D and non-IV–D child support orders and does not apply to any other type of withholding, including spousal-only support orders. We are adding § 303.100(h) to expressly state that the OMB-approved form must be used for income withholding in all child support orders.

5. Comment: One commenter requested that requirements listed in § 303.100(e) clarify that income withholding orders are not to include instructions for an employer to implement in the future (for example, step-down or step-up payments).

Response: We agree with this commenter that income withholding orders are not to include instructions for an employer to implement in the future. Changes in the amount of income withholding require an amended IWO be sent to the employer reflecting the new terms for income withholding in the case. However, the rule does not amend the requirements listed in § 303.100(e).

6. Comment: One commenter suggested the regulation reference more generic title such as ''the standard OMB-approved form,'' rather the current form title ''Income Withholding for Support'' because of the possibility of a change to the form's title in the future.

Response: We disagree. The language in the regulation regarding the IWO form is sufficiently clear.

7. Comment: One commenter recommended the regulation state that the notice may be electronic and that the e-IWO form is an OMB-approved form.

Response: In accordance with Section 306 of Public Law 113–183, *Preventing Sex Trafficking and Strengthening Families* Act, States must use the OCSE e-IWO process when an employer elects to receive IWOs electronically. Further guidance can be found in OCSE AT–14–12.[109] At this time, we do not think it is necessary to revise the regulations since the statute is clear.

8. Comment: One commenter requested the creation of a standard return document to accompany the IWO, which the employer could return to the sender to indicate any noncompliance with Federal income withholding requirements. The commenter noted that the most recent version of the IWO includes language requiring such action, but that courts, private attorneys, or others may be using prior IWO versions without such language.

Response: We understand the commenter's desire to provide information to those issuing income withholding orders regarding the reason an employer has returned the IWO, especially when an outdated version of the IWO form is being used that may not include the ''Return to Sender'' language. While we decline to create an additional form for this purpose, we note that some employers have addressed this need by creating a coversheet to accompany any IWO they return, clarifying the reason(s) for their rejection of the IWO. OCSE has previously distributed a template of this coversheet to the American Payroll Association members and to others upon request.

9. Comment: One commenter noted that since Tribal IV–D agencies enforce child support orders for States and are required to use the OMB-approved IWO form, employers or States may assume that withheld payments must go through a State's SDU instead of through the Tribal IV–D agency.

Response: In accordance with 45 CFR 309.115(d), if there is no TANF assignment of support rights to the Tribe and the Tribal IV–D agency has received a request for assistance in collecting support on behalf of the family from a State or another Tribal IV–D agency under § 309.120, the Tribal IV–D agency must send all support collected to either the State IV–D agency or the other Tribal IV–D agency for distribution, as appropriate, except as provided in paragraph (f) of this section. Paragraph (f) indicates that rather than send collections to a State or another IV–D agency for distribution, the Tribal IV–D agency may contact the requesting State or Tribal IV–D agency to determine appropriate distribution and distribute collections as directed by the other agency.

10. Comment: One commenter suggested that language be included on the IWO stating that: ''The order/notice applies to all employers except Indian Tribes, tribally-owned businesses, or Indian-owned businesses on a reservation. If you are a Tribe, tribally-owned business, or Indian-owned business located on a reservation and you choose to honor the support order and withhold as directed in the enclosed order/notice, we appreciate your voluntary compliance.'' The commenter believes that this would serve as a reminder to States and employers of tribal sovereignty.

Response: We disagree with this comment. Per § 309.90(a)(3) and § 309.110, Tribal employers under the jurisdiction of a Tribe with a IV–D program are required to honor income withholding orders and will be held liable for the accumulated amount the employer should have withheld from the noncustodial parent's income if they fail to comply with these provisions.

11. Comment: One commenter requested that the Child Support Portal process employment terminations for both IV–D and non-IV–D cases. They explained that currently, employers must first determine whether the employee termination is in a IV–D case or a non-IV–D case. If it is a IV–D case, the employer may report the termination electronically. If it is a non-IV–D case, the employer must report the termination manually.

Response: The e-IWO process is currently only available for IV–D cases.

[109] AT–14–12 is available at: *http://www.acf.hhs.gov/programs/css/resource/e-iwo-implementation-and-amendment-of-title-iv-d-State-plan-preprint-page-38–3.*

Section 304.20—Availability and Rate of Federal Financial Participation

1. Comment: A few commenters asked that we define ''reasonable'' as used in § 304.20(a)(1).

Response: The term ''reasonable'' is addressed in *Subpart E—Cost Principles* found at 45 CFR *Part 75—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards,* and is applicable to grants made to States under this part. Specifically, § 75.404 indicates that a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when the non-Federal entity is predominantly federally-funded. In determining reasonableness of a given cost, consideration must be given to: (a) Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the non-Federal entity or the proper and efficient performance of the Federal award; (b) the restraints or requirements imposed by such factors as: sound business practices; arm's-length bargaining; Federal, State, local, tribal, and other laws and regulations; and terms and conditions of the Federal award; (c) market prices for comparable goods or services for the geographic area; (d) whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the non-Federal entity, its employees, where applicable its students or membership, the public at large, and the Federal Government; (e) whether the non-Federal entity significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the Federal award's cost.

2. Comment: Several commenters asked that OCSE provide specific services and activities included in § 304.20(a)(1) and (b) for which FFP is available.

Response: This regulation provides for general categories of allowable expenditures consistent with HHS cost principles in 45 CFR part 75, subpart E that allow for matching of expenditures that are necessary and reasonable and can be attributed to the child support enforcement program. More specific examples are found in policy guidance.

3. *Comment:* A few commenters are concerned that the cost principles in 2 CFR part 225 will stymie State's flexibility in providing the services and activities allowed in § 304.20.

Response: The OMB *Cost Principles for State, Local, and Indian Tribal Governments* (formerly OMB Circular A–87) are published at 2 CFR part 200. However, HHS has codified the OMB cost principles in subpart E of 45 CFR part 75, which apply to all State and local expenditures in HHS-funded programs. When a State is considering if an expense is reasonable or allowable, the State should cross-reference the child support regulations at 45 CFR part 300 and 45 CFR part 75. Part 75 allows the cognizant agency to restrict or broaden funding for allowable activities or services; therefore, child support regulations take precedence over 45 CFR part 75. Section 75.420 indicates that failure to mention a particular item or cost is not intended to imply that it is either allowable or unallowable; rather, determination as to allowability in each case should be based on the treatment provided for similar or related items of cost, and based on the principles described in §§ 75.402 through 75.411. In case of a discrepancy between the provisions of a specific Federal award and the provisions below, the Federal award governs. Criteria outlined in § 75.403 must be applied in determining allowability of costs.

4. Comment: One commenter requested OCSE to consider 90 percent reimbursement for automation projects finalized in the rule.

Response: We appreciate the comment. However, OCSE has no authority to increase the FFP rate through the regulatory process. This would require a statutory change by Congress.

5. Comment: A few commenters asked for clarification regarding the intent of the proposed change to § 304.20(b)(1)(viii)(A) and if it suggests the IV–D agency should be helping families determine the need for public assistance.

Response: This change was not intended to suggest that IV–D agencies determine a family's need for public assistance. However, there may be situations where the State IV–D agency determines that it needs to refer cases to the IV–A or IV–E agency, such as for TANF assistance, emergency assistance, child welfare services, etc. This provision provides flexibility to collaborate with other programs in case the need for a referral arises.

6. Comment: One commenter asked that we explain the differences between what is allowed for reimbursement for the Medicaid agreements in § 304.20 and what is not allowed based on § 304.23.

Response: Section 304.20(b)(1)(viii)-(ix) addresses the availability of FFP for the establishment of agreements with other agencies administering the title IV–D, IV–E, XIX, and XXI programs for activities related to cross-program coordination, client referrals, and data sharing when authorized by law. In this final rule, we removed § 304.23(g) that prohibited FFP for the costs of cooperative agreements between IV–D and Medicaid agencies under 45 CFR part 306, which was removed from the regulations years ago. Section 304.23(g) is no longer necessary as a result of the enactment of Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which required States to include a provision for health care coverage in all child support orders established or enforced by the IV–D agency. FFP continues to be available for these medical support activities under § 304.20(b)(11).

7. Comment: One commenter was concerned that the elimination of paragraph 304.20(b)(1)(ix)(C) regarding transferring collections from the IV–D agency to the Medicaid agency prohibits the State from requiring this activity in the IV–D interagency agreement. However, because § 302.51 explaining the distribution process was not amended, States will still have to transfer the support, but will no longer be able to get FFP for including how to perform this task in an agreement.

Response: We agree and have retained the former provision regarding the availability of FFP under an agreement for the transfer of collections from the IV–D agency to Medicaid in the final regulatory text at § 304.20(b)(1)(ix)(D).

8. Comment: A few commenters asked for clarification on what child support proceedings would qualify for bus fare or other minor transportation expenses as provided in § 304.20(b)(3)(v).

Response: Providing bus passes and gas vouchers are considered allowable as local transportation assistance in support of providing child support services. Providing local transportation vouchers can be a highly cost-effective means to increase participation in child support interviews, genetic testing, and hearings, and decrease no-shows and defaults, which increase staff costs and court time, and reduce compliance.

We also encourage States to consider alternatives to the need to travel to the child support office or court, such as the use of technology, including Web applications, video conferences, or telephonic hearings.

9. Comment: OCSE received several comments related to proposed § 304.20(b)(3)(vii), which would have allowed ''*de minimis*'' costs associated

with the inclusion of parenting time provisions entered as part of a child support order and incidental to a child support enforcement proceeding. The commenters were uncertain about the definition of the term ''*de minimis.*''

Response: Black's Law Dictionary defines *de minimis* as ''insignificant'' or ''not enough to be considered,'' and the Oxford dictionary defines *de minimis* as ''too trivial or minor to merit consideration.'' The *de minimis* parenting time rule provision was not intended to open up Federal matching funds for new parenting time activities. Instead, the rule recognizes current State practice and was intended as a no-cost technical fix to clarify cost allocation and audit issues consistent with generally accepted accounting principles.

Currently, 36 States calculate parenting time credits as part of their child support guidelines, or otherwise provide for standard parenting time at the time the support order is set. In addition, many courts recognize voluntary parenting time agreements during child support hearings when the agreements have been worked out between the parents ahead of time and the parents simply ask the court to add the agreements to the support orders.

Congress has not authorized FFP for parenting time activities. Thus, the proposed provisions regarding parenting time under this provision and under § 302.56(h), *Guidelines for Setting Child Support Orders,* were intended to clarify that States may not charge parenting time activities to title IV–D but may coordinate parenting time and child support activities so long as the IV–D program is not charged additional costs and the State adheres to generally accepted accounting principles.

In light of the comments received on the proposed parenting time provisions and the unintended confusion regarding the proposal, OCSE has deleted the proposed FFP provision in paragraph (b)(3)(vii). See Comment/Response 2 under § 302.56—*Guidelines for Setting Child Support Orders, Parenting Time:* [Proposed § 302.56(h)].

10. Comment: Multiple commenters asked if courts are eligible for FFP for education and outreach activities intended to inform the public about the child support enforcement program as referenced in § 304.20(b)(12).

Response: States may enter into cooperative agreements with courts to provide educational and outreach activities intended to inform the public, parents and family members, and young people who are not yet parents about the Child Support Enforcement program, responsible parenting and co-parenting, family budgeting, and other financial consequences of raising children when the parents are not married to each other. As such, we have added paragraph (b)(12) to allow these as FFP eligible activities in cooperative arrangements with courts and law enforcement officials as cited in § 304.21(a)(1).

11. Comment: One commenter asked that we consider changing the phrase in § 304.20(b)(12) from ''when the parents are not married'' to ''when the parents do not reside together and share expenses as a married or unmarried couple.''

Response: We believe the language as originally drafted is more flexible; therefore, we did not change the regulatory language.

12. Comment: In the NPRM, OCSE specifically asked for feedback regarding the allowability of FFP for electronic monitoring systems for child support purposes. We received feedback from several States, child support organizations, and community based organizations mostly in support of using electronic monitoring systems as an alternative to incarceration for child support purposes.

Response: At this time, we are not planning to regulate in this area since these costs are incurred as part of the general costs of government, similarly to the costs of incarceration.

Section 304.23—Expenditures for Which Federal Financial Participation Is Not Available

1. Comment: Related to § 304.23(d), one commenter asked if the annual firearms qualifications for deputy sheriffs assigned to county IV–D agencies are considered reasonable and essential short-term training.

Response: No, firearms qualifications are necessary for all deputy sheriffs and are therefore considered a general cost of government. In accordance with 45 CFR 75.444, *General costs of government,* these costs for States, local governments, and Indian Tribes are unallowable for Federal funding.

2. Comment: One commenter asked if reasonable and essential short-term training includes preapproved college courses that would directly improve an individual's ability to perform his or her current job or another IV–D-related job, even if those college courses are also counted towards credit hours needed to complete the individual's degree or certificate.

Response: Yes, funding this training has been long-standing OCSE policy. OCSE Action Transmittal (AT) 81–18[110] defines the term short-term training as:

> . . . any training that would directly improve any individual's ability to perform his or her current job or another IV–D related job, does not provide merely a general education for an individual and is not taken for the sole purpose of earning credit hours toward a degree or certificate. FFP is available under the above definition regardless of the source of the training. For example, FFP is available for short term training provided by State and local IV–D agencies, or an agency or individual who provides IV–D services under a cooperative or purchase of service agreement. In addition, FFP is available for short term training conducted by the multi-function agency in which the State IV–D agency is located, or by another State or local agency. Short term training provided by a contractor (*e.g.,* college, university, professional association, etc.) is also eligible for FFP.

3. Comment: Many commenters asked for clarification regarding the deletion of § 304.23(i). They questioned if the jailing of parents in child support cases was no longer considered to be ineligible for FFP.

Response: In the NPRM, existing § 304.23(i) regarding the prohibition of FFP for ''any expenditures for jailing of parents in child support enforcement cases'' was inadvertently removed. Expenditures for jailing of parents in child support enforcement cases continue to be ineligible for FFP. Therefore, in the final rule, we did not remove former § 304.23(i), and redesignated proposed paragraph (i) as paragraph (j).

Section 307.11—Functional Requirements for Computerized Support Enforcement Systems in Operation by October 1, 2000

1. Comment: We received numerous comments supporting the proposed regulatory changes placing limitations on garnishing accounts of SSI recipients. These comments focused on the limited income SSI recipients have and the detrimental impact inappropriate garnishment poses for these individuals. However, some commenters questioned the need for the regulatory change given that in the preamble to the NPRM, we indicated that these inappropriate garnishments are rare.

Response: While we recognize the rarity of these situations, when inappropriate garnishments occur, they must be remedied quickly. The final regulation helps ensure that States will resolve these situations in a timely manner by promptly refunding

[110] AT–81–18 is available at: *http://www.acf.hhs.gov/programs/css/resource/definition-of-short-term-training.*

improperly garnished amounts to noncustodial parents.

2. Comment: Several commenters expressed concern that the NPRM would require States to invest resources to upgrade their statewide child support enforcement systems for a small number of cases.

Response: We agree the automated procedures required by the rule will require States to enhance their State systems' ability to identify cases where the noncustodial parent is the recipient of protected Federal benefits. However, system enhancements will help to ensure that low-income noncustodial parents retain the Federal benefits that are exempt from child support enforcement and essential to their livelihood. Regulatory changes by the Department of Treasury require all Federal benefits to be deposited electronically in a bank account. This means that SSI recipients no longer have the option to receive their benefits through a check. This change has increased the risk that SSI benefits will be improperly withheld by child support agencies. OCSE has facilitated efforts by the Social Security Administration (SSA) to share data on recipients of protected Federal benefits with States through the Federal Parent Locator Service (FPLS). In 2013, OCSE enhanced its interface with SSA to allow States to match participants in their caseloads who begin or stop receiving SSI benefits. States were notified of these additions to the FPLS as part of the FPLS 13–02 release. States may elect to match with the State Verification and Exchange System (SVES), which supplies both title II and title XVI data to the States. To date, eighteen States have opted in to receive this information. States that wish to receive this additional data as part of their FPLS data matches should contact the OCSE's Division of Federal Systems for more information.

3. Comment: Several commenters expressed opposition to including title II benefits in the regulation.

Response: Many of these commenters misinterpreted the NPRM to apply to noncustodial parent receiving only title II benefits (such as SSDI). The NPRM only applied to noncustodial parents who were either recipient[s] of SSI or recipients receiving concurrent SSI and benefits under title II of the Act. Noncustodial parents meeting these conditions are experiencing extreme financial difficulties and warrant further protection from inappropriate garnishments.

In drafting the NPRM, the Department was urged by several stakeholders to exclude garnishment for ''dual eligibility,'' or concurrent benefits, such as when the individual is eligible for both SSI and SSDI, meets the income test for SSI benefits, and would have received the same amount in SSI-only funds, but for the fact that the individual qualifies for SSDI benefits as well as SSI benefits. SSDI provides benefits to disabled or blind persons based on the person's previous earnings record and Social Security contributions. The SSI program makes cash assistance payments to aged, blind, and disabled persons who have limited income and resources regardless of work history or contributions to Social Security. SSI is a means-tested program with strict financial limits. SSA uses the term ''concurrent'' when a person is eligible for benefits from both programs. A person can receive both SSDI and SSI payments, but must meet the requirements of both programs. In order to receive concurrent SSI and SSDI benefits, a person must meet the SSI income and assets limits and is limited to the SSI benefit amount. For example, an individual begins receiving $733 in SSI monthly benefits. Five months later, he becomes eligible to receive $550 in SSDI monthly benefits, reducing his SSI payments to $183. His concurrent benefits are limited to $733 ($550 in SSDI and $183 in SSI, none of which may be garnished due to the concurrent receipt). If he had not qualified for SSDI, his SSI benefits would have remained at $733.[111] The rule requires States to develop safeguards for the States to prevent garnishment of exempt benefits. These provisions only relate to excluding SSI benefits, as well as concurrent SSI and SSDI benefits under title II.

In light of the comments, we want to emphasize that the final rule makes no changes to our policy regarding recipients of title II benefits being subject to garnishment as outlined in Section 459(h)(1)(A)(ii)(I) of the Act. OCSE has long held that title II benefits are subject to garnishment (See DCL 13–06; PIQ–09–01; DCL–00–103). Title II benefits, such as SSDI benefits, are considered remuneration from employment, and therefore, State or tribal child support agencies are allowed to continue to garnish the benefits of child support directly from the Federal payor as authorized under 459(h).

This final rule only places limitations on garnishments from financial accounts of concurrent SSI and SSDI beneficiaries. As a result of comments, we added in § 307.11(c)(3)(i) the phrase ''Social Security Disability Insurance (SSDI)'' before ''benefits under title II of the Act'' to clarify that we are only addressing when a noncustodial parent is receiving both SSI and SSDI benefits at the same time. Similarly, in paragraph (c)(3)(ii), we added the word ''SSDI'' before ''benefits under title II of the Act.''

4. Comment: One commenter asked why OCSE did not rule out any garnishments for SSI recipients and eliminate the complexity of the rule.

Response: Section 459(h) of the Act and OCSE policy guidance does prohibit garnishing financial accounts of SSI beneficiaries. However, we recognize that in rare instances, these accounts may be inappropriately garnished by local IV–D agencies if they have not previously identified that the noncustodial parent is receiving SSI benefits. The final rule mandates that the State resolve these errors by requiring that funds are refunded within 5 business days after determining that the funds were incorrectly garnished.

5. Comment: One commenter supported the rule, but questioned whether the proposed case closure provisions [(303.11(b)(9)] allow States to close these types of cases and prevent the need for the proposed garnishment regulation.

Response: We agree that the case closure provisions allow States the option to close these types of cases under § 303.11(b)(9). However, because the closure of these cases using this case closure criterion is optional, the regulatory changes are necessary to ensure that disadvantaged noncustodial parents retain protected Federal benefits.

6. Comment: One commenter requested clarification of the term ''previously identified'' used in § 307.11(c)(3)(i). The commenter also asked whether this determination could only come from a match with SSA.

Response: We disagree that the term warrants further definition. The final rule provides that States proactively identify cases where the noncustodial parent is a recipient of SSI benefits. A State may choose to make this determination based on a match with SSA or through other means determined by the State.

7. Comment: One commenter felt that the NPRM imposed strict liability on the IV–D agency, but ignores the responsibility of the financial institution in the garnishment process. Many of the comments suggested that financial institutions are required to determine whether an account meets eligibility standards for garnishment based upon

[111] Further information is available at: *http://www.ssa.gov/redbook/eng/supportsexample.htm.*

the sources of deposits into those accounts.

Response: We disagree. DCL 13–06 indicated that the Department of the Treasury, in conjunction with other Federal agencies, issued an Interim Final Rule regarding the garnishment of accounts containing Federal benefit payments. Since issuing that guidance, the Department of Treasury has finalized the rule. In both the interim and final versions of the rule, financial institutions are instructed to honor garnishment orders issued by State child support enforcement agencies by following standardized procedures ''as if no Federal benefit payment were present'' [112] since many Federal benefit payments are not protected from garnishment for child support under section 459 of the Act. So long as the IV–D agency uses the proper garnishment form (as outlined in the regulation), financial institutions are not required to conduct a ''look back'' review to determine if any funds deposited in the account consisted of restricted Federal benefits. Under the regulations, financial institutions do not have any responsibility in determining the source of funds and responding to the requirements as outlined in the child support garnishment order. In the event that funds are garnished inappropriately, the IV–D agency is solely responsible for resolving an inappropriate garnishment under the regulation.

8. Comment: Several commenters expressed their desire for the Federal government to share in the costs associated with refunding any previously disbursed funds.

Response: The Federal regulations at 45 CFR 75.426 expressly prohibits the Federal government from sharing in costs associated with bad debts and losses.

9. Comment: Several commenters expressed concern that the proposed regulation places States in the difficult position of trying to recoup funds disbursed to the custodial parent.

Response: A State is prohibited from garnishing SSI benefits and must make a SSI recipient whole if it inappropriately garnishes the benefits. The final rule will reduce the likelihood that the State will need to recover from the custodial parent support collections distributed to the family resulting from improper garnishment.

10. Comment: Many States expressed concern with the proposed 2-day timeframe. Suggestions ranged from changing the timeframe anywhere from 7 days to 30 days. In addition, some commenters requested clarification whether the timeframe refers to business or calendar days.

Response: We agree that the proposed 2-day timeframe is too short and that clarification is needed. Based on comments, the final rule extended the timeframe in § 307.11(c)(3)(ii) from 2 days to 5 business days, which begins when the agency determines that SSI or concurrent SSI and title II benefits were incorrectly garnished.

Request for Comments on Undistributed and Abandoned Collections

In the NPRM, we asked for specific comments, including information about States policies and procedures related to undistributed and abandoned child support collections and the efforts that States take, both through their child support agencies and the State treasury offices, to maximize the probability that families receive the collections, or if that result cannot be achieved that the payments are returned to the noncustodial parents.

We received several comments on how States deal with undistributed and abandoned child support payments that indicated that many States have aggressive procedures and processes in place to try to minimize undistributed collections. One commenter suggested the creation of a national work group to study and determine collaboratively policies and procedures related to undistributed and abandoned child support collections. One commenter was hopeful that if OCSE shared information about State practices, States could identify promising practices and ultimately reduce the amount of undistributed and abandoned support payments.

At this time, we are not planning to regulate in this area. We will continue to work with States in providing technical assistance to ensure that States are making diligent efforts to distribute child support collections to the family, whenever locate is an issue.

Topic 2: Updates to Account for Advances in Technology (§§ 301.1, 301.13, 302.33, 302.34, 302.50, 302.65, 302.70, 302.85, 303.2, 303.5, 303.11, 303.31, 304.21, 304.40, 305.64, 305.66, and 307.5)

We received numerous comments supporting the revisions to update the regulations for electronic communications technology under Topic 2 of the rule. We also received a few comments about specific provisions. We did not receive any comments related to Topic 2 that we needed to address for the following sections:

- § 301.13—Approval of State Plans and Amendments.
- § 302.33—Services to Individuals Not Receiving Title IV–A Assistance
- § 302.34—Cooperative Arrangements
- § 302.50—Assignment of Rights to Support
- § 302.65—Withholding of Unemployment Compensation
- § 302.70—Required State Laws
- § 302.85—Mandatory Computerized Support Enforcement System
- § 303.5—Establishment of Paternity
- § 303.31—Securing and Enforcing Medical Support Obligations
- § 304.21—Federal Financial Participation in the Costs of Cooperative Arrangements with Courts and Law Enforcement Officials
- § 304.40—Repayment of Federal Funds by Installments
- § 305.64—Audit Procedures and State Comments
- § 305.66—Notice, Corrective Action Year, and Imposition of Penalty
- § 307.5—Mandatory Computerized Support Enforcement Systems

Section 301.1—General Definitions

1. Comment: One commenter thought it would be clearer to include ''in writing'' or ''written information if requested'' to the definition of ''record.''

Response: We do not agree that this clarification is needed. The regulation defines ''record'' as ''information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.'' This includes documents that are ''in writing.'' As noted in the preamble under Topic 2, the Uniform Electronic Transactions Act explains that this definition ''includes any method for storing or communicating information, including 'writings.' ''

2. Comment: Besides adding definitions for procedures and records, one commenter suggested we added definitions for low income or subsistence level.

Response: We do not agree that additional definitions are needed. Each State should have the flexibility and discretion to define these terms.

Section 303.2—Establishment of Cases and Maintenance of Case Records

1. Comment: One commenter recommended for consistency with

[112] The Final Rule entitled ''Garnishment of Accounts Containing Federal Benefit Payments: Final Rule,'' **Federal Register**, Volume 78, No 103 (29 May 2013), pp. 32099–3211 is available at: *http://www.gpo.gov/fdsys/pkg/FR-2013-05-29/pdf/2013-12683.pdf* and the Interim Final rule entitled ''Garnishment of Accounts Containing Federal Benefit Payments: Interim Final Rule'' **Federal Register**, Volume 76, No 36 (23 February 2011), pp. 9939–9962 is available at: *http://www.gpo.gov/fdsys/granule/FR-2011-02-23/2011-3782.*

§ 303.2(a)(3) and for clarity for when the 5 working day timeframe begins, please consider replacing the newly added words ''made by'' with the word ''received'' in § 303.2(a)(2).

Response: We agree and have made the requested change.

Section 303.11—Case Closure Criteria

1. Comment: We invited comments on whether a recipient of services should be provided the option to request the case closure notice ''in writing'' or ''in a record,'' such as emails, text messaging, voice mails. Three commenters requested the ability to notify the recipient of services by mail or electronic means if the recipient of services has authorized electronic notifications.

Response: At this time, we have decided not to provide the State the flexibility to send case closure notices in a record, such as emails, text messaging and voice mail to all parents since there was not overwhelming support to do so. While an electronic case closure notice may be an appropriate, and even the preferred, method of notification on a case-by-case basis for some custodial parents, it may not be an effective means to notify other parents. Many parents in the child support caseload have limited incomes, and may not have convenient access to a computer, the internet, or mobile communication.

However, we have added a new § 303.11(d)(6) to allow States to issue case closure notices under paragraphs (d)(1) and (4) electronically, on a case-by-case basis, when the recipient of services consents to electronic notifications. The State must keep documentation of the recipient's authorization of the consent in the case record.

2. Comment: One commenter inquired why the notice in the proposed § 303.11(d)(6) is not required to be in writing.

Response: The notice is required to be in writing and we made this correction in this final rule to § 303.11(d)(4) since the numbering scheme changed as a result of deleting some notice requirements.

Topic 3: Technical Corrections (§§ 301.15; 302.14; 302.15; 302.32; 302.34; 302.35; 302.65; 302.70; 302.85; 303.3; 303.7; 303.11; 304.10; 304.12; 304.20; 304.21; 304.23; 304.25; 304.26; 305.35; 305.36; 305.63; 308.2; 309.85; 309.115; 309.130; 309.145; and 309.160)

In the response to comments below, we only discuss sections for which we received applicable comments. Overall, 32 commenters mainly supported our technical revisions, but they had some suggested revisions or needed clarification on some of the issues. We did not receive any comments related to the technical corrections that we needed to address for the following sections:

- § 302.14—Fiscal policies and accountability;
- § 302.15—Reports and maintenance of records;
- § 302.35—State parent locator service;
- § 302.65—Withholding of unemployment compensation;
- § 302.70—Required State laws;
- § 302.85—Mandatory computerized support enforcement system;
- § 303.3—Location of noncustodial parents in IV–D cases;
- § 303.7—Provision of services in intergovernmental IV–D cases;
- § 303.11—Case closure criteria;
- § 304.10—General administrative requirements;
- § 304.12—Incentive payments;
- § 304.20—Availability and rate of Federal financial participation;
- § 304.23—Expenditures for which Federal financial participation is not available;
- § 304.25—Treatment of expenditures; due date;
- § 304.26—Determination of Federal share of collections;
- § 305.63—Standards of determining substantial compliance with IV–D requirements;
- § 309.85—What records must a Tribe or Tribal organization include in a Tribal IV–D plan;
- § 309.130—How will Tribal IV–D programs be funded and what forms are required?;
- § 309.145—What costs are allowable for Tribal IV–D programs carried out under § 309.65(b) of this part?;
- § 309.160—How will OCSE determine whether Tribal IV–D program funds are appropriately expended?

Section 301.15—Grants

1. Comment: Two commenters suggested that the suffix ''A'' be eliminated from all references to Form OCSE–396A and OCSE–34A to reflect the changes made in the ACF Office of Grants Management (OGM) AT–14–01 and OCSE AT–14–14, *Revised Quarterly Financial Reporting Forms—2014.*[113]

Response: We agree. The suffix ''A'' was deleted to reflect the recent redesignation of these financial forms in accordance with OGM AT–14–01 and OCSE–AT–14–14.

2. Comment: One commenter requested clarification on section 301.15(b). When financial reports are submitted through the On-Line Data Collection system (OLDC), the ''signature of the authorized State program official'' is an electronic signature. The commenter suggested that the reference to the signature in paragraph (2) be revised so that it is clear that the signature is electronic.

Response: We have clarified in both paragraphs (a)(1) and (2) that the signature of the authorized State program official is a digital signature since both the OCSE–396 and the OCSE–34 will be submitted electronically, as indicated in paragraph (b)(1).

3. Comment: One commenter suggested the last sentence of revised paragraph (a)(2) regarding the data used in the computation of the quarterly grant awards issued to the States appears to be misplaced and believes a more appropriate placement is in paragraph (c) *Grant Award.*

Response: We do not believe this revision is necessary. This sentence summarizes the purposes of the OCSE–34. Paragraph (c) indicates that the quarterly grant award is based on the information submitted by the State on the financial reporting forms and consists of an advance of funds for the next quarter, reconciliation of the advance provided for the current quarter, and access to funds.

4. Comment: One commenter requested clarification that technical correction in 301.15(d)(1) does not reflect 45 CFR part 75 Interim Final Rule for the Uniform Guidance effective December 26, 2014 since 45 CFR parts 74 and 92 were superseded when HHS adopted promulgated 45 CFR part 75 as indicated in 45 CFR 75.104.

Response: We agree. However, the recent HHS Interim Final Rule, effective January 20, 2016 (81 FR 3004),[114] contains technical amendments to HHS regulations regarding the Uniform Guidance. The regulatory content updates cross-references within HHS regulations to replace part 74 with part 75. Therefore, it is no longer necessary to make the proposed revisions and we will delete these proposed revisions in the final rule, except as otherwise noted.

Section 302.32—Collection and Disbursement of Support Payments by the IV–D Agency

1. Comment: To be consistent with the definitions in § 303.7 *Provision of Services in Interstate IV–D Cases,* one commenter suggested that § 302.32(b)(1)

[113] Available at: *http://www.acf.hhs.gov/programs/css/resource/revised-quarterly-financial-reporting-forms-2014.*

[114] The Uniform Guidance HHS technical corrections are available at: *https://www.gpo.gov/fdsys/pkg/FR-2016-01-20/pdf/2015-32101.pdf.*

be changed to replace ''interstate'' with ''intergovernmental'' and ''initiating State'' with ''initiating agency.''

Response: We agree and have made the proposed revisions in the final rule.

Section 302.34—Cooperative Arrangements

1. Comment: While many commenters supported our proposed changes, one commenter requested OCSE develop a definition for corrections officials. For instance, the commenter asked if the term ''corrections officials'' includes sheriff departments. One commenter encouraged us to include community corrections officials.

Response: OCSE is not specifically defining corrections officials to allow flexibility for the State to define it based on how the State is organized. However, we would like to clarify that cooperative arrangements are required for corrections officials at any governmental level, such as Federal, State, Tribal, and local levels. OCSE encourages child support agencies to collaborate with Federal, State, Tribal, and local corrections officials, including community corrections officials (probation and parole agencies), to provide case management services, review and adjust support orders, provide employment services to previously incarcerated noncustodial parents, etc. The National Institutes of Justice notes that community corrections programs ''. . . oversee offenders outside of jail or prison and . . . include probation—correctional supervision within the community rather than jail or prison—and parole—a period of conditional, supervised release from prison.'' [115]

Section 304.21—Federal Financial Participation in the Costs of Cooperative Arrangements With Courts and Law Enforcement Officials

1. Comment: Commenters requested clarification as to whether the inclusion of corrections officials in the definition of law enforcement officials allows the State to sign a cooperative arrangement with a sheriff to operate a child support warrant task force or to operate a county jail and receive FFP.

Response: OCSE encourages Child Support Enforcement agencies to collaborate with corrections institutions and community corrections officials, such as probation and parole agencies. As noted in our response to comments under § 302.34, OCSE is not specifically defining corrections officials to allow flexibility for the State to define it based on how the State is organized.

Regarding sheriff's costs for a child support warrant task force, since these costs would relate to reviewing the warrant process to evaluate the quality, efficiency, effectiveness, and scope of support enforcement services and securing compliance with the requirements of the State plan, these costs would be allowable under 45 CFR 304.20(b)(1). However, the State should execute a purchase of service agreement under § 304.22, rather than a cooperative agreement.

Regarding sheriff's costs for operating a county jail, since we do not provide FFP related to jailing costs under § 304.23(i), these costs would not qualify for FFP reimbursement. Section 304.23(i) was inadvertently left out of the NPRM and is corrected in this final rule. This is discussed in more detail in Comment/Response 3 in § 304.23, *Expenditures for which Federal Financial Participation Is Not Available.*

2. Comment: Another commenter asked if the costs of forming cooperative arrangements with courts and corrections officials to receive notice of incarceration of noncustodial parents triggering state-initiated review under § 303.8 are included as allowable expenditures eligible for Federal financial participation.

Response: Yes, these costs would be allowable expenditures related to improving the State's establishment and enforcement of support obligations under § 304.20(b)(3).

3. Comment: Another commenter indicated that by adding corrections officials, they believed that a State could enter into a cooperative agreement with a community corrections provider, which would enable electronic monitoring to be funded directly through the local agency doing the electronic monitoring.

Response: We do not agree with this interpretation. We do not allow for FFP to be used for electronic monitoring costs since these costs are a general cost of government and are related to the judicial branch under 45 CFR 75.444(a)(3).

4. Comment: Multiple commenters asked if courts are eligible for FFP for education and outreach activities intended to inform the public about the child support enforcement program.

Response: States may enter into cooperative agreements with courts to provide educational and outreach activities intended to inform the public, parents and family members, and young people who are not yet parents about the Child Support Enforcement program, responsible parenting and co-parenting, family budgeting, and other financial consequences of raising children when the parents are not married to each other. As such, we have added to § 304.21(a)(1) a cross-reference to § 304.20(b)(12).

5. Comment: One commenter asked for clarification on the inclusion of ''corrections officials'' in § 304.21 and § 302.34.

Response: Please see our response to this comment under Comment/Response 1 for § 302.34, *Cooperative Arrangements* under Topic 3.

Section 305.35—Reinvestment

1. Comment: One commenter thought that the proposed formula for determining State Current Spending Level may not accurately measure a State's compliance with § 305.35 due to the significant differences in the timing of expenditures reported on the OCSE–396 for each Federal fiscal year because approximately 50 percent of total expenditures reported to OCSE are county-related prior quarter adjustments.

Response: We do not agree that a State's compliance would not accurately be measured due to expenditure timing differences. As discussed in ''Instructions for Completion of Form OCSE–396,'' there is no deadline for spending incentive payments. Incentive payments remain available to the State until completely expended. Once expended, however, those expenditures must be reported on Line 1a or 1d, as applicable, within 2 years, in accordance with section 1132 of the Act. Expenditures are considered made on the date the payment occurs, regardless of the date of receipt of the good or performance of the service. For State-administered expenditures, the date of this transaction by the State agency governs; for locally-administered programs, the date of the transaction by the county, city, or other local agency governs.[116]

2. Comment: A few commenters requested clarification regarding the applicability of this section to political subdivisions to which the incentives are provided by the States.

Response: As discussed in both AT–01–01 and AT–01–04,[117] OCSE indicated that any payments made to political subdivisions must be used in

[115] National Institutes of Justice, Office of Justice Programs, DOJ—*http://www.nij.gov/topics/corrections/community/pages/welcome.aspx.*

[116] The Instructions for the OCSE–396 are available at: *http://www.acf.hhs.gov/programs/css/resource/instructions-for-ocse-396-quarterly-financial-report.*

[117] Available at: *http://www.acf.hhs.gov/programs/css/resource/final-rule-on-incentives-penalties-and-audit* and *http://www.acf.hhs.gov/programs/css/resource/reinvestment-of-child-support-incentive-payments,* respectively.

accordance with the provisions in § 305.35. States are responsible for ensuring that all components of their child support program must comply with the reinvestment requirements, including local or county programs, other State agencies, vendors or other entities that perform child support services under contract or cooperative agreement with the State.

3. Comment: One commenter believed that our regulation should go further into requiring that these funds actually be spent. The commenter thought that localities should not be allowed to ''stock-pile incentive dollars,'' and should require localities to spend incentives within 2 years of being earned or submit a long-term spending plan for our approval. The commenter added that if a local agency receiving incentive funds does not spend the funds, then these funds should be forfeited to another local agency in the same community that provides an approved spending plan. This would foster intra-county cooperation in the use of funds. It would also allow the agency more directly involved in the daily enforcement of child support services the opportunity for a larger share of incentives.

Response: As discussed in the response to Comment/Response 2, States are responsible for ensuring that all components of their child support program must comply with the reinvestment requirements, including local or county programs, other State agencies, vendors, or other entities that perform child support services under contract or cooperative agreement with the State. Additionally, as discussed in our response to Comment/Response 1, there is no deadline for spending incentive payments. Incentive payments remain available to the State until completely expended. Once expended, however, those expenditures must be reported on Line 1a or 1d of the OCSE–396, as applicable, within 2 years, in accordance with section 1132 of the Act.

4. Comment: One commenter asked if § 305.35 allowed the use of State IV–D agency and/or other county component current spending level surpluses to offset State IV–D agency and/or county components with current spending level deficits in Federal fiscal years where the total of all components making up the State current spending levels exceeds the State baseline expenditure level to avoid disallowance of incentive amounts.

Response: No, a State must expend the full amount of incentive payments received to supplement, and not supplant, other funds used by the State to carry out its IV–D program activities or funds for other activities approved by the Secretary, which may contribute to improving the effectiveness or efficiency of the State's child support program, including cost-effective contracts with local agencies.

5. Comment: Several commenters asked questions regarding clarification on the base year amount and whether the base year amount needs to be recalculated annually for States and, if applicable, political subdivisions. One commenter wanted to provide an option to recalculate the base year amount for the few States that had incentives included in their base year amount. Another commenter indicated that the rule needed to be updated to calculate a new base level of funding since the base level had not been updated for over two decades.

Response: As specified in § 305.35(d), a base amount of spending was determined by subtracting the amount of incentive funds received by the State child support program for Fiscal Year 1998 from the total amount expended by the State in the program for the same period. Alternatively, States had an option of using the average amount of the previous three fiscal years (1996, 1997, and 1998) for determining the base amount. The base amount of State spending must be maintained in future years.

OCSE calculated the base amount of spending for each State using 1998 expenditure data unless the State notified OCSE that the State preferred the base amount as an average of the 1996, 1997, and 1998 expenditures. Only five States (Georgia, Mississippi, New Jersey, New York, and South Dakota) requested the use of the three-year average.[118] At this time, we have no plans for updating the base level.

On June 23, 2011, OCSE sent letters to all IV–D Directors reminding them of the actual amount of their base level expenditures for incentive reinvestment purposes.

6. Comment: One commenter suggested the following as an alternative to our proposed changes in § 305.35(d) in the NPRM: ''State expenditures may not be reduced as a result of the receipt and reinvestment of incentive payments, but can be reduced under the baseline as a result of cost savings.''

Response: We do not agree with this proposed change because the baseline spending level cannot be reduced as a result of cost savings. As discussed in the final rule on incentive payments to States, 65 FR 82178 (December 27, 2000),[119] OCSE recognized that ''a fixed base year could potentially penalize States that reduce costs as a result of program improvements or cuts in government spending. On the other hand, we also recognized that a fixed base year would not reflect inflation or other increases in the costs of personnel or services. Thus, any negative effects would be lessened over time.''

7. Comment: Several commenters suggested that the suffix ''A'' be eliminated from all references to Form OCSE–396A and OCSE–34A to reflect the changes made in OGM AT–14–01 and OCSE AT–14–14.[120]

Response: We agree. The suffix ''A'' was deleted in all references to OCSE–396A in paragraph (e) to reflect the recent redesignation of these financial forms in accordance with OGM AT–14–01 and OCSE AT–14–14.

8. Comment: One commenter thought that the term ''disallowances of incentive amounts'' was unclear, and suggested that we replace it with ''a reduction in incentives awarded.''

Response: We do not agree with this suggested revision. OCSE has used the disallowance terminology since Federal fiscal year 2001. It is technically correct in terms of grants management. OCSE would be making a disallowance, which may be collected by reducing the State's incentive payments or State's child support grant payments.

9. Comment: Another commenter believed that a disallowance for a State not reinvesting the full amount of the incentive payment to supplement, not supplant, other funds used by the State to carry out the child support program or to use the funds for other activities, approved by the Secretary for improving the efficiency and effectiveness of the program, seems like a harsh penalty. The commenter suggested that in cases of non-compliance, OCSE should follow the progressive steps outlined in § 305.66 by providing the State with a corrective action year.

Response: We do not agree with the suggestion. Section 305.66 outlines the steps taken when a State is found by the Secretary to be subject to a penalty as described in § 305.61. This section does not identify incentive funds not being reinvested as a reason that a State would be subject to a financial penalty. Additionally, we do not support this change since the financial penalty would be much harsher. A disallowance

[118] See Dear Colleague Letter (DCL) 01–50, available at: *http://www.acf.hhs.gov/programs/css/resource/base-level-program-expenditures-for-incentive-reinvestment-revised.*

[119] Available at: *https://www.gpo.gov/fdsys/pkg/FR-2000-12-27/xml/FR-2000-12-27.xml.*

[120] Available at: *http://www.acf.hhs.gov/programs/css/resource/revised-quarterly-financial-reporting-forms-2014.*

as proposed would result in penalty amounts from one to five percent of the State's title IV–A payments.

10. Comment: One commenter believed that our calculation related to the State Share of Expenditure in paragraph (e)(1) was incorrect. The commenter thought that the correct calculation should be ''Total Expenditures less expenditures funded with incentives = the base for determining the State share. The base for determining the State share is multiplied by 34% and that result is compared to the required base level spending.''

Response: We do not agree with this change in our formula. The formula in the final rule is the formula that we have been using since 2001. The State Share of Expenditures must deduct the Federal Share of total expenditures claimed for the current quarter and prior quarter adjustments claimed on the OCSE–396 for all four quarters of the fiscal year.

Section 305.36—Incentive Phase-In

1. Comment: One commenter requested an additional conforming revision to delete 45 CFR 305.36 since it was an outdated requirement from 2002.

Response: We agree with the commenter and have deleted the outdated provision.

V. Impact Analysis

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act (Pub. L. 104–13), all Departments are required to submit to OMB for review and approval any reporting or recordkeeping requirements inherent in a proposed or final rule. There are seven new requirements as a result of these regulations. These new regulatory requirements are one-time system enhancements to the statewide child support system. The description and total estimated burden for the changes are described in the chart below.

Section and purpose	Instrument	Number of respondents: 54	Average burden hours per response	Total cost	National federal share	National state share
Added requirement under § 302.33 to generate notices.	Systems Modification.	One-time system enhancement.	300 hours × $100 per 54 States to modify statewide child support system.	$1,620,000	$1,069,200	$550,800
Added optional requirement under § 302.33 for revised applications for limited services.	Systems Modification.	One-time system enhancement.	5,000 hours × $100 per 27 States to modify statewide child support system.	13,500,000	8,910,000	4,590,000
Added requirement under § 303.8 for notice of the right to request review and adjustment when parent is incarcerated.	Systems Modification.	One-time system enhancement.	200 hours × $100 × 54 States	1,080,000	712,800	367,200
Added optional requirement under § 303.11 for notice to recipient when case closed because limited service has been completed.	Systems Modification.	One-time system enhancement.	1,000 hours × $100 × 27 States.	2,700,000	1,782,000	918,000
Added requirement under § 303.11 for notice because the referring agency does not respond to a notice or does not provide information demonstrating that services are needed.	System Modification.	One-time system enhancement.	500 hours × $100 × 54 States	2,700,000	1,782,000	918,000
Under § 303.72 discontinued notice requirement for interstate tax refund offset.	Systems Modification.	One-time system enhancement.	500 hours × $100 × 54 States	2,700,000	1,782,000	918,000
Added requirement under § 307.11 develop automated procedures to identify the recipient of Supplemental Security Income (SSI).	Systems Modification.	One-time system enhancement.	400 hours × $100 × 54 States	2,160,000	1,425,600	734,400
Added requirement for State plan page amendment under 42 CFR 433.152.	State plan amendment.	One time for 54 State Medicaid programs, (which includes DC and 3 territories).	2 hours × $54.08 × 54 States	5,840.64	2,920.32	2,920.32
Added requirement for cooperative agreements with IV-D agencies under 42 CFR 433.152.	Cooperative agreement.	One time for 54 State Medicaid programs.	10 hours × $54.08 × 54 States.	29,203.20	14,601.60	14,601.60
Totals			265,248 hrs	26,495,043.84	17,481,121.92	9,013,921.92

Part 302 contains information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Although States will have to submit revised Child Support State plan pages for §§ 302.33, 302.56, and 302.70, we do not estimate any additional burden on the ''State Plan for Child Support Collection and Establishment of Paternity Under Title IV–D of the Social Security Act,'' and the State Plan Transmittal Form (OMB 0970–0017), which were reauthorized until June 30, 2017. When these forms were submitted for reauthorization, we had estimated that each State would be submitting eight State plan preprint pages annually as a result of changes in regulations, policies, and/or procedures.

None of the forms are new burdens on States. For example § 303.100 clarifies the regulation that States are required to use the Income Withholding Order (IWO) form. Use of the OMB-approved form is already required. The OMB Control number is 0970–0154, which expires on July 31, 2017. Section 303.35 clarifies that the OCSE–396 is used to calculate the State current spending level. This form is an OMB-approved form, Control number 0970–0181, which expires on May 31, 2017. Finally, there has been an update from use of form SF 269A to SF 425. This is a technical update with no addition burden. SF 425 is an OMB-approved

form, Control number 0348–0061, which expired on February 28, 2015.

With regard to the requirements for cooperative agreements for third party collections under 42 CFR 433.152, Medicaid State plan amendments will be required as well as amendments to State cooperative agreements. The one-time burden associated with the requirements under § 433.152 is the time and effort it will take each of the 54 State Medicaid Programs, which includes the District of Columbia and 3 territories, to submit State plan amendments and amend their cooperative agreements.

Specifically, we estimate that it will take each State 2 hours to amend their State plans and 10 hours to amend their cooperative agreements. We estimate 12 total annual hours at a total estimated cost of $35,043.84 with a State share of $17,521.92. The Centers for Medicare and Medicaid Services reimburses States for 50 percent of the administrative costs incurred to administer the Medicaid State plan.

In deriving these figures, we used the hourly rate of $54.08/hour, which is the mean hourly wage of management officials according to 2014 data from the Bureau of Labor Statistics.[121]

Other than what is addressed above, no additional information collection burdens, as described in the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), are imposed by this regulation.

Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), and enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this regulation will not result in a significant impact on a substantial number of small entities. The primary impact is on State Governments. State Governments are not considered small entities under the Act.

Regulatory Impact Analysis

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. While there are some costs associated with these regulations, they are not economically significant as defined under E.O. 12866. However, the regulation is significant and has been reviewed by OMB.

An area with associated Federal costs is modifying the child support statewide automated system for one-time system enhancements to accommodate new requirements such as notices, applications, and identifying noncustodial parents receiving SSI, and CMS State plan changes. This rule has a total cost of approximate $26,495,044. This includes a total cost of $26,460,000 to modify statewide IV–D systems for the 54 States or Territories at a cost of $100 an hour (with an assumption that 27 States will implement the optional requirements), with $17,463,600 as the Federal share. In addition, there is a cost of $35,044 is designated to CMS' costs for State plan amendments and cooperative agreements, which includes the Federal share of $17,522.

These regulations will improve the delivery of child support services, support the efforts of noncustodial parents to provide for their children, and improve the efficiency of operations.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, Tribal and local Governments, in the aggregate, or by the private sector, of $100 million or more in any one year. This $100 million threshold was based on 1995 dollars. The current threshold, adjusted for inflation is $146 million. This rule would not impose a mandate that will result in the expenditure by State, local, and Tribal Governments, in the aggregate, or by the private sector, of more than $146 million in any one year.

Congressional Review

This final rule is not a major rule as defined in 5 U.S.C. Chapter 8.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a policy or regulation may negatively affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. The required review of the regulations and policies to determine their effect on family well-being has been completed, and this rule will have a positive impact on family well-being as defined in the legislation by helping to ensure that parents support their children, even when they reside in separate jurisdictions, and will strengthen personal responsibility and increase disposable family income.

Executive Order 13132

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments or is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism impact as defined in the Executive Order.

List of Subjects

42 CFR Part 433

Administrative practice and procedure, Child support, Claims, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

45 CFR Part 301

Child support, State plan approval and grant procedures.

45 CFR Part 302

Child support, State plan requirements.

45 CFR Part 303

Child support, Standards for program operations.

45 CFR Part 304

Child support, Federal financial participation.

45 CFR Part 305

Child support, Program performance measures, Standards, Financial incentives, Penalties.

45 CFR Part 307

Child support, Computerized support enforcement systems.

45 CFR Part 308

Child support, Annual State self-assessment review and report.

45 CFR Part 309

Child support, Grant programs—social programs, Indians, Reporting and recordkeeping requirements.

[121] The BLS Occupational Employment Statistics 2014 wage data for management occupations is available at: *www.bls.gov/oes/current/oes110000.htm.*

(Catalog of Federal Domestic Assistance Programs No. 93.563, Child Support Enforcement Program.)

Mark H. Greenberg,

Acting Assistant Secretary for Children and Families.

Andy Slavitt,

Acting Administrator for the Centers for Medicare & Medicaid Services.

Sylvia M. Burwell,

Secretary.

■ For the reasons discussed above, the Department of Health and Human Services amends 42 CFR part 433 and 45 CFR chapter III as set forth below:

Centers for Medicare and Medicaid Services

42 CFR Chapter IV

PART 433—STATE FISCAL ADMINISTRATION

■ 1. The authority citation for part 433 is revised to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 2. Section 433.152 is amended, effective January 20, 2017 by revising paragraph (b) to read as follows:

§ 433.152 Requirements for cooperative agreements for third party collections.

* * * * *

(b) Agreements with title IV–D agencies must specify that:

(1) The Medicaid agency may not refer a case for medical support enforcement when the following criteria have been met:

(i) The Medicaid referral is based solely upon health care services provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12)), including through the Purchased/Referred Care program, to a child who is eligible for health care services from the Indian Health Service (IHS).

(ii) [Reserved]

(2) The Medicaid agency will provide reimbursement to the IV–D agency only for those child support services performed that are not reimbursable by the Office of Child Support Enforcement under title IV–D of the Act and that are necessary for the collection of amounts for the Medicaid program.

Administration for Children and Families

45 CFR Chapter III

PART 301—STATE PLAN APPROVAL AND GRANT PROCEDURES

■ 3. The authority citation for part 301 continues to read as follows:

Authority: 42 U.S.C. 651 through 658, 659a, 660, 664, 666, 667, 1301, and 1302.

■ 4. Amend § 301.1 by revising the first sentence of the definition of ''Procedures'' and adding the definition of ''Record'' in alphabetical order to read as follows:

§ 301.1 General definitions.

* * * * *

Procedures means a set of instructions in a record which describe in detail the step by step actions to be taken by child support enforcement personnel in the performance of a specific function under the State's IV–D plan. * * *

* * * * *

Record means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

* * * * *

■ 5. Amend § 301.13 by revising the first sentence of the introductory text and paragraphs (e) and (f) to read as follows:

§ 301.13 Approval of State plans and amendments.

The State plan consists of records furnished by the State to cover its Child Support Enforcement program under title IV–D of the Act. * * *

* * * * *

(e) *Prompt approval of the State plan.* The determination as to whether the State plan submitted for approval conforms to the requirements for approval under the Act and regulations issued pursuant thereto shall be made promptly and not later than the 90th day following the date on which the plan submittal is received in OCSE Regional Program Office, unless the Regional Office has secured from the IV–D agency an agreement, which is reflected in a record, to extend that period.

(f) *Prompt approval of plan amendments.* Any amendment of an approved State plan may, at the option of the State, be considered as a submission of a new State plan. If the State requests that such amendments be so considered, the determination as to its conformity with the requirements for approval shall be made promptly and not later than the 90th day following the date on which such a request is received in the Regional Office with respect to an amendment that has been received in such office, unless the Regional Office has secured from the State agency an agreement, which is reflected in a record, to extend that period.

* * * * *

■ 6. Amend § 301.15 by revising paragraphs (a), (b), (c), and (d), and by removing paragraph (e) to read as follows:

§ 301.15 Grants.

* * * * *

(a) *Financial reporting forms*—(1) *Form OCSE–396: Child Support Enforcement Program Quarterly Financial Report.* States submit this form quarterly to report the actual amount of State and Federal share of title IV–D program expenditures and program income of the current quarter and to report the estimated amount of the State and Federal share of title IV–D program expenditures for the next quarter. This form is completed in accordance with published instructions. The digital signature of the authorized State program official on this document certifies that the reported expenditures and estimates are accurate and that the State has or will have the necessary State share of estimated program expenditures available when needed.

(2) *Form OCSE–34: Child Support Enforcement Program Quarterly Collection Report.* States submit this form quarterly to report the State and Federal share of child support collections received, distributed, disbursed, and remaining undistributed under the title IV–D program. This form is completed in accordance with published instructions. The digital signature of the authorized State program official on this document certifies that the reported amounts are accurate. The Federal share of actual program expenditures and collections and the Federal share of estimated program expenditures reported on Form OCSE–396 and the Federal share of child support collections reported on Form OCSE–34 are used in the computation of quarterly grant awards issued to the State.

(b) *Submission, review, and approval*—(1) *Manner of submission.* The Administration for Children and Families (ACF) maintains an On-line Data Collection (OLDC) system available to every State. States must use OLDC to submit reporting information electronically. To use OLDC, a State must request access from the ACF Office of Grants Management and use an approved digital signature.

(2) *Schedule of submission.* Forms OCSE–396 and OCSE–34 must be electronically submitted no later than 45 days following the end of the each fiscal quarter. No submission, revisions, or adjustments of the financial reports submitted for any quarter of a fiscal year will be accepted by OCSE later than December 31, which is 3 months after the end of the fiscal year.

(3) *Review and approval.* The data submitted on Forms OCSE–396 and OCSE–34 are subject to analysis and review by the Regional Grants Officer in the appropriate ACF Regional Office and approval by the Director, Office of Grants Management, in the ACF central office. In the course of this analysis, review, and approval process, any reported program expenditures that cannot be determined to be allowable are subject to the deferral procedures found at 45 CFR 201.15 or the disallowance process found at 45 CFR 304.29 and 201.14 and 45 CFR part 16.

(c) *Grant award*—(1) *Award documents.* The grant award consists of a signed award letter and an accompanying ''Computation of Grant Award'' to detail the award calculation.

(2) *Award calculation.* The quarterly grant award is based on the information submitted by the State on the financial reporting forms and consists of:

(i) An advance of funds for the next quarter, based on the State's approved estimate; and

(ii) The reconciliation of the advance provided for the current quarter, based on the State's approved expenditures.

(3) *Access to funds.* A copy of the grant documents are provided to the HHS Program Support Center's Division of Payment Management, which maintains the Payment Management System (PMS). The State is able to request a drawdown of funds from PMS through a commercial bank and the Federal Reserve System against a continuing letter of credit. The letter of credit system for payment of advances of Federal funds was established pursuant to Treasury Department regulations. (Circular No. 1075).

(d) *General administrative requirements.* The provisions of part 95 of this title, establishing general administrative requirements for grant programs and part 75 of this title, establishing uniform administrative requirements and cost principles, shall apply to all grants made to the States under this part, with the following exceptions:

(1) 45 CFR 75.306, *Cost sharing or matching* and

(2) 45 CFR 75.341, *Financial reporting.*

* * * * *

PART 302—STATE PLAN REQUIREMENTS

■ 7. The authority citation for part 302 continues to read as follows:

Authority: 42 U.S.C. 651 through 658, 659a, 660, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396(k).

■ 8. Revise § 302.14 to read as follows:

§ 302.14 Fiscal policies and accountability.

The State plan shall provide that the IV–D agency, in discharging its fiscal accountability, will maintain an accounting system and supporting fiscal records adequate to assure that claims for Federal funds are in accord with applicable Federal requirements. The retention and custodial requirements for these records are prescribed in 45 CFR 75.361 through 75.370.

■ 9. Amend § 302.15 by removing ''and'' at the end of paragraph (a)(6), revising paragraph (a)(7), and adding paragraph (a)(8) to read as follows:

§ 302.15 Reports and Maintenance of Records.

* * * * *

(a) * * *

(7) Statistical, fiscal, and other records necessary for reporting and accountability required by the Secretary; and

(8) The retention and custodial requirements for the records in this section are prescribed in 45 CFR 75.361 through 75.370

* * * * *

■ 10. Amend § 302.32 by revising the section heading, introductory text, and paragraphs (a), (b) introductory text, and (b)(1) to read as follows:

§ 302.32 Collection and disbursement of support payments by the IV–D agency.

The State plan shall provide that:

(a) The IV–D agency must establish and operate a State Disbursement Unit (SDU) for the collection and disbursement of payments under support orders—

(1) In all cases being enforced under the State IV–D plan; and

(2) In all cases not being enforced under the State IV–D plan in which the support order is initially issued in the State on or after January 1, 1994, and in which the income of the noncustodial parent is subject to withholding in accordance with section 466(a)(8)(B) of the Act.

(b) Timeframes for disbursement of support payments by SDUs under section 454B of the Act.

(1) In intergovernmental IV–D cases, amounts collected by the responding State on behalf of the initiating agency must be forwarded to the initiating agency within 2 business days of the date of receipt by the SDU in the responding State, in accordance with § 303.7(d)(6)(v) of this chapter.

* * * * *

■ 11. Amend § 302.33 by revising paragraph (a)(4), adding paragraph (a)(6), and revising the first sentence of paragraph (d)(2) to read as follows:

§ 302.33 Services to individuals not receiving title IV–A assistance.

(a) * * *

(4) Whenever a family is no longer eligible for assistance under the State's title IV–A and Medicaid programs, the IV–D agency must notify the family, within 5 working days of the notification of ineligibility, that IV–D services will be continued unless the family notifies the IV–D agency that it no longer wants services but instead wants to close the case. This notice must inform the family of the benefits and consequences of continuing to receive IV–D services, including the available services and the State's fees, cost recovery, and distribution policies. This requirement to notify the family that services will be continued, unless the family notifies the IV–D agency to the contrary, also applies when a child is no longer eligible for IV–E foster care, but only in those cases that the IV–D agency determines that such services and notice would be appropriate.

* * * * *

(6) The State may elect in its State plan to allow an individual under paragraph (a)(1)(i) of this section who files an application to request paternity-only limited services in an intrastate case. If the State chooses this option, the State must define how this process will be implemented and must establish and use procedures, including domestic violence safeguards, which are reflected in a record, that specify when paternity-only limited services will be available. An application will be considered full-service unless the parent specifically applies for paternity-only limited services in accordance with the State's procedures. If one parent specifically requests paternity-only limited services and the other parent requests full services, the case will automatically receive full services. The State will be required to charge the application and service fees required under paragraphs (c) and (e) of this section for paternity-only limited services, and may recover costs in accordance with paragraph (d) of this section if the State has chosen this option in its State plan. The State must provide the applicant an application form with information on the availability of paternity-only limited services, consequences of selecting this limited service, and an explanation that the case will be closed when the limited service is completed.

* * * * *

(d) * * *

(2) A State that recovers standardized costs under paragraph (d)(1) of this section shall develop a methodology, which is reflected in a record, to

determine standardized costs which are as close to actual costs as is possible.
* * *

* * * * *

■ 12. Amend § 302.34 by revising the first sentence to read as follows:

§ 302.34 Cooperative arrangements.

The State plan shall provide that the State will enter into agreements, which are reflected in a record, for cooperative arrangements under § 303.107 of this chapter with appropriate courts; law enforcement officials, such as district attorneys, attorneys general, and similar public attorneys and prosecutors; corrections officials; and Indian Tribes or Tribal organizations. * * *

■ 13. Revise § 302.38 to read as follows:

§ 302.38 Payments to the family.

The State plan shall provide that any payment required to be made under §§ 302.32 and 302.51 to a family will be made directly to the resident parent, legal guardian, caretaker relative having custody of or responsibility for the child or children, judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child, or alternate caretaker designated in a record by the custodial parent. An alternate caretaker is a nonrelative caretaker who is designated in a record by the custodial parent to take care of the children for a temporary time period.

■ 14. Amend § 302.50 by revising paragraph (b)(2) to read as follows:

§ 302.50 Assignment of rights to support.

* * * * *

(b) * * *

(2) If there is no court or administrative order, an amount determined in a record by the IV–D agency as part of the legal process referred to in paragraph (a)(2) of this section in accordance with the requirements of § 302.56.

* * * * *

■ 15. Revise § 302.56 to read as follows:

§ 302.56 Guidelines for setting child support orders.

(a) Within 1 year after completion of the State's next quadrennial review of its child support guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan, the State must establish one set of child support guidelines by law or by judicial or administrative action for setting and modifying child support order amounts within the State that meet the requirements in this section.

(b) The State must have procedures for making the guidelines available to all persons in the State.

(c) The child support guidelines established under paragraph (a) of this section must at a minimum:

(1) Provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay that:

(i) Takes into consideration all earnings and income of the noncustodial parent (and at the State's discretion, the custodial parent);

(ii) Takes into consideration the basic subsistence needs of the noncustodial parent (and at the State's discretion, the custodial parent and children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State; and

(iii) If imputation of income is authorized, takes into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.

(2) Address how the parents will provide for the child's health care needs through private or public health care coverage and/or through cash medical support;

(3) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders; and

(4) Be based on specific descriptive and numeric criteria and result in a computation of the child support obligation.

(d) The State must include a copy of the child support guidelines in its State plan.

(e) The State must review, and revise, if appropriate, the child support guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support order amounts. The State shall publish on the internet and make accessible to the public all reports of the guidelines reviewing body, the membership of the reviewing body, the effective date of the guidelines, and the date of the next quadrennial review.

(f) The State must provide that there will be a rebuttable presumption, in any judicial or administrative proceeding for the establishment and modification of a child support order, that the amount of the order which would result from the application of the child support guidelines established under paragraph (a) of this section is the correct amount of child support to be ordered.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the child support guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the child support guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's child support guidelines required under paragraph (e) of this section, a State must:

(1) Consider economic data on the cost of raising children, labor market data (such as unemployment rates, employment rates, hours worked, and earnings) by occupation and skill-level for the State and local job markets, the impact of guidelines policies and amounts on custodial and noncustodial parents who have family incomes below 200 percent of the Federal poverty level, and factors that influence employment rates among noncustodial parents and compliance with child support orders;

(2) Analyze case data, gathered through sampling or other methods, on the application of and deviations from the child support guidelines, as well as the rates of default and imputed child support orders and orders determined using the low-income adjustment required under paragraph (c)(1)(ii) of this section. The analysis must also include a comparison of payments on child support orders by case characteristics, including whether the order was entered by default, based on imputed income, or determined using the low-income adjustment required under paragraph (c)(1)(ii). The analysis of the data must be used in the State's review of the child support guidelines to ensure that deviations from the guidelines are limited and guideline amounts are appropriate based on

criteria established by the State under paragraph (g); and

(3) Provide a meaningful opportunity for public input, including input from low-income custodial and noncustodial parents and their representatives. The State must also obtain the views and advice of the State child support agency funded under title IV–D of the Act.

■ 16. Amend § 302.65 by:

■ a. In paragraph (a), removing the definition of ''State employment security agency'';

■ b. In paragraph (a), adding the definition of ''State workforce agency'' in alphabetical order;

■ c. Revising paragraph (b);

■ d. Removing the term ''SESA'' wherever it appears and adding in its place the term ''SWA'' in paragraphs (c)(1), (2), and (5) through (7); and

■ e. Revising paragraph (c)(3).

The revisions and addition read as follows.

§ 302.65 Withholding of unemployment compensation.

* * * * *

(a) * * *

State workforce agency or *SWA* means the State agency charged with the administration of the State unemployment compensation laws in accordance with title III of the Act.

* * * * *

(b) *Agreement.* The State IV–D agency shall enter into an agreement, which is reflected in a record, with the SWA in its State for the purpose of withholding unemployment compensation from individuals with unmet support obligations being enforced by the IV–D agency. The IV–D agency shall agree only to a withholding program that it expects to be cost effective and to reimbursement for the SWA's actual, incremental costs of providing services to the IV–D agency.

(c) * * *

(3) Establish and use criteria, which are reflected in a record, for selecting cases to pursue via the withholding of unemployment compensation for support purposes. These criteria must be designed to ensure maximum case selection and minimal discretion in the selection process.

* * * * *

■ 17. Amend § 302.70, by revising paragraphs (a)(5)(v), (a)(8), and the first sentence of paragraph (d)(2) to read as follows:

§ 302.70 Required State laws.

(a) * * *

(5) * * *

(v) Procedures which provide that any objection to genetic testing results must be made in writing within a specified number of days before any hearing at which such results may be introduced into evidence; and if no objection is made, a report of the test results, which is reflected in a record, is admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy;

* * * * *

(8) Procedures under which all child support orders which are issued or modified in the State will include provision for withholding from income, in order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing an application for services under § 302.33, in accordance with § 303.100(g) of this chapter.

* * * * *

(d) * * *

(2) *Basis for granting exemption.* The Secretary will grant a State, or political subdivision in the case of section 466(a)(2) of the Act, an exemption from any of the requirements of paragraph (a) of this section for a period not to exceed 5 years if the State demonstrates that compliance would not increase the effectiveness and efficiency of its Child Support Enforcement program. * * *

* * * * *

■ 18. Amend § 302.85 by revising paragraphs (a)(1) and (b)(2)(ii) to read as follows:

§ 302.85 Mandatory computerized support enforcement system.

(a) * * *

(1) * * * This guide is available on the OCSE Web site; and

(b) * * *

(2) * * *

(ii) The State provides assurances, which are reflected in a record, that steps will be taken to otherwise improve the State's Child Support Enforcement program.

PART 303—STANDARDS FOR PROGRAM OPERATIONS

■ 19. The authority citation for part 303 is revised to read as follows:

Authority: 42 U.S.C. 651 through 658, 659a, 660, 663, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), 1396(k), and 25 U.S.C. 1603(12) and 1621e.

■ 20. Amend § 303.2 by revising the first sentence of paragraph (a)(2) and revising paragraph (a)(3) to read as follows:

§ 303.2 Establishment of cases and maintenance of case records.

(a) * * *

(2) When an individual requests an application for IV–D services, provide an application to the individual on the day the individual makes a request in person, or send an application to the individual within no more than 5 working days of a request received by telephone or in a record. * * *

(3) Accept an application as filed on the day it and the application fee are received. An application is a record that is provided or used by the State which indicates that the individual is applying for child support enforcement services under the State's title IV–D program and is signed, electronically or otherwise, by the individual applying for IV–D services.

* * * * *

■ 21. Amend § 303.3 by:

■ a. Revising paragraph (b)(1); and

■ b. In paragraph (b)(5), removing the term ''State employment security'' and adding the term ''State workforce'' in its place.

The revision reads as follows:

§ 303.3 Location of noncustodial parents in IV–D cases.

* * * * *

(b) * * *

(1) Use appropriate location sources such as the Federal PLS; interstate location networks; local officials and employees administering public assistance, general assistance, medical assistance, Supplemental Nutrition Assistance Program (SNAP) and social services (whether such individuals are employed by the State or a political subdivision); relatives and friends of the noncustodial parent; current or past employers; electronic communications and internet service providers; utility companies; the U.S. Postal Service; financial institutions; unions; corrections institutions; fraternal organizations; police, parole, and probation records if appropriate; and State agencies and departments, as authorized by State law, including those departments which maintain records of public assistance, wages and employment, unemployment insurance, income taxation, driver's licenses, vehicle registration, and criminal records and other sources;

* * * * *

■ 22. Amend § 303.4 by revising paragraph (b) to read as follows:

§ 303.4 Establishment of support obligations.

* * * * *

(b) Use appropriate State statutes, procedures, and legal processes in establishing and modifying support obligations in accordance with § 302.56 of this chapter, which must include, at a minimum:

(1) Taking reasonable steps to develop a sufficient factual basis for the support obligation, through such means as

investigations, case conferencing, interviews with both parties, appear and disclose procedures, parent questionnaires, testimony, and electronic data sources;

(2) Gathering information regarding the earnings and income of the noncustodial parent and, when earnings and income information is unavailable or insufficient in a case gathering available information about the specific circumstances of the noncustodial parent, including such factors as those listed under § 302.56(c)(1)(iii) of this chapter;

(3) Basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income is unavailable or insufficient to use as the measure of the noncustodial parent's ability to pay, then the support obligation or recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in § 302.56(c)(1)(iii) of this chapter.

(4) Documenting the factual basis for the support obligation or the recommended support obligation in the case record.

* * * * *

■ 23. Amend § 303.5 by revising paragraph (g)(6) to read as follows:

§ 303.5 Establishment of paternity.

* * * * *

(g) * * *

(6) The State must provide training, guidance, and instructions, which are reflected in a record, regarding voluntary acknowledgment of paternity, as necessary to operate the voluntary paternity establishment services in the hospitals, State birth record agencies, and other entities designated by the State and participating in the State's voluntary paternity establishment program.

* * * * *

■ 24. Amend § 303.6 by:

■ a. Removing ''and'' at the end of paragraph (c)(3);

■ b. Redesignating paragraph (c)(4) as paragraph (c)(5); and

■ c. Adding new paragraph (c)(4).

The addition reads as follows:

§ 303.6 Enforcement of support obligations.

* * * * *

(c) * * *

(4) Establishing guidelines for the use of civil contempt citations in IV–D cases. The guidelines must include requirements that the IV–D agency:

(i) Screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order;

(ii) Provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions; and

(iii) Provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action; and

* * * * *

■ 25. Amend § 303.7 by revising paragraphs (c)(10) and (d)(10) and adding paragraph (f) to read as follows:

§ 303.7 Provision of services in intergovernmental IV–D cases.

* * * * *

(c) * * *

(10) Distribute and disburse any support collections received in accordance with this section and §§ 302.32, 302.38, 302.51, and 302.52 of this chapter, sections 454(5), 454B, 457, and 1912 of the Act, and instructions issued by the Office;

(d) * * *

(10) Notify the initiating agency when a case is closed pursuant to §§ 303.11(b)(17) through (19) and 303.7(d)(9).

* * * * *

(f) *Imposition and reporting of annual $25 fee in interstate cases.* The title IV–D agency in the initiating State must impose and report the annual $25 fee in accordance with § 302.33(e) of this chapter.

■ 26. Amend § 303.8 by:

■ a. Redesignating paragraphs (b)(2) through (6) as paragraphs (b)(3) through (7), respectively;

■ b. Adding new paragraph (b)(2);

■ c. Revising newly redesignated paragraph (b)(7);

■ d. Adding a sentence at the end of paragraph (c); and

■ e. Revising paragraph (d).

The additions and revisions read as follows:

§ 303.8 Review and adjustment of child support orders.

* * * * *

(b) * * *

(2) The State may elect in its State plan to initiate review of an order, after learning that a noncustodial parent will be incarcerated for more than 180 calendar days, without the need for a specific request and, upon notice to both parents, review and, if appropriate, adjust the order, in accordance with paragraph (b)(1)(i) of this section.

* * * * *

(7) The State must provide notice—

(i) Not less than once every 3 years to both parents subject to an order informing the parents of their right to request the State to review and, if appropriate, adjust the order consistent with this section. The notice must specify the place and manner in which the request should be made. The initial notice may be included in the order.

(ii) If the State has not elected paragraph (b)(2) of this section, within 15 business days of when the IV–D agency learns that a noncustodial parent will be incarcerated for more than 180 calendar days, to both parents informing them of the right to request the State to review and, if appropriate, adjust the order, consistent with this section. The notice must specify, at a minimum, the place and manner in which the request should be made. Neither the notice nor a review is required under this paragraph if the State has a comparable law or rule that modifies a child support obligation upon incarceration by operation of State law.

(c) * * * Such reasonable quantitative standard must not exclude incarceration as a basis for determining whether an inconsistency between the existing child support order amount and the amount of support determined as a result of a review is adequate grounds for petitioning for adjustment of the order.

(d) *Health care needs must be an adequate basis.* The need to provide for the child's health care needs in the order, through health insurance or other means, must be an adequate basis under State law to initiate an adjustment of an order, regardless of whether an adjustment in the amount of child support is necessary.

* * * * *

■ 27. Revise § 303.11 to read as follows:

§ 303.11 Case closure criteria.

(a) The IV–D agency shall establish a system for case closure.

(b) The IV–D agency may elect to close a case if the case meets at least one of the following criteria and supporting documentation for the case closure decision is maintained in the case record:

(1) There is no longer a current support order and arrearages are under $500 or unenforceable under State law;

(2) There is no longer a current support order and all arrearages in the case are assigned to the State;

(3) There is no longer a current support order, the children have

reached the age of majority, the noncustodial parent is entering or has entered long-term care arrangements (such as a residential care facility or home health care), and the noncustodial parent has no income or assets available above the subsistence level that could be levied or attached for support;

(4) The noncustodial parent or alleged father is deceased and no further action, including a levy against the estate, can be taken;

(5) The noncustodial parent is living with the minor child (as the primary caregiver or in an intact two parent household), and the IV–D agency has determined that services are not appropriate or are no longer appropriate;

(6) Paternity cannot be established because:

(i) The child is at least 18 years old and an action to establish paternity is barred by a statute of limitations that meets the requirements of § 302.70(a)(5) of this chapter;

(ii) A genetic test or a court or an administrative process has excluded the alleged father and no other alleged father can be identified;

(iii) In accordance with § 303.5(b), the IV–D agency has determined that it would not be in the best interests of the child to establish paternity in a case involving incest or rape, or in any case where legal proceedings for adoption are pending; or

(iv) The identity of the biological father is unknown and cannot be identified after diligent efforts, including at least one interview by the IV–D agency with the recipient of services;

(7) The noncustodial parent's location is unknown, and the State has made diligent efforts using multiple sources, in accordance with § 303.3, all of which have been unsuccessful, to locate the noncustodial parent:

(i) Over a 2-year period when there is sufficient information to initiate an automated locate effort; or

(ii) Over a 6-month period when there is not sufficient information to initiate an automated locate effort; or

(iii) After a 1-year period when there is sufficient information to initiate an automated locate effort, but locate interfaces are unable to verify a Social Security Number;

(8) The IV–D agency has determined that throughout the duration of the child's minority (or after the child has reached the age of majority), the noncustodial parent cannot pay support and shows no evidence of support potential because the parent has been institutionalized in a psychiatric facility, is incarcerated, or has a medically-verified total and permanent disability. The State must also determine that the noncustodial parent has no income or assets available above the subsistence level that could be levied or attached for support;

(9) The noncustodial parent's sole income is from:

(i) Supplemental Security Income (SSI) payments made in accordance with sections 1601 *et seq.,* of title XVI of the Act, 42 U.S.C. 1381 *et seq.;* or

(ii) Both SSI payments and Social Security Disability Insurance (SSDI) benefits under title II of the Act.

(10) The noncustodial parent is a citizen of, and lives in, a foreign country, does not work for the Federal government or a company with headquarters or offices in the United States, and has no reachable domestic income or assets; and there is no Federal or State treaty or reciprocity with the country;

(11) The IV–D agency has provided location-only services as requested under § 302.35(c)(3) of this chapter;

(12) The non-IV–A recipient of services requests closure of a case and there is no assignment to the State of medical support under 42 CFR 433.146 or of arrearages which accrued under a support order;

(13) The IV–D agency has completed a limited service under § 302.33(a)(6) of this chapter;

(14) There has been a finding by the IV–D agency, or at the option of the State, by the responsible State agency of good cause or other exceptions to cooperation with the IV–D agency and the State or local assistance program, such as IV–A, IV–E, Supplemental Nutrition Assistance Program (SNAP), and Medicaid, has determined that support enforcement may not proceed without risk of harm to the child or caretaker relative;

(15) In a non-IV–A case receiving services under § 302.33(a)(1)(i) or (iii) of this chapter, or under § 302.33(a)(1)(ii) when cooperation with the IV–D agency is not required of the recipient of services, the IV–D agency is unable to contact the recipient of services despite a good faith effort to contact the recipient through at least two different methods;

(16) In a non-IV–A case receiving services under § 302.33(a)(1)(i) or (iii) of this chapter, or under § 302.33(a)(1)(ii) when cooperation with the IV–D agency is not required of the recipient of services, the IV–D agency documents the circumstances of the recipient's noncooperation and an action by the recipient of services is essential for the next step in providing IV–D services;

(17) The responding agency documents failure by the initiating agency to take an action that is essential for the next step in providing services;

(18) The initiating agency has notified the responding State that the initiating State has closed its case under § 303.7(c)(11);

(19) The initiating agency has notified the responding State that its intergovernmental services are no longer needed;

(20) Another assistance program, including IV–A, IV–E, SNAP, and Medicaid, has referred a case to the IV–D agency that is inappropriate to establish, enforce, or continue to enforce a child support order and the custodial or noncustodial parent has not applied for services; or

(21) The IV–D case, including a case with arrears assigned to the State, has been transferred to a Tribal IV–D agency and the State IV–D agency has complied with the following procedures:

(i) Before transferring the State IV–D case to a Tribal IV–D agency and closing the IV–D case with the State:

(A) The recipient of services requested the State to transfer the case to the Tribal IV–D agency and close the case with the State; or

(B) The State IV–D agency notified the recipient of services of its intent to transfer the case to the Tribal IV–D agency and close the case with the State and the recipient did not respond to the notice to transfer the case within 60 calendar days from the date notice was provided;

(ii) The State IV–D agency completely and fully transferred and closed the case; and

(iii) The State IV–D agency notified the recipient of services that the case has been transferred to the Tribal IV–D agency and closed; or

(iv) The Tribal IV–D agency has a State-Tribal agreement approved by OCSE to transfer and close cases. The State-Tribal agreement must include a provision for obtaining the consent from the recipient of services to transfer and close the case.

(c) The IV–D agency must close a case and maintain supporting documentation for the case closure decision when the following criteria have been met:

(1) The child is eligible for health care services from the Indian Health Service (IHS); and

(2) The IV–D case was opened because of a Medicaid referral based solely upon health care services, including the Purchased/Referred Care program, provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12)).

(d) The IV–D agency must have the following requirements for case closure notification and case reopening:

(1) In cases meeting the criteria in paragraphs (b)(1) through (10) and (b)(15) and (16) of this section, the State must notify the recipient of services in writing 60 calendar days prior to closure of the case of the State's intent to close the case.

(2) In an intergovernmental case meeting the criteria for closure under paragraph (b)(17) of this section, the responding State must notify the initiating agency, in a record, 60 calendar days prior to closure of the case of the State's intent to close the case.

(3) The case must be kept open if the recipient of services or the initiating agency supplies information in response to the notice provided under paragraph (d)(1) or (2) of this section that could lead to the establishment of paternity or a support order or enforcement of an order, or, in the instance of paragraph (b)(15) of this section, if contact is reestablished with the recipient of services.

(4) For cases to be closed in accordance with paragraph (b)(13) of this section, the State must notify the recipient of services, in writing, 60 calendar days prior to closure of the case of the State's intent to close the case. This notice must also provide information regarding reapplying for child support services and the consequences of receiving services, including any State fees, cost recovery, and distribution policies. If the recipient reapplies for child support services in a case that was closed in accordance with paragraph (b)(13) of this section, the recipient must complete a new application for IV–D services and pay any applicable fee.

(5) If the case is closed, the former recipient of services may request at a later date that the case be reopened if there is a change in circumstances that could lead to the establishment of paternity or a support order or enforcement of an order by completing a new application for IV–D services and paying any applicable fee.

(6) For notices under paragraphs (d)(1) and (4) of this section, if the recipient of services specifically authorizes consent for electronic notifications, the IV–D agency may elect to notify the recipient of services electronically of the State's intent to close the case. The IV–D agency must maintain documentation of the recipient's consent in the case record.

(e) The IV–D agency must retain all records for cases closed in accordance with this section for a minimum of 3 years, in accordance with 45 CFR 75.361.

■ 28. Amend § 303.31 by revising paragraphs (a)(2) and (3), (b)(1) and (2), (b)(3) introductory text, (b)(3)(i), and (b)(4) to read as follows:

§ 303.31 Securing and enforcing medical support obligations.

(a) * * *

(2) Health care coverage includes fee for service, health maintenance organization, preferred provider organization, and other types of private health insurance and public health care coverage under which medical services could be provided to the dependent child(ren).

(3) Cash medical support or the cost of health insurance is considered reasonable in cost if the cost to the parent responsible for providing medical support does not exceed five percent of his or her gross income or, at State option, a reasonable alternative income-based numeric standard defined in State law, regulations, or court rule having the force of law or State child support guidelines adopted in accordance with § 302.56(c) of this chapter.

(b) * * *

(1) Petition the court or administrative authority to—

(i) Include health care coverage that is accessible to the child(ren), as defined by the State, and is available to the parent responsible for providing medical support and can be obtained for the child at reasonable cost, as defined under paragraph (a)(3) of this section, in new or modified court or administrative orders for support; and

(ii) Allocate the cost of coverage between the parents.

(2) If health care coverage described in paragraph (b)(1) of this section is not available at the time the order is entered or modified, petition to include cash medical support in new or modified orders until such time as health care coverage, that is accessible and reasonable in cost as defined under paragraph (a)(3) of this section, becomes available. In appropriate cases, as defined by the State, cash medical support may be sought in addition to health care coverage.

(3) Establish criteria, which are reflected in a record, to identify orders that do not address the health care needs of children based on—

(i) Evidence that health care coverage may be available to either parent at reasonable cost, as defined under paragraph (a)(3) of this section; and

* * * * *

(4) Petition the court or administrative authority to modify support orders, in accordance with State child support guidelines, for cases identified in paragraph (b)(3) of this section to include health care coverage and/or cash medical support in accordance with paragraphs (b)(1) and (2) of this section.

* * * * *

■ 29. Amend § 303.72 by revising paragraph (d)(1) to read as follows:

§ 303.72 Requests for collection of past-due support by Federal tax refund offset.

* * * * *

(d) * * *

(1) The State referring past-due support for offset must, in interstate situations, notify any other State involved in enforcing the support order when it receives the offset amount from the Secretary of the U.S. Treasury.

* * * * *

■ 30. Amend § 303.100 by revising paragraph (e)(1) introductory text and adding paragraphs (h) and (i) to read as follows:

§ 303.100 Procedures for income withholding.

* * * * *

(e) * * *

(1) To initiate withholding, the State must send the noncustodial parent's employer a notice using the required OMB-approved *Income Withholding for Support* form that includes the following:

* * * * *

(h) *Notice to employer in all child support orders.* The notice to employers in all child support orders must be on an OMB-approved *Income Withholding for Support* form.

(i) *Payments sent to the SDU in child support order not enforced under the State IV–D plan.* Income withholding payments made under child support orders initially issued in the State on or after January 1, 1994 that are not being enforced under the State IV–D plan must be sent to the State Disbursement Unit for disbursement to the family in accordance with sections 454B and 466(a)(8) and (b)(5) of the Act and § 302.32(a) of this chapter.

PART 304—FEDERAL FINANCIAL PARTICIPATION

■ 31. The authority for part 304 continues to read as follows:

Authority: 42 U.S.C. 651 through 655, 657, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396(k).

■ 32. Revise § 304.10 to read as follows:

§ 304.10 General administrative requirements.

As a condition for Federal financial participation, the provisions of 45 CFR

part 75 (with the exception of 45 CFR 75.306, *Cost sharing or matching* and 45 CFR 75.341, *Financial reporting*) establishing uniform administrative requirements and cost principles shall apply to all grants made to States under this part.

§ 304.12 [Amended]

■ 33. Amend § 304.12 by removing paragraphs (c)(4) and (5).

■ 34. Amend § 304.20 by:

■ a. Revising paragraphs (a)(1), (b) introductory text, (b)(1)(iii) introductory text, (b)(1)(viii) introductory text, and (b)(1)(viii)(A);

■ b. Removing the ''.'' at the end of paragraph (b)(1)(viii)(C) and adding a ''; '' in its place;

■ c. Adding paragraphs (b)(1)(viii)(D) and (E);

■ d. Revising paragraphs (b)(1)(ix), (b)(2) introductory text, (b)(2)(vii), and (b)(3) introductory text;

■ e. Redesignating paragraph (b)(3)(v) as paragraph (b)(3)(vii);

■ f. Adding paragraphs (b)(3)(v) and (vi);

■ g. Removing the semicolon at the end of the paragraph (b)(5)(v) and adding a period in its place;

■ h. Removing ''; and'' at the end of paragraph (b)(9) and adding a period in its place;

■ i. Revising paragraph (b)(11);

■ j. Adding paragraph (b)(12); and

■ k. Removing paragraphs (c) and (d).

The additions and revisions read as follows:

§ 304.20 Availability and rate of Federal financial participation.

(a) * * *

(1) Necessary and reasonable expenditures for child support services and activities to carry out the State title IV–D plan;

* * * * *

(b) Services and activities for which Federal financial participation will be available will be those made to carry out the State title IV–D plan, including obtaining child support, locating noncustodial parents, and establishing paternity, that are determined by the Secretary to be necessary and reasonable expenditures properly attributed to the Child Support Enforcement program including, but not limited to the following:

(1) * * *

(iii) The establishment of all necessary agreements with other Federal, State, and local agencies or private providers to carry out Child Support Enforcement program activities in accordance with Procurement Standards, 45 CFR 75.326 through 75.340. These agreements may include:

* * * * *

(viii) The establishment of agreements with agencies administering the State's title IV–A and IV–E plans including criteria for:

(A) Referring cases to and from the IV–D agency;

* * * * *

(D) The procedures to be used to coordinate services; and

(E) Agreements to exchange data as authorized by law.

(ix) The establishment of agreements with State agencies administering Medicaid or CHIP, including appropriate criteria for:

(A) Referring cases to and from the IV–D agency;

(B) The procedures to be used to coordinate services;

(C) Agreements to exchange data as authorized by law; and

(D) Transferring collections from the IV–D agency to the Medicaid agency in accordance with § 302.51(c) of this chapter.

(2) The establishment of paternity including, but not limited to:

* * * * *

(vii) Developing and providing to parents and family members, hospitals, State birth records agencies, and other entities designated by the State and participating in the State's voluntary paternity establishment program, under § 303.5(g) of this chapter, educational and outreach activities, written and audiovisual materials about paternity establishment and forms necessary to voluntarily acknowledge paternity; and

* * * * *

(3) The establishment and enforcement of support obligations including, but not limited to:

* * * * *

(v) Bus fare or other minor transportation expenses to enable custodial or noncustodial parties to participate in child support proceedings and related activities;

(vi) Services to increase *pro se* access to adjudicative and alternative dispute resolution processes in IV–D cases related to providing child support services; and

* * * * *

(11) Medical support activities as specified in §§ 303.30, 303.31, and 303.32 of this chapter.

(12) Educational and outreach activities intended to inform the public, parents and family members, and young people who are not yet parents about the Child Support Enforcement program, responsible parenting and co-parenting, family budgeting, and other financial consequences of raising children when the parents are not married to each other.

■ 35. Amend § 304.21 by revising paragraphs (a) introductory text and (a)(1) to read as follows:

§ 304.21 Federal financial participation in the costs of cooperative arrangements with courts and law enforcement officials.

(a) *General.* Subject to the conditions and limitations specified in this part, Federal financial participation (FFP) at the applicable matching rate is available in the costs of cooperative agreements with appropriate courts and law enforcement officials in accordance with the requirements of § 302.34 of this chapter. *Law enforcement officials* mean district attorneys, attorneys general, similar public attorneys and prosecutors and their staff, and corrections officials. When performed under agreement, which is reflected in a record, costs of the following activities are subject to reimbursement:

(1) The activities, including administration of such activities, specified in § 304.20(b)(2) through (8), (11), and (12);

* * * * *

■ 36. Revise § 304.23 to read as follows:

§ 304.23 Expenditures for which Federal financial participation is not available.

Federal financial participation at the applicable matching rate is not available for:

(a) Activities related to administering titles I, IV–A, IV–B, IV–E, X, XIV, XVI, XIX, XX, or XXI of the Act or 7 U.S.C. Chapter 51.

(b) Purchased support enforcement services which are not secured in accordance with § 304.22.

(c) Construction and major renovations.

(d) Education and training programs and educational services for State and county employees and court personnel except direct cost of short-term training provided to IV–D agency staff in accordance with §§ 304.20(b)(2)(viii) and 304.21.

(e) Any expenditures which have been reimbursed by fees collected as required by this chapter.

(f) Any costs of those caseworkers described in § 303.20(e) of this chapter.

(g) Any expenditures made to carry out an agreement under § 303.15 of this chapter.

(h) The costs of counsel for indigent defendants in IV–D actions.

(i) Any expenditures for jailing of parents in child support enforcement cases.

(j) The costs of *guardians ad litem* in IV–D actions.

§ 304.25 [Amended]

■ 37. Amend § 304.25(b) by removing ''30 days'' and adding ''45 days'' in its place.

■ 38. Amend § 304.26 by revising paragraph (a)(1), removing and reserving paragraph (b), and removing paragraph (c).

The revision reads as follows:

§ 304.26 Determination of Federal share of collections.

(a) * * *

(1) 75 percent for Puerto Rico, the Virgin Islands, Guam, and American Samoa for the distribution of retained IV–A collections; 55 percent for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa for the distribution of retained IV–E collections; 70 percent for the District of Columbia for the distribution of retained IV–E collections; and

* * * * *

■ 39. Amend § 304.40 by revising paragraph (a)(2) to read as follows:

§ 304.40 Repayment of Federal funds by installments.

(a) * * *

(2) The State has notified the OCSE Regional Office in a record of its intent to make installment repayments. Such notice must be given prior to the time repayment of the total was otherwise due.

* * * * *

PART 305—PROGRAM PERFORMANCE MEASURES, STANDARDS, FINANCIAL INCENTIVES, AND PENALTIES

■ 40. The authority for part 305 is revised to read as follows:

Authority: 42 U.S.C. 609(a)(8), 652(a)(4) and (g), 658a, and 1302.

■ 41. Amend § 305.35 by:

■ a. Adding a sentence to the end of paragraph (d);

■ b. Redesignating paragraph (e) as paragraph (f); and

■ c. Adding new paragraph (e).

The additions read as follows:

§ 305.35 Reinvestment.

* * * * *

(d) * * * Non-compliance will result in disallowances of incentive amounts equal to the amount of funds supplanted.

(e) Using the Form OCSE–396, ''Child Support Enforcement Program Quarterly Financial Report,'' the State Current Spending Level will be calculated by determining the State Share of Total Expenditures Claimed for all four quarters of the fiscal year minus State Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments for all four quarters of the fiscal year, plus the Federal Parent Locator Service (FPLS) fees for all four quarters of the fiscal year.

(1) The State Share of Expenditures Claimed is: Total Expenditures Claimed for the Current Quarter and the Prior Quarter Adjustments minus the Federal Share of Total Expenditures Claimed for the Current Quarter and Prior Quarter Adjustments claimed on the Form OCSE–396 for all four quarters of the fiscal year.

(2) The State Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments is: IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments for the Current Quarter and the Prior Quarter Adjustments minus the Federal Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments for the Current Quarter and Prior Quarter Adjustments claimed on the Form OCSE–396 for all four quarters of the fiscal year.

(3) The Fees for the Use of the Federal Parent Locator Service (FPLS) can be computed by adding the FPLS fees claimed on the Form OCSE–396 for all four quarters of the fiscal year.

* * * * *

§ 305.36 [Removed]

■ 42. Remove § 305.36.

■ 43. Amend § 305.63 by revising paragraph (d) introductory text to read as follows:

§ 305.63 Standards for determining substantial compliance with IV–D requirements.

* * * * *

(d) With respect to the 75 percent standard in paragraph (c) of this section:

* * * * *

■ 44. Amend § 305.64 by revising the second sentence of paragraph (c) to read as follows:

§ 305.64 Audit procedures and State comments.

* * * * *

(c) * * * Within a specified timeframe from the date the report was sent, the IV–D agency may submit comments, which are reflected in a record, on any part of the report which the IV–D agency believes is in error.

* * *

■ 45. Amend § 305.66 by revising paragraph (a) to read as follows:

§ 305.66 Notice, corrective action year, and imposition of penalty.

(a) If a State is found by the Secretary to be subject to a penalty as described in § 305.61, the OCSE will notify the State, in a record, of such finding.

* * * * *

PART 307—COMPUTERIZED SUPPORT ENFORCEMENT SYSTEMS

■ 46. The authority for part 307 continues to read as follows:

Authority: 42 U.S.C. 652 through 658, 664, 666 through 669A, and 1302.

■ 47. Amend § 307.5 by revising paragraph (c)(3) to read as follows:

§ 307.5 Mandatory computerized support enforcement systems.

* * * * *

(c) * * *

(3) The State provides assurance, which is reflected in a record, that steps will be taken to otherwise improve the State's Child Support Enforcement program.

* * * * *

■ 48. Amend § 307.11 by revising paragraph (c)(3) to read as follows:

§ 307.11 Functional requirements for computerized support enforcement systems in operation by October 1, 2000.

* * * * *

(c) * * *

(3) Automatic use of enforcement procedures, including those under section 466(c) of the Act if payments are not timely, and the following procedures:

(i) Identify cases which have been previously identified as involving a noncustodial parent who is a recipient of SSI payments or concurrent SSI payments and Social Security Disability Insurance (SSDI) benefits under title II of the Act, to prevent garnishment of these funds from the noncustodial parent's financial account; and

(ii) Return funds to a noncustodial parent, within 5 business days after the agency determines that SSI payments or concurrent SSI payments and SSDI benefits under title II of the Act, in the noncustodial parent's financial account have been incorrectly garnished.

* * * * *

PART 308—ANNUAL STATE SELF–ASSESSMENT REVIEW AND REPORT

■ 49. The authority for part 308 continues to read as follows:

Authority: 42 U.S.C. 654(15)(A) and 1302.

■ 50. Amend § 308.2 by revising paragraphs (b)(2)(ii), (c)(3)(i), and (f)(2)(i) to read as follows:

§ 308.2 Required program compliance criteria.

* * * * *

(b) * * *

(2) * * *

(ii) If location activities are necessary, using all appropriate sources within 75 days according to § 303.3(b)(3) of this chapter. This includes all the following locate sources as appropriate: custodial parent, Federal and State Parent Locator Services, U.S. Postal Service, State workforce agency, employment data, Department of Motor Vehicles, and credit bureaus;

* * * * *

(c) * * *

(3) * * *

(i) If location activities are necessary, using all appropriate location sources within 75 days according to § 303.3(b)(3) of this chapter. Location sources include: custodial parent, Federal and State Parent Locator Services, U.S. Postal Service, State workforce agency, Department of Motor Vehicles, and credit bureaus;

* * * * *

(f) * * *

(2) * * *

(i) If location is necessary to conduct a review, using all appropriate location sources within 75 days of opening the case pursuant to § 303.3(b)(3) of this chapter. Location sources include: custodial parent, Federal and State Parent Locator Services, U.S. Postal Service, State workforce agency, unemployment data, Department of Motor Vehicles, and credit bureaus;

* * * * *

PART 309—TRIBAL CHILD SUPPORT ENFORCEMENT (IV–D) PROGRAM

■ 51. The authority for part 309 is revised to read as follows:

Authority: 42 U.S.C. 655(f) and 1302.

§ 309.115 [Amended]

■ 52. Amend § 309.115 by:

■ a. Removing reference to ''§ 9.120 of this part'' and adding in its place ''§ 309.120'' in paragraph (b)(2); and

■ b. Removing the reference to ''303.52'' and adding in its place ''302.52'' in paragraph (c)(2).

■ 53. Amend § 309.130 by revising paragraphs (b)(3) and (4) to read as follows:

§ 309.130 How will Tribal IV–D programs be funded and what forms are required?

* * * * *

(b) * * *

(3) SF 425, ''Federal Financial Report,'' to be submitted quarterly within 30 days after the end of each of the first three quarters of the funding period and within 30 days after the end of each of the first three quarters of the liquidation period. The final report for each period is due within 90 days after the end of the fourth quarter of both the funding and the liquidation period; and

(4) Form OCSE–34, ''Child Support Enforcement Program Quarterly Collection Report'' must be submitted no later than 45 days following the end of each fiscal quarter. No revisions or adjustments of the financial reports submitted for any quarter of the fiscal year will be accepted by OCSE later than December 31, which is 3 months after the end of the fiscal year.

* * * * *

■ 54. Amend § 309.145 by revising paragraph (a)(3) introductory text to read as follows:

§ 309.145 What costs are allowable for Tribal IV–D programs carried out under § 309.65(a) of this part?

* * *

(a) * * *

(3) Establishment of all necessary agreements with other Tribal, State, and local agencies or private providers for the provision of child support enforcement services in accordance with Procurement Standards found in 45 CFR 75.326 through 75.340. These agreements may include:

* * * * *

■ 55. Amend § 309.160 by revising the first sentence to read as follows:

§ 309.160 How will OCSE determine if Tribal IV–D program funds are appropriately expended?

OCSE will rely on audits conducted under 45 CFR part 75, *Subpart F—Audit Requirements.* * * *

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